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I. INTRODUCTION.

Erik Belfiore's complaint in this case alleged that his employer, Merchant Link, Inc., paid him less than comparable employees and undermined his managerial authority because of his race, in violation of the County's Human Rights Law, M.C. § 27-19(a)(1). From mid-2008 until November 2011, Mr. Belfiore was Merchant Link's chief operating officer (COO).

In this report I conclude that Mr. Belfiore has not proved by a preponderance of the evidence that disparities in pay were attributable to racial discrimination. Merchant Link's explanations are plausible and Mr. Belfiore did not show that they were pretext for discrimination. I also conclude that Mr. Belfiore did not establish a *prima facie* case that the examples of "undermining" he presented were severe or pervasive enough to affect the terms and conditions of his employment materially

Three weeks after alerting Merchant Link's chief executive officer and its compensation committee that he would take legal action over his compensation, he was fired. The firing occurred a day after an employee accused Mr. Belfiore of urging her to help sabotage a new software system important to Merchant Link's work. Mr. Belfiore was not interviewed before he was fired. Mr. Belfiore contends that his firing was retaliation for his threat to invoke legal remedies and therefore violated § 27-19(c)(1) of the Human Rights Law.

Although there are disquieting elements in the summary firing, I conclude that there is insufficient evidence in the record to permit a fair inference that retaliation was a motivating factor in Merchant Link's decision to discharge Mr. Belfiore.

After briefly outlining the procedural development of this case, this report addresses each of Mr. Belfiore's claims in turn: disparate compensation; undermining of authority; and retaliation.

II. STATEMENT OF THE CASE

Mr. Belfiore filed his complaint with the Office of Human Rights in December 2011. Docket entry 1(a); HE ex. 1.¹

The Office of Human Rights investigated and determined reasonable cause existed that Merchant Link had unlawfully discriminated and retaliated. Docket entry 1(b). The Office dismissed claims against Mr. Belfiore's 2005-2008 employer, Chase Paymentech, of which Merchant Link had then been a division.

The Office's efforts to conciliate failed and in December 2013, the Office certified the case to the Commission for public hearing. Docket entry 3; HE ex. 2. The Commission's Case Review Board in turn referred the case to the Office of Zoning and Administrative Hearings. Docket entry 3; HE ex. 3.

As hearing examiner, I issued an order allowing the parties to conduct discovery until May 30, 2014. Docket entry 10. During the course of discovery, I issued a number of Orders resolving discovery disputes. Docket entries 18, 22, 28, 29.

In July 2014, I suspended the participation of Merchant Link's two attorneys because neither was a member of the Maryland Bar and one of them had misrepresented that she was. Docket entry 36. I denied their motion to participate *pro hac vice* until they fully complied with Md. Rule 14 and until they provided good cause why they should be allowed to practice despite the misrepresentation. Neither out-of-state attorney attempted to be reinstated. The Order granted a properly credentialed Maryland lawyer permission to replace them as Merchant Link's counsel.

Following close of discovery, I issued a number of procedural orders extending time for submissions. Docket entries 52, 58, 59. I also issued administrative

¹ Hearing exhibits are identified in this report as HE ex. (hearing examiner's); CX (complainant's); and RX (respondent's). The Merchant Link exhibits on file use "JE" rather than "RX"; the numbering is identical. Transcript citations are given in this report as "T." followed by date and page.

HE ex. 4 is a joint stipulation by the parties of uncontested facts. The parties reserved the right to object to any fact on relevancy grounds. During the hearing, neither party objected to the stipulated facts.

subpoenas but declined to issue subpoenas to out-of-state witnesses for lack of jurisdiction. Docket entries 59, 60, 65. I partially granted Merchant Link's motion to preclude Mr. Belfiore from calling its former counsel as a witness. Docket entry 62. I agreed that counsel could not be compelled to testify because of attorney-client privilege but deferred ruling on whether he could be called if Merchant Link expressly or implicitly waived its privilege during the hearing. He was never called.

I denied three Merchant Link motions. One demanded dismissal of Mr. Belfiore's compensation claim, arguing that the claim was untimely under the Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* 550 U.S. 618 (2007). I concluded that *Ledbetter* did not apply to the language of § 27-7, the limitations section of the Human Rights Act. Docket entry 61. In addition, federal and state employment discrimination laws had been amended to overcome the *Ledbetter* decision in a way that made them similar to § 27-7. A second motion challenged the constitutionality of § 27-8, the remedies provision of the Human Rights Act, and demanded that any monetary award to Mr. Belfiore be limited. I denied the constitutional challenge on the merits and denied the remainder of the motion as premature because there had been no finding of liability. Docket entry 66. The third motion demanded dismissal of Mr. Belfiore's allegations that his managerial authority had been undermined because of his race or, alternatively, asked that related evidence be excluded. I concluded the evidence that Merchant Link wanted excluded was presumptively relevant to Mr. Belfiore's disparate compensation claim even if the "undermining" incidents were not independently actionable. Docket entry 67. I denied dismissal of the "undermining" claim because it stated a colorable claim under *dicta* in two Fourth Circuit decisions. *Id.*, citing *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (2007); *Boone v. Goldin*, 178 F.3d 253, 256-57 (4th Cir. 1999).

I denied Mr. Belfiore's motions for summary judgment on all his claims because neither the County's Administrative Procedure Act nor the Commission's regulations grant (or deny) the Commission authority to dispose of cases summarily. Docket entry 70, citing *Engineering Management Services, Inc. v. Maryland State Highway*

Administration, 375 Md. 311, 375 A. 2d 211 (2003). Nonetheless, I also stated that implicit authority exists in the APA to dispose of cases summarily in some circumstances because it is implausible that the Council intended agencies to conduct pointless hearings when no material facts are in dispute. In the present case, however, Mr. Belfiore could not prevail as a matter of law because material facts in dispute existed as to each of his claims.

The hearing began as scheduled on February 9, 2015, and continued through February 13. A sixth hearing day had been scheduled for February 16 but needed to be postponed when County offices were closed that day because of snow. The hearing resumed and concluded on February 20.

Ten witnesses testified during the hearing,. Two depositions, both taken by the complainant of Merchant Link officials, were admitted into evidence. In one case, the witness (Charron) was beyond the Commission's subpoena jurisdiction. In the other (Nussbaum) the subpoena had been served at the wrong address.

The hearing record was kept open to receive specified additional exhibits. Those documents were filed when due. Docket entries 73-76.

On April 28, I notified the parties that I discovered I held shares in J.P. Morgan Chase which was (and still may be) a part owner of Merchant Link. Docket entry 77. On the same day I sold the shares to avoid any appearance of a conflict of interest. I asked the parties to comment by May 15 if they had concerns about the stock ownership. No comments were filed.

The parties' briefs on the merits were filed by May 1, the due date. Docket entries 78 (Belfiore br.), 80 (Merchant Link br.) Merchant Link moved to strike references in the Belfiore brief to exhibits that had not been admitted at the hearing and Mr. Belfiore filed an opposition. I granted the motion because Commission decisions must be based only on evidence of record. Docket entry 86, citing the County Administrative Procedure Act ("APA"), M.C. Code §10(a)-(b).

Counsel for Mr. Belfiore timely submitted his application for attorney's fees. Docket entry 83. Merchant Link filed a timely response. Docket entry 84.

The record closed on June 1. On July 13, I extended the time for filing this Report to August 17. Docket entry 85.

III. COMPENSATION CLAIM.

A. SUMMARY OF EVIDENCE.

1. Merchant Link's Business Structure.

In order to understand the record evidence involving Mr. Belfiore's racial discrimination claim, it's necessary to understand something of Merchant Link's evolving structure and its compensation system. Merchant Link is headquartered in Silver Spring but some employees work remotely. See T.2/12 at 193 (reference to employee in Colorado).

As its name implies, Merchant Link serves as an electronic intermediary between credit card issuers and merchants. When a credit card is presented to a merchant, the card is swiped on a Merchant Link device that communicates the information to Merchant Link which then directs it by means of the company's proprietary "transaction switch" to the card issuer for payment; bank approval of the transaction then flows back through Merchant Link to the merchant. T. 2/10 at 188 (Justice); T. 2/11 at 86-87 (Lane). According to Merchant Link's current chief executive officer ("CEO"), Daniel Lane, its switch system currently processes about five billion transactions a year worth between \$300 and \$400 billion. T. 2/11 at 87. Merchant Link also uses its systems to protect credit card data as it flows between merchant and card issuer. *Id.* It bills its merchant customers either per transaction or by monthly subscription, as well as for "tech support" and installation. *Id.* at 90.

A former company CEO, Christopher Justice, testifying for Mr. Belfiore, classified the company as more of a service company than a technology company; Mr. Lane, the present CEO classified it as essentially a technology company. Compare 2/10 at 171 with 2/11 at 83-84.

In 2005, when Mr. Belfiore was hired, the company was a subsidiary of Chase Paymentech, itself a subsidiary of J.P. Morgan Chase. In 2008, Merchant Link underwent a series of permutations and restructurings in anticipation of an

ultimately unsuccessful spin-off and sale. See T. 2/9 at 39-40 (Belfiore); T. 2/10 at 147 (Justice).

As noted in the Statement of the Case, the Office of Human Rights dismissed claims against Chase Paymentech. That company's pay practices are not before the Commission.

When the sale failed, the company became a joint venture of J.P. Morgan Chase and First Data Corporation in December of 2008. T. 2/10 at 147 (Justice). More exactly, according to the joint venture agreement, it became a wholly-owned subsidiary of Paymentech-ML Holdings, LLC, which itself is owned by Chase and First Data on a 51-49% basis. See CX 55(a) at ML 00091.

A board of managers consisting of Chase Paymentech and First Data executives exercises overall control of the joint venture.² The initial members were Brian Mooney and Barry McCarthy, representing First Data Corporation, and Michael Duffy and Daniel Charron, representing Chase Paymentech. CX 23(a) at 20, § 7.2(a). (Duffy was Paymentech's CEO and Charron its COO). The Agreement establishing the venture required board approval of appointments and replacement of officers, and the setting of officer compensation. *Id.*, §§ 7.3(a)-(b)).

Among the board's decisions at its first meeting in December 2008 was the creation of a compensation committee, to which Mr. Charron and Mr. McCarthy were appointed. CX 6 at 2.

Mr. Justice, who had been hired by Chase Paymentech in December 2005 as Merchant Link's president, was appointed CEO of the company once it was reconstituted as the joint venture in 2008. Mr. Justice resigned in March 2009 and was replaced on an "interim" basis as CEO by Mr. Charron (see CX. 44), who remained at Chase Paymentech headquarters in Dallas and delegated day-to-day operational control to Lane, Belfiore, and Timothy Kinsella, executive vice president for sales. The Charron "interim" period lasted two years until Mr. Lane was appointed CEO in April 2011, seven months before Mr. Belfiore was fired.

² During the hearing the managers were often referred to as "directors" but there was no "board of directors." See T. 2/11 at 99 (Lane).

2. Merchant Link's Compensation System.

Merchant Link's pay system loosely links salaries to pay levels; normally, the higher the grade, the higher the salary. T. 2/10 at 193 (Justice); 2/9 at 43 (Belfiore: base salary is determined by grade). Each grade has a broad salary range meaning that a lower ranked employee may sometimes earn more than a higher ranked one.³

According to Mr. Lane (T.2/12 at 62),

the grade is associated with a job and a job description. * * * When a person gets promoted, their job, their job title and job description would change and with that the associated grade would change. So there, when a person is promoted from one job into another, there is a salary increase associated with that. If a grade was changed without changing a person's title, it was due either to an adjustment or a reclassification of that job. And that didn't necessarily always mean an automatic increase because of the, the band that, that, that job grade could have a band that overlapped the job grade above or below it.

Salaries are supplemented company-wide by a stated percentage under an "annual incentive plan" (AIP) bonus. See HE ex. 4 at 2 ¶¶ 5-6. For someone at grade 14, the AIP is 20%; at grade 16, the AIP is 25%. See CX 13; T. 2/9 at 76-77 (Belfiore).

Compensation is also enhanced by "long term incentive plan" (LTIP) grants. HE ex. 4 at 2, ¶ 7. These are often larger than the AIP bonuses. The amount available for LTIP awards each year depends on the company's overall economic performance but the amount awarded to individual employees is at the company's discretion. According to Mr. Lane, Merchant Link's CEOs initially propose a pool of money to the board of managers for all such grants. *Id.* at 68 (Lane). Once the board approves the pool, the CEO has broad flexibility to set individual awards. *Id.* at 68-69.

Merchant Link has no written guidelines to limit the CEO's discretion in awarding LTIP grants. *Id.* Mr. Belfiore did not know how amounts were determined: "the best answer I can give [is] it was at the discretion of Dan Charron. Dan Charron gave you what he felt you deserved." T. 2/9 at 44. According to Mr. Lane, at the

³ A 2006 pay scale apparently prepared by Chase Paymentech is in the record as CX 13. Mr. Lane testified that that scale was discarded when Merchant Link became a joint venture, testimony that Mr. Belfiore disputes. *Compare* T. 2/11 at 57 *with* docket entry 74 (post-hearing letter from Mr. Belfiore's counsel).

executive level, the board of managers scrutinized LTIP awards as part of total compensation. T. 2/12 at 69 (Lane).

One half of each LTIP award vests in January of the first year *after* the award, the second half vests in January of the year thereafter. HE ex. 4 at 2, ¶ 7. LTIP payments may overlap after an employee has worked for several years. For example, in year three the employee would be entitled to the second half LTIP award from year one and the first half LTIP award from year two. It is therefore sometimes difficult to compare compensation among employees, especially those hired fewer than two years earlier.

For most existing employees, salaries, AIP, and LTIP awards are generally announced and effective in February.

3. Mr. Belfiore's Employment History at Merchant Link.

Mr. Belfiore was hired by Chase Paymentech/Merchant Link in September 2005 as manager of financial analysis. HE ex. 4, at 1, ¶ 1. In anticipation of the possible sale of the company, that company prepared a brochure describing Mr. Belfiore as having 15 years of finance and ten years of payment and telecom experience. CX 5.

Mr. Justice appointed Mr. Belfiore as Merchant Link's COO in May 2008 when Merchant Link was up for sale and still a Paymentech subsidiary. HE ex. 4 at 1, ¶ 2. Mr. Justice testified that he promoted Mr. Belfiore to move him out of finance "into overall operations because part of the goal * * * was to groom Erik to be my successor." T. 2/10 at 151. Despite his promotion, Merchant Link's 2008 salary schedule identified Mr. Belfiore as general manager for customer service, a position he claims he never held; by 2010, his title had been corrected. See CX 2; CX 3; T. 2/9 at 48.

Mr. Belfiore replaced Mr. Lane, who had been COO but took the position of chief technology officer (CTO) in the restructuring. T. 2/10 at 151 (Justice). According to Mr. Justice, "Dan really owned the, really the IT side of the house, everything from development, product, all of the technology infrastructure." *Id.* at 152. He testified that Lane was one of the co-founders of the company and developed some of its technology. *Id.* at 172. Before the restructuring, Mr. Lane supervised all technical

services, merchant services, product management, learning and development. T. 2/20 at 18 (Belfiore).

In December 2008 the new Paymentech-ML Holdings board of managers elected Mr. Justice, Mr. Lane, and Mr. Belfiore as “officers” of the joint venture at its first board meeting. CX 6 at 3. Mr. Justice became CEO (rather than president) and Mr. Lane and Mr. Belfiore retained their pre-reorganization titles as CTO and COO, respectively. *Id.* at 3. (According to Mr. Justice, Mr. Kinsella remained part of his “executive team” but was not a company officer. T. 2/10 at 150).

Mr. Justice described corporate officers as having greater responsibilities than other executives. They were part of a “decision-making body * * * setting policy, procedure, helping to drive the business.” *Id.* at 198. They uniquely had fiduciary responsibilities to the board and the corporation: “So there are legal ramifications to being a corporate officer * * *.” *Id.*

As COO, Mr. Belfiore took over the “operations components of the business.” *Id.* at 152 (Justice). From Mr. Lane, he inherited three departments. See CX 16 at ML 000443. Already in 2008, when Merchant Link had about 110 employees 58, or 53%, worked under Mr. Belfiore. CX 1 at 3a; T. 2/9 at 36 (Belfiore).

By early 2011 he had six departments reporting to him: tech support; installation; implementation; funds research; financial analysis, and billing operations. See RX 144(a)). The largest group reporting to Mr. Belfiore as COO was the service delivery team. In a 2008 internal Merchant Link document discussing personnel changes, Mr. Justice wrote that the “group implements, installs, and maintains our customers.” CX 16 at 1. In testimony, Mr. Justice described it as a “call center.” T. 2/10 at 152.

Because the board of managers deferred appointing a chief financial officer (“CFO”) (CX 6 at 2), most of the joint venture’s financial operations continued to be conducted by Paymentech in Dallas but Mr. Belfiore supervised a one to two -person billing function. T. 2/9 at 34 (Belfiore). Mr. Belfiore characterized his role as being Merchant Link’s primary financial spokesman at board of managers meetings. *Id.* 2/9 at 35. Merchant Link had no legal staff but Mr. Belfiore acted as the company’s

principal liaison with outside counsel. (Mr. Belfiore is not a lawyer; he attended law school on his own while employed at Merchant Link). *Id.* at 206.

As the result of the transfer of functions and personnel, Mr. Belfiore contended, Mr. Lane had “significantly less responsibility” as CTO than he had had as COO. T. 2/20 at 18. Although the two men had different job functions, Mr. Belfiore believed he and Mr. Lane had the same level of responsibilities as corporate officers. T. 2/9 at 93, 205. They also had the same fiduciary duties and attendant risks. *Id.*; see *id.* at 208.

After Mr. Belfiore was appointed COO, he, along with Mr. Lane and Mr. Kinsella, was one of three executives who reported directly to the CEO. Justice, Lane, Belfiore, and Kinsella were listed as the “senior management team” by Merchant Link in 2008. CX 5. That arrangement seems to have continued after Mr. Charron took over as interim CEO. An “early 2011” organizational chart shows Mr. Belfiore one level down from the CEO, alongside Mr. Lane and Mr. Kinsella (although their names, unlike Mr. Belfiore’s, do not appear) and above other executives. RX 144(a). Mr. Belfiore is shown as having six units reporting to him, Mr. Lane seven, and Mr. Kinsella one. *Id.*

When Mr. Lane became CEO in 2011, the structure seems to have changed, at least as reflected in a May 2011 organizational chart. RX 144(b). There, seven boxes appear directly under the CEO and Mr. Belfiore is not elevated above other executives. The organization chart also shows that the financial analysis section has migrated from Mr. Belfiore’s supervision to that of the CFO (a position that doesn’t appear in the earlier chart). Mr. Belfiore testified that Merchant Link was under a mandate to become self-sufficient in financial management by 2011 and more responsibilities had been transferred to Silver Spring from Paymentech. T. 2/9 at 187.

As part of his promotion to COO in 2008, Mr. Belfiore’s grade was raised from 12 to 14. T. 2/9 at 35 (Belfiore). (It’s not clear from the record whether his grade was raised in May or December 2008). Despite Mr. Belfiore’s enhanced title and role, Merchant Link and Chase Paymentech continued to carry Mr. Belfiore on their books

as a grade 14 mid-level employee through 2010. As a result, his AIP bonus was limited to 20% during 2008, 2009, and 2010.

In January 2011, Mr. Lane, who then supervised Merchant Link's human resources group, informed Mr. Belfiore by email that Mr. Charron had noticed that "your grade was listed as 14, which is inconsistent with your title" and had directed it be corrected. (CX 58). Mr. Lane described the lower grade as "a vestige of the way your promotion was handled" and to "migration changes" caused by adoption of new payroll systems. *Id.* A few days later, Mr. Belfiore's grade was raised to 16. But, as Mr. Lane's memorandum to the Mr. Belfiore's employee file stated, the raise came with "no adjustments to title or salary." (CX 59). One consequence of the grade promotion, however is that he became entitled to 25% AIP bonuses instead of the 20% bonuses he had been receiving as a grade 14 employee.

Mr. Belfiore believed he should have been promoted much earlier, when he was named COO. T.2/10 at 29. He also believed the 16 level was inadequate; he should have been promoted to the "CO" (company officer) level. *Id.* An employee at that level would have been entitled to AIP bonuses of 45%. CX 13.

According to Mr. Belfiore, his relationship with Mr. Charron "started really well." T. 2/10 at 78. Mr. Charron told him he would be of "tremendous assistance." *Id.* It wasn't a personal relationship, it was one that was "100 percent business all the time." T. 2/10 at 84-85. According to Mr. Belfiore, Mr. Charron told him that he intended to have Mr. Belfiore become Merchant Link's first CFO but had been dissuaded by Paymentech's own CFO at the time because (Mr. Belfiore believed) she did not want him to outrank her senior managers at Paymentech. T. 2/10 at 78-79. Mr. Charron also called him frequently to commend his work and to discuss major issues; "* * * I was one of the first people he called." *Id.* at 80.

Occasionally, the two men had disagreements because Mr. Charron seemed to favor Chase Paymentech's interests over Merchant Link's and Mr. Belfiore was "not timid" about protecting the latter. T. 2/10 at 27, 84. At some point, Mr. Charron told Mr. Lane that he thought Mr. Belfiore was greedy. *Id.* at 81 (Belfiore).

Mr. Belfiore characterized his relationship with Mr. McCarthy, a board and compensation committee member, as business-like. T. 2/10 at 86. The two men communicated occasionally by telephone and Mr. McCarthy had never said anything disparaging about his work at board meetings that were conducted electronically. T. 2/10 at 86. Before October 2011, Mr. McCarthy seemed to have had no input in setting Mr. Belfiore's compensation "nor have I seen where his approval was requested." T. 2/10 at 88 (Belfiore).

Mr. Belfiore believed that Mr. Duffy, Chase Paymentech's CEO and a member of the joint venture's board of managers, also respected his work. T. 2/10 at 88 (Belfiore). Duffy resigned as a board member in September 2011, before Mr. Belfiore's discharge. CX 55(b).

Mr. Belfiore testified that for most of their common tenure his relationship with Mr. Lane was friendly. They visited each other socially and played basketball together. T. 2/10 at 69. Together they attended at least "a couple" of soccer matches in which Mr. Belfiore's daughter played; Mr. Lane later facilitated a tryout by her to join a soccer team that Mr. Lane, his son, and brother coached. *Id.* at 69 Mr. Lane had also participated as a witness in a mock trial in which Mr. Belfiore was counsel at law school. T. 2/10 at 70 (Belfiore).

According to Mr. Belfiore, he was the only African-American reporting directly to Merchant Link's CEOs. See T. 2/20 at 32.

4. *Compensation History through August 2011.*

Mr. Belfiore believed that Charron, McCarthy, and Lane discriminated against him in setting his compensation between 2009 and 2011. T. 2/9 at 195-197; T. 2/10 at 95. According to Mr. Belfiore, Mr. Charron had complete control over his salary from the time he was promoted to COO. T. 2/20 at 35. So far as Mr. Belfiore was aware, no one had brought up his race in making compensation decisions. T. 2/10 at 94.

He acknowledged that setting compensation "is not a simple task." T. 2/9 at 208. He agreed that job responsibilities, market rates, and education, could be

legitimate factors in setting pay. T. 2/10 at 9. Pay history and negotiating skills, he felt, should not be. *Id.*

Merchant Link initially hired Mr. Belfiore at a salary of \$90,000.⁴ By May 2008, when he was promoted to COO, Mr. Belfiore's salary had risen to \$95,500. HE ex. 4 at 1, ¶ 4. Upon promotion his salary increased to \$105,000 upon promotion, a \$10,000 (or 10.5%) increase. *Id.* According to Mr. Belfiore, Mr. Charron told him at the time that he agreed that Mr. Belfiore was being underpaid but suggested he look for another job if he considered the salary raise inadequate. T. 2/9 at 61 (Belfiore). The record does not disclose whether the conversation took place before Merchant Link became a joint venture.

In late 2008 or early 2009 Mr. Justice recommended that the board of managers authorize a larger salary increase for Mr. Belfiore because his salary was “significantly out of whack” compared to his “peer group” and to the other executives who were Mr. Justice's “direct reports” (presumably referring to Mr. Lane and Mr. Kinsella). T. 2/10 at 154 (Justice). In a transition memorandum, Justice had recommended a pay increase for him and two other employees because they were “attrition risks.” CX 55. Mr. Duffy and Mr. Charron, allegedly told Mr. Justice that it was Paymentech's policy to limit salary increases to 10% but they never presented him with a written copy of the policy. T. 2/10 at 154 (Justice). Charron also had told Mr. Justice it wasn't his fault that Mr. Belfiore had originally agreed to a lower pay grade: “company policy was the 10 percent increases and that was all there was to it.” *Id.* at 155 (Justice); see similarly *id.* at 182. Mr. Justice acknowledged he'd never previously recommended more than a 10% raise for subordinates. *Id.* at 189. He was aware, however, that the manager of network operations, Jay Konar, had received “a couple” of such increases “because we were trying to save and keep him from going somewhere.” T. 2/10 at 189. The record does not disclose which of the conversations and raises to which Mr. Justice was referring occurred after creation of the joint venture.

⁴ Salaries, AIP bonuses, and annual compensation amounts are generally rounded to the nearest \$100 throughout this Report for the sake of readability.

According to Mr. Belfiore, either around that time or somewhat earlier, Mr. Charron had become angry when he learned that Mr. Belfiore had received only an \$8000 LTIP award in 2007, and told him he “got screwed.” T. 2/10 at 80 (Belfiore). Mr. Charron told Mr. Belfiore he would arrange to increase his LTIP grant to \$50,000 the following year. *Id.*

Mr. Belfiore testified he should have received a \$70,000, not a \$10,000, salary raise when he became COO in May 2008 in light of his elevation in the hierarchy and his added responsibilities. T. 2/10 at 16. More generally, he believed that he should receive compensation comparable to Mr. Lane’s as CTO. Although the two men had different job roles, they had the same level of responsibility as corporate officers, the same fiduciary duties, and the same attendant risks. T. 2/19 at 93, 108. Their duties and risks overlapped. *Id.* at 208.

After 2008, according to the parties’ stipulation, Mr. Belfiore received the following pay packages in 2009, 2010, and 2011 (HE ex. 4, ¶¶ 4-16):

<u>Date</u>	<u>Salary</u>	<u>AIP</u>	<u>LTIP</u>	<u>Total</u>
2009	\$120,000	\$20,800 (20%)	\$75,000	\$215,000
2010	\$123,000	\$22,400 (20%)	\$75,000	\$220,400
2011	\$130,000	\$32,500 (25%)	\$75,000	\$237,000

These amounts may not coincide with the pay he actually received in each of those years because they do not include earlier LTIP awards still payable and because compensation packages normally run from February to February.⁵

As the chart shows, Mr. Belfiore’s salary was raised to \$120,100, slightly over a 14% increase in January 2009, from \$105,000. It increased 3%, to \$123,600, in February 2010. (All Merchant Link executives appear to have received a 3% salary increase that year. RX 141). In February 2011, it rose by 4.9% to \$130,000.

On May 15, 2011, Mr. Belfiore took medical leave that lasted until August 25, somewhat over three months. HE ex. at 2, ¶ 18. While on leave, he received short-term disability payments of \$12,867. *Id.*

⁵ The joint stipulation does not mention an AIP bonus for 2011 but it is undisputed that Mr. Belfiore at grade 16 would automatically be entitled to 25% of salary.

According to the parties' joint stipulation, Mr. Belfiore received \$195,600 in pay for his work in 2011 until he was fired on November 11. HE ex. 4 ¶ 17. (November 11 was his 314th day of employment that year). It is not clear from the record whether short term disability payments are included in his earnings. Mr. Belfiore believed they are, "that's the only way it makes sense." T. 2/9 at 205. The amount may (or may not) include enhanced compensation that Merchant Link paid for two pay periods in September 2011 but then rescinded and intended to recoup (see next section).

5. *Compensation History, September-November 2011.*

Mr. Belfiore criticized his salary in telephone discussions with Mr. Lane shortly before he was due to return to work in August 2011. He had learned that Mr. Lane had raised the salaries of six highly-paid employees and had hired three new executives. T. 2/10 at 31 (Belfiore). When he asked whether they had been offered higher salaries than his own, Mr. Lane admitted they had been. *Id.* at 32.

In further telephone conversations, Mr. Lane conceded that Mr. Belfiore's salary was low and offered to raise it to \$160,000. T. 2/10 at 32 (Belfiore); T. 2/11 at 194 (Lane). Mr. Belfiore countered with a demand for \$172,000 and Mr. Lane agreed. T. 2/11 at 195 (Lane). On September 6, Mr. Lane asked Merchant Link's human resources director, Wendy Nussbaum, to process the salary increase "to be commensurate with his COO title." RX 83.

Mr. Belfiore admitted the proposed increase was not discriminatory. T 2/10 at 33.

The pay increase went into effect on September 1, raising Mr. Belfiore's salary by 32.3%, but it lasted only two pay periods. See CX 8, entries for 9/15/11 & 9/30/11; CX 63 at ML 00073. On October 6, Merchant Link's chief financial officer, Christina Smith, wrote Mr. Lane "We need to reverse Erik's merit increase until we receive the appropriate approvals" from the board of managers; the higher payments needed to be recouped temporarily. RX 84 at ML 00064-000065. *Id.* Mr. Lane reported this news to Mr. Belfiore. T. 2/9 at 64 (Belfiore).

When he learned from Lane about the need for board authorization, Mr. Belfiore responded: “This seems to be a ruse to just open the opportunity for my raise to be retracted.” T. 2/9 at 64 (Belfiore). He nevertheless believed the increase would be approved because Mr. Lane assured him he would try to persuade the compensation committee and because Lane reported “Dan Charron said that he wouldn’t have done it but he won’t go against it.” T. 2/9 at 64-65.

On Tuesday, October 11, Mr. Lane asked Ms. Nussbaum to prepare a request to the compensation committee to increase Mr. Belfiore’s salary. RX 85 at ML 00075. In the email, Mr. Lane listed positions at Merchant Link that could be considered comparable to the COO position. They included the executive vice president for sales and marketing (Laura Kirby-Meck), the director of software development (Ben Chudasama), and the vice president of network operations (Jay Konar).⁶ Mr. Lane included his own position and that of the CFO but noted that Ms. Smith’s “salary reflects all-in comp from Chase Paymentech” (from which Ms. Smith had been hired four months earlier). *Id.* Ms. Nussbaum replied the same day. See *id.* at ML 00074. The Nussbaum email included surveys of COO compensation locally and nationwide. See RX 90, 91, 93, 95, 96. In general, they showed median COO salaries to be well above \$172,000 at for-profit firms.

On Thursday October 13, Mr. Lane wrote Mr. McCarthy recommending that he be allowed to pay Mr. Belfiore the salary he had promised. He told McCarthy, “I know this is a huge(!) adjustment, but his salary is significantly below comparable COO salaries for an organization our size,” as well as “Merchant Link’s comparable salaries for like positions.” CX 63 & RX 88 at ML 00071.

In the email, Mr. Lane also informed McCarthy that Mr. Charron had told him he would support the request for the increase. He urged speedy approval: “I’d like to make the adjustment immediately because there is some exposure to ML should Erik challenge his compensation.” *Id.*

⁶ The names do not appear in the October 13 email but are included in a later Lane email, CX 88.

Mr. McCarthy apparently balked at giving an immediate raise, preferring to phase it in over time. On Monday, October 17, Mr. Lane, responding to a telephone conversation with Mr. McCarthy the previous Friday, wrote that he still wanted to implement the increase “[i]n light of my promise” to Mr. Belfiore but proposed to establish two-month milestones over a six-month period: “I understand your approach in these situations and preference to do adjustments as employees demonstrate additional responsibilities, but because of the commitment I made to Erik, in this case I’d like to adjust his salary up front and monitor his progress with the objectives.” *Id.* at ML 00072. Mr. Lane also noted that Mr. Belfiore had been named COO years earlier. *Id.*

Mr. McCarthy wrote back four days later, on Thursday October 20, refusing to allow the immediate increase without prior deliberation by the two-man compensation committee: “Dan Charron and I exchanged messages yesterday. You need to schedule a comp committee review before communicating any senior salary action. We have not had such a meeting, and therefore you cannot keep your commitment at this time.” *Id.* at ML 00710. McCarthy asked Lane to schedule a committee meeting. *Id.*

The following day, Friday October 21, Mr. Belfiore sent an email to Charron, McCarthy, and Lane, complaining that his compensation was not “commensurate with my level in the organization and my education and experience” and attributing the shortfall to “your actions and inaction” stemming from racial discrimination. CX 64 at ML 000445. He wrote that he had raised the issue of compensation several times; in May 2008, when he was promoted to COO; in 2009, again after he was formally named COO of the joint venture; in May 2009 (apparently referring to a discussion with Mr. Charron), and in 2011, and when he was promoted to grade 16. *Id.*

In light of his work and compensation histories, as well as the recent compensation packages for other Merchant Link executives, Mr. Belfiore wrote, he had no choice but “to initiate the process of identifying a suitable legal resolution.”

Id. (The threat of litigation prompted subsequent exchanges of emails between the parties' counsel. CX 75(a)-(c)).⁷

On Tuesday of the following week, October 25, the compensation committee met, now aware of Mr. Belfiore's racial discrimination allegation. According to a recapitulation of the meeting by Mr. Lane in an email that day, the committee requested "additional historical data," including "the history of increases, Mr. Belfiore's role and performance, and executive compensation generally at Merchant Link." CX 65. In addition to writing to Mr. McCarthy, Mr. Charron, and Ms. Nussbaum, he also addressed the email to Harry Jones, Merchant Link's outside counsel. *Id.*

Despite Mr. Lane's stated plan in the email to schedule a committee meeting, the committee never met before Mr. Belfiore was fired twelve work-days later, on Friday November 11. .

Mr. Belfiore testified he didn't believe Mr. Lane ever intended the increase to be implemented. The offer was a ploy that "would be found out and it would be retracted as it was. * * * I didn't feel the attempt was genuine." T. 2/10 at 96 (Belfiore). Indeed, Mr. Belfiore considered Mr. Lane's unilateral implementing of the increase without board approval to have been "a blatant violation of the bylaws and operating agreement that governed the LLC, a breach of fiduciary duty." T. 2/10 at 66; see, similarly *id.* at 33-35.

Throughout their time at Merchant Link, Mr. Belfiore believed, Mr. Lane had not valued his work (T. 2/10 at 98):

* * * Dan Lane had his own personal judgments and valuations of my worth and what I should be paid. He had those same personal valuation[s] and judgments versus other people and he felt that despite my position, despite my officer-ship, despite any of that, there were certain people, because it was me, I can't tell you if it was I was short, if I was black or whatever, that I was not going to make more money than those people.

⁷ Mr. Belfiore deemed the correspondence from Merchant Link's outside counsel to be a harassing defensive ploy rather than an effort to resolve the compensation issue. T. 2/9 at 133.

Mr. Belfiore asserted that Mr. Lane controlled Merchant Link's human relations section and therefore had the power to set some salaries "and he had no problem paying them at a higher level than he would pay me even though they were at a lower level of the organization." T. 2/10 at 99 (Belfiore). Even though Mr. Lane had not been CEO before 2011, as head of the human relations staff he should have known all executive pay scales, including Mr. Belfiore's, and probably discussed them with Mr. Charron. *Id.* at 98-99.

Mr. Belfiore admitted he also had power to set compensation for his own subordinates although he contended Mr. Lane exercised ultimate control over all compensation after 2008 because he had "veto power" over all human relations decisions. T. 2/9 at 82; T. 2/10 at 100; T. 2/20 at 20-21.

Mr. Belfiore considered Mr. McCarthy's request for additional information to have been disingenuous. T. 2/20 at 38. Merchant Link already had sent him all relevant information; anything else was unnecessary. *Id.*⁸

6. *Compensation for Other Merchant Link Executives.*

⁸ In addition to introducing testimony and exhibits designed to prove the merits of his compensation claim, Mr. Belfiore called an expert to calculate the monetary relief he would be entitled to if he prevailed.

Rick Randall Gaskins was admitted as an expert witness on damages. He testified about a report he prepared. T. 2/13 at 69; CX 84. The report was intended to compare what Mr. Belfiore would have earned absent discrimination – "fair salary" – with what he did earn. *Id.* at 74, 82, 85. Calculations included separate columns for LTIP and AIP awards. Schedule 5 was a calculation of consequential damages. *Id.* at 87. Mr. Gaskins also calculated what additional taxes Mr. Belfiore would have to pay if he received two years of back- or front-pay as a lump sum rather than over a two-year period. *Id.* at 108-109. (In making these "tax equalization" calculations, he testified, the common practice is to assume that the recipient of back-pay would file separate rather than joint tax returns. *Id.* at 100-101).

Mr. Gaskins admitted that his "fair salary" numbers were all supplied to him by Mr. Belfiore: "I took the figures as presented because I don't have expertise in the vocational arena." *Id.* at 88, 91. Mr. Belfiore had not given him documentation to support the figures. *Id.* at 105. Mr. Gaskins simply did the arithmetic calculations for the differences between actual earnings and Mr. Belfiore's representations. *Id.* at 91, 106-107. The same was true with respect to the consequential damages and tax equalization numbers. *Id.* at 105, 106. In calculating damages, Mr. Gaskins had not taken Mr. Belfiore's efforts to find other employment into account. *Id.* at 93-94.

Mr. Gaskins conceded that his calculations would have to be revised if the numbers that Mr. Belfiore had provided were flawed. See *id.* at 80.

As I noted above, compensation comparisons can be somewhat confusing because of when LTIP awards vest. The parties stipulated to some pay packages in 2011. Merchant Link submitted an exhibit of actual 2011 and 2010 incomes as measured by Internal Revenue Commission W-2 forms. It also submitted a list of 2011 salaries alone. I address each of these in turn.

a. The parties stipulated to the authorized compensation packages for seven of its highest-level executives in 2011 other than Mr. Lane. HE ex. 4 ¶¶ 20-29. None had been appointed corporate officers by the board of managers. They include:

- *Executive 5*. Executive 5 had been hired by Mr. Justice in 2007 at \$160,000 (CX 2). Executive 5 left Merchant Link in May 2011. T. 2/10 at 114 (Belfiore).

- *Ms. Kirby-Meck*. Ms. Kirby-Meck was hired July 8, 2011, as executive vice-president for sales and marketing (replacing Mr. Kinsella), reporting directly to Mr. Lane. HE ex. 4 ¶ 22.

- *Ms. Smith*. In June 2011, Merchant Link hired Ms. Smith from Chase Paymentech as interim CFO. HE 4 at 3, ¶ 24. She received no AIP or LTIP awards. *Id.*

- *Mr. Chudasama*. Mr. Chudasama was the director of software development. HE ex. 4 ¶ 25.

- *Mr. Konar*. Mr. Konar was vice president of network operations. *Id.* ¶ 26.

- *Chris Sutherland*. Mr. Sutherland was a new hire in late June 2011 as director of enterprise security. *Id.* ¶ 27. Despite being a new employee, Mr. Sutherland was awarded an LTIP grant. See *id.*

- *Sue Zloth*. Ms. Zloth, was vice-president of product management.

The stipulated pay packages for 2011 translate to the amounts shown in the following chart arranged in descending order of total compensation, including Mr. Belfiore:

<u>Name</u> *	<u>Salary</u>	<u>AIP</u>	<u>LTIP</u>	<u>Total</u>
Executive 1	\$301,500	0	0	\$301,500
Executive 2	\$171,900	\$43,000 (25%)	\$50,000	\$264,900
Executive 3	\$169,400	\$42,300 (25%)	\$40,000	\$252,700
Executive 4	\$160,000	\$40,000 (25%)	\$50,000	\$250,000
Executive 5	\$167,000	\$42,000 (25%)	\$35,000	\$244,000
<i>Belfiore</i>	\$130,000	\$32,500 (25%)	\$75,000	\$237,000
Executive 6	\$175,000	\$35,000 (20%)	\$20,000	\$230,000
Executive 7	\$165,000	\$41,300 (25%)	0	\$206,300 ⁹

The parties' stipulation did not include pay packages for three other highly compensated employees, James Reese, Misael Henriquez, and Mary Bodhane. A Merchant Link exhibit identified Mr. Reese's and Mr. Henriquez's titles as "software developer V" and Ms. Bodhane's as "director, relationship mgmt." See RX 145

Executive 8's 2011 compensation packages appear in an undisputed exhibit submitted by Mr. Belfiore, CX 54:

as CTO	\$201,700	\$73,000 (25%)	\$150,000	\$424,700
as CEO	\$225,000	\$78,800 (35%)	\$210,000	\$513,800

b. Merchant Link submitted an exhibit displaying total compensation for Merchant Link's highest compensated employees in 2011 as measured by W-2 tax forms. RX 141 (1st page).¹⁰ It shows that employees who worked a full year, plus Mr. Belfiore, earned the following (in order of income):¹¹

* The names of the executives other than the Complainant have been redacted to protect their privacy.

⁹ Ms. Kirby-Meck did not receive an LTIP award in 2011 but did receive one in 2012. T. 2/13 at 125 (Lane).

¹⁰ The exhibit pages are numbered "ML 00087x" *et seq.* but the last digit, the "x," can't be read in the copies on file.

¹¹ William Gore, the new CFO who replaced Ms. Smith in 2012, testified that the exhibit is a compilation of income reported to the IRS on W-2 forms in 2010, 2011, and 2012. T.2/13 at 160. He acknowledged that the compensation reported for some on the list would not reflect full year compensation if the employee had left or joined Merchant Link before year's end. *Id.* at 163-164. For new hires, the exhibit would also not show LTIP awards because they had not vested. T, 2/13 at 165, 167.

At the hearing, I considered the exhibit unhelpful because of its partial-year figures but the portions of the exhibit included in this Report reflect income received by *full*-year employees in 2010 and 2011.

Executive 8*	\$409,000
Executive 9	211,000
Executive 4	208,100 ¹²
Executive 3	205,800
Executive 10	198,400
<i>Belfiore</i>	195,600 (until 11/11/11)

Converting Mr. Belfiore's 314-day earnings into a full year's income would have earned him approximately \$223,000, placing him second only to Executive 8 in the list.

The same exhibit gives full year earnings for 2010, showing the following employees who worked a full year, in order of income:

Executive 8*	\$345,900
Executive 2	246,700
Executive 5	243,200
Executive 9	200,200
Executive 10	195,400
Executive 11	179,902
<i>Belfiore</i>	174,300
Executive 3	164,500
Executive 4	164,400

c. Another Merchant Link exhibit provides 2011 salary-alone figures for 2011 (*i.e.*, omitting AIP and LTIP awards). CX 145. It shows the following employees had higher salaries than Mr. Belfiore that year:

Executive 1*	\$301,500
Executive 8	245,000
Executive 3	169,400
Executive 7	165,000
Executive 10	149,300
Executive 9	146,000
Executive 12	137,400
Executive 13	133,000
Executive 11	131,500

Mr. Khetane, whose name appears nowhere else in the record, is identified in the exhibit as "manager, database administration. *Id.*

* The names of the executives other than the Complainant have been redacted to protect their privacy.

¹² Mr. Konar left Merchant Link on the last work day of 2011, Friday, December 30.

7. *Merchant Link's explanation of its compensation packages.*

Mr. Lane was Merchant Link's chief defender. In addition, Mr. McCarthy, Mr. Charron, and Ms. Nussbaum provided testimony supporting Merchant Link's handling of Mr. Belfiore's compensation. As noted above, Mr. Belfiore introduced the Charron and Nussbaum depositions as hostile witnesses.

a. *Mr. Lane.* As he had in his internal September-October emails, Mr. Lane freely admitted that Mr. Belfiore's 2011 salary was well below that of other Merchant Link managers but the other components of his compensation "were right in line with his responsibilities." T. 2/11 at 196. While he believed that Mr. Belfiore's salary "was lower than it should have been, * * * I don't feel that had anything to do with Mr. Belfiore's race." T. 2/13 at 149.

Mr. Lane considered Mr. Belfiore to be a friend and pushed for a salary increase with the two-man compensation committee. T. 2/11 at 102. In general, Mr. Lane thought that Mr. Belfiore had been "doing a good job" at Merchant Link; he'd been "decisive," "delegated responsibility effectively," and "addressed problems quickly." T. 2/11 at 182-183. He'd also sometimes been surly, grouchy, and difficult to deal with, especially after he returned from medical leave. *Id.* at 183-185; T. 2/12 at 38.

Before Mr. Lane became CEO, he had no role in setting Mr. Belfiore's pay. T. 2/11 at 193. The first time he became aware that Mr. Belfiore was dissatisfied with his compensation was during the telephone call in August 2011, when he agreed to Mr. Belfiore's request that his salary be raised to \$172,000. *Id.* When he agreed to the raise, he had been unaware that the joint venture agreement kept the power to set officer pay exclusively in the board's hands. T. 2/10 at 96, 100. The error was called to his attention in the Smith email on October 6. *Id.* at 101; T. 2/11 at 199-200, 204. Mr. Charron had told him he would not veto the salary raise if Mr. Lane recommended it but Mr. McCarthy "definitely didn't agree with the amount"; he wanted Lane to phase in the increase after first establishing goals and timetables. T. 2/11 at 202; T. 2/12 at 18.

It was apparent from the Nussbaum research that Mr. Belfiore was earning less than other COOs in the Washington area but those earning more “had a broader range of responsibility” than Mr. Belfiore and some discrepancy in pay was therefore justified. T. 2/12 at 8.¹³

Mr. Lane had not raised the subject of Mr. Belfiore’s salary increase at a board meeting because he thought the compensation committee should act first. T. 2/10 at 119. The committee had taken up the issue on October 25 but did not make a decision. Although Mr. Lane had tentatively scheduled a follow-up committee meeting for November 8, the meeting didn’t take place because scheduling committee meetings was difficult and his staff hadn’t finished its research. T. 2/10 at 109, 120, 121.

In refutation of Mr. Belfiore’s contention that he should have been compensated at the same level as Mr. Lane (before he became CEO), Mr. Lane maintained he had had far broader responsibilities as COO and later as CTO. As COO and CTO he had supervised all of Merchant Link’s technology functions, a learning and development group, and the service delivery department. T. 2/11 at 50. He also took over the human relations responsibilities when Mr. Justice left in 2009. T. 2/10 at 177. He claimed he also often ran the company because Mr. Charron had “told us that if there were any decisions that had to be made” in Charron’s absence “Dan Lane would make the call.” T. 2/10 at 180.

Mr. Belfiore, by contrast, hadn’t taken over half of his responsibilities; he had just assumed a subset. T. 2/13 at 156. Mr. Belfiore inherited only service delivery from Mr. Lane, as well as a nascent billing department that mostly relied on accounting and finance services from Chase Paymentech from Dallas. T. 2/10 at 50, 177.

¹³ RX 95-96, part of the Nussbaum research, describe COO duties generally:

In compliance with the goals, policies, and objectives established by the Chief Executive Officer and Board of Directors, directs, coordinates, and administers all aspects of organization operations through subordinates. Assists in the development of organization policies that encompass such areas as personnel, financial performance, and organization expansion. * * *

In partial justification of his own pay packages while he was COO and CTO, Mr. Lane cited his long history with Merchant Link. He considered himself one of its two founders, together with Jim Margolies. T. 2/11 at 41. He had joined Merchant Link as its second employee in the early nineties. T. 2/11 at 41. Margolies had a 90% equity share in the company, Lane, 10%. *Id.* At the time, Margolies ran the business side of the company and Lane its day-to-day operations. T. 2/10 at 158-159. When the company was sold to Paymentech in 1995, Mr. Lane received 10% of the proceeds. *Id.* at 43. Together with six others, he holds two of Merchant Link's patents for its security and encryption products. T. 2/10 at 158. In 2002 –after Paymentech bought NXT, another company owned by Margolies where Executive 8 was employed at \$165,000 – his annual pay increased to \$180,000 and he became Merchant Link's COO. T. 2/11 at 47. Some NXT employees joined Merchant Link at the same time, including Ms. Zloth and Mr. Konar. T. 2/11 at 43, 64.

By early 2011, when Executive 8 was still the CTO, his overall compensation was \$410,000, including a salary of approximately \$202,000. T. 2/10 at 150-151; CX 54. His compensation grew to almost \$ 513,000 when he was named CEO, including \$225,000 in salary. *Id.*

Both as COO and as CTO after 2008, Executive 8 was classified as grade 15 or 16. T. 2/11 at 58-59. Mr. Lane denied that Merchant Link had implemented a grade and pay scale (CX 13), that included levels higher than grade 16. Higher grades had been used by Chase Paymentech but by mid-2009 Merchant Link had developed its own all-numerical grade scale. T. 2/11 at 59-60. (As Mr. Belfiore has noted, Merchant Link did not submit any revised pay/grade scale. See docket entry 74).

In his role as chief technology officer, with oversight of Merchant Link's human relations department, Mr. Lane had authority to set the pay of his subordinates so long as he kept annual pay increases to 3% or less (greater increases required approval by Mr. Charron or, earlier, Mr. Justice). T. 2/12 at 64-67. Within those parameters, he had given raises over the years that he believed his subordinates deserved. *Id.* at 67.

In setting his subordinates' pay when he was CTO, Mr. Lane did not consider what Mr. Belfiore, whose pay he did not control, was receiving. T. 2/13 at 147. Mr. Belfiore, Mr. Lane said, had similar authority to set the pay of his subordinates. T. 2/12 at 66. He had never come upon a written policy limiting salary increases to less than 10% at Merchant Link. T. 2/10 at 154.

Mr. Lane admitted that Mr. Belfiore supervised the largest number of Merchant Link employees. (T. 2/11 at 138) but he offered two principal reasons why Mr. Belfiore's salary and overall compensation lagged. One, echoing Mr. Charron, was that Mr. Belfiore had started in a relatively junior position with a commensurately low salary in 2005. (One undated exhibit from about 2007-2008, showing a combined Chase Paymentech-Merchant Link salary roster in descending order, ranked Mr. Belfiore 284th with a salary of \$93,700. See CX 141 (pages 5-10).

A second reason for Mr. Belfiore's somewhat overall lower compensation had to do with Merchant Link's status as a technology company, not as a service company. T. 2/10 at 83-84. Technology "drove the company." T. 2/10 at 55. Merchant Link provided "very complex technical products" for which its customers paid "a lot of money." T. 2/11 at 85-86.

Mr. Belfiore, however, served in a service capacity. He had no role in creating Merchant Link's products. T. 2/10 at 181. Mr. Lane doubted that Mr. Belfiore understood "a lot of aspects of our business very well" other than the work of his own departments. *Id.* at 183. The service delivery group, Mr. Lane testified "were viewed as a, by some as a help desk and we actually tried to fight that perception so they were somewhere between a help desk and a technical desk. * * * [S]o they were generally viewed as a, as lower responsibility, tended to be more hourly workers with less experience and a limited skillset" than Merchant Link's technical employees. T. 2/13 at 151-152. While service delivery, billing, and merchant services (another department Mr. Belfiore supervised) were important, "I don't think it was as important or critical to the business as the technology." T. 2/10 at 55; see, similarly, *id.* at 83. As for Mr. Belfiore's financial work, "this is a guess, maybe 20 percent of

the activities were done in Silver Spring and 80 percent of the activities were at Paymentech.” T. 2/13 at 153.

Pay at Merchant Link is generally based on the employee’s or new hire’s compensation history, skills, and prior experience. T. 2/11 at 168-169. Persons with a technology background are much harder to find and attract in the Washington area and so, for example, “we’re having to pay a lot of money for security engineers.” T. 2/10 at 172.

Mr. Lane did not know why Mr. Belfiore’s salary had not been increased when Mr. Belfiore’s grade had been corrected in 2011. T. 2/12 at 63-64. He and Charron had not discussed salary, possibly because “he was aware that Mr. Belfiore’s had already been increased.” T. 2/12 at 64. Mr. Lane was not asked why there had been no retroactive payment of AIP differences.

Mr. Lane believed that Mr. Belfiore’s responsibilities were not such that he deserved to be paid more than other senior executives. T. 2/11 at 197. He saw no distinction between “corporate officers” (aside from the CEO) and Merchant Link’s other high-level executives such as executive vice-presidents and vice-presidents. T. 2/13 at 136-137. Each was responsible for his or her division: “Everybody – regardless of whether someone’s a VP, an EVP or an officer, they reported to the president or CEO at the time[.] * * * [I]t wasn’t necessarily a hierarchy where everybody had to report up to a corporate officer.” T. 2/13 at 137.

Mr. Lane addressed the role and pay of several senior executives.

- *Mr. Konar*. When hired in 2006 he came on as director of network operations and his compensation was set at market rates for such a position. T. 2/13 at 128-129. His salary rose faster than Mr. Belfiore’s, partly because Konar had started at middle management earlier and because he played a highly critical role in supervising Merchant Link’s technology that was responsible for handling billions of transactions annually. T. 2/12 at 113, 126. He was hired at the director level; “I don’t consider that a middle manager.” T.2/12 at 113. He ran several divisions within the technology group, including “a 24 by 7 network operation center with several managers and some directors under him, and that network and those functions had

to be up all the time, 24/7, and had to handle an enormous amount of data and transaction volume flowing through there.” T. 2/13 at 142. People like Konar and others with specialized skills could demand higher salaries than corporate officers with broad but generalized skills. T. 2/12 at 118.

- *Mr. Chudasama* managed the company’s software which, together with Mr. Konar’s network “in combination were the technology that * * * drove the data.” T. 2/12 at 126. Mr. Chudasama managed a software development group of about 16. T. 2/13 at 143. Mr. Lane had hired him from Chase Paymentech in 2003 and his compensation was set at a level necessary to attract him to Merchant Link. T. 2/13 at 127. Mr. Chudasama was himself a software developer and had experience managing a team of software developers. T. 2/13, 127, 143.

- *Ms. Zloth* supervised a group of 8-12 product managers and systems analysts: T. 2/13 at 143. “These are the people that designed and interacted with customers and the market to develop, to provide the business and technical requirements to the software team to develop our products.” T. 2/13 at 132-133; 143. Her unit “developed many of our key projects like Transaction Vault, Transaction Shield, our core gateway functions, and these were the security and gateway products * * *.” *Id.* at 142. According to Mr. Lane, Ms. Zloth had a technical and project management background. *Id.* Together with Mr. Lane and four others, she owned a patent to technology used by Merchant Link. T. 2/11 at 158. Without her, Mr. Lane surmised, a project with Best Buy, worth about \$5 million of Merchant Link’s \$50 million revenue, might not have happened. *Id.* at 143.

Mr. Lane also gave Merchant Link’s reasons for the pay levels of some non-technology executives:

- Executive 5 was hired by Mr. Justice in 2006-2007 as vice president of sales from MICROS, one of Merchant Link’s most important hardware suppliers. T. 2/11 at 76. (He had been offered salary of \$160,000 at the time of hire. T. 2/10 at 15). Mr. Kinsella’s principal responsibility was to sell Merchant Link’s products to new clients and to manage relationships with existing clients. T. 2/11 at 131-132. His background was in selling and in managing salespeople. His background in sales and

marketing gave him a different skill-set from Mr. Belfiore's. *Id.* In the formal hierarchy, Mr. Kinsella was at the same level as Mr. Belfiore even though not recognized as a corporate officer. See *id.* at 136. Lane testified he had no role in setting Kinsella's compensation. See *id.* at 135.

- Mr. Lane hired *Ms. Kirby-Meck* shortly after Mr. Kinsella left Merchant Link in 2011. T. 2/12 at 111. Mr. Lane said he set her salary based on her experience, "her skillset, my interview with her, her reputation and her set of responsibilities that she was going to be running * * *." T.2/13 at125. Ms. Kirby-Meck's role, like that of Mr. Kinsella before her, was to bring in new customers and to maintain relationships with existing customers. T. 2/13 at 142. According to Lane, each in turn was responsible "for bringing in all the revenue for the business." *Id.*

- *Ms. Smith* had been hired on an interim basis as CFO to facilitate the transfer of Merchant Link's finances and accounting from Chase Paymentech in Dallas to Merchant Link's headquarters. Before she was hired, about 80% of those functions were carried out in Dallas and 20% in Silver Spring. T. 2/13 at 153. Ms. Smith was to build finance and accounting departments that could provide 100% of Merchant Link's needs over a twelve to fifteen-month period and to hire the necessary staff. *Id.* Mr. Charron was acting CEO when Merchant Link decided that Ms. Smith should transfer; he based her compensation on what she had been earning at Paymentech. T. 2/13 at 123. She was not eligible for AIP and LTIP payments.

Mr. Lane did not discuss Mr. Reese's, Mr. Henriquez's or Ms. Bodhane's compensation. By their titles, Mr. Reese and Mr. Henriquez presumably worked for Mr. Lane (as CTO) and Ms. Bodhane for Mr. Kinsella. See RX 145. The three came to Merchant Link from a company called NXT in 1995, 2004, and 1998, respectively. T. 2/11 at 43-44 (Lane); see CX 3. Mr. Lane had worked with them at NXT before the company was acquired by Chase Paymentech and merged into Merchant Link. T. 2/11 at 44.

After Mr. Belfiore was fired, he was replaced by Denise Williams as head of the service delivery departments but she did not inherit his title as COO. T. 2/12 at

65. To Mr. Lane's recollection she was given a grade of 13 or 14 and a salary of \$120,000, *Id.*

b. *McCarthy testimony.* Mr. McCarthy testified he had not known Mr. Belfiore was African-American before Mr. Belfiore raised the racial issue (presumably in the October 21 email). He said he "had no idea" and was "startled." T. 2/13 at 18, 57. He had never visited Merchant Link and had never met Mr. Belfiore; "[h]aving grown up with lots of people with names like Belfiore, I presumed he was Italian * * *." T. 2/13 at 57.

Mr. McCarthy didn't think the compensation committee had rejected Lane's request to increase Mr. Belfiore's salary; he thought the committee was "trying to materially improve his compensation." T. 2/13 at 23. He contended that his October 20 email dealt with a "bigger issue than Mr. Belfiore." *Id.* at 47: "My message back to Dan [Lane] was not about the compensation specifically. It was about management protocol and ensuring that proper approvals are received before proceeding." *Id.* Although Mr. Lane should not unilaterally have raised Mr. Belfiore's salary, Mr. McCarthy did not regard Lane's action as malfeasance "but a small and immaterial misstep." *Id.* at 52.

c. *Charron deposition.* Mr. Charron claimed to have little recollection of events. He had talked to Mr. Belfiore about his pay but couldn't say where or when; "I have conversations with a lot of people as it relates to their pay." CX 88 at 9. He vaguely remembered authorizing a salary increase for Mr. Belfiore while he was interim CEO but said "I can't recall" if he had ever denied an increase. *Id.* at 15. He also couldn't recall if Mr. McCarthy had raised concerns about Mr. Belfiore's salary in 2011. *Id.* at 22. He said he had never seen the Lane memorandum authorizing Mr. Belfiore's promotion to grade 16 in 2011, purportedly at Mr. Charron's suggestion, and couldn't recall any conversation with Lane about it. *Id.* at 25-26.

When asked if Mr. Belfiore was a corporate officer, Mr. Charron replied "I don't have an answer for that"; he understood only that he was "on the management team." *Id.* 23. He claimed that the board had no role in appointing corporate officers; that was a decision left to the CEO. *Id.* at 14-15. Merchant Link had only one corporate

officer in 2011, its CEO, Mr. Lane. *Id.* at 25. Asked if corporate officers were on the same level as other merchant Link executives, Mr. Charron replied they might be “the same or different.” *Id.* at 24.

d. Nussbaum deposition. Ms. Nussbaum (who was no longer employed by Merchant Link at the time of the deposition) testified that she didn’t believe Mr. Lane was aware that he needed compensation committee approval before authorizing a pay increase for Mr. Belfiore. CX 86 at 36. During her employment at Merchant Link, from June 2011 to November 2012, Mr. Belfiore’s salary increase was the only one that had necessitated compensation committee approval. *Id.* at 57.

From her perspective, “I think Dan Lane was genuinely trying to get Erik Belfiore a raise.” *Id.* at 40; see 65 (Lane acted in good faith), 67 (same)). She did not consider Mr. Lane’s failure to ask compensation committee approval for the raise originally to be an act of malfeasance because “I believe he honestly did not know he had to go through channels” instead of authorizing it on his own. *Id.* at 64-65.

Ms. Nussbaum said the \$42,000 request was unusually high, “I’ve never experienced an increase that high.” *Id.* at 19. In comparing compensation, “you don’t just look at a title * * *, the nature of the job is also important.” *Id.* at 32. Most COOs guide their company’s overall direction. *Id.* at 32. She assessed Mr. Belfiore’s role at Merchant Link to be less extensive. *Id.* at 32-33.

B. GOVERNING LAW AND LEGAL PRINCIPLES.

Among other things, the Human Rights Law prohibits employers from “discriminat[ing] against any individual with respect to compensation, terms, conditions, or privileges of employment” because of the individual’s race. M.C. Code § 27-19(a)(1).

The Human Rights Law, § 29-1(b) notes that “[t]he prohibitions in this article are substantially similar, but not necessarily identical, to prohibitions in federal and state law.” Maryland courts interpreting Maryland and County laws prohibiting discrimination have generally found federal decisions construing comparable federal laws to be persuasive authority. See, e.g., *Taylor v. Giant of Maryland, LLC*, 423 Md. 628, 652, 33 A.3d 445 (2011); *Chappell v. Southern Md. Hospital, Inc.*, 320 Md. 483,

494, 578 A.2d 766 (1990); *Edgewood Management Corp. v. Jackson*, 212 Md. App. 177, 200 n. 8, 66 A.3d 1152 (2013).

This is a case in which Mr. Belfiore claims that Merchant Link paid him less than other comparable employees because of his race. His evidence is circumstantial rather than direct, in the sense that he has presented no evidence in which a decision-maker has made racial comments or otherwise presented proof of discrimination under ordinary principles of proof. See *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728,731 (4th Cir. 1996).

In disparate treatment cases where the evidence is circumstantial, Maryland courts have adopted an analysis first promulgated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and amplified in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). See *Dobkin v. University of Baltimore School of Law*, 210 Md. App. 580, 592-593, 63 A.3d 692 (2013).¹⁴

First, the complaining employee must present a *prima facie* case of discrimination. The *prima facie* case “raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.” *Burdine*, 450 U.S. at 254, quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

In order to show disparate treatment in an employment case, the employee must show that similarly-situated employees of other races were treated better than he was. To make comparisons, *Taylor v. Giant of Md. LLC*, 423 Md. 628, 631 n. 2

¹⁴ The court cited the following Maryland cases:

Giant of Maryland, LLC v. Taylor, 188 Md. App. 1, 26, 981 A.2d 1 (2009), *rev'd on other grounds* 423 Md. 628, 33 A.3d 445 (2011); *Dep't of Natural Res. v. Heller*, 391 Md. 148, 171, 892 A.2d 497 (2006); *Maryland Commission on Human Relations v. Kaydon Ring & Seal, Inc.*, 149 Md. App. 666, 695–98, 818 A.2d 259 (2003); *Nerenberg v. RICA of Southern Maryland*, 131 Md. App. 646, 661, 750 A.2d 655 (2000); *Killian v. Kinzer*, 123 Md. App. 60, 68, 716 A.2d 1071 (1998); *Brandon v. Molesworth*, 104 Md. App. 167, 188 n. 18, 655 A.2d 1292 (1995), *aff'd in part, rev'd in part*, 341 Md. 621, 672 A.2d 608 (1996); *Maryland Shipbuilding & Drydock Co., Inc. v. Maryland Commission on Human Relations*, 70 Md. App. 538, 545–46, 521 A.2d 1263 (1987); *Levitz Furniture Corp. v. Prince George's County*, 72 Md. App. 103, 111–13, 527 A.2d 813 (1987); *Baltimore and Ohio Railroad Co. v. Bowen*, 60 Md. App. 299, 305, 482 A.2d 921 (1984); *Maryland Commission on Human Relations v. Washington County Community Action Council, Inc.*, 59 Md. App. 451, 455–56, 476 A.2d 222 (1984).

(2010) has noted there must be “evidence that a ‘similarly situated’ individual with ‘sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other *prima facie* evidence, would allow * * * an inference of discrimination” (indirectly quoting *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007); ellipses mine). *Taylor* was not itself a compensation case but its logic is sound and is easily transferable to compensation cases.

An employee can successfully establish a *prima facie* case of discrimination in compensation by showing that he or she is a member of a protected class, was paid less than those outside the protected class, and the other employees were performing substantially similar work. *Hemphill v. Atamark Corp.*, __ F. Supp. __ 2014 WL 1248296 (D. Md. 2014), *affirmed*, 582 Fed. Appx. 151 (2014) (“Without similarly situated comparators, plaintiff cannot demonstrate that he received unequal pay despite working the same job as non-African-American employees * * *”). Besides needing to establish the similarity of jobs held by the employee and others, the plaintiff must show that his duties required the same skill, effort, and responsibilities. See *Nixon v. State*, 96 Md. App. 485, 625 A.2d 404 (1993) (wage-discrimination case brought under Maryland’s Equal Pay for Equal Work Act, Md. Code, Labor and Employment, § 3-301 *et seq.*). Relying partly on Title VII case law, the court held that plaintiff, an associate professor, had failed to show she was comparably situated to other faculty in the department. See also *Haywood v. Locke*, 387 Fed. Appx. 355, 359 (4th Cir.2010) (plaintiff has the burden of showing he is “similar in all relevant respects to [his] comparator” but “need not be an exact match”).

Second, once the employee successfully presents sufficient evidence to establish a *prima facie* case, the employer must present evidence of “some legitimate, nondiscriminatory reason” for the alleged disparate treatment. *McDonnell Douglas*, 411 U.S. at 802. Although the employer needs to present sufficient probative evidence that raises genuine issues of fact, it need not “persuade the court that it was actually motivated by the proffered reasons.” *Burdine*, 450 U.S. at 254.

Third, if the employer presents probative evidence, the employee can nevertheless prevail by showing either that the discriminatory reason is the more likely explanation for the employer's actions or that the employer's proffered explanation is pretext – "unworthy of credence." *Id.* at 256.

Despite the three-step process, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. As the Court of Special Appeals has noted "'* * * an employer's reason for his action may be a good reason, a bad reason, a mistaken reason, * * * as long as the decision was not based on race and/or sex or other unlawful discriminatory criteria.'" *Levitz Furniture Corp. v. Prince George's County*, 72 Md. App. 103, 113, 527 A.2d 813 (1986) (quoting *Grier v. Casey*, 643 F. Supp. 298, 308 (W.D. N.C. 1986); ellipses, mine).

The County Human Rights Law contains a limitations section. M.C. Code § 27-7(d): "Any complaint must be filed with the director or the Commission within one year after the alleged discriminatory act or practice. If those acts or practices are continuing in nature, the complaint must be filed within one year after the most recent act or practice. * * *."

On its face, subsection (d) anticipates that some discriminatory practices are continuing in nature so that a complaint is timely if filed while the practice continues or within one year of the time it ends.

In the Order denying Merchant Link's motion to dismiss Mr. Belfiore's compensation claim as untimely, I held that *if* there was evidence showing a perpetuation of earlier discrimination within the statutory period then the complaint is timely and the discrimination remediable. As noted above, I believe the Supreme Court's *Ledbetter* decision is not controlling because it construes language distinguishable from § 27-7(d). It has also been superseded by federal and state legislative amendments that essentially adopt subsection (d)'s continuing violation principles. See Lilly Ledbetter Fair Pay Act, Pub. Law 111-2, 123 Stat. 5, amending § 706(e) of Title VII, 42 U.S.C 2000e-5(e); Md. Code, State Government, § 20-607, as amended.

It necessarily follows, however, that if there has been no discrimination within the year preceding the filing of a complaint, there has been no continuation of earlier practices. Under those circumstances, a complaint is untimely as to earlier time periods.

C. *DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW.*

Mr. Belfiore has established a *prima facie* case of discrimination in compensation. Despite his being one of only three second-tier executives, the other two (Lane and Kinsella) out-earned him considerably. Others, lower in the hierarchy, also earned more. The disparity manifested itself most glaringly in salary, but also in overall compensation, though less so. Mr. Belfiore is African American; those being compared were described by Mr. Belfiore as “white” or Indian (Konar and Chudasama).

In addition to these basics, Mr. Belfiore provided some detailed evidence to bolster his *prima facie* case of discrimination. He showed that when he was appointed COO, he did not receive the same compensation as Mr. Lane, his predecessor. Mr. Charron refused to increase his salary to match Lane’s, Kinsella’s, or others’, relying on a purported policy that, so far as the record shows, did not exist. Mr. Charron suggested he leave if he wasn’t satisfied with the pay increases he did receive. Even though Mr. Belfiore supervised half or more of Merchant Link’s employees as COO, his grade was raised only from 12 to 14, a mid-range management level. When it was raised to 16, it came with no retroactive salary or AIP adjustments. When Mr. Lane became CEO, he hired three new employees (Executives 1, 6 and 7) and set their salaries well above the \$130,000 that Mr. Belfiore was earning. And although Mr. Lane had proposed a \$42,000 salary raise in September 2011, his proposal had not been approved by the compensation committee by the time Mr. Belfiore was fired on November 11.

Merchant Link gave reasons for these disparities and the practices that created them. It explained that Mr. Belfiore’s compensation was not made commensurate with Mr. Lane’s because the departments and personnel transferred from Lane to Belfiore were only a subset of those Mr. Lane had supervised. In

addition, Mr. Lane had been one of Merchant Link's founding employees and contributor of some of its technology. He had been working at Merchant Link for its entire existence. His compensation reflected that background and his continuing responsibilities.

Mr. Belfiore did not present sufficient evidence that these explanations are untrue, inadequate, or a pretext for racial discrimination. While Mr. Belfiore inherited Mr. Lane's title, that alone does not require parity of compensation. Before the transfer of functions, Mr. Lane had far broader responsibilities than Mr. Belfiore did after the transfer. As COO, Mr. Lane appears to have been second in command of all Merchant Link divisions before May 2008. Mr. Belfiore inherited only a part of his portfolio. The departments that Mr. Belfiore acquired were also different. Mr. Lane supervised technology employees; Mr. Belfiore supervised service delivery employees. While Mr. Belfiore supervised more employees than Mr. Lane did as CTO, Merchant Link described the incumbents of Mr. Belfiore's departments as less skilled and less experienced. Mr. Justice described the service delivery function as providing a call center and "technical help desk." Without evidence to the contrary, Merchant Link could reasonably conclude that Mr. Lane's responsibilities as COO and CTO and Mr. Belfiore's responsibilities as COO differed enough that Mr. Belfiore did not warrant parity of compensation. *Cf. Galarraga v. Mariott Employees Fed. Credit Union*, __ F. Supp.2d __, 1996 WL 376408,(D. Md.1996) (Equal Pay Act case).¹⁵

The two men's backgrounds, skills, job history, compensation history, also differed materially. There is no evidence to support Mr. Belfiore's contention that Mr. Lane was not one of the founders of the company; he certainly was its first or second employee and in time contributed technology on which he holds patents.

¹⁵ In *Galarraga*, at *4, the district court granted summary judgment against the plaintiff COO who claimed discrimination because he was paid less than a director of data processing. The director was responsible for "researching, developing, and implementing new products, particularly hardware and communication networks." That "involved the highly technical aspects of technology development" and expertise. By contrast, the COO was engaged in general management but "never engaged in the highly technical aspects of data processing and technology development." Despite having some similar management responsibilities "the nature and scope of their management functions were very different, so different that no reasonable juror could find that both jobs were 'substantially equal.'" *Id.*

Apart from Mr. Margolies, he was the only employee to receive part of revenue when the company was sold to Chase Paymentech. Mr. Belfiore came later, started substantially lower in compensation – ranked 284th on Chase Payment Tech’s salary listing in 2007, compared to Mr. Lane’s 22nd – and had distinctly different skills. In short, Merchant Link could reasonably conclude that the two men’s roles and employment histories were sufficiently dissimilar that Mr. Belfiore’s compensation need not be pegged to Mr. Lane’s.¹⁶

Similar considerations apply to comparison with other highly compensated Merchant Link employees, such as Mr. Kinsella and Ms. Smith. Mr. Kinsella was on the same hierarchical level as Mr. Belfiore, even though not a corporate officer. His skills and background were in sales and marketing. As Mr. Lane explained, Mr. Kinsella’s role was to bring in revenue by finding and servicing customers. His skills and duties were very different from Mr. Belfiore’s. He also already had a salary in 2007-2008 that was about 70% higher than Mr. Belfiore’s. As CFO, Ms. Smith presumably was a “corporate officer,” although there is nothing in the record to confirm that. Her compensation was higher than anyone else’s at Merchant Link other than Mr. Lane despite the fact that she was to receive no bonuses. There’s un rebutted evidence that hers was a transitional appointment. Merchant Link explained that the salary was set to match her compensation at Chase Paymentech where she was CFO. She was chosen because her familiarity with Merchant Link’s financial affairs would permit a smooth transition to the company’s full independence from Paymentech’s financial systems. There is nothing in the record to undermine Merchant Link’s appraisal that the relative value of Mr. Kinsella’s and Ms. Smith’s roles, skills, and employment history justified compensation that differed markedly from Mr. Belfiore’s.

¹⁶ The Belfiore brief repeatedly states that Mr. Lane had a CO or GE grade as CTO and that Mr. Belfiore should have been promoted to at least the former. See br. at 11-12. If so, he would have been entitled to larger AIP bonuses. Mr. Lane, however, testified that he himself never rose beyond grade 16 as CTO and that Merchant Link never used grades higher than 16. Nothing in the record raises doubts about the truth of Mr. Lane’s testimony.

Although Mr. Belfiore argues that corporate officer titles, headcount, and “business discretion,” should be the only criteria relevant to assessments of disparity of treatment (br. at 10), that is too simplistic. Titles have some bearing but they are not strait-jackets. Not all directors are paid the same simply by virtue of their titles; neither are vice presidents, executive vice presidents, or, indeed corporate officers.¹⁷ An enterprise may look beyond titles to value the functions being performed, weighing their importance to the organization. They may also consider the employment market, using compensation practices to hold on to, or to lure, managers with skills that are in high demand. The number of employees under supervision, although relevant, also is not determinative. Organizational departments are not fungible. They fulfill different needs for the organization and, while all may be necessary, their worth is rarely identical.

Unlike the others already discussed, Mr. Konar, Mr. Chudasama, and Ms. Zloth were lower in Merchant Link’s formal hierarchy than Mr. Belfiore; they also had different duties, skills, employment histories and supervisor. Their strengths were technological skills that Mr. Belfiore did not share. (Ms. Zloth was part owner of patented technology that Merchant Link uses). While Mr. Lane and Mr. Justice disagreed about how to classify Merchant Link – as a service company or a technology company – there is no record evidence to undermine Mr. Lane’s assertion that “technology drove the company.” Konar, Chudasama, and Zloth had markedly higher salaries than Mr. Belfiore at the time of his promotion to COO. Thereafter, Mr. Lane, as CTO set their compensation based on his assessment of their worth to the company. Since Mr. Lane had no role in setting Mr. Belfiore’s salary during his tenure as CTO, he would not have been bound to moor their compensation to Mr. Belfiore’s. Based on the record, there is no basis for second-guessing Mr. Lane’s apparent determination as CTO that his high-level technology employees deserved to be paid at an elevated level unrelated to Mr. Belfiore’s quite different functions and skills. In fact, there is some support for his approach in Mr. Justice’s testimony that

¹⁷ For example, although Mr. Reese and Mr. Henriquez had the same title, their salaries differed by about \$22,000 in 2011. See CX 145.

Mr. Konar’s salary was raised a “couple” of times during Mr. Justice’s tenure “because we were trying to save and keep him from going somewhere.” T. 2/10 at 189.¹⁸

Ultimately, though, the issue is not whether Mr. Belfiore should have been better paid but whether gaps between his compensation and others’ was more likely caused by racial animus than by legitimate organizational needs. Merchant Link freely acknowledges that Mr. Belfiore’s salary was below where it deserved to be. For reasons already discussed, its explanations for the differences have not been discredited by a preponderance of the evidence.

There is insufficient evidence that the three men who had power over Mr. Belfiore’s compensation acted with racial motives. The evidence points in the opposite direction with respect to Mr. Lane and Mr. McCarthy. It is more ambiguous with respect to Mr. Charron, but remains insufficient to infer a racial component to his decisions.

Mr. Lane had no input in setting Mr. Belfiore’s pay while he was CTO. Although he had responsibility for Merchant Link’s personnel practices, that did not include setting Mr. Belfiore’s compensation. Under the company’s joint venture Agreement, only the board of managers is empowered to set the pay for company officers at the CEO’s recommendations. Nothing in the record suggests that Mr. Lane participated in or had any input in making those decisions before April 2011.

The record provides no support for Mr. Belfiore’s contention that Mr. Lane’s actions between September and November 2011 were part of a ruse. The emails sent during that period appear genuine and there is no reason not to read them at face value. Indeed, the raise that Mr. Lane agreed to actually took effect for two periods.

¹⁸ By one measure, Mr. Belfiore’s *salary* rose faster than that of Mr. Lane, Mr. Kinsella, Ms. Zloth, and Mr. Chudasama, but not as fast as Mr. Konar’s. *Compare* CX 3 *with* chart, above at 22:

	<u>2008</u>	<u>2011</u>	<u>difference</u>
Executive 8*	\$193,900	\$201,700	\$13,800 (7.1%)
Executive 5	\$162,000	\$167,000	\$ 5,000 (3.0%)
Executive 2	\$153,000	\$171,900	\$18,900 (12.4%)
Executive 3	\$152,800	\$169,400	\$16,600 (10.9%)
Executive 4	\$112,200	\$160,000	\$47,800 (41.8%)
Belfiore	\$105,000	\$130,000	\$25,000 (19.3%)

* The names of the executives other than the Complainant have been redacted to protect their privacy.

It was retracted only because Ms. Smith reminded Mr. Lane about the limits of his authority. Ms. Nussbaum, who no longer worked at Merchant Link, testified that she believed Mr. Lane was unaware that he could not unilaterally raise Mr. Belfiore's salary. She had no reason to fabricate and I credit her testimony. Once Mr. Lane was informed that the compensation committee needed to approve the increase, his subsequent emails show that he continued to pursue the matter diligently, marshalling evidence to support the raise and encouraging Mr. McCarthy – the sole sticking point – to support it promptly.

There's no evidence that Mr. McCarthy acted with racial animus. Mr. McCarthy testified he didn't know Mr. Belfiore's race and presumed he was Italian until he learned differently on October 21. Mr. McCarthy's testimony that the two men had never met is unrebutted. His pre-October 21 emails show that he objected to an immediate raise because he wanted a broader discussion of compensation at Merchant Link. The \$42,000 (32+ percent) raise was highly unusual, according to Ms. Nussbaum's testimony. It was reasonable for Mr. McCarthy to raise questions. Neither his emails, sent before he learned of Mr. Belfiore's race, nor his hearing testimony lend any credibility to the suspicion that he acted with an unlawfully ulterior purpose.

Mr. Charron's role is more shadowy. He did not testify in person, and I find much of his testimony doubtful at best. Mr. Charron's seeming coyness in remembering none of his actions in the relevant period prompts serious doubts. His forgetfulness seems to be more calculated than credible. And Merchant Link's failure to call its former CEO to explain the company's actions before 2011 raises suspicion.

It is established that Mr. Charron stood in the way of granting Mr. Belfiore a larger pay raise in 2008 and 2009. I credit Mr. Justice's testimony that Mr. Charron had used a Merchant Link "policy" to deny Mr. Belfiore more than a 10% raise in 2008. If there ever was such a policy, the record does not substantiate it. I also credit Mr. Belfiore's testimony that Mr. Charron told him in 2009 to look for another job if he didn't like his compensation.

Nevertheless, the record as a whole is far more ambiguous. Mr. Belfiore testified that Mr. Charron had been upset when he learned that Mr. Belfiore's LTIP grant had been only \$8,000 and took steps to raise it to \$50,000 in the following year. Mr. Belfiore testified that it was Mr. Charron who initiated his \$15,000 (14%) raise in 2009 although the increase was not as high as Mr. Belfiore believed to be adequate. These actions are inconsistent with the proposition that he harbored animus, although not dispositive.

More telling is that Mr. Charron authorized three consecutive \$75,000 LTIP awards in 2009, 2010, and 2011 with board approval. The record is skimpy about LTIP awards for other employees in 2009 and 2010, but Mr. Belfiore could not name anyone who received higher awards over that period. T. 2/9 at 204-205. So far as the record reveals, Mr. Belfiore received the highest LTIP award in 2011 (other than Mr. Lane) while Mr. Charron was still CEO.

In addition, there is no reason to doubt Mr. Lane's contemporaneous emails and his related testimony that Mr. Charron supported his request to raise Mr. Belfiore's salary to \$172,000. It was Mr. McCarthy, not Mr. Charron, who balked. It is highly unlikely that someone who harbored racial animosity against Mr. Belfiore would immediately sanction a \$42,000 salary increase for him.

While distinguishing motives is always problematical, I conclude that Mr. Belfiore has not established by a preponderance of evidence that Merchant Link's explanations for its pay practices were pretextual, unworthy of credence, or a disguise for racial discrimination.

IV. “UNDERMINING AUTHORITY” CLAIMS.

During these proceedings Mr. Belfiore claimed Merchant Link violated § 27-19(a)(1)(A) of the Human Rights Act in 2011 by undermining his managerial authority and thereby imposing discriminatory terms and conditions of employment on him because of his race. His brief cites several instances in before and after October 21, 2011, when personnel outside his chain of command circumvented him to go directly to his subordinates, made decisions without requesting his input as COO, didn’t provide him information he needed, and scheduled meetings without informing him. Although he sought Mr. Lane’s intervention, he asserts, he hadn’t gotten the support he deserved because of racial discrimination.

At the hearing, Mr. Belfiore focused on incidents occurring *after* October 21. These incidents, the Belfiore brief contends, were in retaliation for his threat to sue and violated § 27-19(c)(1) of the Human Rights Act. Section 27-19(c) provides: “(c) A person must not: 1) retaliate against any person for: (A) lawfully opposing any discriminatory practice prohibited under this division * * *.”

A. BELFIORE EVIDENCE.

1. *Belfiore testimony and evidence.*

Mr. Belfiore introduced several email exchanges he contends show that his authority was undermined *after* he threatened legal action against Merchant Link.

- On October 26, 2011, the manager of the customer help desk, Linest Eady, who reported to Mr. Belfiore, emailed Mr. Lane after she learned that a Belfiore-backed proposal to increase pay for her staff had been denied. CX 33.

Mr. Belfiore testified that he and Ms. Eady had proposed to reallocate funds intended to pay for new hires to increase the pay of existing employees in the service delivery department. T. 2/9 at 174-175. Although Mr. Lane had originally accepted the concept, he changed his mind. *Id.*

After the Lane denial, Eady and Belfiore agreed between themselves to forfeit an open position and to use the savings to raise wages for the existing staff. Ms. Eady’s email reflected that proposal. *Id.* Mr. Lane responded the same day, raising a number of questions. CX 33. Ms. Eady forwarded the Lane response to Mr. Belfiore

and told him she would provide answers to Lane's questions. In turn, Mr. Lane responded he would raise the question with Ms. Nussbaum. *Id.* Neither party has included evidence in the record about what happened next.

Mr. Belfiore believed he had been excluded from the decision-making (T.2/9 at 175-176):

Well, he's in my garden right now. If I want to hire more people, it's my decision; it's not his. These are my people, these are my decisions to make, and you're going and brokering deals with my people and you're not even – he's copying Wendy, but he didn't add Erik. Where was * * * the response, the appropriate response that would have said: Had you talked to Erik about this? What does Erik think? So basically he, I guess he decided that I was a non-entity, so he needed to do my job.

- On November 3, 2011, Mr. Belfiore responded to a November 1 email from Mr. Lane asking why he had not attended an October 31 meeting held to prepare for a future board presentation. CX 28. Mr. Belfiore testified that before he filed his complaint of discrimination he and Mr. Lane had worked closely together. T. 2/9 at 161. They would telephone each other each morning and talk about company policies, plans, and procedures. *Id.* He saw the November 1 email as “a way that Dan was trying to build a case” once Mr. Belfiore had notified him he was considering filing a complaint. *Id.* at 162. Mr. Belfiore had forwarded the email exchange to his lawyer. *Id.* at 161.

Mr. Belfiore wrote in his response to the Lane email that he had waited until 30 minutes before the meeting but hadn't received the information necessary to prepare. CX 28. He could not perform his job “if I am not fully included and apprised of all relevant information beforehand.” *Id.* He cited an incident the previous month in which he had notified Mr. Lane that a different meeting should be rescheduled because he was ill; although that meeting was rescheduled, Mr. Belfiore was not informed. *Id.* Both incidents confirmed “a chronic complaint of mine * * * that I continue to endure either exclusion or an undermining of my authority that precludes me of [*sic*] discharging my responsibilities * * *.” *Id.*

Mr. Belfiore testified he had planned to attend the October 31 meeting but information he needed that had been promised by Ms. Smith earlier that day never

arrived. *Id.* at 172-173, citing CX 32. Mr. Belfiore explained that preparations for board meetings require much advance study and internal coordination to permit the board to make informed decisions. T. 2/9 at 164.

- On November 1, the day after Mr. Lane sent his email asking why Mr. Belfiore had not attended the board meeting, Mr. Belfiore discovered that Ms. Smith had scheduled a slide presentation to which he had not been invited. T. 2/9 at 166; CX 30. He learned of the presentation adventitiously because he and Lane shared the same calendars. *Id.* The meeting was rescheduled but, again, Mr. Belfiore was not informed. *Id.* at 168, citing CX 29.

Even as Mr. Lane complained that Mr. Belfiore wasn't attending meetings, Mr. Lane wasn't notifying him that meetings were being scheduled. *Id.*

- Also, on November 1, a meeting of the management review team was scheduled by Michael Ryan, a sales representative reporting to Ms. Kirby-Meck. CX 31; T. 2/9 at 170. Mr. Belfiore was a member of the management review team, along with Mr. Lane and Ms. Kirby-Meck. *Id.* at 169. Ordinarily, the team would meet on Fridays to discuss the details of possible sales to major customers. *Id.* at 170.

Mr. Belfiore, however, was not among those notified of the meeting. *Id.* So although Mr. Lane chastised him for not attending meetings, "he's not even inviting me to the meetings, or when he sees I'm not invited, he's not picking up the phone and saying * * * I need you to be there to help make this decision." *Id.* at 171.

Asked on cross-examination why Mr. Lane would try to undermine his authority at the same time he was recommending a salary increase, Mr. Belfiore responded Mr. Lane changed his attitude after October 21 (T. 2/10 at 39):

Dan Lane was feverishly trying to get me a raise until shortly after the 10/21 e-mail. There's a 10/25 e-mail, a recap of the Board of Directors, that the whole process of getting my raise had changed, the whole reason and rationale for my raise had changed. And then after 10/25, Dan Lane was no longer feverishly trying to get me a raise and he was * * * investing in these undermining tactics * * *.

2. *Timothy Robinson testimony.*

Mr. Belfiore called Timothy Robinson, who worked under Mr. Belfiore's supervision as a billings operations manager, to testify about several instances when

other managers would come directly to him rather than to Mr. Belfiore. T. 2/10 at 191. The incidents happened before and after October 21, 2011. *Id.* at 209

Mr. Robinson was hired in 2009 as the billing operations manager. T. 2/12 at 182, 183-184. He is one of Mr. Belfiore's neighbors and Mr. Belfiore had alerted him to the job opening. *Id.* Mr. Robinson described himself as Mr. Belfiore's close confidant. T. 2/10 at 197.

Among those who sometimes avoided Mr. Belfiore was Mr. Kinsella, who would approach Mr. Robinson directly to make billing changes even though Mr. Robinson had repeatedly told him to go through Mr. Belfiore because only he had authority to make such changes. *Id.* Sometimes Mr. Kinsella would stop for a few weeks and then resume coming directly to him. *Id.* at 192.

Similarly, Mary Anderson, director of project management (who worked remotely in Colorado), behaved the same way despite several reminders from Mr. Robinson to present her issues to Mr. Belfiore first. T. 2/12 at 192-193, 195 citing CX 34. On September 20, she had sent out an email requesting an invoice be sent to a bank customer. *Id.*; T.2/10 at 196. It was Mr. Belfiore, not Mr. Robinson, who had final authority about billing changes. Mr. Belfiore was not included in the email. On October 16, Ms. Anderson wrote Lane, Smith, Kirby-Meck and others, including Mr. Robinson, about a meeting she had with an outside group over a possible change in billing. See CX 35. According to Mr. Robinson, she hadn't explicitly refused his requests to include Mr. Belfiore but she continued to email Mr. Robinson without copying them to Mr. Belfiore. *Id.* at 195-197,.

In addition to Mr. Kinsella and Ms. Anderson, Mr. Chudasama would sometimes come to Mr. Robinson's door with requests that should have been addressed to Mr. Belfiore. *Id.* at 212.

Mr. Robinson didn't know if Mr. Kinsella's and Ms. Anderson's actions were race-based. *Id.* at 205, 208. It is unlikely that Ms. Anderson, in Colorado, knew Mr. Belfiore's race. *Id.* at 212. He described the Belfiore-Kinsella relationship as cordial and business-like. *Id.* at 204-205.

Mr. Robinson learned from conversations with Mr. Belfiore that he felt he was being excluded from participation in meetings and decisions. *Id.* at 198, 199, 208. Mr. Belfiore complained to him that he was being left “out of the loop and that affected his ability to do his job.” *Id.* at 209. In particular (*id.* at 198),

there were certain meetings he would discuss with me that he found out after the fact as far as being excluded. Certain meetings that he should have been a part of, I thought, he was not being made aware of or being a part of those meetings.

Mr. Robinson acknowledged he had no independent knowledge about all meetings, but he participated in some that should have included Mr. Belfiore and hadn't. *Id.* at 202.

Mr. Belfiore seemed more wary in his last month at work. Before October, Mr. Belfiore's door had normally been open but in his last weeks at Merchant Link it was usually closed. T. 2/12 at 207. Mr. Belfiore had told him, “they're looking for something, you know, they're harassing me, so I just keep my door closed” until they knock. *Id.*

B. *MERCHANT LINK EVIDENCE.*

1. *Cross-Examination of Mr. Belfiore.*

On cross-examination Mr. Belfiore agreed that he had expressed concern about the circumvention of his authority before October 21. He had “issues with specific individuals” for years. T. 2/10 at 39. When they arose he preferred to go to Mr. Lane to settle the matter because of Mr. Lane's relationships: “I would prefer that they handle the business in the correct way.” *Id.* When he spoke to Mr. Lane in August about pay, he also complained about circumvention of his authority: “I brought my issues to Dan for resolution before concluding that they were for nefarious reasons.” T. 2/20 at 43.

Mr. Belfiore did not testify about these earlier incidents in his case-in-chief but cited them as evidence of racial bias in his pre-hearing submissions and in his post hearing brief. They appear in the record because Merchant Link asked about them during cross-examination.

In March 2011, Mr. Belfiore complained to Mr. Lane about not receiving information from Ms. Zloth. RX 72. On cross-examination, Mr. Belfiore testified that this was another example of when he and his staff had not been consulted about matters within their jurisdictions (T. 2/10 at 45):

This is just another incident documented where they wanted a member of my staff to participate into some * * * deal that my involvement of my people in any situation had to be done with my approval and my authority and they saw fit to go around me and around the people that needed to be involved in this discussion * * *. Dan Lane facilitated this often.

On his first day back from medical leave in August, Mr. Belfiore wrote Mr. Lane and Ms. Nussbaum that he hadn't been consulted before Ms. Nussbaum moved the office services manager, Nicole Robinson, from the 9th floor, where Mr. Belfiore's office was located, to the 7th floor. T. 2/10 at 46; RX 73. After Ms. Nussbaum responded a few minutes later with explanations for the move, Mr. Belfiore replied he would take up the issue with Mr. Lane. *Id.* Ms. Nussbaum, in turn, replied that she should be involved in any discussion because "Nichole reports directly to me." *Id.* Mr. Lane wrote both Ms. Nussbaum and Mr. Belfiore he would come by later in the day to discuss the issue. *Id.* The record evidence on the incident ends there.

On September 8 Mr. Belfiore emailed a request to Ms. Smith for what his brief (at 18) calls a Service Delivery and Salary Plan that would have an impact on his departments in the next year. RX 74. The email was sent at 9:39 a.m. Two hours later, he sent a follow-up email to Mr. Lane (but not Ms. Smith) asking for his help: "I really need this information * * *." *Id.* Mr. Lane replied three-quarters of an hour later, saying he'd left a message with Ms. Smith and that he would ask her to provide what information she had assembled. *Id.* A few minutes later, Mr. Belfiore wrote Mr. Lane again (but not Ms. Smith) telling him that Mr. Belfiore needed the information for a meeting the next day. *Id.* The record does not disclose whether Ms. Smith provided the information.

On September 20, 2011, after Mr. Robinson forwarded Ms. Anderson's first email, Mr. Belfiore wrote to Ms. Anderson and to Mr. Lane that he needed to be included in emails relating to billing. *Id.* Nevertheless, as Mr. Robinson had testified,

Ms. Anderson again scheduled a meeting on October 18 without notifying him. RX 76; T. 2/10 at 43.

On cross-examination, Mr. Belfiore acknowledged he *had* been invited to a meeting of the management review team on November 4. T. 2/10 at 47. In an email he asked Mr. Lane whether the people involved were in the meeting were members of the team; when told they were, Mr. Belfiore replied he didn't agree with a change in process. JE 82. In further emails between the two men, Mr. Lane explained that the new process would shorten turnaround times. *Id.* Mr. Belfiore replied, "So, what?" *Id.*

Mr. Belfiore acknowledged he had also been invited to a meeting on November 3 but had to decline the meeting to pick up his daughter at school at midday. RX 79; T. 2/10 at 49-50.

2. *Mr. Lane's Testimony.*

Mr. Lane provided Merchant Link's only testimony on the "undermining of authority" claim. He had kept in touch with Mr. Belfiore every few weeks while he was on medical leave. During that time, Mr. Belfiore had only occasionally been engaged in company matters; after he returned, he was less and less engaged. T. 2/11 at 188-189; T. 2/12 at 28. Mr. Lane talked to him about his attitude and Mr. Belfiore responded he was frustrated with his pay. *Id.* Mr. Lane told him to come back motivated and promised to "take care of him" if he did. T. 2/11 at 190.

When Mr. Belfiore returned from his medical leave, his surliness became more intense. T. 2/11 at 184. He barked at some employees and told them to leave because he didn't want to talk to them. *Id.* at 185. When Mr. Lane mentioned his surliness, Mr. Belfiore would "argue with me or give me a reason why he was." T. 2/11 at 184. He was "[t]erse, confrontational, sometimes combative." T. 2/12 at 38. The November 4 email exchange about altered procedures for the management review team that ended with Mr. Belfiore's "So what?" were typical Belfiore emails and their tone "was typical of his attitude." *Id.*, citing RX 82.

Mr. Belfiore attended meetings in the early days of his employment but in about late 2010 he skipped many. *Id.* at 185. He told Mr. Lane he didn't have time

or that the meeting held no value for him. *Id.* In particular, Mr. Belfiore hadn't attended board meetings in 2011 although his presence was expected. T. 2/12 at 28-29, 35; CX 55E.

C. *GOVERNING LAW AND LEGAL PRINCIPLES.*

1. *Discriminatory terms and conditions.*

There is no doubt that a complainant in a discrimination case may prevail by demonstrating that the employer intentionally engaged in a pattern of racial or other prohibited discrimination that ultimately had *tangible* effects on the employee. *State Commission on Human Relations v. Kaydon Ring & Seal, Inc.*, 149 Md. App. 666, 676-677, 818 A.2d 259 (2003). It is less clear how to assess employment decisions that affect an employee but can't be characterized as "tangible"

In a series of cases, the Supreme Court has held that the prohibitions in Title VII are not limited to "economic" or "tangible" discrimination. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002), quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Nevertheless, to be actionable the employer's conduct must be "severe" or must "unreasonably interfere[] with an employee's work performance." *Morgan*, 536 U.S. at 116; *Harris*, 510 U.S. at 23. In evaluating the evidence, courts must look at the totality of circumstances. *Id.* *Morgan*, *Harris*, and *Meritor* were "hostile work environment" in which employees suffered some sort of harassment from supervisors or fellow employees and management knew or should have known of its existence.

In order to be actionable, a claim involving intangible discrimination must meet an objective standard, "severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive * * *." *Zuzul v. McDonald*, ___ F. Supp.3d ___, 2015 WL 1474924 (M.D.N.C. 2015), quoting *Conner v. Schrader Bridgeport Int'l, Inc.*, 227 F.3d 179, 192 (4th Cir. 2000) (internal brackets omitted by the court; ellipses, mine).

Although the "hostile environment" cases are not on all fours with the claims that Mr. Belfiore presents, the Fourth Circuit has twice suggested (but did not find)

that a “significant decrease” in an employee’s “level of responsibility” can so “adversely affect[s] the terms, conditions, or benefits of [his] employment” as to violate Title VII when caused by prohibited bias. *Holland*, 487 F.3d at 219; *Boone*, 178 F.3d at 256-57 (see, above, Statement of the Case).

In such cases, an objective standard would still be necessary and the “significant decrease” would need to be severe. *Boone* cautioned that “Congress did not intend Title VII to provide redress for “trivial discomforts endemic to employment.” *Id.*, 178 F.3d at 256. Otherwise, Commissions and courts would be constantly enmeshed in the minor tribulations of the workplace and common personality conflicts. Title VII, the Supreme Court noted, is not “a general civility code for the American workplace.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). Neither is § 27-19(c).

2. *Retaliatory terms and conditions.*

Most of the focus of Mr. Belfiore’s “circumventing” and “undermining” evidence involved incidents that his brief asserts so “escalated in the time frame after 10/21/2011” that it constitutes retaliation. Br. at 20. The next section of this report deals with a claim of a tangible harm, Mr. Belfiore’s firing. This section is limited to whatever intangible harms he may have suffered before then because of alleged retaliation.

In *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 67-68 (2006) the Supreme Court held that Title VII’s retaliation provision does not prohibit all retaliation but only actions that a “reasonable employee” would have found to be “materially adverse, ‘which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” (Indirectly quoting *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)).

The Court cautioned that the retaliation provision does not make “petty slights,” “minor annoyances,” and “simple lack of good manners.” actionable. *Id.* at 68. The gauge is how a reasonable employee would react “because we believe that the provision’s standard for judging harms must be objective.” *Id.*

D. *DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW.*

None of the incidents that Mr. Belfiore has cited, singly or as a whole, amount to actionable violations of either § 27-19(a)(1) or § 27-19(c)(1). They were neither severe nor pervasive. While some were undoubtedly frustrating for Mr. Belfiore, their impact was not “materially adverse.”

The incidents involved different coworkers under substantially different circumstances. None of them suggest they were orchestrated by Merchant Link. Instead, to the objective observer, they appear to be isolated events common to most large workplaces.

Ms. Anderson probably should have included Mr. Belfiore in her two emails; Mr. Kinsella and Mr. Chudasama should have walked their problems by Mr. Belfiore before going to Mr. Robinson. If the Commission were a mediator or counselor, Mr. Belfiore’s grievances about their conduct would have some traction. But, as the courts have written, anti-discrimination laws do not regulate workplace harmony or civility.

In the Anderson, Kinsella, and Chudasama cases, moreover, it is implausible to infer that race played a role in their behavior. It is highly unlikely that they would avoid Mr. Belfiore because he is African-American only to go to Mr. Robinson, who is also African-American. In addition, in Ms. Anderson’s case in Colorado, there is some doubt whether she even knew that Mr. Belfiore was African-American.

In the September 8 exchange with Ms. Smith about the Service Delivery and Salary Plan, the interval between Mr. Belfiore’s initial request and his two follow-ups was only about two hours. The evidence does not reveal what became of the request. It’s not readily apparent how the delay undermined Mr. Belfiore’s authority or how it could be characterized as severe.

The decision to move Ms. Robinson from one floor to another apparently occurred while Mr. Belfiore was on medical leave. He learned about it the day he returned. He then went over Ms. Nussbaum’s head to Mr. Lane, angering Ms. Nussbaum who felt *she* should be involved in any decision about where her subordinate should work. Mr. Lane agreed to discuss their dispute. Although the record is silent, he presumably overrode Mr. Belfiore’s objections.

While it might have been better practice to consult the absent COO beforehand, Ms. Robinson didn't work for him. It is not obvious how the move of someone in a different department undermined Mr. Belfiore's authority. The incident can only be characterized as normal bureaucratic infighting, nothing more.

The four incidents that occurred after October 21 appear to be more of the same. Ms. Smith had not provided Mr. Belfiore information in time so that he could prepare for a meeting. The trouble is that the record does not reveal whether anyone had received the information in time. Mr. Belfiore chose not to attend the meeting without what he believed he needed. He could have gone and protested that he could not meaningfully participate because he hadn't received the information. Because he was absent without apparent explanation, Mr. Lane chastised him for not showing up. Such misunderstandings are fairly common in large organizations. They do not necessarily reflect either bias or retaliation.

There is no explanation why Mr. Belfiore was not on the November 1 list of invitees to meetings called by Mr. Ryan and Ms. Smith. I assume that failure to notify him made it difficult for him to perform his duties. There is no evidence that Mr. Ryan knew about Mr. Belfiore's pay dispute, so there is no basis for inferring that his omission from the list of invitees was part of a retaliatory scheme.

As for Ms. Smith, there is inadequate support from the record for holding that her failure to invite him rises to the level that a reasonable employee would find severe enough to dissuade him from pursuing his statutory remedies.

Finally, there remains Mr. Lane's apparent rejection of the Belfiore-Eady proposal to sacrifice an open position in order to increase the pay for members of Mr. Belfiore's staff. The record does not disclose what ultimately became of the proposal. On its face, a CEO's hesitation about reallocation of funds is not unreasonable. Merchant Link offered no explanation as to why it would not let its COO run his units so it's possible to infer that an ulterior motive at play. Even so, Mr. Lane's deferral of a decision – or even rejection of the proposal – is not such a materially adverse action that it can reasonably be characterized as violating either § 27-19(a)(1) or § 27-19(c)(1).

I conclude that Mr. Belfiore has not established a *prima facie* case that the post-October 21 incidents, much less the earlier ones, whether viewed individually or as a whole, so undermined his authority as to so gravely alter the terms and conditions of his employment in violation of the Human Rights Law.

V. RETALIATORY DISCHARGE CLAIM.

A. INTRODUCTION.

Mr. Belfiore's downfall was precipitated by a meeting he had on Tuesday, November 8, 2011, with Renee Dantzler, a Merchant Link training specialist. Ms. Dantzler is African American. She was distraught after the meeting and reported it the next day to Zachary Minton, her supervisor and manager for learning and development under Mr. Lane. Mr. Minton referred her to Ms. Nussbaum, who asked Ms. Dantzler to memorialize her recollections in writing. Ms. Dantzler did so on Thursday, November 10 in a two-and-half page memorandum. CX 82. Mr. Minton, who was not called to testify, wrote an email the same day to Nussbaum and Lane detailing his meeting with Ms. Dantzler. Ms. Nussbaum then interviewed Ms. Dantzler and reported what she had learned to Mr. Lane.

Mr. Belfiore was fired the next day, Friday, November 11, without being interviewed. Aside from Ms. Dantzler, no Merchant Link employee was interviewed.

Mr. Lane and two members of Merchant Link's board of managers (McCarthy and Charron) testified that they believed that Mr. Belfiore had tried to get Ms. Dantzler to "sabotage" the customer relations management (CRM) system developed by Microsoft Dynamics that Merchant Link had begun to implement in March of 2011, shortly before Mr. Belfiore left on medical leave in May.

Adoption of the CRM generated complaints by those who were to use it. Dissatisfaction with the system greeted Mr. Belfiore when he returned from medical leave: "[T]here was sort of a line at his door" according to Mr. Robinson, the billings operations manager. T. 2/12 at 188. Mr. Belfiore himself was not a user of the new program and had no direct role in its implementation.

The notice of termination, delivered in person by Mr. Lane, told Mr. Belfiore that he was being fired "for inappropriate communications and mismanagement of

your position, in violation of Merchant Link, LLC's policies, code, and mission, and in violation of your fiduciary duties of due care, good faith, and loyalty." (CX 66). It ordered him to leave the premises immediately. *Id.*

Although McCarthy and Charron testified that the board of managers had affirmed Mr. Lane's decision to fire Mr. Belfiore, no minutes of the board meeting were produced at the hearing. At the time of Mr. Belfiore's discharge the board of managers consisted of two other members. Neither was called to testify and the record is silent as to their reaction or whether they had been informed.¹⁹

B. *SUMMARY OF EVIDENCE.*

1. *Evidence Presented on Behalf of Mr. Belfiore.*

a. *Belfiore testimony.* Mr. Belfiore believed Merchant Link concocted its assertion he had tried to sabotage the CRM (T. 2/10 at 154)

because on October 25th, after receiving my claim, they wanted to purposely frustrate my ability to follow through on my pursuit for justice and they knew that as long as I was there, okay, I would have money, okay, to fund the litigation and I would have access to potential information that could support my claim.

Prior to November 11, 2011, he had never had a negative review or been threatened with termination. T. 2/9 at 37, 158.

Mr. Belfiore acknowledged that the CRM project was important to Merchant Link because it was to be used by so many of its units, primarily including his service delivery staff, and in so many of its functions. T. 2/10 at 51. There had been problems with the program before he went on medical leave but after talking with Mr. Lane, he was assured they'd be fixed: "I was a firm believer in Dan Lane and I honestly felt that he would keep his word. So I didn't think that there were anything to worry about, but what I told [his service delivery staff] is, is that it's their job to document issues as they arise with the implementation," T. 2/9 at 141-142.

He personally had no preferences among the several competing programs but when he returned from medical leave he learned his staff was "up in arms" and

¹⁹ Minutes of a May 16, 2012, board meeting gives the name of two board members then serving as Diane Vogt Faro and George White. (See CX 55(c)). Their names do not appear elsewhere in the record and it is not clear whether they were serving on the board in November 2011.

“distraught” about the Microsoft Dynamics system because it didn’t perform “the very basic functions they needed * * *.” T. 2/9 at 134; T. 2/10 at 54. They also were upset that their concerns weren’t being addressed. *Id.*

In September or October he had telephoned Mr. Chudasama, who had selected the Microsoft Dynamics program, to request that he meet with the service delivery staff, but Chudasama rejected the invitation as a waste of time. T. 2/9 at 153. Mr. Belfiore said he had told Mr. Chudasama that his staff needed a feeling of “ownership” because the one thing about implementing software, if the people who have to use the software “don't take ownership, it will never work right.” *Id.* at 152. Mr. Belfiore repeated his concerns to Mr. Lane who responded that he supported whatever Mr. Chudasama had decided. According to Mr. Belfiore, he couldn’t understand why Mr. Lane wasn’t “as interested as I to get a viable working system * * *.” T.2/10 at 56.

Before the November 8 meeting he had only passing familiarity with Ms. Dantzler and had had no interaction with Mr. Minton. T. 2/10 at 101, 102. On cross-examination, he said that he talked to Ms. Dantzler rather than Mr. Minton because his own (unnamed) department heads had asked him to do so.

Mr. Belfiore testified he called Ms. Dantzler into his office to learn what her role would be and to ask her to talk to his staff so that they could “collaborate and then everybody can come out okay on this.” T. 2/9 at 143. She had not responded to his suggestion. *Id.*

He acknowledged he told Ms. Dantzler that he had “put [in] a good word for her” when she had applied for the training position,” to which she had responded that God had gotten her the job. T.2/9 at 150; T. 2/10 at 60. He had been trying to put Ms. Dantzler at ease: “I was the COO. She was very low on the chain. I didn’t [want] her to feel I was asking her to do something or coercing her. I wanted to add levity to the, to the discourse.” T. 2/10 at 60. Ms. Dantzler, however, had “rebuffed my attempt at levity.” T. 2/10 at 64. Mr. Belfiore maintained that he had provided help to Ms. Dantzler when the training position had become open even if she was unaware of it: “I went to Dan Lane and I said, Dan, why are we not looking at Renee Dantzler,

what we need is people who can show people what they do on the deck. She's been on the deck for a number of years * * * so why don't we give her a shot?" T. 2/10 at 62.

Mr. Belfiore denied he had threatened her employment. T. 2/9 at 144. On cross-examination, he testified he also mentioned that someone who had received help should "pay the gesture forward." T. 2/10 at 61, 133.

After Ms. Dantzler's rebuff, Mr. Belfiore testified he told her (T.2/9 at 151),

I know you got a tight deadline, but people out there are very, very interested in getting a good system. They're willing to help you if you need help. So it's on you. You can either ask for their help or not, and see you, Renee, have a nice life.

Mr. Belfiore denied that he was trying to sabotage the CRM system; he had no means to do so because he had no access to the program and had no active management role in its implementation. T. 2/9 at 151. Because Ms. Dantzler was a trainer, he believed that she also had no means to sabotage implementation: her role was to train workers how to use the system, "not training people on how the system doesn't work." *Id.* at 154. In addition, "documenting problems with the system is totally counter to her role." *Id.*

Mr. Belfiore denied saying "fucking" or other curse words during the meeting. T. 2/10 at 65, 132. He also hadn't asked Ms. Dantzler to avoid telling Mr. Minton about their meeting and hadn't told her "Zack is not on my level." T.2/9 at 67. He hadn't done so because "Zack was a nonentity to me." *Id.*

Mr. Belfiore complained that Merchant Link hadn't followed its own procedures when it fired him, citing part of a February 2011 employee handbook titled "Harassment." T. 2/9 at 148, citing CX 43. The handbook prohibits actions that "would have the effect of creating a threatening or hostile work environment." CX 43 at 14. Harassment "includes, but is not limited to, slurs, jokes, and other verbal, graphic, or physical contact relating to an individual's race, color, sex, sexual orientation, religion, national origin, citizenship, age, or disability." *Id.* After receiving a report of harassment, "the company will thoroughly and objectively investigate all reports * * *." *Id.* at 15. Disciplinary action may include termination,

depending on “the severity of the misconduct and the number of infractions noted.” *Id.* From Mr. Belfiore’s perspective, Merchant Link’s investigation of Ms. Dantzler’s grievance didn’t meet handbook standards. T. 2/9 at 148.

b. *Jomaine E. Sanders testimony.* Mr. Sanders, manager of the tech support staff in the service delivery department, testified “nobody was really happy” with the Microsoft program. T. 2/11 at 14; see CX 27 (memo. listing concerns with program). In 2011 the service delivery group consisted of about 50 employees, spread over four units. *Id.* at 32-33. He estimated that about 75% of his subordinates complained about the system. *Id.* at 15. The program was vital to their work: “We used it every day. So that’s how we did our job.” *Id.* at 29.

Mr. Sanders said that although the service delivery staff was unhappy with the Microsoft Dynamics program, Mr. Belfiore had not asked anyone to complain about it or make frivolous demands; on the contrary (2/11 at 16),

Erik actually wanted us to try to make the CRM work. He said work with Dan, work with Ben [Chudasama], and make sure that your concerns are heard, but make sure your concerns are not just frivolous and light, but make sure that they are necessary for the business and – and accept it, and do what's best for the Department and the company as a whole.”

To Mr. Sanders’ knowledge, Mr. Belfiore had never asked any of his staff to denigrate the system. *Id.* at 26.

Mr. Belfiore had no role in implementing the Microsoft Dynamics system except to the extent that Sanders and other staff reported problems and concerns. He acted as a conduit to bring those concerns to Mr. Chudasama (who had been dismissive) and to Mr. Lane. *Id.* at 25.

Mr. Sanders said it was impossible for Ms. Dantzler to sabotage the system. *Id.* at 26. She had no prior connection with the system and Mr. Sanders thought her role was to document the continuing problems arising during the latter part of the testing phase. *Id.* at 32.

Mr. Sanders denied that Mr. Belfiore was a bully and had never heard him say “fucking” or “fucked” at work. *Id.* at 30. Mr. Belfiore was a passionate person who would make his views known about inferior work but didn’t yell at subordinates. *Id.*

at 34. Instead, Mr. Sanders described him as a mentor: “He was a good mentor in the sense that he wanted us to have a say in the company with regards to our individual functional areas.” *Id.* at 9.

c. *Robinson testimony.* Although Mr. Robinson had no ongoing role in implementing the new CRM program, he used the program daily and had complained about the system both to Mr. Belfiore and to members of the development team. *Id.* at 186. He was not the only one. When Mr. Belfiore returned from medical leave the “line at his door” existed because, despite promises, nothing had been done to fix the system. T. 2/12 at 186, 188.

In Mr. Robinson’s view, Mr. Belfiore never attempted to sabotage the CRM system or to organize a revolt. *Id.* at 188. Rather, he told his managers to document problems and present them to upper management. *Id.* at 187. Although Mr. Belfiore had a passionate management style, Mr. Robinson had never witnessed him bullying others; to the contrary, he served as a mentor. *Id.* at 190.

Ms. Dantzler could not have served as an instrument to do so. She was simply a trainer and the system was already functioning and being used. *Id.* at 189.

2. *Merchant Link’s Evidence.*

a. *Dantzler memorandum and testimony.* Ms. Dantzler did not report to Mr. Belfiore directly or indirectly. Her supervisor was Mr. Minton. Ms. Dantzler was the only training specialist on the CRM project. T. 2/12 at 163. She was aware that some of those she was to train were dissatisfied with the program. *Id.* at 136, 148, 149.

According to Ms. Dantzler, her meeting with Mr. Belfiore, which lasted about twenty minutes, was so upsetting that she called her husband immediately thereafter because Mr. Belfiore had asked her to keep the conversation confidential and that made her uncomfortable. *Id.* at 145, 157-158. The following day, she reported the incident to Mr. Minton. *Id.* at 151, 156. Minton told her to speak to Ms. Nussbaum. *Id.* at 151. She did so the same day. *Id.* at 160. Ms. Nussbaum asked her to write up the Belfiore meeting. *Id.* 160-161. Both Dantzler and Minton put their complaints in writing on the 10th. CX 82 (Dantzler memo); RX 110 (Minton email).

In her written account, Ms. Dantzler said that, after some preliminary questions by Mr. Belfiore about why she had taken so long to come to him, he told her she needn't tell Mr. Minton about the meeting because the conversation was only between the two of them. CX 82 at 1. Mr. Belfiore reminded her that she initially had not been considered for the training position. *Id.* He then claimed that he had spoken up on her behalf and said (in Ms. Dantzler's account) "well you would not have the success you have today if it were not for me." *Id.* She responded that her success was due to God, not Mr. Belfiore. *Id.*

In turn, Mr. Belfiore told her that employees in the service delivery group had not been given the same "Fling [*sic*] opportunity" for advancement that Ms. Dantzler had had. *Id.* at 1-2. Ms. Dantzler stated she replied, "excuse your french [*sic*] and he changed it to flipping." *Id.* at 2. Mr. Belfiore then complained that a job vacancy which had recently been filled had not been posted, meaning that some of his staff had not been able to apply. Ms. Dantzler contradicted him, saying she had seen the job posted. *Id.*

Mr. Belfiore then turned to discussing the CRM and asked her "to advocate for us and make sure we are getting our requirements met." *Id.* at 2. He said that he and his managers had complained about the system to no avail, even though he was the COO and had a master's degree in business administration. *Id.* Ms. Dantzler replied that she and Mr. Minton had pointed out deficiencies and had spoken to the developers to make adjustments. She urged him to speak directly to Mr. Minton "and he said, 'NO' Zack is not on my level and I do not see what good it will do to talk to Zack * * *." *Id.*

Mr. Belfiore then "said (paraphrasing) I want you to complain that the database is not good." *Id.* When Ms. Dantzler pressed him to say exactly why he had summoned her, he responded "I need you to advocate for the people on the floor." *Id.* Then, after suggesting she tell his staff how she got her training position, "He said and I need you in my corner, we are not getting what we need from this CRM and I need you to go to these meetings and say something." *Id.* at 3. The conversation ended shortly thereafter.

Ms. Dantzler then wrote about her perceptions of the meeting (*id.* at 3):

My personal perception is that Eric [*sic*] was implying that he helped me to get my job and now he wants me to return the favor by siding with him on whatever his agenda is. This made me feel very uncomfortable and I found it to be uncharacteristic of someone in his position and unprofessional. Feeling uncomfortable, I called my husband * * *. I was concerned that Eric [*sic*] would try to use my name in his complaints about Dynamics and say, I said something that I did not say to make his [point?].

In her testimony, Ms. Dantzler said she had hesitated before going to Mr. Belfiore's office because she had not been "comfortable" with him in her few previous encounters. T. 2/12 at 157. He had "a very obnoxious personality" towards the end of his employment. *Id.* at 163. In a few CRM meetings "he ranted, he raved, you could hear him on the floor ranting and raving * * *." *Id.* She did not want to have any conversation with him. *Id.* She conceded she had a preconceived idea of him even though they had had no previous personal interactions. *Id.* at 168

During the meeting, Mr. Belfiore had been loud and aggressive. *Id.* at 178. He had cursed until Ms. Dantzler asked him to stop. T. 2/12 at 149, 150-151. She denied that Mr. Belfiore had interviewed her when she applied for the training specialist position. *Id.* at 160.

Mr. Belfiore hadn't directly asked her to sabotage the project but she inferred that's what he wanted. T. 2/12 at 143. He wanted a revolt. T. 2/12 at 146. He wanted her to make a "big stink" about the program. Mr. Belfiore had asked her to assist him "in persuading others that were unhappy with the [CRM] project". T. 2/12 at 139. She understood the "others" to refer to service delivery employees. *Id.* Asked by Mr. Belfiore's counsel why she believed Mr. Belfiore wanted her to work with him against the CRM program, Ms. Dantzler replied:

Because he had suggested to me that I owed him a favor, first, first and foremost, the meeting was confidential which made me feel alarmed to begin with. That he asked me to not to tell anyone about this meeting, my manager included and I felt like he should have been discussing those issues with my manager. In the conversation, I recall him saying that he wasn't happy with the CRM. He asked me was I happy with it and proceeded to say that no one was happy with it and it wasn't the, the database that he wanted. He wasn't, he made it clear that he wasn't

happy about the decision to go with the CRM and continued to talk about what we would do to not make it successful. I don't remember specifically but I remember the conversation totally being about his dislike for the CRM.

Ms. Dantzer believed that she had the ability to sabotage the program by not training the service delivery employees properly. *Id.* at 146. That's what Mr. Belfiore wanted. *Id.* at 154. She, however, saw her responsibility to do just the opposite: it was "to make sure that although we were not happy with the CRM that we were to make the best of the CRM." *Id.* at 175.

She rejected the suggestion that Mr. Belfiore had only asked her to make the best of the program (*id.* at 176):

I wouldn't believe it just on his, his, the way he acted towards the project and he was asking me to do something that I felt a man in his position had more power to see those changes happen than I. And so, no, I don't believe that.

Mr. Belfiore had alarmed her by his request keep the conversation confidential: "If I'm doing something to make the better of the CRM, why should that be private?" *Id.* at 178.

In response to my questions, Ms. Dantzer admitted that the Dynamics program was not user-friendly and that Mr. Belfiore's requests could be interpreted as asking her to take staff complaints to the development team to improve the program rather than to sabotage it (T. 2/12 at 168-169):

Q: * * * Now to whom were you supposed to complain as far as you could tell at the time?

A: I don't know. I'm guessing to the, to the other members in the group --

Q: Which would be?

A: -- in the, in the meeting we had a team of individuals who were working on the projects, developers, managers of service delivery, my manager, myself and another team member.

Q: All right. And did you understand him that you were supposed to complain to the people who worked for Mr. Belfiore or to other people?

A: Complain to other people.

Q: Not to Mr. Belfiore's staff, is that correct?

A: That's correct.

Q: * * * And then in the next paragraph you say quote he said I need you to advocate for the people on the floor, end quote. Again, what did you understand at the time when he said you need to advocate to the people on the floor. To whom were you supposed to advocate?

A: Again to the same group that was working on the project.

Q: * * * And then finally on the next page you say quote again, he said I need you in my corner, we're not getting what we need from the CRM and I need you to go to these meetings and say something. Again, would your testimony be the same that this is to the same people we were talking about before that you were supposed to advocate to or is this is a different group of people?

A: The same people.

* * *

Q: * * * I think you said the language he used, you ultimately interpreted as an attempt by him to sabotage the project, is that correct?

A: That's correct.

Q: Could it also have been interpreted as an attempt to improve the project?

A: It could have been, yes.

b. *Minton email to Ms. Nussbaum (RX 110)*. The email was admitted into evidence in order to establish how it might have influenced Mr. Lane's decision, not for the truth of the statements it contains. See T. 2/12 at 49-51 (Lane); *id.* at 52 (ruling on admissibility). Neither party called Mr. Minton to testify.

After recounting what Ms. Dantzler had told him of her conversation with Mr. Belfiore, Mr. Minton wrote (*id.* at ML000851):

As a result, I am filing a formal complaint against Erik Belfiore for his attempt at workplace bullying, for attempting to recruit one of my employees to aid him in an effort that has negative consequences on the company's future success, for using his position of power to attempt to intimidate an employee that does not report to him.

Mr. Minton concluded (*id.* at ML000851) that his

primary complaint is with how he mistreated one of my employees * * *. This is important not only to me, but to my team, because we are very aware of how counter-productive these behaviors are to the health of our culture and the business in general.

Among the behaviors mentioned in the email that Mr. Minton said he observed were “cussing and screaming” and a “bullying, aggressive management style.” *Id.*

c. *Nussbaum deposition.* Ms. Nussbaum had been employed by Merchant Link for about five months when the Dantzler-Belfiore meeting took place. For about three of those five months, Mr. Belfiore was on leave.

Ms. Nussbaum was no longer employed by Merchant Link at the time of the hearing. She had been subpoenaed to appear by Mr. Belfiore but was apparently served at an old address. See T. 2/10 at 13 (representation by counsel for Merchant Link). She now lives out of State.

Her attention had been called to Ms. Dantzler’s complaint by Mr. Minton, who came to her office “just very, very upset.” CX 86 at 42. He thought Mr. Belfiore had tried to intimidate Ms. Dantzler to act behind Mr. Minton’s back. *Id.* at 43, 49. To Ms. Nussbaum’s knowledge, Mr. Minton had not taken his concerns to Mr. Belfiore. *Id.* at 49.

She had not interviewed Mr. Belfiore because she deemed Ms. Dantzler to have “more integrity, and I believed her. Dan [Lane] believed her.” *Id.* at 52. Ms. Nussbaum described Ms. Dantzler as a hardworking and “utmost professional person.” *Id.* at 53. Ms. Nussbaum had interviewed no one other than Ms. Dantzler and Mr. Minton because “they were the only two that knew about what happened.” *Id.* at 56.

Ms. Nussbaum believed Mr. Belfiore intentionally tried to intimidate Ms. Dantzler. His exchange with Ms. Dantzler mirrored “very common behavior from Erik.” *Id.*; see, similarly, at 51, 54, 59. She regarded Mr. Belfiore as “very intimidating” and “a workplace bully.” *Id.* at 44. He engaged in “yelling and swearing and kicking chairs across offices and many things.” *Id.* at 60. She was unaware, however, whether Mr. Belfiore had previously been reprimanded in writing while at Merchant Link. *Id.* at 44, 48.

Mr. Belfiore’s behavior, she believed, violated company bylaws (*id.* 50-51):

* * * all I can recall is that that there were [*sic*] specific verbiage in the bylaws regarding an officer and how they behave in the workplace. It

had to do with his responsibilities and sitting down with an employee and intimidating them and asking them to * * * revolt or go against the operation of the organization.

Ms. Nussbaum did not identify any relevant bylaw.

Ms. Nussbaum perceived her role as gathering and providing information from Dantzler and Minton to Mr. Lane, not in making recommendations to him about Mr. Belfiore: “I think Dan – I mean, there were frustrations there. So I made sure I spoke with Renee about what happened.” *Id.* at 54; see at 61 (generally citing Lane’s unhappiness about some of Mr. Belfiore’s actions); 62 (same)). Ms. Nussbaum also transmitted the Dantzler memorandum and Minton email to Lane. *Id.* at 55. She did not recommend that Mr. Belfiore be reprimanded for violating the by-laws because she did not then know what they provided. *Id.*

d. *Lane testimony.* Mr. Lane characterized the CRM system to be of core importance to Merchant Link’s operations (T. 2/12 at 40):

[W]e can’t install a customer without it. We can’t solve a customer problem without it. We can’t do our billing without it. We can’t do any of our reporting without it. So it’s a key core system to, to what we do day-to-day.

The system is used to manage “our entire customer demographic from the time they board Merchant Link and become customers and through the entire lifecycle of our relationship with those customers.” *Id.*

Mr. Lane did not himself investigate the Dantzler accusations. T. 2/11 at 122. He had learned of them when Ms. Nussbaum informed him and told him she needed to investigate. *Id.*

So far as Mr. Lane could remember, in the only previous instance involving an employee discharge, the employee had been interviewed before being fired. T. 2/12 at 80. Mr. Lane had not conducted the interview. *Id.*

Although Mr. Belfiore had not been interviewed, Mr. Lane told the board of managers that Mr. Belfiore “had called an employee in his office and attempted to, in my opinion, get her to sabotage the CRM project and that he intimidated her and did that, you know, against her wishes.” T. 2/11 at 123; see T. 2/12 at 45 (Belfiore “asked her essentially go out and disparage and * * * trump up negative feelings towards the

CRM implementation * * *"). In Mr. Lane's view, Mr. Belfiore had asked Ms. Dantzler "to elicit bad feedback, to stir the pot, to go out and work counter to what her job was, which was to train the employees to use the system, and, instead of that * * * to ask and encourage the employees to speak up and find fault with the system." T.2/11 at 135. Mr. Belfiore had raised his voice, had cursed, and had implied he had been instrumental in getting her job. *Id.*

Ms. Dantzler had the means to derail the Dynamics project: "I think she could have significantly delayed the project and put the project in jeopardy." T. 2/11 at 135; see T. 2/12 at 46 (If she did anything but train, "she'd be undermining the progress of the system"). In later testimony, Mr. Lane said that she could have given poor training, drummed up negative feedback, or prompted users to boycott the system. T. 2/12 at 76.

Mr. Belfiore's demands of Ms. Dantzler therefore constitute a breach of his duty "to uphold the mission and the goals and the initiatives of the company" as well as "his duty to not use his influence over another employee and another department to do something destructive to the company." T. 2/11 at 133; see, similarly, *id.* at 144.

Mr. Lane said he based his assessment on the Dantzler and Minton statements and Ms. Nussbaum's summaries of her interviews: "I had written e-mails and documentation from my HR department – I had no reason to believe those were not credible or real – documenting the incident." T. 2/11 at 127. He still believed the incident happened as Ms. Nussbaum recounted it: "I believe the incident happened." T. 2/11 at 128; see, similarly, *id.* at 127, 131, 144, T/ 2/12 at 78. The incident had been "properly investigated" and "Erik did something wrong." T. 2/11 at 128.

The board of managers accepted his conclusions and did not investigate further. T. 2/11 at 123.

It did not bother Mr. Lane that Mr. Belfiore had not been interviewed because nothing that he could have said would have undermined Mr. Lane's belief that Ms. Dantzler was telling the truth. T. 2/12 at 55. Given that, the offense "was so egregious that termination was the only fit course." T. 2/12 at 56. Mr. Lane described

his own actions as “fairly cautious” because they could be perceived as retaliatory “when that wasn’t the case, but I still felt like it was the right thing to do.” T. 2/11 at 145.

Suspension rather than discharge “may not have entered my mind.” T. 2/12 at 79. And a severance package was out of the question because Mr. Belfiore “had crossed the line.” T. 2/12 at 94.

Mr. Lane acknowledged there was nothing in Mr. Belfiore’s previous work history at Merchant Link of a similar nature. *Id.* at 127. He himself had never put anything in writing about Mr. Belfiore’s surliness other than in emails to him. T. 2/12 at 70.

e. *McCarthy testimony.* Mr. McCarthy testified he had initially been informed of the Minton and Dantzler statements by telephone. T. 2/13 at 13, 14. He claimed to be familiar with the Dantzler statement but, after stating he’d received it, testified he wasn’t sure he had. *Compare* T. 2/13 at 16, 51 *with id.* at 36.

Mr. McCarthy deemed the Minton and Dantzler statements to be “complete and compelling” documentation. T. 2/13 at 16. He thought the information he’d received was not one-sided: “it represented the collective view of management and [of] the employees directly involved.” T. 2/13 at 54

Together, the information had “shocked” him: “I don’t recall another time when I was aware of an employee proposing direct damage to the organization.” T. 2/13 at 16; see T. 2/13 at 52 (a “direct threat”). He couldn’t understand why Mr. Belfiore would try to get Ms. Dantzler “to collude with him on some agenda which is to in some way degrade, diminish or otherwise raise doubt about a project around [the] CRM * * *.” T. 2/13 at 42. It wasn’t just one element or another of Mr. Belfiore’s meeting with Ms. Dantzler, it was what “the collective set of actions * * * that created the threat for the organization.” T. 2/13 at 60.

Mr. McCarthy concluded that nothing short of discharge was possible in light of the “believable threat against the institution.” T. 2/13 at 16.

f. *Charron deposition.* Mr. Charron recalled little about Mr. Belfiore’s termination. He understood that Mr. Belfiore had breached his “fiduciary duty” to

Merchant Link but could not recall the specifics, just that “[i]n the general course of business” he’d engaged in “conduct that was detrimental to the business.” CX 88. at 17. Asked if Mr. Charron had received an explanation, he responded, “[i]n general.”

Id. He learned (*id.*):

A. That employees have come to the attention of the CEO being asked to do things they didn’t feel was appropriate. And in general course of business, challenges with doing that job in general.

* * *

I don’t recall the exact conversation.

He could not remember Mr. Belfiore’s interactions with specific Merchant Link employees. *Id.* at 22.

Mr. Charron testified that Merchant Link’s management did not have authority unilaterally to fire corporate officers; board approval is necessary. *Id.* at 16. Ordinarily, the board would call a special meeting to consider a management request. *Id.* In Mr. Belfiore’s case, a meeting was called in which counsel for both Paymentech and Merchant Link participated. *Id.* at 16, 21. Mr. Charron believed minutes of the board meeting authorizing Mr. Belfiore’s removal existed. *Id.* at 19.

As noted above, however, no minutes of any relevant board meeting were produced at the hearing.

g. *Kirby-Meck testimony.* Ms. Kirby-Meck was hired as executive vice president of sales and marketing in July 2011 when Mr. Belfiore was on medical leave. She testified she’d gotten a call from Mr. Belfiore on October 13 during which he became vituperative. She was working at home that day. T. 2/20 at 5, 9. Mr. Belfiore wanted a report she hadn’t completed because she was still adjusting to Merchant Link’s systems. T. 2/20 at 4-5. During the call, he began to yell at her using profanity and she became so uncomfortable that she hung up. T. 2/20 at 5. Mr. Belfiore called back a few minutes later but the conversation again “began to escalate” and she hung up a second time. T. 2/20 at 6.

Ms. Kirby-Meck immediately reported the incident to Mr. Lane who told her he would talk to Mr. Belfiore about it; she believes he did. T. 2/20 at 8. She had not put anything about the incident in writing. T. 2/20 at 12.

Although she had a couple of other interactions with Mr. Belfiore before he was fired, that telephone conversation was the only one that made her uncomfortable, “[o]nly on that call.” T. 2/20 at 9.

C. *GOVERNING LAW AND LEGAL PRINCIPLES.*

In 2013, the Court of Special Appeals applied Maryland case law governing retaliation claims to a case brought under § 27-19(c). In *Edgewood Management Corp. v. Jackson*, 212 Md. App. 177, 199-200, 66 A.3d 1152 (2013), the Court first explained what is required to establish a *prima facie* showing of retaliation under the Human Rights Law:

To establish a *prima facie* case of discrimination based on retaliation, a plaintiff must produce evidence that she engaged in a protected activity; her employer took an adverse action against her; and her employer’s adverse action was causally connected to her protected activity. *Taylor v. Giant of Maryland, LLC*, 423 Md. 628, 658, 33 A.3d 445 (2011) (citing *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 349, 758 A.2d 95 (2000)); *Killian v. Kinzer*, 123 Md. App. 60, 68, 716 A.2d 1071 (1998).

In a “wrongful discharge action[,] temporal proximity between protected activity and discharge [is] evidence supporting an inference that the protected activity was the proximate cause of her termination.” *Edgewood Management*, 212 Md. at 206, citing *Bleich v. Florence Crittenton Services of Baltimore, Inc.*, 98 Md. App. 123, 142, 632 A.2d 463 (1993).

Once an employee establishes a *prima facie* case, the burden of production then shifts to the defendant to offer a non-retaliatory reason for the adverse employment action. See *Killian*, 123 Md. App. at 68, 716 A.2d 1071 (1973). If the employer does so, the burden of production shifts back to the plaintiff to show that the proffered reasons for the employment action were a mere pretext. *Killian*, 123 Md. App. at 68, 716 A.2d 1071.

In *Ruffin Hotel Corp. of Maryland, Inc. v. Gasper*, 418 Md. 594, 17 A.3d 676 (2011), also involving § 27-19(c), the Court of Appeals held that in retaliation cases, the employer has the ultimate burden of showing that retaliation was not a “motivating factor” for its actions once the employee establishes a *prima facie* case

and shows that retaliation likely played a part in the employer's actions *Id.*, 418 Md. at 612; italics in original:

[if] jurors * * * could reasonably find that the employer's decision to terminate was based upon both the employee's deficient performance and the employee's opposition to unlawful harassing conduct, the employee is entitled to a verdict in his or her favor if the jurors are persuaded that the employee's opposition to unlawfully harassing conduct played a *motivating* part in the employer's decision to terminate the employee's employment."

The Court rejected the argument that its earlier case law required an employee to persuade the decision maker that the employee's protected activity "was a determining factor in the decision to discharge her." *Id.* at 613. See also *id.* at 610, favorably citing the lower appellate court's decision, *Gasper v. Ruffin Hotel Corporation of Maryland, Inc.*, 183 Md. App. 211, 222, 960 A.2d 1228 (2008); there, the intermediate court had held "We believe Maryland law to be settled that a plaintiff's burden is to prove that the exercise of his or her protected activity was a 'motivating' factor in the discharge, thereby creating burden-shifting to the defendant."

One issue presented by this case is whether *Ruffin* is still good law in light of an intervening Supreme Court decision adopting the "but for" test for retaliation claims under Title VII of the Civil Rights Act of 1964, *University of Texas Southwestern Medical Center v. Nassar*, ___ U.S. ___, 133 S. Ct. 2517 (2013) ("*Nassar*"). I asked the parties to brief whether *Nassar* implicitly has undermined the Court of Appeals holding in *Ruffin*.

Nassar held that complainants in Title VII retaliation claim cases must prove that their protected activities were the "but-for" causes of their employers' actions. To reach that conclusion, the Court focused on the specific language of Title VII's anti-retaliation section, § 704(a), 42 U.S.C. 2000e-3(a), prohibiting employer retaliation "*because* [an employee] has opposed * * * an unlawful employment practice * * * or * * * made a [Title VII] charge." (Italics added). The "because" phraseology means that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." 133 S. Ct. 2517,

2522 (2013), relying on *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (a decision construing “because of” language in the federal Age Discrimination in Employment Act (“ADEA”). In *Gross*, 557 U.S. at 176, the Court held the meaning of “because of * * * age” meant that age had to be the “but for cause of the employer’s actions.”

The *Nassar* majority distinguished Title VII’s retaliation section from the section prohibiting discrimination on account of race, color, religion, and national origin, § 703, 42 U.S.C. 2002e-2. While the former incorporated the “but for” standard, the latter incorporated the “motivating factor” standard. That was because the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), had concluded (by a plurality) that if a plaintiff could show that “status” discrimination was a “motivating” or “substantial” factor in an employer’s action, the burden of persuasion shifted to the employer to show it would have taken the same action without the discriminatory animus. As *Nassar* phrased it, the employee could prevail by showing that “the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives for the decision.” 133 U.S. at 2520.

In 1991, two years after *Price Waterhouse*, Congress amended § 703 by adding a new subsection that clarified that a plaintiff can prevail by demonstrating that a prohibited factor “was a motivating factor for any employment practice even though other factors also motivated the practice.” 42 U.S.C.2000e-2(m). Relief under the new subsection cannot, however, include damages or reinstatement if the employer demonstrates it “would have taken the same action in the absence of the impermissible motivating factor.” 42 U.S.C. 2000e-2(m)(B).

The *Nassar* Court found it significant that neither *Price Waterhouse* nor the 1991 statutory amendment involved Title VII’s anti-retaliation section. It therefore believed that the *Gross* analysis should be extended to that section.

Four Justices dissented. The dissenters wrote the Court had previously recognized that effective protection against retaliation (*id.* at 2534-2535)

is essential to securing “a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or

gender-based status.” *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53, 63, 126 S. Ct. 2405, 165 L.Ed.2d 345 (2006) * * *. That is so because “fear of retaliation is the leading reason why people stay silent” about the discrimination they have encountered or observed. *Crawford v. Metropolitan Government of Nashville and Davidson Cty.*, 555 U.S. 271, 279 (2009). [(Internal quotation marks and brackets omitted by the dissent.)]

As a result, the dissent wrote, “the ban on discrimination and the ban on retaliation against a discrimination complainant have traveled together * * *. Today’s decision, however, drives a wedge between the twin safeguards in so-called ‘mixed-motive’ cases.” *Id.* at 2535.

As noted above, in Maryland the Court of Appeals rejected the “but-for” test in *Ruffin Hotel* and the Court of Special Appeals implicitly did so in *Edgewood Management*. They remain the prevailing interpretations of § 27-19(c)(1) of the Human Rights Law unless *Nassar* unmistakably requires a different result.

As of now, there have been no reported Maryland decisions discussing *Nassar*. It’s no surprise that the parties in this case differ as to whether *Nassar* so invalidates *Ruffin*’s “motivating factor” holding.

The brief for Mr. Belfiore (at 4) cites a lower court decision in Connecticut that concluded that *Nassar* was inapplicable to a proceeding under that State’s law. *Gonska v. Highland View Manor, Inc.*, 2014 WL 3893100 (Conn. Super. Ct. 2014) (holding that there were “compelling reasons” why *Nassar* would not be adopted by the state’s appellate courts when construing Connecticut law). There are similar post-*Nassar* appellate court decisions in California and Washington, *Mendoza v. Western Medical Center Santa Ana*, 222 Cal.App.4th 1334, 166 Cal.Rptr.3d 720 (2014) (applying “motivating factor” post-*Nassar*); *Knutson v. Wenatchee School District # 246*, 2015 WL 4456245 (Wash. App. 4, Jul. 21, 2015) (same; not to be published).

On the other hand, the brief for Merchant Link (at 25 n. 25) cites two state intermediate appellate court decisions, one in Ohio and one in Texas, that have used the *Nassar* analysis: *Wholf v. Tremco, Inc.*, 26 N.E.3d 902, 909 (Ohio App. 8th Dist. 2015) (holding that “the word ‘because’ appears in both the Ohio and federal anti-

retaliation provision” so that “the plain language of [the state law] provides a ‘cause-in-fact’ causation standard rather than a mixed-motives standard”); *Bedgood v. Texas Educational Agency*, 2015 WL 739635 (Tex. App., Feb. 19, 2015) (citing *Nassar* as being consistent with earlier state court rulings).

Both parties recognize that § 27-19(c) does not use the “because of” terminology that the Supreme Court concluded justified its *Nassar* holding. The Belfiore brief (at 5) argues that the statutory differences are significant enough that *Nassar’s* analysis should not be applicable here. Merchant Link contends that the difference in language is inconsequential because the “for” in § 27-19(c) has the same dictionary meaning as “on account of” and “for the sake of.” Br. at 25, citing Oxford English Dictionary, § VII, items 21-22.

At this point, the Commission is not writing on a blank slate: *Ruffin* remains the only authoritative interpretation of § 27-19(c). The commission cannot presume that the Maryland Court of Appeals will repudiate *Ruffin’s* holding simply because the Supreme Court construed Title VII’s analog focusing on somewhat different language and an entirely different legislative history.

In the Human Rights Law, the Council explicitly recognized that the County law contained prohibitions “similar, *but not necessarily identical* to state and federal law,” implying that judicial interpretations of merely “similar” language need not yield identical results. The Council chose not to use the “because” or “because of” language that appeared in relevant prototypes at the time the Human Rights Law was enacted, Title VII and Md. Code, State Govt. § 20-606(f),²⁰ In § 27-19(c), it also chose not to copy the “because” phraseology it used elsewhere in the Human Rights Law. See § 27-11(a)(3) (part of the prohibitions against discrimination in public accommodations).²¹ The presumption is that the different formulations were conscious and meaningful choices. See *Maryland Department of the Environment v.*

²⁰ That section provides in part: “An employer may not discriminate or retaliate against any of its employees * * * because the individual has: (1) opposed any practice prohibited by this subtitle * * *.”

²¹ “An owner, lessee, operator, manager, agent, or employee of any place of public accommodation in the County must not, with respect to the accommodation: (3) retaliate against any person because that person: (A) lawfully opposed any discriminatory practice under this division * * *.”

Anacostia Riverkeeper, 222 Md. App. 153, 174, 112 A.3d 979 (2015) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely * * *” (indirectly quoting *Russello v. United States*, 464 U.S. 16, 23 (internal quotation marks omitted)), *cert. granted*, ___ Md. ___, 2015 WL 4612316 (Jul. 24 2015)).

It is doubtful that Maryland courts would, without more evidence of legislative intent, repudiate their own precedent simply because the Supreme Court narrowly rejected the “mixed motive” theory of liability for retaliation claims. As the Court of Special Appeals wrote in *Gaspar v. Ruffin Hotel Corp.*, 183 Md. App. 211, 222, “[w]e believe Maryland law to be settled that a plaintiff’s burden is to prove that the exercise of his or her protected activity was a ‘motivating’ factor in the discharge, thereby creating burden-shifting to the defendant.” The *Nassar* dissent is consistent with prior Maryland holdings and supplies cogent reasons why the Maryland courts may well decline to follow *Nassar*’s holding in construing the County’s law.

At this point, the Court of Appeals’ *Ruffin* holdings remain in effect and must govern Commission decisions.

D. DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

From all the evidence, it is clear that the relationship between Mr. Belfiore and Merchant Link deteriorated after Mr. Belfiore returned from medical leave. He was disgruntled with his pay. His frustrations grew when the Lane increase was rescinded after two pay periods and Mr. McCarthy raised doubts about the size of and timing of the increase. Nerves frayed, tempers flared, especially Mr. Belfiore’s. From both Mr. Belfiore’s and Mr. Lane’s perspectives their relationship unraveled.

At the same time, Mr. Belfiore looked after the interests of his staff which was wrestling with what they considered a balky new computer system. That’s not only reflected in the Sanders/Robinson testimony, it’s reflected in the undisputed fact that he was concerned about the impact of the new system on the ability of his departments to do their jobs. Mr. Belfiore, it’s also undisputed, would never be a user

of the system. When he protested to Mr. Chudasama and Mr. Lane, he was conveying his staff's concerns.

On October 21, Mr. Belfiore escalated his pay dispute by notifying Merchant Link that legal action of some sort was imminent unless Merchant Link acted immediately to improve his compensation. Merchant Link responded by getting its outside lawyers involved. Tensions rose, lines were drawn.

The Dantzler meeting, twelve business days later, brought relationships to a boil. I believe Ms. Dantzler's version of what was said at the meeting. She had no reason to invent or distort. True, she considered Mr. Belfiore to be obnoxious by noticing his behavior in meetings but the two had never before had personal interactions, making it unlikely she invented an elaborate story because of personal animosity. She was shaken enough to call her husband immediately and to go to her boss the next day. Those are actions of someone who was deeply upset about what happened at their meeting. Mr. Belfiore testified he tried to make her comfortable and to be jovial. He failed.

I credit Ms. Dantzler's account that Mr. Belfiore asked to keep the conversation secret; that he used his purported assistance in getting her a promotion as leverage to help him; that he voiced his displeasure with the CRM system. (I also credit her statement that he used the word "fucking" as an adjective, despite Mr. Belfiore's denial, and that he had been loud. No one claims that either transgression is a firing offense).

Even so, it's also quite possible that Ms. Dantzler overreacted and misinterpreted what Mr. Belfiore was asking her to do. When I questioned her, she acknowledged that what Mr. Belfiore was asking her for was to bring the shortcomings of the CRM and its users' grievances to the attention of the team installing the system. He and his staff had so far been unsuccessful. Yes, Ms. Dantzler conceded, it could have been an attempt by Mr. Belfiore to use her as an intermediary to improve the system rather than to sabotage it.

It's not the Commission's role to determine what Mr. Belfiore meant. The evidence is ambiguous. The real issue before the Commission is whether what

Merchant Link did next was motivated in part because Mr. Belfiore had protested his pay and threatened to sue.

Mr. Lane certainly acted precipitously. As soon as he received Ms. Nussbaum's report, coupled with the Dantzler memorandum, he fired Mr. Belfiore. He did not ask Mr. Belfiore for an explanation. He did not ask Ms. Nussbaum to talk to any other employee to learn what Mr. Belfiore had said about the CRM program. Had he questioned Mr. Robinson or Mr. Sanders or others, they might have provided a quite different perspective. He did not consider suspending Mr. Belfiore while he gathered more facts. For Mr. Lane, there was no nuance, no ambiguity.

The two members of the board ratified his action without asking for additional information. In their testimony, they spoke in generalities. They simply believed Lane who believed Nussbaum who believed Dantzler's interpretation of what Mr. Belfiore wanted. There is no evidence that the remaining two members of the board were consulted and no written record of board action.

So, the question remains, was Mr. Belfiore's threat to invoke his legal rights part of the motivation for his firing?

I conclude it was not. True, the firing occurred three weeks after he informed Merchant Link of possible suit. Timing alone, though, is an insufficient basis for inferring an unlawful purpose behind an employment decision. Otherwise all adverse employer actions following an accusation of discrimination, no matter how justified, would automatically be classified as retaliation. That's far too sweeping. The Human Rights Law's retaliation provision cannot reasonably be construed to shield employees from the consequences of their own misbehavior. Timing should always be weighed as a factor but cannot alone be conclusive that retaliation motivated an employment decision.

In the present case, Merchant Link could reasonably conclude that Mr. Belfiore's actions warranted strong discipline. He attempted to intimidate Ms. Dantzler and told her not tell her supervisor about the meeting. Even if Ms. Dantzler misperceived what he was asking her to do, Merchant Link, like Ms. Dantzler, could conclude Mr. Belfiore was acting against the company's interests because "If I'm

doing something to make the better of the CRM, why should that be private?” Ms. Dantzler was considered highly credible by Ms. Nussbaum and that was reflected in what she reported to Mr. Lane. Mr. Lane’s decision to believe Ms. Dantzler’s interpretation of Mr. Belfiore’s words and actions is plausible under the circumstances. Mr. Belfiore’s prior aggressive, “bullying,” behavior observed by Ms. Nussbaum and Ms. Kirby-Meck, and reported by Mr. Minton, as well as Mr. Lane’s personal observations, undoubtedly fueled Mr. Lane’s readiness to believe the worst. Although it would have been far preferable for him to allow Mr. Belfiore to defend himself, the Human Rights Law does not require employers to provide hearings, so long as retaliation is not factor in their decision. As the Court of Special Appeals noted in *Nerenberg v. RICA of Southern Maryland*, 131 Md. App. 646, 750 A.2d 655 (2000), “it is not our province to decide whether [the employer’s] reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff’s termination.’ A court ‘does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination.’” (Quoting *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 411 (7th Cir.1997); brackets, mine).

While it is never possible to rule out a hidden motive in any behavior, I am persuaded that Merchant Link would have acted the same way had the Dantzler meeting and her report occurred before October 21. In other words, I cannot find that retaliation was part of the reason Merchant Link fired Mr. Belfiore. The evidence is too sketchy to support an inference to the contrary.

VI. CONCLUSIONS AND RECOMMENDATIONS

The Commission should hold that no violation of either M.C. Code § 27-19(a)(1) or § 27-19(c)(1) has been proven by a preponderance of the evidence.

The Belfiore complaint was not frivolous and each side should bear its own costs and attorneys’ fees.

Respectfully submitted.

LUTZ ALEXANDER PRAGER
Hearing Examiner

August 17, 2015