

**DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS**



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**COMPLAINANT,
Complainant,**

v.

**AARP,
Respondent.**

Docket No.: 17-281-P (N)

**Commissioners: M. Aizawa
W. Allen
A. Maier**

FINAL DECISION AND ORDER

This case is before the Commission on Human Rights pursuant to the District of Columbia Human Rights Act (DCHRA), D.C. Code § 2-1403.11, which provides that after a complaint has been noticed for hearing, a hearing tribunal consisting of three members of the Commission, shall be appointed to make a determination upon such complaint. A public hearing was held in this case on November 13, 14, and 15, 2020, by former Administrative Law Judge Toya Carmichael, sitting as an independent hearing examiner. On August 20, 2020, Judge Carmichael issued a Proposed Decision and Order pursuant to 4 DCMR § 430.1 and the parties were notified of their right to file exceptions. On October 7, 2020, Complainant [REDACTED] filed exceptions to the Proposed Decision. Judge Carmichael subsequently left the Commission and Complainant's objections were reviewed by Chief Administrative Law Judge Erika Pierson, who issued the attached Order on Complainant's Exceptions and a Final Proposed Decision and Order which has been reviewed and discussed by the Tribunal.

Having considered the Proposed Decisions in this case, Complainant's objections, Judge Pierson's Order on Complainant's exceptions, and the entire record, the undersigned members of the Hearing Tribunal adopt in whole the December 3, 2020, Final Proposed Decision and Order of the independent hearing examiner and find that Complainant has failed to establish a claim of unlawful termination based on disability discrimination and retaliation under the DCHRA. The December 3, 2020, Final Proposed Decision and Order is adopted in full and incorporated by reference into this Final Order.

Therefore, it is this **19th day of February 2021**:

ORDERED, that the complaint of COMPLAINANT filed on November 23, 2016, is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED, that the reconsideration and appeal rights of any party aggrieved by the Final Order are attached.

Motoko Aizawa
Chair, Commissioner Motoko Aizawa

Wynter Allen
Commissioner Wynter Allen

Adam Maier
Commissioner Adam Maier

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**COMPLAINANT,
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v.

**AARP,
Respondent.**

Docket No.: 17-281-P (CN)

**Toya A. Carmichael
Administrative Law Judge**

**Erika L. Pierson
Chief Administrative Law Judge**

FINAL DECISION AND ORDER

I. Statement of the Case

Complainant is a person with a disability as defined by the Americans with Disabilities Act (“ADA”). Complainant was employed by the American Association of Retired Persons (AARP) (“Respondent”) as a [REDACTED], from March 2014 through October 2016. In November 2015 Complainant was placed on a performance improvement plan. Complainant made complaints about his supervisor between April 2015 and July 2016. In January 2016, Complainant took five months of medical leave for reasons related to his disabilities. Complainant returned to work in June 2016 with accommodations. On September 21, 2016, AARP terminated Complainant’s employment effective October 3, 2016, when he failed to show improvement under the performance improvement plan.

Complainant asserts that AARP terminated his employment because of his disability, and in retaliation for complaints he made to human resources about discriminatory comments allegedly

made by his supervisor. AARP, in contrast, asserts that Complainant was terminated for poor work performance. For the reasons discussed below, Complainant has failed to meet his burden of proof. Complainant was discharged for a legitimate non-discriminatory reason that was not pretextual. Accordingly, I recommend that the Commission dismiss this case with prejudice.

On August 20, 2020, a Proposed Decision and Order was issued in this case by former Administrative Law Judge Toya Carmichael and the parties were given 30 days to file exceptions. After the issuance of the Proposed Decision, counsel for Complainant withdrew and the parties were granted additional time to file exceptions. On October 7, 2020, Complainant, *pro se*, filed exceptions to the Proposed Decision and Order. The Office of Human Rights (OHR) sent correspondence that it would not file exceptions to the Proposed Decision. Judge Carmichael is no longer with the Commission and therefore Complainant's objections were addressed by Chief Judge Erika Pierson in a separate Order accompanying this Final Proposed Decision. This Final Proposed Decision was amended consistent with the Order on Exceptions, but no changes have been made to the credibility determinations made by Judge Carmichael.

For the reasons discussed below, Complainant has failed to establish that he was terminated, wholly or in part, because of his disabilities. Accordingly, I recommend that the Commission on Human Rights dismiss this case with prejudice.

II. Jurisdiction

This case is governed by the D.C. Human Rights Act ("DHCRA"), D.C. Code § 2-1401.01 *et seq.*; Title VII of the Civil Rights Act of 1991 ("Title VII"), 42 U.S.C. §§ 2000e through 2000e-17, the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111-12213, the District of Columbia Administrative Procedures Act ("DCAPA") (D.C. Official Code §§ 2-501 *et seq.*), and

the procedural rules of the Commission on Human Rights for contested cases, 4 District of Columbia Municipal Regulations (“DCMR”) 4400-4435.

III. Procedural History

On November 23, 2016, Complainant filed a charge of discrimination with the District of Columbia Office of Human Rights (“OHR”) alleging violations of Title VII of the Civil Rights Act of 1991 (“Title VII”), 42 U.S.C. §§ 2000e through 2000e-17, the ADA, 42 U.S.C. §§ 12111-12213, and the D.C. Human Rights Act (“DCHRA”), D.C. Code §§ 2-1401.01 through 2-1411.06. Complainant alleged that Respondent discriminated against him by (1) subjecting him to a hostile work environment based on his disability; (2) terminating him because of his disability; and (3) retaliating against him after he complained to Human Resources about his supervisor’s alleged harassment.

OHR investigated Complainant’s allegations of discrimination and issued its findings in a Letter of Determination (“LOD”) dated March 2, 2018. In the LOD, OHR found probable cause to believe that AARP discriminated against Complainant due to his disability by terminating his employment and retaliating against him after he made a complaint of disability-based harassment against his supervisor.¹ OHR did not find probable cause for the hostile work environment claim. Pursuant to the DCHRA, a finding of probable cause is required before the Commission can entertain a claim. D.C. Code § 2-1403.10. Therefore, the hostile work environment claim is not part of this case.

¹ Proceedings before the Commission are *de novo*; therefore, we do not rely on findings of fact or conclusions of law stated in LOD.

On June 5, 2018, OHR certified this matter to the Commission for a public hearing pursuant to D.C. Code § 2-1403.10, and the case was assigned to former Chief Administrative Law Judge David Simmons. Judge Simmons issued a Scheduling Order on May 23, 2018, which set deadlines for Discovery, Dispositive Motions, the Joint Pre-hearing Statement, the Pre-hearing Conference, and the evidentiary hearing. Stacey Biney, Esq., OHR, entered her notice of appearance on July 13, 2018, on behalf of the complaint (not the Complainant). Counsel for AARP, Karla Grossenbacher, Esq., Samantha Brooks, Esq., and Kelsey Complainantnett, Esq. entered their appearances on July 25, 2018. Complainant represented himself at that time. AARP then submitted its Discovery Notice on August 31, 2018, and OHR and Complainant submitted separate Discovery Notices on September 4, 2018.

On October 17, 2018, the parties submitted a Joint Motion Seeking Extension of the Scheduling Deadlines. Judge Simmons held a conference call on November 9, 2018, wherein the parties outlined various issues that were delaying the conclusion of discovery. On November 18, 2018, Judge Simmons issued an Amended Scheduling Order establishing a new timeline for Discovery and ordering Complainant to produce certain medical, financial, and other related documents by December 7, 2018.

On November 30, 2018, Complainant retained counsel, Victoria Harrison, Esq. and Nicole Behrman, Esq. On December 17, 2018, Complainant's counsel submitted a Motion for Extension of the Discovery Period. On December 20, 2018, Judge Simmons issued a second Order granting an extension of the discovery period for an additional 60 days. On March 6, 2019, Respondent's counsel submitted a Consent Motion for Extension of Dispositive Motion Deadline requesting that the dispositive motion deadline be extended to April 12, 2019.

On March 20, 2019, this case was transferred from Chief Administrative Law Judge David Simmons to Administrative Law Judge Dianne Harris. On March 20, 2019, Judge Harris granted Respondent's Consent Motion for an Extension of Dispositive Motion Deadline and provided the parties with a Third Amended Scheduling Order. On April 12, 2019, Respondent filed a Motion for Summary Judgement contending that the Complainant could not establish a *prima facie* case on either his discrimination or retaliation claims. On June 17, 2019, Judge Harris denied the Motion for Summary Judgement. The parties attempted to settle the matter informally over the course of 30 days beginning on or around June 27, 2019. The Commission was notified on July 29, 2019, that the parties were unable to reach an agreement.

Judge Harris subsequently retired and on August 8, 2019, this case was transferred to Administrative Law Judge Toya Carmichael. On September 4, 2019, the parties submitted a Joint Pre-Hearing Statement, and a Pre-Hearing Conference was held via telephone on September 12, 2019. On September 26, 2019, Respondent submitted a Motion in Limine seeking to exclude certain Complainant and OHR exhibits. Complainant also submitted a Motion in Limine on September 26, 2019, seeking to exclude the testimony of proposed witness, former Human Resources Representative Tracy Volk, and certain Respondent exhibits. Complainant and OHR filed separate Oppositions to Respondent's Motion in Limine on October 10, 2019. Respondent submitted an Opposition to Complainant's Motion in Limine on October 10, 2019. On October 18, 2019, Complainant submitted a Motion to Quash Subpoenas Duces Tecum issued by Respondent to Complainant's former employers. On October 23, 2019, Respondent submitted a Memorandum in Opposition to Complainant's Motion to Quash Subpoenas Duces Tecum. Judge Carmichael denied the motions in Orders dated October 29 and 30, 2019.

Judge Carmichael presided over an evidentiary hearing on November 13, 14, and 15, 2019. Complainant was represented by Ms. Harrison and Ms. Berhman. Complainant testified on his own behalf and as a witness for Respondent. Respondent AARP was represented by Ms. Grossenbacher, Ms. Brooks, and Ms. Bennett. OHR was represented by Ms. Biney and by General Counsel Hnin Khaing, who entered her appearance on the third day of the hearing. The following witnesses testified on behalf of Complainant and Respondent: Supervisor, [REDACTED] [REDACTED] and DW, AARP Senior Human Resources Business Partner. AP, AARP Benefits Advisor, Leave Program and Income Protection Plans, testified by telephone on behalf of Respondent. The exhibits admitted into evidence are attached to this Order as Appendix A. On February 20, 2020, Charles Abbott, Esq., entered his appearance on behalf of OHR.

On December 4, 2019, Judge Carmichael issued a Post-Hearing Order. Pursuant to that Order, the parties submitted Post-Hearing Briefs and Proposed Findings of Fact on December 23, 2019. On August 17, 2020, a Proposed Decision and Order was sent to the parties. On September 1, 2020, counsel for Complainant withdrew from the case and the parties were granted additional time to file exceptions. On October 20, 2020, Complainant filed his exceptions. OHR filed correspondence that they would not be filing exceptions. No exceptions were filed by Respondent.

IV. Issues to be Decided

1. Whether Respondent discriminated against Complainant based on his status as a person with a disability in violation of the DCHRA when it terminated his employment on September 21, 2016.

2. Whether Respondent retaliated against Complainant in violation of the DCHRA because of his disabilities and for making complaints about his supervisor to Respondent's human resources officer when it terminated Complainant's employment effective October 3, 2016.

V. Findings of Fact

1. Complainant began his employment at AARP in March 2014. Hearing Transcript (Tr.) Day 1,² 31-32. Prior to his employment with AARP, Complainant worked for Computer Sciences Corporation (CSC) for 14 years, including eight years as IT Director. Testimony of Complainant, Tr. Day 1.
2. Complainant's position and title throughout his employment at AARP was [REDACTED] [REDACTED] which was a middle-management position. Tr. Day 1, 40:19 – 22. When Complainant began his employment at AARP, Vendor Management was a newly created division and his position was new. Testimony of Complainant, Tr. Day 1, 40-42.
3. Supervisor, [REDACTED], hired Complainant and was his supervisor throughout his tenure. Testimony of Supervisor, Tr. Day 1, 41:1 – 13.
4. On July 21, 2014, Complainant received a 2014 mid-year performance review from Supervisor in which he received a rating of "Meets" expectations. Exhibit (Ex.) J1, AARP 191. The review includes ratings for seven "cultural attributes." Complainant received a rating of "most of the time" in four cultural attributes and a rating of "sometimes" in the following three cultural attributes: courageous, engaging, and energetic.

² Tr. Day 1 was held on November 15, 2019. Tr. Day 2 was held on November 16, 2019, and Tr. Day 3 was held on November 17, 2019.

5. On January 16, 2015, Complainant received a 2014 year-end performance review from Supervisor in which he again received a rating of “Meets” expectations. Ex. J2, AARP 195. Of the seven cultural attributes, Complainant received a rating of “most of the time” in two cultural attributes and a rating of “sometimes” in the following five cultural attributes: trustworthy, visionary, courageous, engaging, and energetic. *Id.*
6. In April 2015, Complainant complained to Supervisor’s supervisor JH,³ that Supervisor had been belligerent and jumped out of her chair during their meeting. Testimony of Complainant, Tr. Day 1, 60:18 – 63. In response to Complainant’s complaint, AARP Human Resources commenced a meeting between Supervisor, Mr. H, and Complainant to discuss Complainant’s concerns about Supervisor. Testimony of Complainant, Tr. Day 1, 56:6 – 9. Complainant felt that Supervisor was no longer nice to him after this meeting. *Id.*
7. After the April 2015 meeting, Complainant and Supervisor began meeting more regularly in an effort to rebuild their employer-employee relationship. Testimony of Complainant, Tr. Day 1, 56:6 – 15.
8. On July 31, 2015, Complainant received a 2015 mid-year performance review from Supervisor in which he was rated as “needs improvement.” Ex. J3, AARP 109. The “Manager Feedback” from Supervisor states:

[Complainant] is always willing to look at things from the bottom up including rolling up his sleeves to do research on the ITS entitlements and using Gartner data. He is detailed oriented in his review of Statements of Work and recommending appropriate service levels.

³ Mr. H [REDACTED] while Complainant was at AARP. Tr. Day 3, 150:1 – 6. He was also Supervisor’s supervisor during Complainant’s employment at AARP. Testimony of DW, Tr. Day 3, 55:15 - 18.

Most common observation and feedback from various management leaders is the need for [Complainant] to be more collaborative, especially at a strategic and cross organization level. [Complainant] needs to be more mindful of change management techniques to challenge business as usual activities at peer level and appropriately elevate and communicate action plans to leadership in order to provide ample opportunity for appropriate weigh in to approve or alter strategic direction.

[Complainant] will work toward improving interactions where there has been conflicting views by reviewing possible discussion points; increasing transparency of work products by sharing up to date and relevant information to teammates; responsiveness to changes in work product; taking a leadership role as a [REDACTED] to share supply/supplier strategy options relating to HW/SW/Network use with greater clarity. Complainant will also need to focus on crispness of recommendations and presentations for consumption by Director and VP levels.

9. On October 14, 2015, Complainant spoke with DW, [REDACTED], by telephone to complain how Supervisor “screams, says she hates him, tells him other staff does not want to work with him and takes away work.” Ex. R14, AARP199. In a Confidential Report of Investigation completed in April 2016, DW documented this call and reported: “Complainant was asked for specific incidents and he could not give any...” *Id.*
10. Five days later, on October 19, 2015, Complainant made an oral complaint to [REDACTED], Ms. D. Testimony of Complainant, Tr. Day 1 at 63. Ms. D discussed the complaint with DW. Tr. Day 3, 9:10 – 14. The April 2016 Confidential Report of Investigation states Complainant met with Ms. D “to report [Supervisor] on “retaliation, collusion and intimidation.” Ex. R14, AARP199.
11. In November 2015, Supervisor consulted with DW about placing Complainant on a performance improvement plan (“PIP”) because he had received a “Needs Improvement” rating for his 2015 mid-year review and was not showing satisfactory improvement.

Testimony of Supervisor, Tr. Day 2, 31:21 – 32:5; Testimony of DW, Tr. Day 3, 16:15 – 17:8.

12. AARP has “Tools for Performance” to assist managers which DW provided to Supervisor, including a template to create the PIP and a sample in the document. Testimony of DW, Tr. Day 3, 17:6 – 18:21; Ex. C10 at 7-9.
13. Supervisor was out of the country at the time she created the PIP and was not able to open the template. Therefore, she used the sample included within the “Tools for Performance” document to create a draft PIP. Testimony of Supervisor, Tr. Day 2, 33:3 – 34:16.
14. AARP does not have a standard template it requires managers to use when developing a PIP. Testimony of Supervisor, Tr. Day 2, 35:1 – 7; Testimony of DW, Tr. Day 3, 18:13 – 20:20; Ex. J4, AARP 592 -594, Ex. C9, AARP 174 – 87.
15. On November 19, 2015, DW and Supervisor met with Complainant and placed him on a 60-day PIP. Ex. J5 AARP 116-117. The four areas highlighted in the PIP were Quality and Completeness of Work Product; Managing through Ambiguity; Consistency in Generating Work Product; and Honoring Commitments. *Id.* Complainant was very “upset, “angry,” and “combative” about the PIP to the point where they could not finish the meeting. Testimony of Supervisor, Tr. Day 2 at 37-38.
16. Complainant responded to the PIP by providing Supervisor with a rebuttal wherein he referred to one of the categories as “psychobabble” and could not name any one of the PIP points that he believed was “on point.” Ex. R4 at 720 – 25; Testimony of Complainant, Tr. Day 1, 147:11 - 169:2; Testimony of DW, Tr. Day 2, 40:10 – 41:20.
17. Prior to the PIP, Complainant used a “worktable” to track his assignments. Complainant proposed to use the “worktable” during the PIP because it was “more specific” and he

“would have specific things that could be measured.” Testimony of Complainant, Tr. Day 1, 147- 169.

18. Supervisor reviewed the worktable Complainant initially drafted and created the final worktable by adding additional columns. Testimony of Complainant, Tr. Day 1, 150:14 – 151:11; Ex. J6, AARP 712 – 719.
19. During the pendency of the PIP, Supervisor and Complainant had weekly one-on-one meetings. Testimony of Complainant, Tr. Day 1, 78:1 – 19. In the meetings, they reviewed the worktable and discussed Complainant’s work product. *Id.* Supervisor memorialized her critiques of Complainant’s work product in writing in the worktable and sent them to Complainant a few days after their one-on-one meetings. *Id.*, Tr. Day 1, 80:2 – 22.
20. Supervisor also kept a separate table of comments about Complainant’s performance under the PIP that she shared with DW. Ex. J16, AARP 782 – 813. Supervisor kept the separate comments because she did not want Complainant to get “angry and combative” in their one-on-ones such that they “couldn’t get to the content of what he needed to do to succeed.” Tr. Day 2, 47:14 – 48:3; Ex. J16.
21. On November 22, 2015, Complainant filed a complaint by telephone with AARP’s Ethics and Compliance hotline asserting retaliatory and abusive behavior on the part of Supervisor that began in October 2014.⁴ Ex. R3. In summary, the complaint reported the following incidents which Complainant reported as harassment from Supervisor:

⁴ Ex. R3 is a summary of Complainant’s hotline complaint. Complainant testified that AARP’s ethics hotline is a third-party administrator. The report reflects that the complaint was taken by telephone. It is not clear if the complaint is a summary of what Complainant reported or if it is a verbatim dictation of the call. Regardless, Complainant testified that the complaint accurately reflected his concerns. Tr. Day 1 at 173-174.

- That in 2014 Complainant had complained to Mr. H about Supervisor's "abusive behavior and workplace harassment" including calling him names like "stupid, idiot, and you will never be a leader;"
- Supervisor's reaction to an incident in October 2014 regarding Complainant's former employer CSC;
- Having complained to Mr. H in December 2014 and March 2015 about Supervisor being "hostile" toward Complainant;
- The April 2015 incident where Complainant complained to Mr. H about Supervisor jumping out of her chair;
- "Retaliation" from Supervisor by taking away assignments;
- Supervisor telling Complainant that other people do not like him;
- Supervisor cancelling meetings;
- Complainant being placed on a PIP;
- Complainant asserting that he is being "constructively discharged."

Ex. R3, AARP 1016 – 17; Testimony of Complainant, Tr. Day 1, 172-175.

22. The complaint did not mention Complainant's disabilities or allege that Supervisor was abusive because of Complainant's disabilities.

23. DW conducted an investigation in response to Complainant's hotline complaint. DW interviewed Complainant on December 7, 2015. Ex. R13, AARP 200. DW documented in a "Confidential Report of Investigation" that Complainant reported Supervisor screams, says she hates him, tells him other staff do not want to work with him, and takes work away from him, but he was not able to provide any specific examples. *Id.*

24. DW spoke with Supervisor in general about Complainant, but she did not tell Supervisor at any time that Complainant had filed a formal complaint against her. Testimony of DW, Tr. Day 3 at 67-73.

25. As part of her investigation, DW interviewed Ms. M, Mr. S and Mr. P. Ex. R14. [REDACTED] [REDACTED] of whom were Senior Advisors like Complainant, confirmed that Supervisor was a tough manager. Testimony of DW, Tr. Day 3, 38:12 – 40:21. Mr. S, who worked closely with all the [REDACTED] reported he saw no differential treatment among them. Testimony of DW, Tr. Day 3, 38:12 – 40:21.
26. On December 23, 2015, Supervisor emailed Complainant the updated worktable containing her comments. Ex. J7, AARP333. Supervisor asked Complainant to be prepared for future meetings by bringing copies of all work products for review. *Id.* On December 24, 2015, Complainant forwarded this email to DW and EB. In the email Complainant complains that Supervisor is harassing and bullying him and “over scrutinization of simple things.” *Id.*; Tr. Day 1 at 80-81, 175-180.
27. On December 30, 2015, Complainant submitted a request to Aetna for short-term disability benefits. Ex. R6, Aetna 355-356. Aetna is the third-party administrator for AARP’s FMLA and short-term disability programs. Testimony of AP, Tr. Day 6 at 119-120.
28. Aetna notified, AARP’s Benefits Advisor, Leave Programs and Income Protection Plans, about the pending claim. Ex. C15, AARP 334. In response, on January 13, 2016, Mr. P emailed Complainant AARP’s guide on FMLA leave and advised him to apply for FMLA leave. *Id.* The FMLA Guide states that medical certification is submitted directly to Aetna which will make the eligibility determination. Ex. C15, AARP 337.
29. Aetna found Complainant eligible for FMLA leave and short-term disability and on January 15, 2016, Supervisor acknowledged Complainant’s FMLA leave by signing the FMLA Form. Ex. O-9; Testimony of Supervisor, Tr. Day 2 at 218. The FMLA form that Supervisor signed did not reflect the nature of Complainant’s medical condition that

necessitated the leave. *Id.* Complainant's last day of work before his leave of absence was January 18, 2016.

30. Complainant's 60-day PIP had not been completed at the time he went on leave, and the PIP was put on pause when Supervisor signed the leave acknowledgement form. Testimony of Supervisor, Tr. Day 2, 64:6 – 15; Testimony of DW, Tr. Day 3, 35:5 – 12. Supervisor told Complainant he would still be on the PIP when he came back from leave. Tr. Day 1, 96: 1 – 7.
31. On January 21, 2016, while on FMLA leave, Complainant received his 2015 Year-End Performance Review from Supervisor in which he was rated "Needs Improvement." Ex. J8 at 110 – 115. The "needs improvement" rating was reached by including comments from other managers relating to Complainant's communication and accountability skills. Testimony of Supervisor, Tr. Day 2, 54:2 – 55:17.
32. Complainant commented on his 2015 Year-End Performance Review that he thought it was "unfair" because he had "complained about [Supervisor's] abusive behavior back in October 2014⁵ and [had] been following up with HR ever since." Ex. J8 at 113.
33. During his FMLA leave, Complainant exchanged emails with Supervisor regarding the status of his leave and his expected return date. None of the emails mentioned any specific medical condition of Complainant. Complainant referred to his "medical problems" and "therapy" appointments. Exs. J9, AARP 735, J10, AARP 749, C19, AARP 237, R8, AARP 743. Supervisor replied with comments such as "okay and hope you feel better," "your note below indicates you expected an extension, so please provide an update," "please continue to update your status regularly," and "...can you please provide more regular

⁵ There was no evidence presented that Complainant had complained about Supervisor in 2014.

updates regarding your leave and intent to return.” Exs. R8, AARP 743, R9, AARP 822 – 24, R12, AARP 883 – 85, and R13, AARP 744 – 46.

34. Complainant’s leave was extended a few times, and in March 2016, Complainant informed Supervisor he would be out for additional time to receive physical therapy for a dislocated shoulder. Testimony of Complainant, Tr. Day 1, 96:8 – 98:2. Each time Complainant sought to extend his FMLA and short-term disability leave, Complainant sent medical documents to Aetna. Testimony of Complainant, Tr. Day 2 at 97, *see e.g.* Ex. C13, AARP 825. Employees at AARP do not receive or review medical documents related to FMLA or short-term disability. Testimony of AP, Tr. Day 3 at 117.

35. While Complainant was out on leave, DW completed her investigation of Complainant’s November 22, 2015, hotline complaint. Ex. R14, AARP 119 – 201. As a result of DW’s investigation, Complainant’s allegations of unfair treatment were not substantiated, but Supervisor was given coaching on her management style. *Id.*, Tr. Day 3, 38:12 – 40:21; Ex. R14. DW recommend coaching so that Supervisor understood that staff perceived her as a tough manager.⁶ Testimony of DW, Tr. Day 3 at 71. DW informed Mr. H about the outcome of the investigation in a meeting on April 25, 2016. Ex. R14

36. In order to return to work, on May 11, 2016, Complainant provided Mr. P with a Fitness for Duty Certification. Ex. J11, AARP 650. His physician certified that Complainant was able to return to work with restrictions. *Id.*

⁶ Supervisor testified that she was coached on things such as not rolling her eyes and leaning back when she spoke. Supervisor testified that she tended to lean forward when trying to understand something, to which Complainant “took affronts.” Supervisor testified that based on the conversation with DW she assumed that Complainant had been talking to DW about her.

37. By email dated May 12, 2016, Mr. P informed DW and Supervisor that Complainant was cleared to return to work, but further clarification was needed to determine what accommodations Complainant needed and what AARP could provide. Ex. J12, AARP 241; Testimony of A. P, Tr. Day 3 at 122-124. Therefore, Mr. P asked Complainant to complete an ADA Employee Request for Accommodation form. *Id.*
38. On May 24, 2016, Complainant's physician faxed the completed request for accommodation form to Mr. P. Ex. J13. Complainant requested the ability to telework and a flexible schedule. Ex. J13, AARP 995 – 1001. Complainant identified four impairments in the request for accommodation: "severe sleep apnea, respiratory disorders, endocrine and immune system disorders." Ex. J13, AARP 996.
39. Complainant's physician certified that Complainant required accommodations due to the following impairments: "obstructive sleep apnea (chronic) and idiopathic sensory neuropathy complicated by poor pulmonary reserve," which affects the following major life activities: walking, sleeping, concentration, lifting or carrying, and the following major bodily functions: respiratory, endocrine, neurological, and brain. Ex. J13.
40. DW and Mr. P reviewed Complainant's request for accommodations and discussed with Supervisor whether the requested accommodations were reasonable and could be provided. Testimony of DW, Tr. Day 3, 43:13 – 46:3.
41. Neither DW nor Mr. P showed the request for accommodations form to Supervisor. Testimony of Supervisor, Tr. Day 3, 46:2 – 6; Testimony of A. P, 125:10 – 17.
42. Supervisor did not have a problem with any of the accommodations requested by Complainant and she agreed to them all. The accommodations included the ability to telework up to five days per week, to have a flexible schedule regarding the need for time

off, and to take breaks as needed. *Id.* As part of his accommodation, Complainant was able to determine when he would telework, depending on how he felt. Testimony of Complainant, Tr. Day 1, 7 – 9.

43. On June 24, 2016, in response to Complainant's request for accommodations, DW sent an email to Complainant, copying Supervisor and Mr. P, stating "Based on the information submitted, AARP has concluded that your reported medical conditions may constitute a disability under the ADA and has agreed to provide the following work-related accommodations effective immediately and continuing through and including October 1, 2016." Ex. J14 at 887; Tr. Day 2 at 73 and 183.

44. Complainant returned to work (via telework) with accommodations on June 29, 2016. Testimony of Complainant, Tr. Day 1, 97:22 - 98:2. On that day Complainant spoke with Supervisor by telephone and Supervisor extended Complainant's November 2015 PIP for an additional 60 days. Ex. J15, AARP 752 – 54. Supervisor also added two new areas for improvement to the June 2016 PIP: "honoring commitments" and "improving teamwork with peers and stakeholders." Ex. J15, AARP 753; Tr. Day 2 at 75-78. During the conversation, Supervisor asked Complainant to give her three days' notice before coming into the office. Complainant told Supervisor he was unable to do because the decision to come in was based on how he felt on any given day. Testimony of Complainant, Tr. Day 1 at 116; Testimony of Supervisor, Tr. Day 2 at 185.

45. On June 29, 2016, Complainant spoke with DW on the phone and she informed him of the outcome of her investigation of his November 22, 2015, hotline complaint. They also discussed the extension of his PIP upon returning to work. Testimony of DW, Tr. Day 3 at 48-49, 73, 77-80.

46. Two days later, on July 1, 2016, Supervisor sent Complainant an email about a work assignment. The email ended with Supervisor stating: “I am counting on you to start off with a positive attitude and assume positive intent on my part so please refrain from commenting on my potential negative reaction to others.” Ex. C5, OHR_Response303. Supervisor was referring to Complainant allegedly having made a statement to a co-worker named T that everything he did for Supervisor was “never good enough.” Testimony of Supervisor, Tr. Day 2 at 79.

47. After receiving this email from Supervisor, Complainant forwarded the email to DW on July 1, 2016, with the subject: “PLEASE HELP ME.” Ex. C5, OHR_Response302. Complainant denied having said anything about Supervisor to T. The email further states:

BTW, [Supervisor] has also questioned if I was really sick and needed an accommodation. I was hoping that I could just do my work and go forward, but the harassment is starting again. I know all of this may seem trivial as an isolated remark, but factoring everything, it is just another piece of information that you can choose not to believe with everything else I have told you.

48. After receiving this email, DW spoke to Supervisor “about making sure she was not mentioning or saying anything about the leave of an employee to make sure that she understood that she needed to focus on the work in the performance improvement plan for Complainant.” Testimony of DW, Tr. Day 3 at 50.

49. After Complainant returned to work, Supervisor and Complainant had weekly one-on-one meetings and they continued to use the PIP worktable. Testimony of Complainant, Tr. Day 1, 128:16 – 129:16. During these meetings, they reviewed the worktable and discussed “what [Complainant] was working on, the progress, issues, and challenges.” Testimony of Complainant, Tr. Day 1, 128:16 – 129:16.

50. Fifty or so days into the extended PIP, Supervisor had determined that, rather than improving, Complainant's performance was deteriorating. Testimony of Supervisor, Tr. Day 2, 83:4 – 10; Ex. J16, AARP 782 – 813.
51. By August 25, 2016, Supervisor consulted with DW about the possibility of recommending Complainant's termination. Testimony of Supervisor, Tr. Day 2, 93:4 – 8; Ex. C8, AAR 97 – 99.
52. Supervisor submitted a written recommendation to terminate Complainant's employment, dated September 15, 2016, which was approved by Mr. H and [] Senior Vice President & Chief Information Officer. Ex. J17, AARP 103-104. The recommendation stated that Complainant exhibited either no or very limited improvement during his PIP and the he was not meeting expectations. *Id.*
53. On September 21, 2016, Complainant was advised during a call with Supervisor and DW that his employment was being terminated, effective October 3, 2016. Testimony of Complainant, Tr. Day 1, 130:2 – 7. In this call, Supervisor told Complainant that he was not performing at the expected level.⁷ Testimony of Supervisor, Tr. Day 2, 94:2 - 15; Testimony of DW, Tr. Day 3, 56:5 - 22.
54. At the time of his discharge from AARP, Complainant suffered from the following medical conditions: sleep apnea, a respiratory disorder that causes diminished lung capacity, type 2 diabetes, and HIV. Testimony of Complainant, Tr. Day 1, 92:2 – 7.

⁷ Judge Carmichael did not credit Complainant's testimony that he was not told that he was being discharged for performance issues and that he was told that he was discharged because he was an at-will employee. Tr. Day 1 at 130. Complainant's testimony was contradicted by both Supervisor and DW, who provided credible testimony. There was no evidence to suggest that DW was by any means biased against Complainant or that there were any problems between Complainant and DW who did not serve in a supervisory role to either Complainant or Supervisor.

55. Supervisor did not know that Complainant was HIV positive or that he had diabetes or sleep apnea. Testimony of Supervisor, Tr. Day 2, 94:16 – 95:15.

VI. DISCUSSION

Complainant presents two claims of unlawful employment practices: discriminatory discharge and retaliation. First, Complainant asserts that Respondent terminated his employment on account of his disabilities in violation of the DCHRA, D.C. Code § 2-1402.11(a). Second, Complainant asserts that his supervisor, Supervisor, discriminated against him on account of his disabilities, and when he made complaints about this alleged discrimination, she retaliated against him by terminating his employment in violation of the DCHRA, D.C. Code § 2-1402.61.

A. Discriminatory Discharge Under the DCHRA

The DCHRA makes it an “unlawful discriminatory practice” for an employer to discharge an employee “wholly or partially for a discriminatory reason based upon the actual or perceived ... disability of any individual.” D.C. Code § 2–1402.11(a) (2001). Because the DCHRA’s definition of “disability” closely resembles the definition of disability found in the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(2) (2000), the Commission and the D.C. Court of Appeals have considered decisions construing the ADA as persuasive in decisions construing comparable sections of the DCHRA. *See Chang v. Inst. for Pub.-Private Partnerships, Inc.*, 846 A.2d 318, 324 (D.C. 2004); *Grant v. May Dept. Stores Co.*, 786 A.2d 580, 583–84 (D.C. 2001).

Similar to an ADA wrongful discharge case, Complainant needs to establish four elements to make out a *prima facie* case of wrongful termination on the basis of a disability: (1) that he has

a disability as defined in the DCHRA; (2) he is qualified for the job from which he was terminated, with or without accommodations; (3) he was terminated despite his qualifications; and (4) that a substantial factor in his termination was membership in the protected class. *See Little v. D.C. Water and Sewer Authority*, 91 A.3d 1020, 1027-28 (D.C. 2014); *Cain v. Reinoso*, 43 A.3d 302, 306 (D.C. 2012); *McFarland v. George Washington University*, 935 A.2d 337, 352 (D.C. 2007).

A complainant may prove disability discrimination under the aforementioned discriminatory discharge framework through either direct or circumstantial evidence. *Hollins v. Federal Nat. Mortg. Ass’n*, 760 A.2d 563, 574-75 (D.C. 2000).⁸ In a case such as this, where Complainant lacks direct evidence of discrimination, his claims are evaluated under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Dougherty v. Cable News Network*, 396 F. Supp. 3d 84, 101 (D.D.C. 2019); *Cain v. Reinoso*, 43 A.3d at 306. Under this framework, an employee bears the initial burden of demonstrating a *prima facie* case of discrimination, by a preponderance of the evidence, which if made, raises a rebuttable presumption of unlawful discrimination. *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 956 (D.C. 2012) (quoting *Hollins v. Fed. Nat’l Mortg. Ass’n*, 760 A.2d at 571).

The preponderance of the evidence standard of proof is not a “heavy,” burden, but rather “it simply requires [the] trier of fact to believe that the existence of the fact is more probable than its nonexistence.” *Concrete Pipe and Prods. of California Inc. v. Constr. Laborers Pension Trust*

⁸ To prove discrimination by direct evidence under the DCHRA, a complainant must “present evidence of conduct or statements by persons involved in the decision making process reflecting the alleged discriminatory attitude sufficient to permit the factfinder to infer that that...attitude was more likely than not a motivating factor in the alleged adverse action.” *Little v. D.C. Water and Sewer Authority*, 91 A.3d 1020, 1025 (D.C. 2014) (quoting *Jung v. George Washington University*, 875 A.2d 95, 111 (D.C. 2005)).

for *Southern California*, 508 U.S. 602, 622 (1993) (quoting *In Re: Winship*, 397 U.S. 358 (1970)); *In re E.D.R.*, 772 A.2d 1156, 1160 (D.C. 2001); Under the DCAPA, D.C. Code §§ 1–1501 *et seq.* (1992), findings of fact and conclusions of law must be supported by substantial evidence in the record. *See, e.g., Wallace v. Eckert, Seamans, Cherin & Mellott*, 294 A.2d at 178–79. Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

After this *prima facie* showing is made, the burden shifts to the employer to rebut the presumption “by articulating some legitimate, non-discriminatory reason for the employment action.” *McDonnell Douglas Corp. v. Green*, 411 U.S. at 793 (internal citations omitted). If the employer articulates some legitimate, non-discriminatory reason for the employment action, the burden shifts back to the employee to prove by a preponderance of the evidence that the employer’s proffered reason was pretext for an unlawful discriminatory purpose. *Id.*

1. Complainant Was Disabled Under the DCHRA and the ADA at the Time His Employment with AARP Was Terminated.

The first prong of a *prima facie* case is that Complainant has a disability as that term is defined under the DCHRA. Respondent does not contest that Complainant is a person with disabilities. The undersigned is satisfied that Complainant has sufficiently established that he had a disability within the meaning of the DCHRA and ADA.

Like the ADA, the DCHRA defines a “disability” as a physical or mental impairment that substantially limits a major life activity. D.C. Code § 2-1401.02 (5A). A complainant has a disability if he or she (1) suffers from an impairment or is regarded as having such an impairment, (2) the impairment limits an activity that constitutes a major life activity, and (3) the limitation is

substantial. *Badwal v. Bd. of Trustees of Univ. of D.C.*, 139 F. Supp. 3d 295, 308–09 (D.D.C. 2015). According to the ADA Amendments Act of 2008 (ADAAA), the definition of disability shall be “construed in favor of broad coverage” of individuals asserting claims under the Act. 42 U.S.C. § 12102(4)(A). Further, the regulations promulgated by the Equal Employment Opportunity Commission (“EEOC”) provide that:

[T]he primary objective of attention in a case brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

29 C.F.R. § 1630.1(c)(4).

When Complainant sought ADA accommodations in May 2016, a physician certified that Complainant was suffering from chronic “obstructive sleep apnea and idiopathic sensory neuropathy, complicated by poor pulmonary reserve,” and that these impairments substantially limited one or more of his major life activities. Ex. J13, AARP 95 – 1001.

Complainant testified credibly that at the time of his termination, he experienced impairments relating to sleep apnea, respiratory disorders, diabetes, and HIV. However, it is not clear if all of Complainant’s reported conditions amounted to a disability under the ADA. Not all complainants with health conditions have a “disability” within the meaning of the ADA. *Nawrot v. CPC Int’l*, 277 F.3d 896, 903 (7th Cir. 2002) (internal citations omitted).

Complainant’s physician certified that Complainant’s sleep apnea and neuropathy were disabilities that interfered with one or more major life functions. Courts interpreting the ADA have held that HIV infection (whether symptomatic or asymptomatic) qualifies as a disability

under the ADA. *See e.g. Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324, 341 (S.D.N.Y. 2010).

Complainant testified repeatedly that he suffered from a “respiratory condition.” Tr. Day 1 at 92, 206, 101. Complainant did not establish the nature of his respiratory condition other than to state that in 2015 he had a bout of bronchitis and during the time he was on FMLA leave his lungs were functioning at 30% capacity. The certification from his physician in May 2016 listed as a disability, idiopathic (i.e. unknown) sensory neuropathy complicated by poor pulmonary reserve. Thus, there is sufficient evidence to establish that Complainant had a disability related to an undisclosed respiratory condition. It is the impairment itself, not the medical diagnosis of the condition, that determines whether a particular ailment qualifies as an impairment under the ADA. *Green v. American University*, 647 F. Supp. 2d 21, 28 (D.D.C. 2009).

Complainant further testified that he suffered from Type 2 diabetes. Although the parties stipulated in their Joint Pre-Trial Statement that Complainant was a person with disabilities as defined by the ADA, they did not stipulate to which qualified disabilities apply to Complainant. Clearly, those disabilities listed on Complainant’s May 2016 ADA accommodation form apply. Diabetes, however, was not listed on his ADA accommodation form. Before the ADAAA became effective, courts often concluded that diabetes had to limit other major life activities, such as eating, seeing, or walking, or that the diabetic had to withstand a complex analysis regarding their ability to mitigate the symptoms of diabetes to establish that a substantial limitation existed. *See Hensel v. City of Utica*, No. 615CV0374LEKTWD, 2017 WL 2589355, at *4 (N.D.N.Y. June 14, 2017). Given the changes to the ADA’s definition of disability, diabetes is more easily found to be a disability under the ADA. Although Congress sought to repeal the “significantly or severely restricting” requirement as it pertained to the “substantially limits” factor of the ADA,

the ADAAA still requires that the qualifying impairment create an “important” limitation. *Koller v. Riley Riper Hollin & Colagreco*, 850 F. Supp. 2d 502, 513 (E.D. Pa. 2012) citing 29 C.F.R. pt. 1630 App. (2011). Complainant asserts that he has been complaining about Supervisor discriminating against him based on his disabilities since 2014. Between 2014 and May 2016, the only disabilities Complainant asserts Supervisor was aware of was diabetes and respiratory problems. Supervisor denies ever having known Complainant had diabetes or respiratory problems that amounted to a disability and there was no evidence that prior to taking FMLA leave in January 2016, Complainant suffered from diabetic related problems or sought accommodations for his diabetes. Complainant did not provide any testimony regarding the impact of his diabetes and it is not clear if the parties were stipulating that Complainant’s diabetes was a disability under the ADA. Regardless, as discussed further below, there was no evidence that Supervisor knew that Complainant had diabetes at any time during his employment with AARP or had reason to discriminate against him because of his diabetes.

2. Complainant Was Qualified for the Position of Senior Advisor of Vendor Relationships.

The second prong of a *prima facie* case of disability discrimination is that the employee was qualified for the job, with or without accommodations. *Cain v. Reinoso*, 43 A.3d at 306. Although AARP asserts that Complainant was terminated because his performance was not at the level expected of a Senior Advisor, Complainant asserts that he was in fact qualified for his position at the time of his termination and that he was terminated despite those qualifications. Tr. Day 1, 84:22 – 85:15.

The ADA defines a “qualified individual” as someone who can *perform the essential functions of the employment* position with or without reasonable accommodations. 42 U.S.C.

§ 12111(8) (emphasis added); *Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013). In determining the essential functions of a position, courts “generally give substantial weight to the employer’s view of job requirements.” *Id.* (internal citations omitted). EEOC regulations further instruct courts to defer to “a written description” of the job prepared by the employer, if available. 42 U.S.C. § 12111(8). An employee is required only to “introduce[] some evidence that []he possesses the objective qualifications necessary to perform the job”. *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1193 (10th Cir. 2000).

The D.C. and other circuit courts interpreting Title VII and the ADA have held that at the *prima facie* stage, a court should focus on a plaintiff’s “objective qualifications” to determine whether he or she is qualified for the relevant job. *See Stewart v. Ashcroft*, 211 F. Supp. 2d 166, 170 (D.D.C. 2002), *aff’d*, 352 F.3d 422 (D.C. Cir. 2003); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1298 (D.C.Cir.1998) (en banc) (noting that “courts traditionally treat explanations that rely heavily on subjective considerations with caution,” and that “an employer’s asserted strong reliance on subjective feelings about the candidates may mask discrimination”). Once a plaintiff demonstrates that he has met objective employment qualifications, the plaintiff has established a *prima-facie* case. *Accord Medina v. Ramsey Steel Co.*, 238 F.3d 674, 681 (5th Cir.2001) (stating that while courts should consider objective qualifications at the first step of the *McDonnell Douglas* framework, courts should consider subjective criteria only at the second and third steps of the analysis to avoid collapsing the entire analysis into a single initial step).

A contrary rule, under which an employer’s subjective evaluation of poor work performance could defeat a plaintiff’s initial *prima facie* case, cannot be squared with the structure and purpose of the *McDonnell Douglas* framework. *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005) (holding that if the court were to hold an employer’s subjective

evaluations sufficient to defeat the *prima facie* case, the court’s inquiry would end, and plaintiff would be given no opportunity to demonstrate that the subjective evaluation was pretextual.”); *MacDonald v. E. Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1121 (10th Cir.1991) (holding that a plaintiff can show that [h]e is qualified by presenting “credible evidence that [h]e continued to possess the objective qualifications [h]e held when [h]e was hired”).

The record establishes that the essential functions of Complainant’s job included [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. C12, AARP 171 – 173. Complainant had 14 years of relevant IT experience including 8 years as an IT Director. Complainant’s first two performance evaluations met expectations. The record further demonstrates that even while Complainant was on a PIP, his teams received awards for good work. On this record, I conclude that Complainant was objectively qualified for the position he held.

3. Complainant’s employment was terminated despite his qualifications.

The third prong of a *prima facie* case of discriminatory discharge is that a qualified employee was terminated despite his qualifications. *Cain v. Reinoso*, 43 A.3d at 306.

Complainant has established that he was qualified for the position for which he was hired, although he did not meet all of Respondent’s expectations once he was in the position. This element only asks whether Complainant met the basic qualifications of the position of Senior Advisor but does not determine whether he performed at a level sufficient to maintain his position with AARP. Accordingly, Complainant has met the third element of the *prima facie* case.

4. Complainant's Disability Was Not a Motivating Factor in AARP's Decision to Terminate His Employment.

The fourth prong of a *prima facie* case is that a substantial factor in Complainant's termination was membership in the protected class (person with a disability). *See Cain v. Reinoso*, 43 A.3d at 306. To establish the fourth prong of a *prima facie* case, a complainant must demonstrate that the adverse action was causally connected to the protected class. *Propp v. Counterpart Int'l*, 39 A.3d 856, 868 (D.C. 2012).

a) Supervisor had Sufficient Knowledge of Complainant's disabilities as of May 2016 to establish a *prima facie* case.

Respondent argues that Complainant has failed to establish a *prima facie* case because Supervisor had no knowledge that Complainant was a person with disabilities. Resp. Post-Hearing Memorandum of Points and Authorities ("Resp. Memo") at 6. Whether an employer knew about an employee's disability is a "threshold question" with respect to the issue of disability discrimination "vel non as an employer cannot fire an employee because of a disability unless it knows of the disability." *Said v. Nat'l R.R. Passenger Corp.*, 317 F. Supp. 3d 304, 337 (D.D.C. 2018) (internal citation omitted).

As discussed earlier, Complainant established that he suffered from the following disabilities that limited one or more major life functions: chronic obstructive sleep apnea, a respiratory condition, HIV, and sensory neuropathy complicated by poor pulmonary reserve.⁹

⁹ Although the record reflects that Complainant also suffered from a dislocated shoulder while he was on FMLA leave, there was no evidence that his injury amounted to a disability as that term is defined in the DCHRA. In addition, it is well-established that temporary, non-chronic impairments of short duration, such as broken limbs, with little or no long term or permanent impact, are usually not disabilities under the ADA. 29 C.F.R. Ch. XIV, Pt. 1630; *see also Wallace v. Eckert*, 57 A.3d at 954.

However, there is no evidence that Supervisor was aware of any of these specific conditions although she was aware that at least as of May 2016, Complainant suffered from some disability that required reasonable accommodations and thus, at that point he was regarded as having a disability.

HIV Status

Complainant testified that he did not tell anyone at AARP that he is HIV positive, aside from identifying an “immune system disorder” on the May 24, 2016, request for accommodation form, which was not seen by Supervisor. In his Exceptions to the Proposed Order, Complainant argues that Supervisor could not make an assessment of his request for accommodations without reviewing the ADA accommodations form. However, it was not necessary for Supervisor to know what medical condition Complainant suffered from to determine whether she could provide the accommodations requested. Complainant also states that he testified about coming into the office twice after his FMLA leave ended and that Supervisor backed away from him, which he asserts “is a reaction that is typical with people who are HIV.” Exceptions at 20. Complainant testified that he came to the office twice and Supervisor “jumped the back at me (sic),” which he summarized as Supervisor making it difficult for him to come back to the office. Tr. Day 1 at 124. Complainant never testified that he felt this was a reaction to his HIV status but requests in his Exceptions that the court draw such a conclusion. In addition, there was no evidence that Supervisor saw his FMLA request that stated he suffered from “immune system disorders,” which has been found to be insufficient to place an employer on notice that an employee is HIV positive. *See e.g. Zillyette v. Capital One Fin. Corp.*, 1 F.Supp.2d 1435, 1443 (S.D.Fla.1998) (holding employer lacked sufficient notice of plaintiff’s disability stemming from HIV even though employer knew of plaintiff’s excessive absenteeism and diabetes, and received a doctor’s note

saying plaintiff suffered from “an immunological disease”). There is no evidence that anyone at AARP knew that Complainant was HIV positive because the FMLA medical documentation was submitted directly to Aetna and not shared with AARP.

Diabetes

Complainant testified that throughout his employment and at the time of his termination, he suffered from diabetes. The ADAAA recognizes diabetes as a disability that substantially limits a major life activity. *See* 29 C.F.R. §1630.2(j)(3)(iii). However, there was no evidence that Supervisor or DW knew that Complainant had diabetes. Complainant testified that in 2014 he told Supervisor that he had diabetes, but he did not provide any specific information regarding how, when or the circumstances under which he communicated this to Supervisor. Tr. Day 1 at 209. Supervisor testified credibly that she did not know that Complainant had diabetes at any time during his employment. Tr. Day 2, 94: 22 – 95:15. Complainant also did not have a known history of illnesses or absences related to his diabetes that would place Supervisor on notice. As such, there was not substantial evidence to establish Supervisor knew Complainant had diabetes. Similar to his HIV status, Complainant’s statement on the May 24, 2016, request for accommodations form that he suffered from “endocrine and immune system disorders,” was insufficient and too vague to place Respondent on notice that he had diabetes even if they had seen the FMLA form.

Sleep Apnea

Complainant testified that he does not recall if he told anyone at AARP that he had sleep apnea, other than to list it in the May 24, 2016, request for accommodation form, which was not seen by Supervisor. Tr. Day 1, 206:22 – 211:11; Tr. Day 2 3 at 46. Supervisor testified credibly that she never saw the ADA accommodation request and did not know the nature of Complainant’s

medical conditions. Tr. Day 2, 94: 22 – 95:15. Supervisor’s testimony was corroborated by DW and Mr. P, who testified they did not show Complainant’s ADA accommodation request to Supervisor or tell her about the medical conditions listed on the form. Tr. Day 3, 42:2 – 6; 125:10 – 17. They only discussed with Supervisor whether AARP could provide the requested accommodations. Complainant testified that he believes Supervisor knew about his specific disabilities because he “assumed” she had seen his ADA accommodation request and because anything he said to DW seemed to get back to Supervisor. Tr. Day 1, 119:16 – 120:12; 206:22 – 211:11. Complainant’s assumption has been rebutted by three witnesses. There is no evidence Supervisor knew Complainant had sleep apnea.

Respiratory Condition

The only remaining medical condition that amounted to a disability was Complainant’s “respiratory problems.” Complainant testified that in August 2015, he was very sick and told Supervisor that he had bronchitis. It was during this time that he was diagnosed with “lung issues.” Tr. Day 1 at 101, 119, 140. In his exceptions, Complainant argues that Supervisor was aware he had bronchitis and had difficulty walking. Bronchitis, however, which can be acute or chronic, is not necessarily a disability under the ADA¹⁰ and there was no evidence Supervisor, in August or November 2015, regarded or should have regarded Complainant as having a disability based on his bronchitis. There was no testimony regarding Complainant having trouble walking.

¹⁰ For example, the Social Security Administration recognizes chronic asthmatic bronchitis as a form of chronic obstructive pulmonary disease (COPD). <https://www.ssa.gov/disability/professionals/bluebook/3.00-Respiratory-Adult.htm>

There was no evidence that in August 2015 Complainant's "lung issues" amounted to a disability under the DHCRA that was known to Supervisor. Three months later, in December 2015, Complainant requested FMLA and short-term disability leave. Supervisor testified credibly that she was not aware of the underlying medical reasons necessitating Complainant's medical leave. Tr. Day 2 at 63. Complainant further testified that in 2016, while he was on FMLA leave, he told Supervisor that he had "respiratory issues" and had dislocated his shoulder.¹¹ Tr. Day 1, 206:22 – 211:11. Supervisor, in contrast, testified that she did not know that Complainant had respiratory issues at the time of his termination, but she knew he was sick. Tr. Day 2, 94: 22- 95:15. Complainant has failed to establish that Supervisor knew he had a respiratory problem that amounted to a disability under the ADA.

FMLA and Short-Term Disability

Complainant argues that because Supervisor was aware that he was receiving short-term disability and was on FMLA leave, she was aware that he had disabilities. When Complainant applied for FMLA and short-term disability leave in December 2015, all his medical documentation was provided directly to Aetna, a third-party administrator for AARP's benefits. There was no evidence that anyone at AARP was made aware of the nature of Complainant's medical problems necessitating the need for FMLA leave or short-term disability. Indeed, at the hearing, Complainant did not identify what specific medical condition he had in December 2015 that necessitated taking FMLA leave and short-term disability. Complainant testified only that he was very sick, he could barely walk or breath and was having a hard time functioning. Tr. Day 1

¹¹ On direct examination, Complainant testified that while he was on leave, he told Supervisor that he had respiratory issues and that his lung capacity was at 30%. Tr. Day 1 at 101. On Cross-examination, Complainant testified that he was not sure if he actually told Supervisor his lung capacity was at 30%, but he definitely told her he had "respiratory issues." Tr. Day 1 at 210.

at 93. There was no evidence that prior to taking leave in December 2015, Complainant was exhibiting any obvious symptoms or difficulty working that would alert Supervisor that he had a disability that substantially limited a major life activity. Supervisor testified that Complainant was always present for work.

When Supervisor signed Complainant's FMLA form in December 2015, the form did not state what medical condition had necessitated the leave. Although Supervisor knew that Complainant was receiving FMLA benefits, that knowledge would only necessarily put her on notice that Complainant had demonstrated that he suffered from any one of a number of conditions. Sickness benefits are available to employees who are unable to work due to any physical or mental condition which do not necessarily qualify as a "disability" within the meaning of the DCHRA. *See Said v. Nat'l R.R. Passenger Corp.*, 317 F. Supp. 3d at 338 (holding that the employer's knowledge that the employee was collecting sickness benefits was not sufficient to demonstrate that the defendant was "on notice of the existence and nature of [her] disability."); *Berry v. T-Mobile, USA, Inc.*, 490 F.3d 1211, 1219 (10th Cir. 2007) ("[Defendant's] approval of [plaintiff's] FMLA request does not establish a question of fact. An employer's knowledge of an impairment alone is insufficient to establish the employer regarded the employee as disabled [for purposes of an ADA claim]"); *Chang v. Inst. for Pub.-Private Partnerships, Inc.*, 846 A.2d 318, 325 (D.C. 2004) *citing Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir.1996) ("the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action."); *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 382 (3d Cir. 2002)(holding the fact that employer knew employee had been sick with pneumonia and was still having some difficulties breathing does not show that the company regarded him as disabled for the purposes of the ADA).

Similarly, Supervisor's awareness that Complainant was receiving short-term disability does not equate knowledge of a disability that substantially limits a major life activity. The receipt of short-term disability benefits does not automatically indicate that an employer perceived an employee as disabled for purposes of the ADA. *Foos v. Taghleef Indus., Inc.*, 132 F. Supp. 3d 1034, 1053–54 (S.D. Ind. 2015) *citing* *Wellman v. DuPont Dow Elastomers, L.L.C.*, 739 F.Supp.2d 665, 673 (D.Del. 2010) (“Merely having knowledge of the impairment [which led to short term disability leave] ... is insufficient to suggest that the employer considered or perceived the employee as disabled”). Indeed, “the standards for ‘disability’ within the meaning of disability benefits and ‘disability’ within the meaning of the ADA are quite different.” *Boadi v. Ctr. for Human Dev., Inc.*, 239 F. Supp. 3d 333, 353 (D. Mass. 2017) *citing* *Foos*, 132 F. Supp. 3d at 1053. The fact that Complainant was approved for short-term disability, at most, gives rise to an inference that AARP thought Complainant was temporarily unable to perform his job.

Reasonable Accommodations

As discussed above, there was no evidence that Supervisor had any knowledge of a specific medical condition of Complainant that amounted to a disability between 2014 and May 2016. At issue is then is whether Supervisor's knowledge as of May 2016, that Complainant suffered from *some* medical condition that amounted to a disability, is sufficient for a *prima facie* case. To establish the employer's knowledge of an employee's disability, “notice ... need not be precise, but it must put the employer sufficiently on notice of the existence and nature of the disability.” *Green v. Am. Univ.*, 647 F. Supp.2d 21, 33 (D.D.C. 2009). Respondent cited to numerous cases in its brief which stand for the proposition that an employer must be on notice of both the existence and nature of an employee's disability. However, most of those cases concerned either employees

who failed to establish they had a disability under the ADA or who failed to notify the employer that they sought accommodations for their disability.¹²

What is different in Complainant's case from the cases cited by Respondent in its Post-Hearing Brief is that at the time Complainant was terminated, AARP was providing him with reasonable accommodations based on his disabilities. In the cases cited by Respondent, the employers were deemed to have insufficient knowledge that the employee had a disability that required reasonable accommodations. Knowing the nature of a disability is critical to determine appropriate accommodations. That is not the issue here. Supervisor was aware, as of May 2016, that Complainant suffered from some medical condition that qualified as a disability under the ADA which triggered the need for reasonable accommodations. The June 24, 2016, email that DW sent to Complainant and copied to Supervisor stated that Complainant's "reported medical conditions may constitute a 'disability' under the ADA and that his requests for accommodations was granted." Ex. J14, AARP887. Those accommodations included mostly working from home, taking frequent breaks, and time off as needed. Based on this email and the discussion Supervisor

¹² See *Evans v. Davis Mem'l Goodwill Indus.*, 133 F. Supp. 2d 24, 27-28 (D.D.C. 2000) (Employer was not on notice of a disability where employee informed employer about a head injury, but did not tell employer about "any job-related limitation stemming from" the injury); *Schneider v. Giant of Md, LLC*, No. 09-1913, 389 F. Appx. 263, 270 (4th Cir. July 26, 2010) (holding that an employer's knowledge that employee had diabetes does not amount to knowledge of a disability requiring accommodations. Employee needs to "inform the employer of *both* the disability and the employee's need for accommodations for that disability); *Burns v. Snow*, No. 04-1345, 130 F. App'x 973 (10th Cir. May 16, 2005) (employee failed to show she is disabled under the ADA, or that she sufficiently notified employer of any limitations resulting from a disability, or requested an accommodation when she asked for "light duty" and referenced lupus); *Moore v. Time Warner GRC* 9, No. 96-CV-4206L, 18 F. Supp. 2d 257, 261 (W.D.N.Y. Aug. 18, 1998) ("It is an employee's burden to inform his employer not only of his alleged disability but also about his need for assistance and to suggest a reasonable accommodation." Holding employee failed to demonstrate that he informed employer his alleged disability and suggested a reasonable accommodation.")

had to approve the accommodations, Supervisor was on notice, as of May 2016, that Complainant had some medical condition sufficient to qualify under the ADA as a disability warranting reasonable accommodations. It was reasonable for AARP not to share Complainant's specific diagnosis with Supervisor because he is entitled to a level of privacy and there was no need for Supervisor to know the specifics of his medical condition. But to turn his right to privacy into a shield against knowledge that he had a disability would place an unreasonable onerous on an employee. To allow an employer to deny knowledge of disability under these circumstances would be contrary to the purposes of the DCHRA.

Accordingly, Complainant has established that he was a member of a protected class and that AARP and Supervisor had knowledge that he was a member of the protected class as of May 2016. However, Complainant still must produce sufficient evidence that Respondent intentionally discriminated against him based on his disability. *Conn v. Am. Nat'l Red Cross*, 149 F. Supp. 3d 136, 150 (D.D.C. 2016).

b. The Record Fails to Establish that Supervisor Maintained Animus Toward Complainant Because of His Disability.

In order to establish the fourth prong of a *prima facie* case of an unlawful termination under the DCHRA, a plaintiff ... must demonstrate that his disability was a substantial factor in his termination. *McFarland v. George Washington University*, 935 A.2d at 352. This *prima facie* showing requires circumstantial evidence raising an inference of purposeful discrimination. “[W]e infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that th[e] actions [of the employer] were bottomed on impermissible considerations.” *Id.* at 346 (internal citations omitted).

Complainant alleges that Supervisor terminated him because of his disability. Specifically, Complainant asserts that Supervisor expressed animosity toward him in two phone calls. Complainant testified that during a call in March 2016, while he was on medical leave, Supervisor was “angry” that Complainant was extending his leave. Tr. Day 1 at 100:2 - 102:6. Complainant testified that Supervisor was not empathetic and only wanted to know when he would return to work. However, Complainant did not identify any specific statements or comments made by Supervisor that related to his disabilities. Complainant did not specify what Supervisor said to him on the call that led him to conclude that she was “angry.” Tr. Day 100: 2 - 102:6.

Complainant further testified that during a call on June 29, 2016, the day he returned to work, Supervisor went on a “rant” about his medical conditions and accused him of faking the need for his leave. Tr. Day 1, 114:7 – 115:6. Supervisor, in her testimony, denied making any such statement. Tr. Day 2 at 72-73. Complainant further testified that Supervisor asked him to provide three days’ notice if he was coming to the office and to inform her when he takes breaks, which, per his accommodations, were permitted frequently. Supervisor acknowledged that she asked Complainant to give her three days’ notice before coming to the office, as a courtesy, and she documented this in her comments table she shared with DW; however, Supervisor documented this occurring on July 6, 2016, not on June 29, 2016. Ex. J16, AARP811.¹³ As Complainant was given the accommodation to work primarily work from home, it was not unreasonable for Supervisor, as his manager, to request to be notified when he planned to come into the office.

¹³ Supervisor wrote: “Discussed keeping me informed of time in office so we can meet in person when this occurs (see email exchange). Complainant decided he will work mostly from home to avoid missed communications on attendance and impact on his health.”

Although Complainant established that his condition did not permit him to give three days' notice, there was nothing to suggest that Supervisor's request had discriminatory animus.

In his exceptions, Complainant argued that while the accommodation he requested was the flexibility to work from home, Supervisor made it so difficult for him to come to the office that he was forced to work from home and this was because of her animosity about his disabilities. Other than requesting to be given notice of when he would come to the office, Complainant did not present any evidence that Supervisor made it difficult for him to come to the office.

Supervisor denied asking Complainant to notify her when he took breaks. Whether Supervisor asked Complainant to report his breaks is not supported by substantial evidence. Complainant did not establish why Supervisor would make such a request or how it was discriminatory or even improper. There were no witnesses to either of these two calls and no further evidence on the record to verify the content of these calls or to infer discriminatory animus. Tr. Day 1, 197:1 – 199:9. Complainant has failed to prove, by a preponderance of the evidence, that Supervisor made such statements. The DCAPA requires that findings of fact be supported by “substantial” evidence. *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 463–64 (D.C. 2008). Substantial evidence “means more than a mere scintilla.” *Id.* What the D.C. Court of Appeals has demanded is “relevant and admissible evidence that a reasonable mind would accept as adequate.” *Id. citing Office of People's Counsel v. Pub. Serv. Comm'n*, 797 A.2d 719, 725–26 (D.C. 2002).¹⁴ Courts frequently describe preponderance of the evidence as 51% - if the party

¹⁴ Although Complainant claims to have recorded several conversations with Supervisor, there are no recordings of either the March 2016 or the June 2016 call. Tr. Day 1, 197:1 – 199:9. Complainant testified that he deleted all the recordings except a partial recording of the call in which he was informed of his discharge. Tr. Day 1, 197:1 – 200:7.

with the burden adduces only slightly more evidence than the opposing party, he has satisfied his burden. If a party with the burden adduced only 50%, the evidence is often considered in equipoise (i.e. balanced) and the party with the burden has failed to meet that burden. *See e.g. Pendergrass v. U.S. Dep't of Def.*, No. 17-CV-0546 (KBJ), 2020 WL 5406043, at *9 (D.D.C. Sept. 9, 2020).

Complainant also argues that Supervisor harbored animosity toward him because of the time he was absent from the office on FMLA leave. The documentary evidence contains a few email communications between Supervisor and Complainant while he was on leave, as well as emails between Supervisor and other AARP staff, regarding Complainant's leave status. In her emails with Complainant, Supervisor uses language such as, "okay and hope you feel better," "your note below indicates you expected an extension, so please provide an update," and "please continue to update your status regularly," and "...can you please provide more regular updates regarding your leave and intent to return." Ex. R8, AARP 743; Ex. R12, AARP 883 – 85, Ex. R13, AARP 744 – 46. The language in these emails do not reflect that Supervisor had any animosity against Complainant because of his status as a person with a disability. Rather, the emails suggest that Supervisor was frustrated that Complainant had not been providing regular updates as requested. One email Supervisor sent to Complainant on March 22, 2016, asks Complainant to provide an update as his FMLA leave had expired on March 18, 2016. Ex. R12. Another email between Supervisor and Mr. P suggested that Supervisor was frustrated with Complainant's failure to keep her updated on the status of his return, and Mr. P stated that an employee must keep their supervisor informed of their leave status. *See* Ex. R9. None of these emails sent by Supervisor to Complainant or anyone at AARP stand out as hostile, discriminatory, or outside the bounds of normal business communications.

In one email sent on March 23, 2016, in response to an email communication from TM regarding when Complainant would return to work, Supervisor states in reference to Complainant: “I think it may be called avoidance.” Ex. C23, AARP 825. While Complainant and OHR posit that this phrase indicates discriminatory intent on behalf of Supervisor toward Complainant because of his status as a person with disabilities, I am unable to read such intent into a single word. *See Little v. D.C. Water & Sewer Auth.*, 91 A.3d 1020, 1025 (D.C. 2014) (finding that “[N]ot every comment reflecting discriminatory attitudes will support an inference that it was a factor motivating the adverse decision.”). Supervisor testified credibly that this isolated comment was in reference to Complainant’s continued PIP. Tr. Day 2 at 177-179.

The only evidence in the record containing information that might be interpreted as Supervisor’s “attitude” regarding Complainant’s absence is the March 23, 2016 email correspondence with Mr. H stating: “we may need to bring in a temp since we are drowning right now [...] I can also review some things we are doing that I want to redirect to PCM but I would like your approval before implementing.” Ex. R10, AARP 000391. At the hearing, Supervisor testified that her team had to “work a lot harder” because of Complainant’s absence. These statements do not indicate animus toward Complainant because of his disabilities, but rather, reflect Supervisor’s concern about the increased workload. Moreover, Supervisor’s interest in hiring a temporary employee, or to shift the workload, indicates that she did not expect Complainant’s position to be permanently vacated at that time or in the near future.

Finally, Complainant argues that Supervisor harbored animosity toward him because of his need for accommodations. Tr. Day 1, 122:10 – 11; Ex. C5. There was no evidence to support this assertion. Supervisor testified that she was willing to work with Complainant, regardless of his accommodations, just as she had worked with other employees who were similarly teleworking

full time. Tr. Day 2, 229:19 – 230:16. There was no evidence that Supervisor, at any time, objected to granting Complainant any of the accommodations he requested. The undersigned does not find Supervisor’s statement on the Job Analysis Form that “some” telework could be accommodated indicative of any hostile attitude about Complainant’s teleworking accommodation. Ex. R11. Without knowing the exact nature of his disability, Supervisor would not have been expected to know how much telework he reasonably needed. Complainant has offered no direct proof of disability animus, nor did his evidence raise an inference of discriminatory intent. For the aforementioned reasons, I conclude that Complainant has failed to meet the fourth element of the *prima facie* case. In other words, he has not established, by a preponderance of the evidence, that his disability was a factor in AARP’s decision to terminate him.

5. Even if Complainant Could Establish a *Prima Facie* Case of Discriminatory Termination, He Has Not Shown that AARP’s Legitimate Reasons for his Termination Was Pretextual.

At step two of the *McDonnell Douglas* process, once a *prima facie* case has been made, the burden of production shifts to the employer to articulate a “legitimate, nondiscriminatory reason for the employment action.” *McFarland v. George Washington Univ.*, 935 A.2d at 354 (internal citation and quotation omitted). However, this burden shift occurs only after an employee establishes a *prima facie* case of discrimination by a preponderance of the evidence. In his case, Complainant failed to establish a *prima facie* case. Nonetheless, to provide the parties with a complete evaluation of the evidence presented, I have considered Respondent’s proffered legitimate non-discriminatory reason for terminating Complainant and whether Complainant could establish the reason was pretextual. The employer’s burden, however, is merely one of production. *Burdine*, 450 U.S. at 254-55. “The employer can satisfy its burden by producing admissible evidence from which the trier of fact [can] rationally conclude that the employment

action [was not] motivated by discriminatory animus.” *Id. quoting Atlantic Richfield*, 515 A.2d at 1099–1100. AARP has satisfied its burden under part two of the *McDonnell Douglas* test by providing copious documentation of Complainant’s failure to meet its performance standards.

Respondent maintains that Complainant was terminated due to poor work performance. Poor work performance is a legitimate, nondiscriminatory reason for termination. *See Walden v. Patient-Centered Outcomes Research Inst.*, 304 F. Supp. 3d 123, 139 (D.D.C. 2018) (holding that employer’s dissatisfaction with employee’s work was a legitimate and nondiscriminatory reason for many of the actions it took, including conducting additional performance reviews, a negative annual performance review, and placing employee on a PIP); *Dews–Miller v. Clinton*, 707 F.Supp.2d 28, 52 (D.D.C. 2010) (holding that supervisors’ dissatisfaction with employee’s work was a legitimate, nondiscriminatory reason for rating employee as “minimally successful” on performance evaluations.); *Hussain v. Gutierrez*, 593 F.Supp.2d 1, 9 (D.D.C. 2008) (failure “to perform routine duties in a timely fashion” constitutes “a legitimate, nondiscriminatory reason for terminating” an employee.).

As previously stated, the record indicates that Complainant received overall ratings of “meets” expectations on both his mid-year 2014 and his end-year 2014 performance reviews. He then received a rating of “needs improvement” in his mid-year 2015 performance review. Exs. J3, J5, J8. In compliance with AARP’s stipulation that managers may work with Human Resources to impose a PIP in cases where an employee’s performance is not improving, Supervisor then worked with DW to place Complainant on a PIP in November 2015.

Complainant’s PIP cited four areas that Supervisor believed Complainant needed to succeed in to maintain his job: (1) quality and completeness of work product, (2) managing through

ambiguity, (3) consistency in generating work product, and (4) honoring commitments. Ex. J4. Under each of these headings, Supervisor provided descriptions of changes Complainant could make that would improve his performance respective to that issue. Ex. J4. The PIP included instructions for Complainant to more actively integrate senior leadership review in his work product, standardize his work processes, work with managers to prioritize assignments, respond appropriately to ambiguous and uncertain events, seek input from peers prior to the end stages of development, track project delivery dates, share project completion plans, and conduct himself professionally. Ex. J4.

In explaining why she identified these specific issues, Supervisor testified that she had received feedback from Complainant's co-workers about his demeanor, "how he would treat them," and that he frequently insisted that his recommendations be incorporated rather than business or operation preferences. Tr. Day 2 at 77:14 – 78:6. When the PIP was extended in June 2016, Supervisor added an additional criteria: "improving teamwork with peers and stakeholders," which directed Complainant to provide timely updates and complete assignments in a way that is consistent with team and management direction. Ex. J15. In his exceptions, Complainant argues that the inclusion of "improving teamwork with peers and stakeholders," in the PIP after he returned from FMLA is suspect because when he was rated as "needs improvement" in his 2015 mid-year review, the only area noted for improvement was "collaboration," which was not included in the original PIP as an area for improvement.

I disagree with Complainant that the only reason for his rating of "needs improvement" was "collaboration." His performance evaluation states that the "most common observation and feedback from various management leaders is the need for Complainant to be more collaborative." Ex. J3, AARP107. "Most common observation" does not equate "only." The performance

evaluation further notes that Complainant needed to improve his interactions when there are conflicting views, increase transparency of work products by sharing up-to-date and relevant information, take a leadership role as a Senior Advisor, and focus on crispness of recommendations and presentations. *Id.* The areas noted for improvement in the November PIP are consistent with each of these deficiencies noted in the 2015 mid-year review, except, as noted by Complainant, it did not include collaboration or improving teamwork. Complainant went on FMLA leave not long after the PIP was implemented, and Supervisor then amended the PIP in June 2016 after Complainant returned to include “honoring commitments” and “improving teamwork with peers and stakeholders.” Supervisor testified she added these items because they continued to be a “really big problem” while they were working on the PIP before Complainant went on FMLA leave and she had received more and more feedback from people about Complainant’s demeanor. Tr. Day 2 at 75-78. While Complainant disagrees with this assessment, contrary to his arguments in his exceptions, the amendment to the PIP was not without reason such that a discriminatory animus should be inferred.

Finally, AARP policy states that a manager may initiate a recommendation for termination if an employee does not improve under a PIP. Ex. C9, AARP177. The record reflects that Supervisor spoke with DW on August 25, 2016, toward the end of Complainant’s extended PIP, about recommending that Complainant’s employment be terminated because he was not improving. Ex. C8. In his exceptions, Complainant argues that there was no evidence that he was not improving under the PIP. He further argues that AARP failed to follow its own policies by terminating him when he had never been rated as failing to meet expectations. To his second point, AARP’s “Tools to Address Concerns with Performance” specifically states: “AARP does not have progressive discipline in that discipline must occur in a step by step process.” Ex. C9, AARP176.

Thus, AARP does not require a rating of failing to meet expectations before an employee may be terminated.

Regarding Complainant's failure to improve under the PIP, Supervisor identified a number of deficiencies after Complainant returned from FMLA leave. Specifically, Supervisor testified that she was "disappointed" about the actions Complainant took on "Cvent" (Tr. Day 2 at 83-85); the Chief Information Officer was dissatisfied with Complainant's work with "via west" (Tr. Day 2 at 88-92); and his work on Senior Leadership Team did not reflect his skill. Supervisor testified that Complainant's work was not only not improving but was getting worse. Tr. Day 1 at 90-93. Supervisor's documentation of Complainant's performance, throughout the four performance reviews and the PIP, was compliant with AARP's "Tools to Address Concerns with Performance" guidelines for managers and sufficient to justify a finding that Complainant could no longer perform the essential functions of the [REDACTED]. There was no evidence that Supervisor's asserted justification was false.

Once the employer presents a non-discriminatory reason for an employment decision, the employee must show "'both that the reason was false, and that discrimination was the real reason'." *Ottenberg's Bakers, Inc. v. D.C. Comm'n on Human Rights*, 917 A.2d 1094, 1103 (D.C. 2007) citing *Hollins, supra*, 760 A.2d at 571. Complainant rebuts Respondent's non-discriminatory reason for his termination and argues that, despite Supervisor's low rating of his performance in the 2015 mid-year review and her unfavorable assessment of his performance under the PIP, he was a high performing employee. Tr. Day 1 at 84:20 – 85:6. He states, for example, that there was "no truth" to the "needs improvement" assessment in his 2015 end-year performance review, and that there was "no problem with the quality or timeliness" of his work. Tr. Day 1 at 84:20 – 85:6. He further testified that he was confused by the initial PIP and did not

understand what he needed to do to improve his performance despite the fact that he was the one who initiated the worktable used to monitor his performance. Tr. Day 1 at 69:2 – 5. Regarding the extended PIP, Complainant testified that he had no problems working with peers and stakeholders. Tr. Day 1 at 127:10-16.

Even if Complainant is correct that he had no problems working with peers, a “plaintiff’s perception of himself, and of his work performance, is not relevant. It is the perception of the decisionmaker which is relevant.” *Ajisefinni v. KPMG LLP*, 17 F. Supp. 3d 28, 41 (D.D.C. 2014) (holding that plaintiff’s opinion that she was competent and performed well in her position is simply not relevant to establishing pretext), *citing Smith v. Chamber of Commerce of the U.S.*, 645 F. Supp. 604, 608 (D.D.C. 1986). For the dispute to be material, the evaluations must be so contradictory as to persuade a reasonable finder of fact that the evaluations were in fact false and were a pretext for discriminatory termination. *Id.* The core inquiry is whether Complainant’s termination was motivated by a discriminatory animus. Complainant’s evaluations are not so contradictory as to give rise to such an inference. Complainant’s assertions that the two PIPs were so subjective that they prevented him from succeeding in his job, and that this subjectivity is evidence of discriminatory pretext are unsupported by the record.

Further, the Commission is not in a position to evaluate whether AARP’s employee performance management system is the most efficient, or whether the feedback provided pursuant to it is perfectly tailored to best provide for the success of every AARP employee. *See e.g., DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (“[W]hen an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff’s termination.”); *McFarland v. George Washington Univ.*, *supra*, 935 A.2d at 350 (absent

a finding of discrimination, “neither a court nor a jury sits as a ‘super-personnel department that re-examines an entity’s business decisions’.”) *citing Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006) (“We have consistently declined to serve as a ‘super-personnel department that reexamines an entity’s business decisions’.”); *Furline v. Morrison*, 953 A.2d 344, 354 (D.C. 2008) (“[C]ourts are not free to second-guess an employer’s business judgment, [and] a plaintiff’s mere speculations are insufficient to create a genuine issue of fact regarding an employer’s articulated reasons for its decisions.”) (internal citation omitted).

Courts are understandably “reluctan[t] to become involved in the micromanagement of everyday employment decisions.” *Brown v. Vance-Cooks*, 920 F. Supp. 2d 61, 71 (D.D.C. 2013) *citing Forman v. Small*, 271 F.3d 285, 291 (D.C. Cir. 2001). Here, Supervisor documented problems with Complainant’s work in her comment table and engaged in an effort to help Complainant improve, but ultimately concluded he failed to do so. The documentation reveals a legitimate basis for AARP’s actions.

Additionally, the record reflects a long, simmering, breakdown in Complainant and Supervisor’s professional relationship, for reasons unrelated to Complainant’s disability. Complainant began expressing concerns about his interactions with Supervisor as early as April 2015, before there was any knowledge of his disability or illness. The only disability Complainant asserts Supervisor was aware of in 2015 was diabetes and that he had a bout of bronchitis. Even if Supervisor knew Complainant had diabetes, as he argues, there was no evidence that any complaints he made about Supervisor in 2014 or 2015 were complaints about Supervisor discriminating against him because of his disability. *See Holcomb v. Powell*, 433 F.3d 899, 899-900 (D.C. Cir. 2006) (Holding that the mere filing of two informal discrimination complaints, where nothing more is known about the nature, merit, or outcome of those complaints, cannot be

used as a proxy to establish discriminatory animus). The record supports that these early complaints were related to Supervisor's management style, which DW described as "tough." Supervisor testified that she had a good relationship with Complainant early in his employment, but things began to deteriorate when she stopped coming into the office early and started closing her door to maintain privacy with regard to the vendor contractor offices located across the hall. Tr. Day 2 at 18:3; 118:21 – 119:11. DW testified that when she first spoke with Complainant in October 2015, he complained to her that he felt like Supervisor was ignoring him when she closed her door, and that Complainant was taking it personally. Tr. Day 3 at 12:10 – 15:4. In addition, both Supervisor and DW testified that Complainant was repeatedly speaking to other staff and managers in a negative manner about Supervisor, which further increased the tensions between them. Tr. Day 3 at 84; Tr. Day 2 at 199; Ex. C5.

Supervisor also testified that Complainant reacted progressively worse to the criticism he received on his performance reviews. Regarding his 2014 mid-year performance review, Supervisor noted that she rated Complainant as "meets" expectations because he was "new to the organization" and a "meets" is all that she "would expect anybody to do in the first few months - or in the first year." Tr. Day 2 at 19:3 – 22:13. Supervisor testified that Complainant "wasn't happy" and "was disappointed" with this performance review because he "felt that he was doing a really good job," and that was not reflected in his evaluation, despite a rating of "meets" expectations. Tr. Day 2 at 19:3 – 22:13.

Supervisor testified that she again gave Complainant a rating of "meets" expectations for his 2014 end-review because he "was still assimilating into the organization and there were other things to learn." Tr. Day 2, at 19:3 – 22:13. Supervisor noted that she "started to see some issues

with way [Complainant] interfaced with [AARP] clients. [...] Behaviorally [...] there were just some gaps that he needed to turn around and be more aware of.” Tr. Day 2 at 22:5 – 22:13.

For his 2015 mid-year performance review, Supervisor rated Complainant as “needs improvement” because there “were some issues with people that he was working with, and his work product and even a discussion of the work product would sometimes shift, and it just wasn’t as crisp or up to par for a Senior Advisor.” Tr. Day 2, 23:8 – 18. Supervisor noted that Complainant had issues with PS, who is responsible for the Data Center, and N, who was responsible for the enterprise architecture. Tr. Day 2 at 24:1 – 21. Also contributing to the needs improvement rating was an incident Supervisor described as “egregious” when Complainant was assigned to the End-User Services project in early 2015 and attended a meeting in Rockville without Supervisor’s knowledge where he passed unauthorized information to his former employer CSC who was bidding on an AARP contract, ultimately causing CRC to increase its bid and AARP removing CRC from consideration.¹⁵ Tr. Day 2 at 27-29. As a result of this incident, Complainant was removed from the End-User Services. Supervisor then testified that Complainant was “angry” with this evaluation. Tr. Day 2 at 24:1 – 25:5. Supervisor recalls that Complainant was “really disappointed” and “went so far as to ask that he would see my supervisor [...] because he didn’t feel it was fair” and he “was also somewhat concerned about the decrease in the rating for cultural attributes.”¹⁶ Tr. Day 2, 20:21 – 21:6.

¹⁵ This is the same incident that Complainant reports as harassment from Supervisor in his November 22, 2015, hotline complaint. Complainant however describes the incident very differently from Supervisor.

¹⁶ The cultural attributes are “trustworthy, visionary, courageous, results oriented, and caring.”

Both DW and Supervisor testified that when they met with Complainant to implement the PIP in November 2015, he was “extremely disrespectful” and agitated and kept interrupting Supervisor to the point that DW had to end the meeting without being able to review the entire PIP document. Tr. Day 2 at 37:5 – 22; Tr. Day 3 at 21:3 – 23:20. According to DW, Complainant was “not receptive to anything related to his performance improvement plan.” Tr. Day 3 at 24:22 – 25:10. Shortly after the November 19, 2015 PIP was implemented, Complainant filed a complaint about Supervisor with AARP’s Ethics and Compliance hotline on November 22, 2015. Complainant complained about Supervisor calling him names, her reaction to the End-User Services incident, jumping out of her chair, and taking actions he characterized as “hostile.” In that complaint, Complainant did not complain or suggest that Supervisor was retaliating against or treating him badly because of his disabilities.

The D.C. Circuit Court has consistently held that “[n]ot every complaint garners its author protection under Title VII.” *Peters v. D.C.*, 873 F. Supp. 2d 158, 205 (D.D.C. 2012) citing *Broderick*, 437 F.3d at 1232 (plaintiff’s written complaint to her supervisors did not constitute a protected activity because she complained of her treatment but did not allege that she was suffering discrimination or retaliation). “Even harsh treatment by a supervisor does not support an employment discrimination claim, absent any assertion that the treatment was due to the plaintiff’s [protected trait].” *Peters v. D.C.*, 873 F. Supp. 2d at 199 (holding that employee failed to establish she complained about race discrimination where complaint merely alleged that employee’s supervisor regularly shouted at her in presence of her staff).

For the foregoing reasons, Complainant has failed to establish that AARP’s proffered reason for his termination was pretextual.

B. Retaliation

1. Burden of Proof

As a preliminary matter, I address the arguments of counsel for Complainant and Respondent regarding the burden of proof. AARP argues in its Post-Hearing Memorandum that, consistent with claims brought pursuant to the ADA, Complainant must prove that his disabilities were the “but for” cause of his discharge and he has failed to do so. Resp. Memo at 11-12. Complainant argues in his Proposed Findings of Fact and Conclusions of Law (“Compl. FOF”) that he need only establish that his disability was a motivating factor. Compl. FOF at 4.

It is well established and undisputed that claims of disparate treatment under Title VII of the Civil Rights Act as amended in 1991, and the DCHRA, provide that an unlawful employment practice is established if the complainant demonstrates that discrimination “was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e–2 (m) (1991); *McFarland v. George Washington University*, 935 A.2d at 352. The D.C. Courts have often looked to cases construing Title VII “to aid us in construing the [DCHRA]” because “the anti-discrimination provisions of both statutes are substantially similar.” *Lively v. Flexible Packaging Ass’n*, 830 A.2d 874 (D.C. 2003) (quoting *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 361 n. 17 (D.C.1993)). Thus, D.C. courts have traditionally applied a motivating factor standard to all claims under the DCHRA, including retaliation. See *Propp v. Counterpart Int’l*, 39 A.3d at 866 citing *Arthur Young*, 631 A.2d at 369; *Furline v. Morrison*, 953 A.2d 344 (D.C. 2008)(“It is enough if retaliation was ‘a substantial factor,’ even if not the only factor.”).

However, Title VII only applies to claims of discrimination based on race, color, religion, sex, or national origin. Title VII does not apply to federal claims of age or disability

discrimination. Those claims are brought under the Age Discrimination in Employment Act (ADEA) and the ADA.

In 2009, the Supreme Court decided *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), wherein it addressed whether Title VII’s “motivating factor” standard applied outside of the Title VII context to claims brought under the private-sector provision of the ADEA which prohibits employers from “discriminat[ing] against any individual ... **because of** such individual’s age.” *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (emphasis added). The Court held that unlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. *Id.* at 174. In *Gross*, the Court examined the language of the private-sector provision of the ADEA (29 U.S.C. § 623(a))¹⁷ and concluded that discrimination “**because of**” age meant that “age was the ‘reason’ that the employer decided to act.” *Id.*, at 176. Thus, under the private-sector provision of the ADEA, “a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.” *Id.* The Court further held that Congress must have omitted the language intentionally because when it amended Title VII, Congress also contemporaneously amended the ADEA, but did not provide for a motivating factor analysis.

Prior to the Supreme Court’s decision in *Gross*, courts generally applied the motivating factor (or “mixed-motive”) analysis available in the Title VII context to ADA claims. *See e.g. Propp v. Counterpart Int’l*, 39 A.3d at 866; *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 337

¹⁷ The provision of the ADEA applicable to private employers provides, in relevant part, that “[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual’s age.” 29 U.S.C. § 623(a)(1) (emphasis added).

(2d Cir. 2000); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995); *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008) (per curiam); *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1064–65 (9th Cir.2005) overruled by, *Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2019). Because the anti-retaliation provisions of the DCHRA are substantially similar to the so-called “opposition clause” in Title VII,” the D.C. Court of Appeals has construed the DCHRA coercion and retaliation provisions to guarantee employees the same protection from retaliation as is provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–3 (a) (2007).¹⁸ See *Propp v. Counterpart Int’l*, 39 A.3d at 864.

Subsequently, in 2013, the Supreme Court revisited the principle defined in *Gross*: that the text of an anti-discrimination statute must expressly provide for a “motivating factor” test before that test can be applied. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S.338, 360 (2013). In *Nassar*, the Court clarified that “Title VII retaliation claims require proof that the desire to retaliate was the *but-for cause* of the challenged employment action” *Id.* (emphasis added). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. The Court held there is no “meaningful textual difference” between the terms “because of,” “by reason of,” or “based on” – all of which connote “but-for” causation. See *id.* at 349-50.

¹⁸ Title VII’s anti-retaliation provision is separate and distinct from its status-based discrimination provisions and states: “It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e–3(a).

After *Gross* and *Nasser*, what was left undecided was whether the “but for” causation standard also carried to retaliation claims brought under the ADA and other statutes such as § 1981 of the Civil Rights Act.¹⁹ The ADA, similar to the ADEA, prohibits discrimination “**on the basis of**” disability and prohibits retaliation “**because such individual**” participated in a protected activity. 42 U.S.C. §§ 12112(a) and 12203 (emphasis added). To date, neither the D.C. Court of Appeals nor the D.C. Circuit Court has weighed in on this issue as it applies to the DCHRA or ADA. I have looked to D.C. District Court decisions decided after *Gross* and *Nassar* for guidance and have found them to be split.

Citing *Nassar*, a D.C. District Court Judge held: “to demonstrate causation in a Title VII or DCHRA case, “traditional principles of but-for causation” apply, and a plaintiff must show “that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” *Nunnally v. District of Columbia*, 243 F. Supp. 3d 55, 67 (D.D.C. 2017). However, relying solely on precedent, another D.C. District Court Judge held a retaliation claim brought under the ADA can rest on a “motivating factor” causation analysis. *Drasek v. Burwell*, 121 F. Supp. 3d 143, 154 (D.D.C. 2015). In a subsequent D.C. District Court case, a Judge declined to follow *Drasek*, and instead agreed with the Sixth Circuit’s decision that, under *Gross*, both the ADEA and the ADA “prohibit discrimination that is a ‘but-for cause of the employer’s adverse decision’.” *Conn v. Am. Nat’l Red Cross*, 149 F. Supp. 3d 136, 142 (D.D.C. 2016) (quoting *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012)).

¹⁹ The Supreme Court has since held that the motivating factor test in Title VII is not applicable to claims under § 1981 of the Civil Rights Act. *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 139 S. Ct. 2693, 204 L. Ed. 2d 1089 (2019). The Court held §1981, which dates back to 1866, and has never said a word about motivating factors and the two statutes have distinct histories and there was “not a shred of evidence that Congress meant them to incorporate the same causation standard.” *Id.*

Recently, a D.C. District Court judge discussed, without deciding the issue, that it is unclear if a but-for standard applies in DCHRA retaliation cases:

It is also far from clear that [a but-for] standard applies to DCHRA retaliation claims. *Compare Watson v. D.C. Water & Sewer Authority*, No. 16-cv-2033, 2018 WL 6000201, at *16 (D.D.C. Nov. 15, 2018) (“[U]nder ... the DCHRA, the plaintiff need only prove that retaliation was a ‘motivating factor.’”), *aff’d*, 777 F. App’x 529 (D.C. Cir. 2019), and *Jones v. D.C. Water & Sewer Auth.*, No. 12-cv-1454, 2016 WL 659666, at *7 (D.D.C. Feb. 18, 2016) (“[N]either the D.C. Court of Appeals nor the D.C. Circuit has weighed in on whether [Title VII cases] in any way altered the causation standard under the DCHRA’s retaliation provision. To date, D.C. courts have not required ‘but-for’ causation, but instead have used a standard comparable to the ‘motivating factor’ test.” (citations omitted)), *with Nunnally v. District of Columbia*, 243 F. Supp. 3d 55, 67 (D.D.C. 2017) (applying “but-for” test), and *Martin v. District of Columbia*, 78 F. Supp. 3d 279, 313 (D.D.C. 2015) (same).

Mosleh v. Howard Univ., No. 1:19-CV-00339 (CJN), 2020 WL 956527, at *7 (D.D.C. Feb. 27, 2020).

Other federal trial courts are also split on this issue. The Second Circuit recently addressed the issue in *Natofsky v. City of New York*, 921 F.3d 337, 348 (2d Cir. 2019), *cert. denied*, 206 L. Ed. 2d 822 (Apr. 20, 2020), and joined the conclusion reached by the Second, Fourth, Sixth, Seventh, and Ninth Circuits that the ADA requires a plaintiff alleging a claim of employment discrimination to prove that discrimination was the but-for cause of any adverse employment action:

There is no express instruction from Congress in the ADA that the “motivating factor” test applies. Moreover, when Congress added § 2000e-2(m) to Title VII, it “contemporaneously amended” the ADA but did not amend it to include a “motivating factor” test.

Id. at 348 and at 354 (Chin, J., dissenting)(agreeing that a but-for causation standard applies to the retaliation claim, but explaining why he believes the motivating-factor standard continues to apply to discrimination and failure-to-accommodate claims brought under the Rehabilitation Act.); *see also e.g. Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2019), *cert. denied*, 206 L. Ed. 2d 855 (Apr. 27, 2020) (applying the but-for standard to the ADA after *Gross*); *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 235–36 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319 (6th Cir. 2012)(“The part of Title VII that contains the ‘motivating factor’ test - § 2000e–2 -is *not* included in the list of enforcement provisions identified in the ADA; *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963–64 (7th Cir. 2010).

The Fourth Circuit further noted the language “on the basis of” in the ADA was changed (from “because of”) in 2008, *before* the *Gross* decision, and not in response to the *Gross* decision and thus, the ADA has always required a complainant’s disability be the “but-for” factor in the adverse action. *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d at 235–36.²⁰

In this case, Respondent argues because neither the D.C. Circuit nor the D.C. Court of Appeals has taken a position on the appropriate standard in retaliation cases under the DCHRA or ADA in light of *Gross* and *Nassar*, I am bound by the current precedents from the District of Columbia courts which provide that a motivating factor analysis applies to claims of retaliation under the DHCRA and ADA. Given that *Nassar* grounded much of its determination in a close reading of Title VII’s text, there is good reason to conclude that its holding is confined to that

²⁰ The Sixth Circuit held, this was done to “ensure[] that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.’ ” *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d at 336 *citing* Cong. Rec. S8840–01 (Sept. 16, 2008) (Senate Statement of Managers).

statute. *See Battle v. Truland Sys. Corp.*, 30 F. Supp. 3d 9, 24 n.8 (D.D.C. 2014) (opining that *Nassar's* reasoning was “based on the specific language and structure of Title VII, as distinguished from other anti-discrimination and retaliation laws, including § 1981, but declining to decide whether it applied to the latter statute).

There are differences between Title VII, the ADA, and the DCHRA. While the DCHRA and ADA serve similar purposes, the Council of the District of Columbia intended to create more robust protections than federal laws and the expressed intent of the DCHRA is “to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to the enumerated [protected] classes.” D.C. Code § 2-1401.01 (emphasis added). Although we look to the federal cases interpreting the ADA for guidance, Complainant’s claims have been brought under the DCHRA, not the ADA. The DCHRA prohibits personnel actions taken “**wholly or partially**” for a discriminatory reason, including disabilities. D.C. Code § 2-1402.11(a). A separate provision of the DCHRA prohibits retaliation “**on account of**” the exercise or enjoyment of any right granted or protected by the Act. D.C. Code § 2-1402.61 (emphasis added). If § 2-1402.11 of the DCHRA is treated like claims under § 2000e-2(m) of Title VII, and applies only to status-based discrimination, then Complainant’s retaliation claims are considered only under § 2-1402.61 of the DCHRA. The “on account of” language of the DCHRA’s retaliation statute is very similar to both the ADA’s anti-retaliation language: “on the basis of,” and Title VII’s: “because of” language which the Supreme Court held denotes “but for” causation. But, reading that language in conjunction with the stated purpose of the DCHRA could support a motivating factor standard for retaliation cases. OHR, which is charged with interpreting the DCHRA, did not take a position on this issue in its Post Hearing Brief.

More recently, in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), the Supreme Court considered whether the following federal-sector provision of the ADEA requires “but-for” causation:

[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made **free from** any discrimination **based on** age.

29 U. S. C. § 633a(a) (emphasis added). The Court interpreted the phrase “**free from**” to mean that “a personnel action must be ‘untainted’ by discrimination based on age.” *Id.* Thus, the Court held, age must be the but-for-cause of the *differential treatment*, not that age must be the but-for cause of the *ultimate decision*. *Id.* The Court noted that but-for causation is important in determining the appropriate remedy. *Id.* (holding that plaintiffs who demonstrate under § 633a(a) only that they were subjected to unequal consideration cannot obtain reinstatement, back-pay, compensatory damages, or other forms of relief related to the end result).

Fortunately, the causation question here is ultimately academic, because even if the Commission applies the more lenient standard for Complainant’s retaliation claim, Complainant failed to establish a *prima facie case* and failed to meet even the lesser “motivating factor” standard.

2. *Prima Facie Case*

Complainant asserts that AARP terminated his employment in retaliation for complaints he made regarding disability discrimination from Supervisor. Under the DCHRA, “it is an unlawful discriminatory practice for an employer to retaliate against a person on account of that person’s opposition to any practice made unlawful by the DCHRA.” *Howard Univ. v. Green*, 652 A.2d 41, 45 (D.C.1994). Where, as here, the complainant relies on circumstantial evidence to prove

retaliation, we apply the same *McDonnell Douglas* burden-shifting framework that was applied to Complainant's disability discrimination claim.²¹ *Propp v. Counterpart Int'l*, 39 A.3d at 863.

To establish a *prima facie* case of retaliation, Complainant must demonstrate by a preponderance of the evidence that: (1) he was engaged in a protected activity or that he opposed practices made unlawful by the DCHRA, (2) Respondent took an adverse action against him, and (3) a causal connection existed between his opposition or protected activity and the adverse action taken against him. *Bryant v. District of Columbia*, 102 A.3d 264, 268 (D.C. 2014). Such a *prima facie* showing gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate, nondiscriminatory reason for the employment action at issue. *Vogel v. D.C. Office of Planning*, 944 A.2d at 463. If the employer offers a legitimate reason, the presumption of illegality drops out of the case, and the employee has the burden of proving by a preponderance of the evidence that the stated reason is pretextual and that the adverse personnel action was indeed retaliatory. *Id.*

a) Protected Activities

The first prong of a *prima facie* case is that complainant opposed an unlawful practice or was engaged in a protected activity. Here, Complainant asserts that he engaged in a protected activity for which he was terminated as an act of retaliation. A plaintiff engages in protected activity for purposes of Title VII's opposition clause, if he opposed conduct that he reasonably believed to violate the Title VII (or the DCHRA). *Carter-Obayuwana v. Howard Univ.*, 764 A.2d 779, 790–91. Protected activity need not take the form of a lawsuit or of a formal complaint to an

²¹ The “elements” or “factors” under the *McDonnell Douglas* framework are those required to establish a *prima facie* case and have no bearing on the burden persuasion at issue in *Nassar* and *Gross*.

enforcement agency. *Id.* On the contrary, like Title VII, the protections of the DCHRA extend to an employee's informal complaints of discrimination to his or her superiors within the organization. *Id.* In fact, internal complaints have been held to constitute "clearly protected activity." *McKenna v. Weinberger*, 729 F.2d 783, 791 (D.C. Cir. 1984) (holding that complaint to superior officer about sexist treatment amounted to a protected activity).

A plaintiff claiming retaliation must demonstrate that he "voice[d the] complaint about ... the allegedly unlawful activity." *Carter-Obayuwana v. Howard Univ.*, 764 A.2d at 791 (internal citations omitted). In other words, the plaintiff is required to "alert the employer [and make the employer aware of the fact] that [he or] she is lodging a complaint about allegedly discriminatory conduct." *Id.* The employee need not, however, employ any "magic words" such as "discrimination," for "the communication of a complaint of unlawful discrimination ... may be *inferred* or *implied*" from the surrounding facts. *McFarland v. George Washington Univ.*, 935 A.2d at 359 (quoting *Green*, 652 A.2d at 47) (emphasis in original, citations omitted). Still, complainants must offer some specificity in their allegation. *Williams v. Spencer*, 883 F. Supp. 2d 165, 177 (D.D.C. 2012) ("vague and unsubstantiated" complaints of discrimination do not constitute protected activity); *Lemmons v. Georgetown Univ. Hosp.*, 431 F. Supp. 2d 76, 91–92 (D.D.C. 2006) (to constitute protected activity, the "alleged discriminatory treatment . . . cannot be generic; rather, the plaintiff must be opposing an employment practice made unlawful by the statute under which she has filed her claim of retaliation"); *Logan v. Dep't of Veteran Affairs*, 404 F.Supp.2d 72, 77 (D.D.C. 2005) (stating that the plaintiff did not engage in statutorily protected activity because her complaints regarding hospital practices did not "include a claim of discrimination based upon race, color, religion, sex, or national origin").

Here, Complainant asserts three instances in which he alleges that he complained about disability discrimination: (1) in his comments to his 2015 year-end review; (2) in a June 29, 2016 call to DW; and, (3) in a July 1, 2016 email to DW. Tr. Day 1, 179:8 – 185:18; Tr. Day 3, 73:9 – 78:17, 81:18. Outside of these events, Complainant’s only other references to disability complaints are “overall discussions” that he “assumes” “some people outside of [Supervisor’s office] that might have heard” some of the things she was saying. Tr. Day 1, 179:8 – 188:22. There was however, no evidence presented to support this assertion.

i. Complainant’s Comments in the 2015 Year-End Review Do Not Constitute a Complaint About Disability Discrimination.

Regarding his first allegation of disability discrimination, Complainant’s employee comments in his 2015 year-end review state (in part):

This evaluation is unfair. I have initially complained about [Supervisor’s] abusive behavior back in October 2014 and have been following up ever since. [...] My complaint is currently under investigation and the negative comments re part of the retaliation and discrimination that is occurring.

Ex. J8. There was no evidence that Complainant made any complaints to anyone at AARP or outside of AARP about Supervisor in October 2014. Rather, when Complainant lodged his hotline complaint in November 2015, he asserted that the behavior being complained about started in October 2014. Ex. R3. While Complainant asserts that he had informally complained about Supervisor between October 2014 and April 2015, there is no evidence of these complaints of the nature of the complaints. The first established complaint that Complainant made about Supervisor was in April 2015 when he complained to Supervisor’s supervisor, Mr. H, about Supervisor’s behavior during a meeting, which was unrelated to his disabilities.

Complainant testified that the “complaint currently under investigation” refers to his November 22, 2015 complaint to AARP’s ethics hotline. However, in that complaint, which was made before Complainant took medical leave in December 2015, Complainant never alleged that Supervisor was discriminating against him because of his disabilities nor did the complaint infer such discrimination. Ex. R3; Tr. Day 1 at 173. The complaint stated that Supervisor was:

[V]erbally abusive threatening my job and was calling me names like stupid, idiot, you will never be a leader, etc. It all came out of nowhere. It was like one day I was the golden boy and the next day I was trash.

Id. There was no mention of discrimination or Complainant having disabilities. Rather, Complainant complained of a “hostile work environment,” which does not also serve as a complaint about disability discrimination. “It is not enough for an employee to object to favoritism, cronyism, violation of personnel policies, or mistreatment in general, without connecting it to membership in a protected class, for such practices, however repugnant they may be, are outside the purview of the DCHRA. The employee must ‘alert the employer that she is lodging a complaint about allegedly [unlawful] discriminatory conduct. Employer awareness that the employee is engaged in protected activity is thus essential to making out a prima facie case for retaliation’.” *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 464 (D.C. 2008) *citing Green*, 652 A.2d at 47. Complainant’s November 2015 complaint does not amount to protected activity because it makes no mention of his disabilities or discrimination or anything from which to infer disability discrimination. *Slate v. Pub. Def. Serv. for the D.C.*, 31 F. Supp. 3d at 308 (“The plaintiff is required to allege discrimination in order for a complaint to be ‘protected’ under Title VII.”). Complainant’s comments in his 2015 Year-End Review reference his previous complaints which did not allege disability discrimination and was therefore not a protected activity.

ii. Complainant's June 29, 2016 call and July 1, 2016 Email to DW.

To place Complainant's assertions in perspective, I have set forth the alleged sequence of events below, which are not all in the findings of fact as I am unable to find all these assertions to be true:

Complainant testified that on June 29, 2016, the day he returned from medical leave, he spoke on the phone with Supervisor who went on a "rant" about his medical leave and disabilities, testimony which I previously held was not proven. Tr. Day 1 at 114, 119. Complainant did not attribute any specific statements to Supervisor on June 29, 2016, other than his general characterization of her "rant" about his disabilities. Complainant further testified that Supervisor asked him to provide three-days' notice of when he would come to the office and to inform him of all breaks, which per his accommodations, were permitted frequently. Tr. Day 1 at 116. Supervisor acknowledged that she asked Complainant to give her three days' notice as a courtesy. Tr. Day 2 at 185. Because Complainant's decision to come into the office was based on how he was feeling on any given day, it was not possible to provide three-days' notice and therefore Supervisor told Complainant he need not provide notice. Supervisor denied ever asking Complainant to notify her when he takes breaks and testified that she does not monitor anyone's breaks. Tr. Day 2 at 74.

It is undisputed that also on June 29, 2016, Complainant and DW had a telephone conversation in which DW informed Complainant about the outcome of her investigation of his November 22, 2015 hotline complaint and they discussed the extension of his PIP upon returning to work. Tr. Day 3, at 48-49, 73, 77-80. Complainant testified that during this conversation, he

also told DW that Supervisor made reference to his medical conditions and asked him to provide three days' notice of coming to the office and to report his breaks, which Complainant asserts were complaints about Supervisor discriminating against him on account of his disabilities, and thus, was a protected activity. Tr. Day 1 at 116. Supervisor denies making any such statements.

At the hearing, DW could not recall if Complainant said something to her during the June 29, 2016, call regarding Supervisor discriminating against him because of his disabilities. However, when DW was interviewed by OHR on October 12, 2017 for the probable cause investigation of this case, the investigator's interview notes reflect that DW stated that sometime after Complainant returned from medical leave, he mentioned something about Supervisor harassing him because of his leave. Ex. C25.²² DW however, testified credibly that she did not perceive Complainant's complaint on June 29, 2016, to be a complaint regarding disability discrimination. Tr. Day 3, 73:9 - 81:18. Rather, DW testified that Complainant's primary concern

²² The OHR interview notes were offered to refresh DW' recollection over the objection of counsel for Respondent who argued that the document was double hearsay and not the actual statement of DW. Ruling on this objection was held in abeyance. Although hearsay is admissible in administrative hearings, the weight to be accorded to hearsay evidence "range[s] from minimal to substantial based on a case-by-case evaluation of the reliability and the probative value of the evidence." *Compton v. D.C. Bd. of Psychology*, 858 A.2d 470, 478 (D.C. 2004) *citing* *Jadallah v. D.C. Dep't of Empl't Svs.*, 476 A.2d 671, 678 (1984). The D.C. Court of Appeals has cautioned that "administrative findings and conclusions based exclusively on hearsay [are subject] to exacting scrutiny." *Id.* Double hearsay (or hearsay within hearsay) is admissible if each level of hearsay satisfies a hearsay exception. *See e.g. Gardner v. United States*, 898 A.2d 367, 374 (D.C. 2006). Double hearsay is especially subject to scrutiny because the author of the document may have misheard or misunderstood the hearsay statement, or the written words may not convey the meaning intended by the hearsay declarant. However, because DW testified and was subject to cross-examination, the report is not suspicious. Moreover, the OHR report is neither inconsistent with DW' testimony nor did it serve to impeach her testimony. DW acknowledged in her testimony that at some point, Complainant had made reference to Supervisor harassing him because of his disabilities, but she was unsure when he first made such an assertion. The OHR report supports the testimony of Complainant and DW that some statement was made, most likely, on the June 29, 2016, phone call.

was the extended PIP and that the focus of the conversation was around his performance. Tr. Day 3 at 77-79. Judge Carmichael found the testimony of DW to be very credible and gave it great weight as a human resources professional with 27 years of experience who had close knowledge of Complainant and Supervisor's working relationship. Tr. Day 3, 8:7 – 22. 77:2 – 90:20. Nonetheless, whether the June 29, 2016, call amounted to a protected activity does not turn on DW's perception of the call.

Two days later, on July 1, 2016, Supervisor sent Complainant an email about a project which also said: "I am counting on you to start off with a positive attitude and assume positive intent on my part so please refrain from commenting on my potential negative reaction to others."

²³ Ex. C5. On the same day, Complainant forwarded the email to DW with the subject line: "PLEASE HELP ME." Ex. C5. In his email to DW, Complainant denied having said anything about Supervisor to a co-worker named "T." The email further states:

BTW, [Supervisor] has also questioned if I was really sick and needed an accommodation. I was hoping that I could just do my work and go forward, but the **harassment** is starting again. I know all of this may seem trivial as an isolated remark, but factoring everything, it is just another piece of information that you can choose not to believe with everything else I have told you.

Ex. C5, OHR_Response303 (emphasis added).

²³ Supervisor testified that when Complainant returned from leave, she transferred an assignment from his co-worker T to him because she genuinely believed he would be good at the project. Complainant allegedly made a comment to T that everything he did for Supervisor was "never good enough." Supervisor testified that she did not want that perception and attitude to cloud his return and that there was good intent on her behalf. She stated that she wanted him to understand that there was good intent and to "not make things up in his mind" that was contrary to that because she really did want Complainant to succeed. Tr. Day 2, 79:12 - 22.

DW testified that she did not perceive the June 29, 2016, call or the July 1, 2016, email, as disability complaints. Tr. Day 3, 73:9 - 81:18. DW testified that Complainant would repeat the same accusations as before about Supervisor “which were based on his opinion and not any truth behind it.” *Id.* at 79. The record reflects that Complainant’s previous complaints suggested that Supervisor was unfair, singling him out, and unreasonable.

Although DW did not perceive Complainant’s email as a complaint about disability discrimination, DW testified that she did follow up with Supervisor “about making sure she was not mentioning or saying anything about the leave of an employee to make sure that she understood that she needed to focus on the work in the performance improvement plan for Complainant.” Tr. Day 3 at 50. DW further testified:

I would ask her questions. How is it going? What’s going on? Have you – for example, have you had any interactions with him about his -- his medical or whatever, to make sure that she understands and knows the policies and guidelines. I don’t specifically say, well, Complainant said this, or, Complainant said that.

Tr. Day 3 at 68:5-11. The question then, is whether Complainant’s statement in his email to DW, that he was being harassed by Supervisor because she questioned if he was really sick and needed an accommodation, amounted to a “protected activity,” irrespective of whether Supervisor in fact made the alleged discriminatory remarks. *See Howard University v. Green*, 652 A.2d at 46 (“plaintiff need only prove she had a reasonable good faith belief that the practice she opposed was unlawful under the DCHRA, not that it actually violated the Act.”); *Berman v. Orkin Exterminating Co., Inc.*, 160 F.3d 697, 702 (11th Cir. 1998) (“In order to state a retaliation claim, the plaintiff need only show that he had a ‘reasonable belief’ that an unlawful employment practice was occurring, and is not required to show that the employer actually engaged in an unlawful employment practice.”).

Although there is insufficient evidence to establish that Supervisor actually made remarks questioning Complainant's need for accommodations, the June 29, 2016, call and July 1, 2016, email, taken together with DW's testimony that she followed-up with Supervisor about not mentioning Complainant's leave or medical, supports a conclusion that on July 1, 2016, Complainant made a complaint about discriminatory remarks allegedly made by Supervisor and is a protected activity. It is well established that protected activities encompass utilizing informal grievance procedures such as complaining to management or human resources about the discriminatory conduct. *Slate v. Pub. Def. Serv. for the D.C.*, 31 F. Supp. 3d at 292 citing *Richardson v. Gutierrez*, 477 F.Supp.2d 22, 27 (D.D.C. 2007) ("It is well settled that Title VII protects informal, as well as formal, complaints of discrimination.").

However, Complainant has failed to establish a causal connection between his July 1, 2016, complaint to DW and his termination in September 2016 under either a motivating factor standard or a but for causation standard because there is no evidence Supervisor knew about the protected activity. Employer awareness that the employee is engaged in protected activity is essential to making out a *prima facie* case for retaliation. *Green*, 652 A.2d at 46. In order to establish the element of causation in a retaliation claim, an employee must show that the decision-makers responsible for the adverse action had actual knowledge of the protected activity: "[i]t is not sufficient that [the defendant] *could* or even *should* have known about [the plaintiff's] complaints; [the decision-maker] must have had actual knowledge of the complaints for her decisions to be retaliatory." *McFarland v. George Washington Univ.*, 935 A.2d at 357. The record does not support that Supervisor had actual knowledge that Complainant had complained to DW on July 1, 2016, about disability discrimination.

Supervisor testified that she was not aware that Complainant had complained about her on June 29, 2016 or July 1, 2016. Tr. Day 2 at 94, 95, 200. DW testified credibly that although she followed-up with Supervisor, she did not specifically tell Supervisor that Complainant had made a specific complaint, but Supervisor was aware that Complainant was essentially, always complaining about her. Tr. Day 3 at 77-80. In addition, DW testified that she herself did not perceive Complainant's complaints on June 29 and July 1, 2016, to be complaints regarding disability discrimination. Supervisor testified that she could not recall if DW told her about Complainant having expressed concerns about her on July 1, 2016. Tr. Day 2 at 200. Complainant argues that DW's testimony that she did not tell Supervisor about the July 1, 2016 complaint was not credible and was contradicted by her testimony that she followed-up with Supervisor. I disagree.

DW's testimony was entirely credible and consistent. It is not uncommon or illogical that a human resources representative would not share with a supervisor that an employee voiced an informal complaint about that supervisor; for example, to ensure that the supervisor does not retaliate against the employee. A more prudent action would be to address the substance of the complaint with the supervisor without revealing the complaint or complainant. DW similarly testified that she did not tell Supervisor in November 2015 that Complainant filed a hotline complaint, but she did interview Supervisor. Supervisor did however testify that, in light of the questions DW asked, she assumed that Complainant had been speaking with DW. Tr. Day 2 at 200:8. If Supervisor did not have actual knowledge of such protected activity, Complainant cannot establish that he was fired *because of* that protected activity. See *Bryant v. District of Columbia*, 102 A.3d 264, 268 (D.C. 2014). Therefore, Complainant cannot establish a *prima facie*

case of retaliation because he is unable to show both that Supervisor knew of the protected activity and terminated him because of it.

Nonetheless, even if Supervisor's assumptions were sufficient to establish knowledge that Complainant's July 1, 2016 complaint to DW was a disability discrimination complaint, there was no evidence that his termination two months later on September 21, 2016, was causally connected to the July 1, 2016 complaint.

2. AARP Discharged Complainant for Legitimate, Non-Discriminatory Reasons which Complainant Failed to Prove were Pretextual.

Complainant and OHR argue that the temporal proximity of Complainant's termination to the June 29, 2016, call and July 1, 2016, email, establishes a causal connection under the third prong of a *prima facie* case. An employee may establish the causal connection between the adverse employment action and the protected activity by "showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity." *Nicola v. Washington Times Corp.*, 947 A.2d 1164, 1175 (D.C. 2008) (internal citation omitted). The Supreme Court has said that in cases where a plaintiff seeks to establish causation based on temporal proximity between protected activity and adverse employment action, "the temporal proximity must be 'very close [.]'" *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74 (2001). The United States Court of Appeals for the District of Columbia Circuit has held that a temporal proximity of "a few weeks" between protected activity and adverse employment action is sufficient to support an inference of a causal nexus between the two events. *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1368 (2000). The District of Columbia Court of Appeals has held that a "very close" temporal proximity can establish a *prima facie* case. *Nicola v. Washington Times Corp.*, 947 A.2d at 1175 (holding nine-

day gap sufficient to establish causation); *see also e.g. Woodruff v. Peters*, 482 F.3d 521, 529 (D.D.C. 2007) (finding that “less than a month” between protected event and adverse action was sufficiently close in time to infer discrimination); *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1202 (10th Cir. 2006) (holding that twenty-four days is sufficient to infer existence of causal connection); *Goos v. Nat’l Ass’n of Realtors*, 715 F.Supp. 2, 4 (D.D.C. 1989) (finding that just over five weeks between the protected action and the plaintiff’s termination was short enough time lapse to infer a causal connection). *Taylor v. Solis*, 571 F.3d 1313, 1322 (D.C. Cir. 2009) (no causality where two and a half months from protected activity to adverse action); *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (C.A.10 1997) (3-month period insufficient).

Here, Complainant attempted to establish that Supervisor made the decision to terminate Complainant as early as August 8, 2016 (six weeks after the protected activity) for two reasons. First, Supervisor’s last entry on her table of comments about Complainant was on August 8, 2016. Ex. J16, Tr. Day 2 at 205-206. Second, a meeting invite that Supervisor sent to DW on August 12, 2016, had the subject “Personnel update,” although the meeting did not take place. Ex. C7; Tr. Day 2 a 204. These dates are, however, speculative at best.

The record reflects that Supervisor initiated conversation with DW about terminating Complainant’s job by email on August 25, 2016 – eight weeks (55 days) after the July 1, 2016, email, , which *might* support a temporal causal connection. However, it was also four days before Complainant’s extended PIP would have expired. While close temporal proximity between a protected activity and an adverse employment action may be sufficient to establish causation at the *prima facie* stage of a retaliation claim, “positive evidence beyond mere proximity is required to defeat the presumption that [an employer’s] explanations are genuine.” *Woodruff v. Peters*, 482 F.3d 521, 530. In addition, some courts have declined to infer a causal link based on temporal

proximity where an employee's negative performance evaluations predated any protected activity. *See e.g. Shaner v. Synthes*, 204 F.3d 494, 504-405 (3d Cir. 2000) (internal quotation marks omitted)(holding no causal link where performance evaluations contained similar criticisms both before and after company was aware that employee suffered from MS); *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 309 (4th Cir. 2006) (“[w]here 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”).

As discussed previously, Respondent proffered a legitimate, non-discriminatory reason for Complainant's termination: poor work performance. Such a legitimate reason “breaks the causal connection between the first two elements and defeats a retaliation claim.” *Slate v. Pub. Def. Serv. For the D.C.*, 31 F. Supp. 3d at 292. Then “the court must simply determine whether the plaintiff has put forward enough evidence to defeat the proffer and support a finding of retaliation.” *Id.* Although the evidence does not support a *prima facie* case of retaliation, I have considered whether Complainant, nonetheless, put forth sufficient evidence to defeat AARP's proffered non-discriminatory reason and support a finding of retaliation. If Complainant had established a *prima facie* case, under the *McDonnell Douglas* framework, once AARP proffered a legitimate, non-discriminatory reason for his termination, Complainant has the burden of coming forward with evidence that AARP's stated reasons for terminating him were false - a pretext - and that “discrimination was the real reason.” *Nicola v. Washington Times Corp.*, 947 A.2d at 1175.

“[T]he emphasis is on the need for *evidence*: ‘As courts are not free to second-guess an employer's business judgment, a plaintiff's mere speculations are insufficient to create a genuine issue of fact regarding [an employer's] articulated reasons for [its decisions]....’ ” *Furline v. Morrison*, 953 A.2d at 354 (quoting *Brown v. Brody*, 339 U.S. App. D.C. 233, 245-46 (1999))

(emphasis in original). In general, the focus at this stage is on whether there was substantial evidence that retaliation could be inferred from the combination of “(1) the plaintiff’s *prima facie* case; (2) any evidence the plaintiff presents to attack the employer’s proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer) or any contrary evidence that may be available to the employer (such as evidence of a strong track record in equal opportunity employment).” *Id.* at 353-354.

Complainant argues in his Post-Hearing Memorandum (“Compl. Memo”) that AARP’s proffered reason for his termination was pre-textual because he was not a poor performer. First, Complainant argues that there was no legitimate reason his performance rating went from meets expectations in 2014 to needs improvement in 2015. Complainant argues the only thing that changed between the 2014 End-Year Review where he met expectations and the 2015 Mid-Year Review where he needed improvement, was that Complainant had complained about Supervisor to her supervisor and to human resources, and Supervisor was embarrassed in front of her boss. Compl. Memo at 13. However, when Supervisor completed Complainant’s 2015 Mid-Year Review on July 31, 2015, the only complaint Complainant made about Supervisor was three months earlier, in April 2015, when he complained to Mr. H about Supervisor jumping out of her chair during a meeting which was unrelated to his disabilities. Complainant only speculates that Supervisor was embarrassed by this complaint. There was no evidence that anything else occurred between April and July 2015. The three months between the April 2015 complaint and the July 2015 evaluation were too far apart to infer retaliatory intent. Moreover, there was no evidence that Supervisor had any knowledge in July 2015 that Complainant suffered from any disabilities.

Complainant states that when he received ratings of meets expectations in his 2014 Mid-Year and End-Year reviews, Supervisor noted that he excelled in supporting peers needing his skills. Compl. Memo at 12. However, in his 2015 Mid-Year review, in which he was rated “needs improvement,” Supervisor listed “collaboration” as an area needing improvement. Complainant’s 2014 End-Year Review stated: “He excels in supporting peers needing his skills to create and document requirements for vendor discussions/negotiations.” Ex. J2, AARP193. Complainant’s 2015 Mid-Year review states: “Most common observation and feedback from various management leaders is the need for Complainant to be more collaborative, especially at a strategic and cross organization level.” Ex. J3, AARP107. While Complainant characterizes these differences in his exceptions as “contradicting,” they can also be qualified as a deterioration in Complainant’s interaction with peers resulting in the reduced rating.

Complainant’s ability to “support peers” to create and document is not necessarily the same thing as collaborating at a strategic and cross organizational level. Regardless, this is exactly the type of second-guessing of an employer’s business judgment that is inappropriate. Assessment of job performance often involves countless contestable judgments, but Complainant points to nothing other than his own opinion of his performance to dispute the performance evaluation, which is not enough to overcome AARP’s proffered non-discriminatory reason. *See Vatel v. All. of Auto. Mfrs.*, 627 F.3d 1245, 1247 (D.C. Cir. 2011)(“[I]t is the perception of the decision-maker which is relevant, not the self-assessment of the plaintiff.”). Supervisor testified that Complainant was given ratings of meets expectations early on because he was still new and learning. It is not unreasonable that by the 2015 Mid-Year review, one year into his employment, Supervisor expected Complainant to be performing at a higher level as a senior level manager.

Contrary to his arguments, the fact that Supervisor had previously given Complainant successful evaluations cuts the exact opposite way: “[C]ourts in this district have observed that an inference of *nondiscrimination* is appropriate when the same person who hired or promoted the employee later proposes that an adverse action be taken against him.” *Brown v. Vance-Cooks*, 920 F. Supp. 2d 61, 69 (D.D.C. 2013) (citations omitted) (emphasis in original). Moreover, “[a]n employer’s description of an employee’s performance as unsatisfactory will not be deemed pretextual just because the employee was a good performer at an earlier time.” *Id.*

Second, Complainant argues that the PIP itself was deficient and did not support that Complainant had performance problems. Compl. Memo at 13. Complainant argues the goals in the PIP were not objective. Complainant testified at length that he did not understand how to meet the goals and in his response to the PIP, he described it as “psychobabble.” Supervisor agreed that some of the goals as written were subjective, but appropriate. For example, under Quality and Completeness of Work Product, one goal was: “Bring value to data by communicating meaningful insights, by decision-making opportunities aside from reporting details,” which at the hearing, the parties agreed was subjective. Ex. J5, AARP116; Tr. Day 2 at 134. Supervisor testified that the goals were not unreasonable given Complainant’s level of responsibility in the organization. Tr. Day 2 at 141. There are also goals that are specific and objective such as, “communicate trends and changes in an bulleted fashion, complete with dates and anomalies/issues” and “In weekly one-on-one meetings, present details of where you stand with projects/deliverables, what actions you have taken and progress against deliverable dates,” “Develop timelines that account for multiple-levels of review, backing into due dates, and are share with/considerate of others if assistance is required.” Ex. J5, AARP116. The Commission is not in position to analyze the appropriateness of each goal to the business operations of AARP.

Although Complainant attempts to challenge Supervisor's criticism of him as overly subjective, he did not present any evidence to rebut Supervisor's assertion that she honestly believed that his work had deteriorated, was deficient, and was below what she expected of a senior manager. *See Fischbach v. D.C. Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (stressing that the salient issue is not whether the employer's reasons were true or false, but whether it honestly believed the reasons when taking the personnel action). Complainant notes that even while he was on the PIP, he received an award and accolades from Supervisor in January 2016 which supports that he was performing effectively. Supervisor nominated the team that worked on the End-User Services project for an "Accomplishment" award which all team members received on January 14, 2016. Ex. C14. Complainant was an integral part of the team in the beginning, but he was subsequently removed from the team due to the alleged incident in Rockville with Complainant's former employer. Supervisor testified she nominated Complainant for the award because he deserved it because he did great work on the End-User Services project. Tr. Day 2 at 167. Complainant was never rated as not meeting expectations. A rating of needs improvement suggests that he does some things satisfactory. "It is nonsensical to suppose that a plaintiff should be able to demonstrate that an employer's stated reason for its adverse action is pretextual merely because the employer cannot prove that the plaintiff was deficient in *every* aspect of his job performance." *Brown v. Vance-Cooks*, 920 F. Supp. 2d 61, 73 (D.D.C. 2013) (emphasis in original).

Third, Complainant argues that the PIP did not comport with AARP's "Tools to Address Performance" (Ex. C9) because it does not identify specific examples of concerns with his past performance. Compl. Memo at 14. AARP's "Tools to Address Performance" was just that – a tool. DW testified it was a resource made available to all AARP managers and that AARP did not

require that a PIP follow a particular format. This is supported by the fact that DW approved the use of the PIP. Supervisor testified that she did not use the sample template when she completed Complainant's PIP because she was out of the country and unable to open the template. I agree the PIP does not have specific examples of past performance problems. Supervisor testified she discussed examples with Complainant during their one-on-one meetings, which Complainant refutes. Despite not including specific examples of past concerns in the PIP, the worktable set forth all the projects that Complainant was working on and it was the tool used to track performance going forward. Complainant does not explain how Supervisor's decision not to use the sample template or include specific examples of past problems rendered the PIP improper or establishes that Complainant is a satisfactory performer.

Fourth, Complainant argues that performance was not the reason for his termination because Supervisor did not monitor Complainant's performance under the PIP and never referred to the PIP. Compl. Memo at 14. This assertion is not supported by the record. Complainant and Supervisor testified that after he was placed on the PIP, they had weekly meetings. Although at one point Complainant testified that they rarely met and never discussed the PIP, Complainant testified that in his one-on-one meetings with Supervisor they reviewed the worktable and discussed what he "was doing, strategy and [Supervisor's] opinion" on his work product and "any issues, challenges." Tr. Day 1, 78:1 – 19. Complainant testified that Supervisor memorialized her critiques of Complainant's work product in writing in the worktable and sent them to Complainant a few days after their one-on-one meetings. Tr. Day 1, 80:1 – 81:1. Supervisor testified that the worktable was, in a sense, a roadmap to successful completion of the PIP. The worktable identified what was expected of Complainant on each project and what the output should be and was not meant to reflect the elements in the PIP. Tr. Day 2 at 149. Consequently, if Complainant was

successful on the work projects, he would be successful on his PIP. Supervisor testified that she also kept a separate table of comments because she did not want Complainant to get “angry and combative” in their one-on-ones such that they “couldn’t get to the content of what he needed to do to succeed.” Tr. Day 2, 47:14 – 48:3.

On December 25, 2015, Complainant emailed DW about Supervisor’s requirement that he bring hard copies of his work to their weekly meetings. Ex. J7, AARP332 – 33. Complainant lamented that had received negative feedback regarding his failure to bring those hard copies, which he thought was harsh and nit-picky. *Id.*; Tr. Day 1, 176:7 - 179:7. Supervisor, however, testified that she had asked Complainant to bring hard copies of his work product to their one-on-one meetings during the PIP so that she could “guide him on exactly how to improve.” Tr. Day 2, 77:2 – 10. Instead of bringing hard copies, Supervisor testified that he would “maybe” send a soft copy. Tr. Day 2, 77:2 – 10. Supervisor states that, when pressed for a hard copy, Complainant replied a couple of times by saying, “that’s your responsibility. Who’s prepared, me or you?” Tr. Day 2, 77:2 – 10. This is an example of how, even on very small points, Supervisor and Complainant have different perceptions of what is reasonable.

Lastly, Complainant argued that the June 2016 extension of the PIP was “illegitimate” because it added an element about working with peers when he had been on leave for five months and therefore, not in contact with peers. Compl. Memo at 15. The extension of the PIP and the additional goals are two separate issues. When Complainant went on sick leave, he was told the PIP would still be in place when he returned. Further, DW testified that before Complainant went on medical leave, Supervisor had discussed with her that she was not seeing improvement under the PIP and they discussed extending it beyond the 60 days. Regarding the additional goals, both the original PIP and Complainant’s 2015 Mid-Year Performance Review made specific references

to concerns regarding teamwork and collaboration, but it was not identified as a specific goal on the original PIP. Supervisor testified that she added the goal because Complainant had a “major problem with his interaction with his peers and his stakeholders so I wanted to make sure that he was aware of that so he could make improvements on that.” Tr. Day 2 at 191:4. Given that the new goal was not inconsistent with the information in his 2015 Year-End Review and the original PIP, I do not find it suspect.

Lastly, in his exceptions, Complainant argues that when he was terminated on September 21, 2016, over the phone, he was not told that he was being discharged for performance reasons. Rather, he was told that he was being discharged because he was an at will employee. Complainant argues that this is another example of how his termination was pretextual. At the hearing, DW testified that she and Supervisor called Complainant together. Supervisor told Complainant that he was being terminated because he was not performing to expectations. Supervisor then left the room and DW continued the call to discuss termination details. Complainant recorded the second portion of the call with DW. In his exceptions, Complainant argues that this recording was evidence of the inconsistent statements. However, if the call only had DW’s portion of the conversation, it could not establish an inconsistent statement made by Supervisor. Regardless, no such recording was offered or admitted into evidence and the court reporter did not transcribe the recording played. The transcript reflects only “(Recording plays.)” Tr. Day 1 at 190. The recording was played on cross-examination, at the request of Respondent’s counsel, in an attempt to impeach Complainant’s testimony that he had been recording all of his calls with Supervisor.

Complainant has not produced any evidence of weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in AARP’s proffered legitimate reasons for terminating him to infer that AARP did not act for the asserted non-discriminatory reasons. In

addition, Supervisor is the person who hired Complainant. In *Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d at 1247–1249, the court found that the person who hires an individual is unlikely to fire that same person for an invidious motive when there is evidence of incompatible working styles. Complainant did not disagree that he and Supervisor had a tense and hostile relationship well before he went on medical leave. Complainant has failed to establish that AARP's proffered reason for his termination – poor work performance – was a pretext for disability discrimination.

IV. Conclusions of Law

1. AARP has presented a legitimate, non-discriminatory reason for Complainant's termination.

The preponderance of the evidence establishes that Complainant's disabilities did not factor into AARP'S decision to terminate his employment and Complainant failed to establish that AARP's proffered reason for his termination was a pretext for discrimination.

2. The preponderance of the evidence establishes that AARP did not unlawfully retaliate against Complainant because of complaints made against Supervisor when it discharged Complainant from his employment with AARP.

December 3, 2020



Erika L. Pierson
Chief Administrative Law Judge
D.C. Commission on Human Rights