BEFORE THE MONTGOMERY COUNTY
COMMISSION ON HUMAN RIGHTS
Case Review Board

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
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MONIQUE FOSTER	*	
	*	
Complainant	*	Human Rights Commission
v.	*	HRC No. E-06174
	*	OZAH Referral No. HR 17-03
SUMNER VILLAGE	*	
	*	
Respondent	*	
	*	

* *

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

I. STATEMENT OF THE CASE

Complainant, Monique Foster (Complainant or Ms. Foster), originally filed a complaint alleging racial discrimination against her former employer, Respondent Sumner Village Condominium Association (Respondent or Sumner Village) with the U.S. Equal Employment Opportunities Commission (EEOC) on July 22, 2015. CX 12, 13.[1] The EEOC dismissed that complaint as premature (CX 11), and Ms. Foster filed a second complaint with the EEOC after she had been terminated by Sumner Village. RX W. The EEOC accepted her second complaint and referred it to the Montgomery County Office of Human Rights (MCOHR) for investigation. CX 8. Ms. Foster signed the MCOHR Complaint form on September 1, 2016. HE Exhibit 1.

MCOHR conducted its investigation and issued a Determination (HE 2) on August 3, 2016. MCOHR determined that Sumner Village did not discriminate against Complainant based on her race, but did retaliate against her for protected activity by terminating her employment. *Id.* The Determination concluded with the following statement (*Id.)*:

> Having determined reasonable grounds to believe a violation of Chapter 27 has occurred, the Director now directs the Respondent to participate in a collective effort toward a just reconciliation of this matter. To arrange for a conciliation, the Respondent should contact the Enforcement Manager, 21 Maryland Avenue, Suite 330, Rockville, MD 20850 in writing within 30 days of the date of receipt of the determination.

Attempts at conciliation failed and on March 17, 2017, the MCOHR Director certified the case to the Human Rights Commission (HRC) under Section 27-7(g)(4) of the Code. DKT. 4. Shortly thereafter, the HRC Hearing Panel referred the case to the Office of Zoning and Administrative Hearings (OZAH) to conduct a public hearing and issue a recommended decision. HE 5.

[1] References to evidence are labelled "CX" (Complainant's Exhibit), "RX" (Respondent's Exhibit) and "HE" (exhibits introduced by the Hearing Examiner to establish jurisdiction in the case.)

OZAH issued a Scheduling and Procedures Order on April 3, 2017. DKT. 6. After holding a pre-hearing conference attended by both parties, the Hearing Examiner issued a Revised Scheduling and Procedures Order on May 4, 2017, scheduling a trial date for October 16, 2017. DKT. 7.

On September 6, 2017, Sumner Village filed a Motion for Partial Summary Judgment. It alleged that Foster's racial discrimination claim was foreclosed because she failed separately to appeal MCOHR's Determination that there were no reasonable grounds to support her claim of racial discrimination (as opposed to her claim of retaliatory termination.) DKT. 12, p. 3. Respondent argued that a separate appeal was unnecessary. DKT. 14, p. 3. Upon consideration of the summary judgment motion and Ms. Foster's opposition thereto (DKT. 14), the Hearing Examiner denied the motion so that the MCOHR could provide its interpretation on whether an independent appeal of the racial discrimination claim was required under the Code and Executive Regulations. DKT. 16.

The MCOHR advised that Complainant was required to file an independent appeal of the MCOHR's Determination relating to her discrimination claim. MCOHR explained, however, that the Determination should have included information that an appeal was available and instructions for filing the appeal. DKT. 25. On October 5, 2017**,** MCOHR issued a corrected Determination containing the required information. DKT. 30.

Because the discrimination claim could come before the Hearing Examiner after consideration by the Human Rights Commission (HRC) Hearing Panel, the Hearing Examiner asked the parties whether they would prefer to postpone the public hearing scheduled for October 16, 2017, so that both claims could be heard together. DKT. 31. Upon agreement from the parties, the Hearing Examiner issued an Order rescheduling the hearing to January 22, 2018. DKT. 34.

The racial discrimination claim was not certified to the HRC Hearing Panel until January 16, 2018. As a result, both parties requested that the public hearing before the Hearing Examiner be further postponed. The Hearing Examiner rescheduled the public hearing to April 20, 2018, with the consent of the parties. DKT. 40, 41, 47. On February 27, 2018, the HRC Hearing Panel affirmed MCOHR's Determination that no reasonable grounds existed for Ms. Foster's racial discrimination claim. DKT. 49; RX V.

The public hearing on Ms. Foster's retaliatory termination claim proceeded as rescheduled on April 20, 2018. Because the date on which Ms. Foster first filed a complaint with the EEOC was at issue in the case, the Hearing Examiner gave the Complainant until May 7 to obtain records from the EEOC verifying the date of Ms. Foster's first complaint. She also left the record open until May 21, 2018 to give both parties an (1) opportunity to submit written closing statements and (2) present argument on whether Chapter 27 of the Montgomery County Code should be interpreted to require the Complainant to show that her protected activity was the "but for" cause of her termination under the Supreme Court's decision in *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–47, 133 S. Ct. 2517, 2525, 186 L. Ed. 2d 503 (2013) (*i.e.,* that the harm would not have occurred in the absence of a Ms. Foster's protected activity.) T. 211-212. The Complainant submitted an EEOC Intake Sheet and Intake Questionnaire signed by Ms. Foster on July 22, 2015. CX 12, 13. Both parties timely submitted their written arguments and the record closed on May 21, 2018. DKT. 54-55.

The Hearing Examiner finds that Ms. Foster failed to prove by a preponderance of the evidence that the employer's actions terminating her employment were a pretext for retaliation based on protected activity.

II. GOVERNING LAW

Appellant's claims in this case are governed by Montgomery County's Human Rights and Civil Liberties Law (HRCL), codified in Chapter 27 of the Montgomery County Code. Section 27-19(c) of the HRCL provides:

> (c) A person must not:
>
> (1) retaliate against any person for:
>
> (A) lawfully opposing any discriminatory practice prohibited under this division; or
>
> (B) filing a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under this division;

Section 27-1(b) of the HRCL states that "[t]he prohibitions in this article are substantially similar, but not necessarily identical, to prohibitions in federal and state law." *Id.*, §27-1(b).

Like Title VII of federal law, a complainant under the HRCL may prove retaliation stemming from the activities protected by the law in two ways. The first is through direct evidence. Evidence is direct when, "it consists of statements by a decision maker that directly reflect the alleged animus and bear squarely on the contested employment decision.' " *Dobkin v. Univ. of Baltimore Sch. of Law*, 210 Md. App. 580, 592, 63 A.3d 692, 699 (2013)(quoting *Merritt v. Old Dominion Freight Line, Inc.,* 601 F.3d 289, 299–300 (4th Cir.2010) (quoting *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 100, 123 S.Ct. 2148, 156 L.Ed.2d 84) (2003)).

Where the evidence presented is indirect, survival of a pre-trial motion for summary judgment is determined by a "burden-shifting" analysis first established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), holding modified *by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). Recently, the Maryland Court of Special Appeals applied this analysis to

retaliation claims arising under Section 27-19(c) of the HRCL:

> The *McDonnell Douglas* burden-shifting standard applies to retaliation claims under the Montgomery County Code as well. *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 199–200, 66 A.3d 1152 (2013). To establish a retaliation claim, the employee must first establish a *prima facie* case by producing evidence that (1) the employee "engaged in a protected activity;" (2) the "employer took an adverse action against [the employee];" and (3) the "adverse action was causally connected to [the employee's] protected activity." *Id.* at 199, 66 A.3d 1152 (citations omitted). If he succeeds in establishing a *prima facie* case, the burden shifts to the employer to offer evidence of "a non-retaliatory reason for the adverse employment action." *Id.* at 200, 66 A.3d 1152 (citations omitted). If the employer meets its burden, "the burden of production shifts back to [the employee] to show that the proffered reasons for the employment action were a mere pretext." *Id.* (citation omitted). Establishing pretext is only the initial step of the remainder of the analysis, however…the plaintiff retains the burden of proving that he was the victim of wrongful retaliation. *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089; *Hicks*, 509 U.S. at 515, 113 S.Ct. 2742. To prove the causal connection between the employee's protected activity and the adverse employment action, he must demonstrate that his "opposition to unlawful harassing conduct played a *motivating* part in the employer's decision to terminate the employee's employment." *Ruffin Hotel Corp. of Maryland, Inc. v. Gasper*, 418 Md. 594, 612, 17 A.3d 676 (2011) (emphasis in original). (Footnote omitted.)

Belfiore v. Merchant Link, LLC, 236 Md. App. 32, 51-52 (2018); *see also, Muse-Ariyoh v. Bd. of Educ. of Prince George's County, 235 Md. App. 221, 244, 175 A.3d 886, 900 (2017), cert. denied sub nom. Muse-Ariyoh v. Bd. of Educ. of Prince George's Co., 457 Md. 680, 181 A.3d 214 (2018)*(An employee bringing a State law claim of discriminatory retaliation must establish a *prima facie* case that "(1) he/she engaged in a protected activity, (2) the employer took an adverse employment action against him/her, and (3) the adverse employment action was causally connected to the protected activity.)

While the burden-shifting analysis enables a complainant to survive summary judgment and establish the court's jurisdiction, it does not alter a complainant's ultimate burden of proof, which is to "to establish that the non-discriminatory basis offered by the employer is a pretext and that the act complained of, in fact and in law, was the product of unlawful discrimination." *Muse-*

Ariyoh v. Bd. of Educ. of Prince George's County, 235 Md. App. 221, 227, 175 A.3d 886, 890 (2017), *cert. denied sub nom*. Muse-Ariyoh v. Bd. of Educ. of Prince George's Co., 457 Md. 680, 181 A.3d 214 (2018). Therefore, once a case has been tried it is unnecessary to parse through the various stages of the burden shifting analysis, and the question remains only whether the employer's proffered non-discriminatory action is actually a pretext for discrimination. *Foster v. University of Maryland-Eastern Shore,* 787 F.3d 243, 250, n.9 (2015).

The HRCL, however, does not protect a complainant from all employer actions alleged to be retaliatory. It protects individuals only from retaliation stemming from "protected activity," or the activity described in Section 27-19(c) of the HRCL. Thus, a complainant must allege that the retaliation stems from the employee's opposition to, or participation in an investigation of, discriminatory practices against a protected class.[2] The Court of Special Appeals explained:

> Not every complaint about discrimination or unfairness, however, qualifies as protected activity. A vague complaint alleging mere prejudice or general unfairness is insufficient; it must allege discrimination connected to a protected class. *See Daniels v. Sch. Dist. of Philadelphia,* 776 F.3d 181, 193 (3d Cir.2015) ("The complaint must allege that the opposition was to discrimination based on a protected category, such as age or race.") (Footnote omitted.); *Slagle v. County of Clarion,* 435 F.3d 262, 268 (3d Cir.) (employee's "vague allegations of 'civil rights' violations" were insufficient to meet the "low bar" of demonstrating participation in protected conduct), *cert. denied,* 547 U.S. 1207, 126 S.Ct. 2891, 165 L.Ed.2d 918 (2006); *Tomanovich v. City of Indianapolis,* 457 F.3d 656, 663 (7th Cir.2006) ("[T]he complaint must indicate the discrimination occurred because of sex, race, national origin, or some other protected class. Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient."); *Booker v. Brown & Williamson Tobacco Co.,* 879 F.2d 1304, 1313 (6th Cir.1989) ("[A] vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment

[2] The HRCL prohibits discrimination in employment based on "race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, gender identity, family responsibilities, or genetic status of any individual or disability of a qualified individual, or because of any reason that would not have been asserted but for the race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, sexual orientation, gender identity, family responsibilities, or genetic status." *Montgomery County Code,* §27-19. In this case, Ms. Foster alleged that Sumner Village retaliated against her because of her complaints about racial discrimination in the workplace.

practice.").

Lockheed Martin Corp. v. Balderrama, 227 Md. App. 476, 507 (2016), *cert. denied sub nom. Balderrama v. Lockheed Martin*, 448 Md. 724 (2016).

To prove an employer's action is retaliatory, the complainant must demonstrate a causal connection between the protected activity (*e.g.,* an employee's complaints about racial discrimination) and the adverse employment action. Basic to this burden is to establish that the employer *knew* of the employee's protected activity. *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998), *(abrogated on other grounds by Burlington N. & Sante Fe Ry. v. White,* 548 U.S. 53, 68, 126 S.Ct. 2405, 2415 (2006)) ("employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the prima facie case."); *Conrad v. CSX Transp., Inc*., 824 F.3d 103, 107 (4th Cir. 2016). Ordinarily, a plaintiff must show some temporal proximity between the protected activity and the adverse employment action, although where there is little proximity, courts may look at gradually increasing adverse activity. *Murphy-Taylor v. Hofmann*, 968 F. Supp. 2d 693, 720–721 (D. Md. 2013). Retaliation is not established where gradually adverse job actions began well before the plaintiff engaged in protected activity. *Id.* Causation may be established by circumstantial evidence even where a respondent denies knowledge of any protected activity. *Taylor v. Giant of Maryland, LLC*, 423 Md. 628, 664 (2011)(The jury was entitled to disbelieve the employer's testimony denying knowledge when individual who received notice of EEOC complaint had been involved in prior grievances and attending meetings with employee's direct supervisors.)

Whether racial discrimination must be the *only* factor motivating the employer's action under the HRCL has not been decided by a Maryland court. Prior to the Supreme Court's decision in *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346, 133 S. Ct. 2517, 2525, 186 L. Ed.

2d 503 (2013), claimants had to prove that the race was a "motivating factor" for the employer's adverse actions. This standard is reflected in *Ruffin v. Gasper v. Ruffin Hotel Corp. of Maryland, Inc.*, 183 Md. App. 211, 222 (2008), *aff'd,* 418 Md. 594 (2011), in which the Court of Special Appeals, adopted the "motivating factor" test for retaliation claims under the Montgomery County's HRCL:

> 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. An instruction that imposes upon a plaintiff the burden of proving that the exercise of his or her protected activity was the "determining" factor in the discharge from employment is a misstatement of the law, and erroneous.

In 2013, however, the Supreme Court in *University of Texas Sw. Med. Center v. Nassar,* 570 U.S. 228, 360, 133 S. Ct. 2517, 2533, 186 L.Ed.2d 503 (2013) construed Title VII to alter the causation required under federal law, at least for cases involving direct evidence of discrimination. Rather than requiring that the protected class be a "motivating factor" in the employer's decision, the *Nassar* court interpreted 1991 amendments to Title VII to provide relief only when the employer's retaliatory action would not have occurred "but for" the employee's protected activity::

> Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

Nassar, 570 U.S. at 360.

The Hearing Examiner in the *Belfiore* case, *supra,* held that *Nassar's* "but for" causation standard did *not* apply to cases arising under the HRCL. He reasoned that the HRCL did not include the language of the 1991 amendments to Title VII upon which the *Nassar* court relied in establishing the newer "but for" causation test. Thus, the Hearing Examiner decided that *Ruffin* remained the controlling case interpreting the Montgomery County Code. *Hearing Examiner's Report and Recommendation,* MCOHR Case No. E-05548, *Belfiore v. Merchant Link LLC,* pp.

71-75 (August 17, 2015). The Court of Special Appeals in *Belfiore* concluded that it was unnecessary to decide the question because it affirmed the Hearing Examiner's recommended decision that Mr. Belfiore had not met the lesser, "motivating factor," standard.

Anticipating a similar question in this case, the Hearing Examiner asked the parties to submit argument on whether the Complainant must demonstrate that her protected activity was the sole cause of her termination. Ms. Foster believes that *Ruffin* still controls for the same reasons relied upon by the Hearing Examiner in *Belfiore. Id.* at 4.

Respondent argues that *Ruffin* should not control this case because courts have traditionally relied on federal interpretations of Title VII when construing State and local anti-discrimination laws. DKT. 54, p. 17. Sumner Village also points to the recent Fourth Circuit case, *Foster v. Univ. of Md-E. Shore,* 787 F.3d 243, 252 (4th Cir. 2015) for the proposition that "but-for" causation has always been a plaintiff's ultimate burden of proof. It also notes that all federal Circuit Courts of Appeal have adopted the *Nassar* standard with the exception of the Fourth Circuit. *Id.* at 19.

Upon review, the Hearing Examiner does not need to address the causation issue raised in the *Belfiore* case because she finds that Ms. Foster failed to meet her burden to prove that Sumner Village terminated her employment based on a protected activity.

III. SUMMARY OF TESTIMONY AND EVIDENCE

The parties' factual account of the events leading up to Ms. Foster's termination differ significantly, although some matters are undisputed.

Sumner Village consists of 395 dwelling units made up of two condominium complexes and one homeowners association. T. 157. All parties agree that Ms. Foster, who is African American, began her employment as a temporary employee of Sumner Village in August, 2013, became full-time in October, 2013, and received a termination letter (dated July 22, 2015, CX 7)

from her supervisor, Ruth Gunn (who is Caucasian), on July 25, 2015. T. 17, 67-68.[3]

1. SUMMARY OF COMPLAINANT'S EVIDENCE.

Initially, Ms. Foster's supervisor was Ms. Charice Young, who is African American. Ms. Foster complained that she received very little training in the duties of her position. According to Ms. Foster, the individual she replaced showed her only what he did day-to-day. There was no instruction manual and employees had to surf the web to find instructions for certain tasks, such as the use of specialized software to place work orders. T. 17-18.

During her first year of employment, Ms. Foster received two "Corrective Action Forms" (CAFs) from Ms. Young on July 28 and 29, 2014. RX F. Ms. Young issued the July 28th CAF because Ms. Foster refused to use the time card machine to punch in and out of work. The CAF states that Ms. Young reviewed the time card policy with Ms. Foster on February 6, 2014, and reminded Ms. Foster of the policy again by e-mail on June 18, 2014. RX F, G. Ms. Young placed Ms. Foster on a 30-day "probationary period" to monitor her time card entries. RX F.

Ms. Foster testified that she initially didn't know how to use the time clock. Foster's workhours were 8:00 a.m. to 4:30 p.m. Eventually, according to Ms. Foster, Ms. Young didn't press Ms. Foster to comply with the policy after Ms. Foster explained that the time clock didn't represent Ms. Foster's true hours. According to Ms. Foster, this was because she frequently got stopped in the parking lot by one of the residents as she was walking into work. In many cases, she did not clock out for lunch because she used her lunch hour to make "lunch runs" for the entire office. On many days, she ended up not taking a lunch, but ate at her desk. T. 30-33.

Ms. Young issued the July 29th CAF for "Performance Below Standards." RX E. The CAF stated that Ms. Foster left early on July 28th and then notified Ms. Young that she would be

[3] Ms. Gunn is an employee of Legum. Ms. Foster was an employee of Sumner Village.

in late on July 29, 2014, even though Ms. Foster was aware that other office staff were on leave and she was to cover the front desk. *Id.* The CAF further provided:

> In addition to these absences, it has been observed by management, staff and residents that Monique is often sited on the property talking on her personal cell phone outside of her normal break hours. All of these incidents put a strained [sic] on both the Admin and Maintenance departments' ability to perform its' [sic] respective duties and responsibilities in a timely and professional manner.

Id. The "Action Taken" in the second (*i.e.,* July 29th CAF) supplemented that of the first CAF by adding that, "Monique's duties as set forth in her job description will also be monitored…" *Id.*

Shortly after the CAFs were issued, Sumner Village hired a maintenance supervisor, Mr. Riva Proctor, who is Caucasian. Ms. Foster testified Mr. Proctor appeared at the office armed and in a SWAT uniform shortly after September 11, 2014. He stated that he was late for work because he was on assignment for President Obama in El Salvador. He entered Ms. Gunn's office, who, Ms. Foster believes, took the weapons from him. According to Ms. Foster, "all" of the staff complained about the incident, including Ms. Foster, who testified that she "mentioned the incident to several Board members." T. 29.

Ms. Foster testified that, during Ms. Young's tenure, the office was disorganized, which created conflict between the staff and between residents and staff. The disorganization resulted in a back log of invoices that weren't paid, which prevented service work from being performed. Communications between staff and residents were unclear. Notices of maintenance work were communicated to residents at the very last minute. Ms. Foster constantly searched for answers on how to re-organize the office to reduce the number of complaints from residents. When Ms. Young resigned, Ms. Gunn became Ms. Foster's supervisor. Ms. Gunn met with Bernadette Thomas, the front desk coordinator, and Ms. Foster. Ms. Gunn said she wanted to work with them to bring some structure to the office. T. 38. Ms. Gunn asked them to write down their suggestions. After

that discussion, Ms. Foster regularly wrote down and submitted her suggestions, although she testified that Ms. Gunn never took her suggestions. T. 39.

After Ms. Young departed, Ms. Foster wanted to address her failure to punch in and out proactively because she felt that the time card did not accurately reflect the number of hours she really worked. However, Ms. Foster had difficulty getting a clear answer as to whether Ms. Gunn or Mr. Proctor supervised her work when she approached them. When she asked Ms. Gunn, Ms. Gunn would say that Mr. Proctor was her supervisor, but when she approached Mr. Proctor, he would say he had nothing to do with the front office. T. 113. Whenever she tried to discuss the matter, according to Ms. Foster, the conversations weren't "comfortable." She felt they were hostile. T. 113-114.

Despite this, Ms. Foster was paid for the periods in which she entered her hours in her time card by hand. Foster began noting "no lunch" on her time cards for her own record-keeping so she could apply for overtime. T. 91-92. Ms. Gunn continually used the handwritten time card entries to pay Ms. Foster. T. 99. Ms. Gunn didn't always initial the time card when Ms. Foster made the handwritten entries. T. 100. Ms. Foster testified that she never knew when she would be paid for overtime and when she wouldn't. *Id.* For instance, she received overtime for work performed during the pay period of February 21, 2015, even though there were no supervisor's initials were on her time card. T. 100; RX F.

In March, 2015, Ms. Foster began corresponding with member's of Sumner Village's Board of Directors regarding the problems in the office. She asked the Board to ensure that the employees received a performance evaluation because all of her co-workers had complained that they hadn't had one. Ms. Foster suggested to co-workers that they should start there and see if they could move forward with organizing the office. She raised the issue with Ms. Gunn multiple

times, but nothing came of her requests. T. 40.

The record reveals that Ms. Foster first e-mailed Mr. John Harbeson, a member of Sumner Village's Board of Directors, with copies to other Board members, on March 19, 2015, and the correspondence lasted "a couple" of months. T. 45; CX 1. Her March 19th e-mail stated:

> I became a Sumner Village employee as the Service Coordinator on October 14, 2013 and as of today March 18, 2015 I have not received an Employee Evaluation. I was advised upon being hired Sumner Village employees receive an evaluation after 90 days and yearly afterward. My work ethic, work performance and integrity have been questioned repeatedly. I believe in professionalism, fairness and organization and to date the front office is neither. I look forward to your assistance in this matter and thank you in advance for your time.

CX 1. Another Board member, responding to Mr. Harbeson, indicated that none of the employees had had any feedback for several years. *Id.* Mr. Harbeson deferred speaking with Ms. Foster until he could speak with the Sumner Village's attorney. *Id.*

Ultimately, Ms. Foster received a performance evaluation on March 23, 2015 from Ms. Gunn and Mr. Proctor (the maintenance supervisor.) She received an overall performance rating of 2.76 (less than successful) on a rating scale of one to five. A rating of 3.0 was satisfactory. Ms. Foster disagreed with this assessment. T. 41. She was advised by Mr. Proctor to write down the points she disagreed with on the evaluation and was told they would meet again.

On March 23, 2015, the Board's attorney relayed to the Board President that Ms. Foster had received her evaluation. The same day, however, Ms. Foster again contacted the Mr. Harbeson (who had agreed to be the Board's point person on the matter):

> This is an update to my previous email. I reached out to the Board because whenever I would go to Ms. Gunn with issues in the office she would become combative and start throwing around accusations, therefore, I began requesting an employee evaluation months ago and was always brushed off. I requested the evaluation to address any areas of improvement I may need and according to the memo that went out, anything new I learned and other duties I've taken on--not to be personally attacked. I was also warned not to go to the Board and I should reach out anonymously as I would become a "target". I didn't believe that until today. A

> memo of everyone's schedule evaluation was attached to our time cards on Friday afternoon, with mine being scheduled for this morning at 9:45. At 9:45 Ms. Gunn was in the office behind closed doors with Riva and Engel. When they were finished around 10:00, I waited for Ms. Gunn to meet with me and instead she closed her door, therefore, I knocked on the door. We met around 10:15 with Riva present and the meeting immediately turned combative when I stated to Ms. Gunn that I did not agree with the evaluation as it does not reflect who I am or my work performance and is not true. I did not sign the evaluation & was advised by Riva & Ruth to write up what I didn't agree with & we're supposed to meet again on Friday.

CX 1. Ms. Foster asked that someone from the Board be present at the planned follow-up review. *Id.* The Board President replied that he was "troubled" by the allegation that she was warned not to take her concerns to the Board. He also stated, "It's troubling to me, too, that this matter arises so soon after the circumstances that led to Charice's [Young's] departure." *Id.* Ms. Foster believes that Mr. Harbeson's reference to the "circumstances" surrounding Ms. Young's departure referred to the lack of leadership and guidance from Ms. Gunn and to feeling "harassed," "belittled," and frustrated from "going to someone that's the head of the office and constantly being pushed away, brushed off." T. 49. She believed that Ms. Young, like Ms. Foster, felt that Ms. Gunn discriminated against African American employees in the office because she would take the time to train Caucasian employees personally. Ms. Gunn would close her door and sit down with them. According to her, the African American employees never received that treatment. T. 50.

Ms. Foster testified that she made several appointments with Ms. Gunn for the follow-up meeting to finalize her evaluation, but nothing happened immediately. T. 41-42. Ms. Foster testified that she was in constant contact with the Board during this period. Ultimately, she met again with Ms. Gunn and Mr. Proctor on April 22, 2015. Ms. Foster was disappointed with the second meeting because Ms. Gunn's comments hadn't changed, although the ratings were slightly higher. T. 42-43. After the April, 2015, meeting with Ms. Gunn, the Board's president e-mailed Ms. Foster, stating that he understood Ms. Gunn and Ms. Foster had reached agreement on the

performance evaluation. Foster replied on the same day (*i.e.,* April 22, 2015) that an agreement had not been reached. T. 43. On April 23, 2015, the Board president responded that he had been "lied to" as well. T. 50-51; CX 1.

Ms. Foster received her final performance evaluation on May 22, 2018, after submitting a written list of her duties to demonstrate that she performed work beyond that listed in her job description. Based on these additional duties, Ms. Gunn raised her performance rating to 3.0 (satisfactory) and increased Ms. Foster's hourly rate from $15.00 to $17.00. RX M, N. The increase in pay was retroactive to December 13, 2014. RX O.

Some aspects of the final evaluation were negative, however. The evaluation contained a "Development Plan" identifying areas where Ms. Foster needed to improve her performance, along with a time period within which improvements should be accomplished. The evaluation identified Ms. Foster's failure to punch in and out as one of the areas of that needed for improvement. The "action steps for achievement" were to, "[c]lock in and out at the beginning and end of the shifts. Lunch breaks should be taken away from your desk and time card punched in and out." RX M, p. 6. "Indicators of success" for improvement included, "[t]ime card will not be missing punches. Coworkers will know when you are available and you can actually enjoy your lunch break." *Id.* The evaluation stated that an improvement needed to be shown within 90 days. *Id.* Ms. Foster wrote that she disagreed with several of the comments, but signed the evaluation. RX M.

Ms. Foster said that she discussed the Development Plan with Ms. Gunn after the interview, although the 90-day period for improvement was not explained to her. T. 111. She felt that no changes were implemented to help her comply with the development plan. T. 112. For example, another item included in the development plan was to "[c]omplete drop down task listing for the maintenance program transition to Building Link." The "Indicator of Success" was,

"[i]nformation will be available to load into BuildingLink." RX M. While this was part of her job, she never received the information necessary to perform the task. According to Ms. Foster, Ms. Gunn did not live up to promises made in the evaluation. T. 113.

During the same period (*i.e.,* March through June, 2015), Ms. Foster testified that Sumner Village had not paid invoices for months and contractors were refusing to provide services. T. 52-54. Maintenance staff's phones had been disconnected and power had gone out at one of the condo buildings because the bills had not been paid. T. 54. The procedure for payment would be for Ms. Gunn to bring the invoices to Ms. Foster when she received them. Ms. Foster scanned them in and sent them back to Ms. Gunn. Ms. Gunn was responsible for sending them to the corporate office for payment. T. 53.

As a result, Ms. Foster would stay late to work on the invoices, but wanted to be compensated for her work after regularly scheduled hours. On June 26, 2015, she requested that she be paid for the overtime and informed Ms. Gunn that her retroactive pay (due after her evaluation) was $300 short. CX 5. She reminded Ms. Gunn of these items in an e-mail on July 13, 2015, T. 53-55; CX 5.

Shortly after requesting the overtime and the back pay, Ms. Foster received two new Corrective Action Forms, both dated July 16, 2015. One CAF cited Ms. Foster for failure to punch in and out of the office; the other for violating the Sumner Village's policy regarding the release of resident's keys to contractors. RX F. Ms. Foster felt that that she was being retaliated against because she was reporting problems in the office to the Board. T. 114. That evening, Ms. Foster sent an e-mail to a new representative of the Board, a Mr. Byers. Comp. Ex. 2. She stated:

> I am requesting a meeting with you regarding several issues in the office. I was under the impression that the hostile tone in the office would change but it hasn't and I have been quite hesitant on reaching out to the Board given my previous experience with reaching out to the Board. I have been asking Ruth for weeks about

> access to several things relating to my job and she has kept information from me. I am not adequately capable of performing my job because of lack of information and the lack of access to BuildingLink. I am concerned because this is the same thing that happened to Charice forcing Charice to resign as I received two write-ups today for things I have had extensive conversations about with Ruth. I am constantly harassed and bullied by Ruth. Ruth will give me an assignment and explain the assignment step by step and then come back and tell me I did it incorrectly after I did exactly what she said do [sic]. Most times she will assign something with little to no instruction and then tell me I didn't do it correctly. Often times she'll change explanations for day to day assignments depending on which resident complains. I also have concerns about Riva I would like to speak with you about. Additionally, when the Office Manager position became available I asked Ruth could I apply for it and she advised me that she wasn't going to have an Office Manager. Today I asked Ruth did these write-ups have anything to do with her bringing in an Office Manager and not advising me as to not allow me to apply, she denied posting the position and denied advising you that she posted it. I thank you in advance for some type of mediation.

CX 2. On July 20, 2018, Mr. Byers responded that he was out of town, but would "be in touch." CX 1. The record contains no further e-mails between Ms. Foster and the Sumner Village Board of Directors.

Ms. Foster acknowledges that she did not punch in and out at times, but she became frustrated because neither Ms. Gunn nor Mr. Proctor would address the fact that the time card machine did not accurately reflect her hours. T. 53, 90-91. Ms. Foster reiterated that she had tried to resolve the issue many times, but her requests for resolution were stymied by the dispute as to who supervised her. T. 114. Ms. Foster also believes that there was a big improvement in her punching in and out after the May 22nd evaluation. T. 114-115.

The second CAF issued on July 16, 2015, alleged that Ms. Foster violated Ms. Foster's key policy. Ms. Foster believes that it stemmed from an incident that occurred sometime around the end of June, 2015.[4] Sumner Village's key policy called for resident's keys to be kept in a locked compartment. The keys are coded and when checked out, the key number is placed in a key log.

[4] The exact date of the incident is not in the record. The Hearing Examiner assumes that it occurred in June, 2015, because Ms. Gunn testified that two residents complained regarding entry of their units on June 30, 2015. T. 204.

Employees were supposed to sign the logs whenever they removed a key. According to Ms. Foster, neither the keys nor the records were kept securely. Security was lax because the key to the locked compartment was kept unsecured next to the compartment. In her opinion, pretty much anyone, including maintenance, security, and custodial staff, had access to the keys. T. 19-20.

Ms. Foster recalled that she left a voice message for one resident, a Ms. DiPaolo, around 3:00 p.m. on a Friday afternoon to let her know that workmen would need to enter her unit the following Monday to repair the HVAC system. Ms. Foster usually left the office around 4:30 p.m. After she left, Ms. DiPaolo went to the office to complain that her door was unlocked when she arrived at her unit on Friday. No one seemed to know why her door was unlocked or who had given the key out. Ms. Foster felt that Ms. DiPaolo assumed it was related to the maintenance because of the voicemail message that she'd left earlier in the day. Ms. Foster still isn't sure whether maintenance workers actually entered the unit on Friday or not.

Ms. Foster insists that she did not release Ms. DiPaolo's key to the HVAC service contractors. She reiterated that anyone could have pulled the key. If someone had to perform maintenance, all they would need to do is simply take the key to the locked compartment, which was unsecured, and sign the resident's key out. T. 27-28.

At Ms. Gunn's request, Ms. DiPaolo submitted a written report complaining about the incident to Ms. Gunn at the end of June. Ms. Gunn then issued the CAF to Ms. Foster on July 16, 2015. Ms. Foster refused to sign the CAF and decided she would rather talk to Ms. DiPaolo directly about the incident. Shortly thereafter, Ms. DiPaolo reached out to Ms. Foster personally and they had follow-up discussions. Another resident complained of contractors unexpectedly entering the unit as well. T. 180.

On July 22, 2015, Ms. Foster advised Ms. Gunn that she would be out in the morning for

a doctor's appointment. The doctor informed her that she had strep throat. Ms. Foster attributed the strep throat to a co-worker, who had appeared for work even though she was sick for at least eight months. Ms. Gunn gave her lozenges and other aids, but the employee did not receive treatment because she had no health insurance. Ms. Foster did not expect to be diagnosed with strep throat. She had never had strep throat and was "definitely upset." T. 58. She grew frustrated with the disorganized nature of the office and felt that she needed someone to "mediate." Id. She wanted to file a complaint to "assist" her workplace "on getting everything better." According to her, the workplace felt very "discriminatory and retaliatory." T. 64.

After the doctor's appointment on July 22, 2015, Ms. Foster went to the EEOC office in Baltimore, Maryland. Her EEOC intake questionnaire complained that she had been "written up for time card punches after I enquire about applying for a higher position and after reporting harassment and bullying to the Board." CX 13. According to the questionnaire, Ms. Foster believed that the actions were discriminatory because both her supervisors were Caucasian and "when they get mad they are very threatening and say a lot of condescending things to the employees." *Id.* . In response to a question about the reason for the discrimination, Ms. Foster answered, "I never asked the Facilities Manager for an explanation when I asked about it he laughed and the General Manager never addressed the situation." *Id.* At the EEOC, she was given notice of her right to sue her employer in court, apparently because at the time she hadn't suffered an adverse employment action covered by Title VII. T. 64-65.

Because she was upset, Ms. Foster called two co-workers, Ms. Bernadette Thomas and Mr. Reggie Starling, on the way to the EEOC office and from the EEOC office. She reached both while they were still at work. According to her, both were close to Ms. Gunn. She informed them she was going to try to file something to get some type of resolution because reaching out to the

Board did not resolve the issues. T. 60-61. Ms. Foster testified that she did not specifically ask either Ms. Thompson or Mr. Starling to tell Ms. Gunn that she was filing an EEOC complaint, although both confirmed later to Ms. Foster that they had done so. T. 121-122.

It was her understanding from the EEOC representative that she would have to go to court to sue the company. T. 65. Getting money was not her goal, however. T. 65. Her complaint of discrimination filed with the EEOC on July 22, 2015, alleged that she was, "[w]ritten up for time card punches after I inquired about applying for a higher position and after reporting harassment and bullying to the Board." CX 12. She also complained that on April 22, 2015, Mr. Proctor (designated as her "supervisor") called her "he" and "him." In the EEOC complaint, Ms. Foster stated that she felt both incidents were discriminatory because, "[t]hey are both Caucasian and I am Black when they get mad they are very threatening and say a lot of condescending things to the employees." *Id.*

On July 31, 2015, the EEOC issued a Notice of Dismissal and Notice of Rights to Ms. Foster informing her that the EEOC had been unable to conclude that there was a violation under Federal law and informing of her right to sue her employer independently. CX 11.

After filing the complaint, Ms. Foster did not return to work because of her illness. When she did return on July 25, 2015, she set her purse down and Ms. Gunn immediately called her into a conference room. Ms. Gunn handed her a termination letter. When Ms. Foster asked why she was being terminated, Ms. Gunn responded that she did not have a reason, but that she wouldn't challenge an unemployment claim. T. 66. Ms. Foster did not realize that she had been terminated as of July 22, 2015, (the date of the termination letter), until she returned to the office on July 25, 2015, even though she had e-mailed Ms. Gunn indicating that she would be off sick. T. 67-68.

Ms. Foster testified that she received unemployment benefits and the employer did not

object due to misconduct. Ms. Gunn didn't answer the phone when they called her. T. 68. Ms. Foster complained again to the EEOC after her termination. The EEOC referred the complaint to the Montgomery County Office of Human Rights, resulting in this case.

2. SUMMARY OF RESPONDENT'S EVIDENCE

Ms. Gunn was the sole witness appearing for the Respondent, Sumner Village. She is employed by Legum and Norman (Legum), and worked at Sumner Village as the general manager for five years beginning in August 2011 until October 15, 2016. Her duties were to manage the employees and ensure that maintenance was being performed. She was responsible for hiring some of the staff, including the office manager. These employees then hired their subordinates with her approval. T. 158. She also met with the Board of Directors, took care of procuring contracts with vendors, and prepared the association's budget. T. 158-159. She supervised Ms. Foster for part of her tenure. T. 159.

When Ms. Foster became a full-time employee, she acknowledged receipt of a "Personnel Policy Handbook" approved by the Sumner Village Association Board of Directors. RX B. Several of the policies in the handbook, including a requirement that employees punch a time card when they arrive and when they leave, are pertinent to this case:

> Time cards are very important. All employees are required to punch in upon arrival, punch out for lunch, punch back in when lunch is completed, and punch out for the day. All employees must punch in and out on the time clock. Any missed punches or punches made in error must be initialed by a manager before payment for those hours worked can be made. Falsification of time cards or work records is grounds for immediate termination. Time clock malfunctions should be reported to Management immediately.

RX A, p. 10.

The Personnel Policy Handbook also provides a procedure for employee complaints. RX A, p. 20. The initial step is to meet with the immediate supervisor, who must make a "reasonable

effort to address the issue" within 3 business days. *Id.* If the resolution proposed by the supervisor is unsatisfactory, or if the employee was uncomfortable discussing it with the supervisor, the employee could elevate the matter to the general manager. If the employee is dissatisfied with the General Manager's response, she may then submit the matter in writing to the Sumner Village Board of Directors. The Handbook disavows any tolerance of harassment as follows:

> Sumner Village will not tolerate harassment of employees by anyone, including any supervisor, co-worker, vendor, or resident of Sumner Village. Harassment consists of unwelcome conduct, whether verbal, physical or visual. Employees should report these situations to management as soon as possible following an incident. Management will investigate **all** reported incidents and report the findings to the SVCA board. The board will review the findings surrounding the incident and where indicated communicate with the resident/owner regarding the incident.

RX A (Emphasis in original.) At around the same time period, Ms. Foster also signed a "No-Harassment Acknowledgement Form" prepared by Legum. RX C. The Legum "no-harassment" policy requires the employee to agree to report any conduct that the employee believes violates the policy to his or her immediate supervisor or to the most senior member of the management of the employee's department, or, at the employee's preference, to Legum's Vice President of Human Resources and Administration, or to an Executive Committee member. RX C.

Ms. Gunn testified that she terminated Ms. Foster, in part, because she would not follow Sumner Village's policy requiring employees to punch in and out. T. 167. According to Ms. Gunn, Sumner Village uses a time clock to track employee's hours so they can validate the time that people come in and out. Employees work different shifts and there isn't always someone else around. The time clock assures that they are be paid appropriately and that Legum knows who is actually on the property working. T. 166-167.

The time card punch machine was located immediately outside of Ms. Foster's office. There is a rack next to the machine that holds the employees' time cards. When employees come

to work, they take their card and drop it in a slot on the machine. They then remove the card and place it back in the time card rack. The time cards are supposed to be kept in the rack at all times so they don't get lost and can be located when payroll needs to be done at the end of the pay period. All non-salaried employees are required to use the time clock, including Ms. Foster. T. 167.

According to Ms. Gunn, an employee that doesn't punch in or out must bring their time card to a supervisor to sign off on the time written on the card. This should be done at the same time the employee writes in the hours. The procedure doesn't permit employees to fill in their hours several days after they fail to use the time card machine. T. 168.

Ms. Gunn spoke with Ms. Foster multiple times about the need to comply with the company policy requiring her to clock in and clock out. She posted a notice next to the time card stating that everyone needed to punch in and out. She put the same notice by the time clock in the shop. T. 168-169. All of the time cards of full-time employees would stay in the time card rack except at the end of the pay period. Security would then pull all of the time cards and bring them to Ms. Gunn. T. 169. During winter and spring of 2015, Ms. Gunn frequently noticed that Ms. Foster's time card was not in the slot on the time card rack. T. 169-170. She informed Ms. Foster that her time card needed to remain in the slot because they would have no record of her time if it were lost. T. 170.

Ms. Gunn acknowledged that, at the time of Ms. Foster's initial review in March, 2015, Ms. Foster complained of a remark made by another employee at some point during the previous winter. Ms. Susan McDonald, the grounds manager at the time, usually worked outdoors. During the previous winter, according to Ms. Gunn, Ms. Gunn asked her to help in the office because there was little for her to do outside. Ms. McDonald (who is Caucasian) shared an office with Ms. Foster, Ms. Gunn and another employee (who is African American). At some point, Ms.

McDonald commented that she was excited that she was to be able to be inside, to dress up and be an "office monkey" because that's what she did when she was in New York and worked in offices about 10 or 15 years before. Ms. Gunn understood the comment to mean that Ms. McDonald was glad to be inside and be with people. According to Ms. Gunn, Ms. Foster did not complain about the remark at the time it occurred; she didn't raise the issue until Ms. Foster's initial performance review in March, 2015. At the performance review, Ms. Foster stated that the comment was offensive and negative and felt that Ms. Gunn should have done something about it. T. 188-189. Ms. Gunn felt that, had Ms. Foster truly found it offensive, she could have said something at the time. Instead, Ms. Foster waited until she received her review, which she was unhappy with. Ms. Gunn denied that the "office monkey" comment was discriminatory—it was a merely statement that Ms. Foster found offensive. T. 191. Ms. Gunn is married to a black man and her son is half black. When they speak to the little children in the family, they say, "you little monkey." It never occurred to Ms. Gunn that Ms. McDonald's remark was racially insensitive until Ms. Foster raised the issue during her review. T. 191-192. Ms. Gunn testified that she would have addressed it had Ms. McDonald had still been employed with Sumner Village. T. 11.

Ms. Gunn confirmed that she increased Ms. Foster's performance rating after the initial review in March, 2015. Ms. Foster's rating for the original review was 2.7 (below successful) and Ms. Gunn increased it to a 3.0, which is a satisfactory rating. T. 190. According to Ms. Gunn, she raised Ms. Foster's performance rating because Ms. Foster had given her a list of all of the duties she was performing. Ms. Gunn justified the increase in pay and higher rating because she felt that Ms. Foster demonstrated that she was performing more duties than were originally within her job description. Ms. Foster was originally hired just to be the service center coordinator and take care of the maintenance tickets. Residents could request Sumner Village to perform small maintenance

tasks in their units. When first employed, Ms. Foster's job was to get those calls from the owners and dispatch the technicians. If there were leaks that affected multiple units, she would handle that as well. After Ms. Young left, Ms. Foster started working with the accounts payable as they came in. That required coding and scanning the invoices. T.205-207.

Contrary to Ms. Foster's account, Ms. Gunn testified that she had gone through the development plan with Ms. Foster during her performance review on May 22, 2015, and explained that Ms. Foster needed to show improvement within 90 days. T. 176. The Development Plan Section of the performance evaluation lists the different goals to be achieved and the 90 days at which they were going to check back and see that progress had been made. T. 176. Ms. Gunn recalled specifically discussing the need to clock in and out at the beginning and end of the day, as well as lunch. Ms. Gunn testified that she informed Ms. Foster that she could use a library or conference room for her lunch break. T. 177. Ms. Gunn paid Ms. Foster even when she hadn't followed the time card policy because she tried to work with her through counseling rather than withholding pay. T. 196.

At Ms. Foster's evaluation, Ms. Gunn testified, Ms. Foster agreed to improve her consistency in recording her time. T. 178. Ms. Gunn did not see any marked improvement in keeping consistent time records after the May 22nd evaluation. T. 178.

Ms. Gunn acknowledged that there were exceptions to the requirement to punch in and out for lunch. She often sent someone to buy lunch for the entire office, including Ms. Foster. When this occurred, Ms. Gunn did not subtract a lunch break for the person that went to buy lunch for the office. T. 177. They often sent someone to buy lunch because people liked one-half hour lunch breaks. The shorter breaks allowed them to go home earlier (*i.e,* work an 8½-hour day instead of a 9-hour day.) Therefore, staff would put orders together, call them in, and people would

take turns picking the food up. Ms. Gunn admitted that Ms. Foster picked up the lunch order a lot of the time, using Ms. Gunn's credit card, because they had projects they were working on for the office. T. 178. When Ms. Foster picked up the food for the office, she would sometimes write in her time card "no lunch break" and sometimes would not. T. 177-178.

Ms. Gunn acknowledged that that Ms. Foster's final performance evaluation (RX M, page 5) states, "Supervisors and employees need to work together on at least two areas of development based on identified areas of development. The progress achieved would be evaluated at the time of the next review." Exhibit M; T. 197.

Ms. Gunn decided to test whether Ms. Foster's compliance with the time card policy had improved on July 16, 2015. When Ms. Gunn arrived at the office at 7:30 a.m. on that date, she pulled Ms. Foster's time card for the pay period of July 11, 2015, to July 24, 2015. Ms. Foster's time card was missing some of the punches for Monday, Tuesday, and Wednesday of the first week. RX L**.** When Ms. Gunn tallied the card at the end of the pay period, the missing punches were filled in by hand. Ms. Gunn reiterated that filling in the time entries after the punches were due did not accord with the Sumner Village's policy. The times that were handwritten were not verified by a supervisor, but appeared to be in Ms. Foster's writing. T. 171-172. Therefore, Ms. Gunn concluded that Ms. Foster must have filled in the time card after the days where she failed to punch in. T. 171-173. Ms. Gunn did not speak with Ms. Foster about this at the time, but it was the reason for the CAF issued on July 16, 2015. T. 173.

Ms. Gunn prepared the July 16, 2015, CAF because failure to punch in had been an ongoing issue that was part of the performance improvement plan given to Ms. Foster after completion of her review. Ms. Foster's failure to use the time card machine at times caused the payroll to be delayed because Ms. Gunn either didn't have the time card or it was not completely filled in. Ms.

Gunn didn't feel that Ms. Foster was making an effort to follow through with what she'd agreed to do at her review. To Ms. Gunn, recording her time properly was an important part of the job to ensure that people are paid for their time worked and the machine is a simple mechanism to use. T. 174. When Ms. Gunn gave the CAF to Ms. Foster on July 16, 2015, Ms. Ms. Foster refused to sign it and left.

Ms. Gunn issued the second CAF on July 16th because she believed that Ms. Foster violated Sumner Village's policy regarding release of resident's keys. Ms. Foster was responsible for coordinating service on HVAC units in two of the buildings. The HVAC units are stacked on top of each other in the four-story buildings. The compressors are on the top of the buildings, so when the HVAC is replaced in a lower unit, the contractors had to run new wiring up through everyone's HVAC closet to connect to the compressor. T. 160. Ms. Foster was to notify the unit owners of the repair work and let them know that contractors would have to enter their units for this purpose.

A son of one of the residents was surprised when a contractor walked in to the unit with his key. T. 180. According to Ms. Gunn, the resident was very upset about the entry. T. 180-181. Another complaint came from a Ms. DiPaolo. Ms. Gunn testified she investigated the incidences by communicating with the contractor who performed the maintenance. T. 180.

Ms. Gunn decided that she needed to terminate Ms. Foster when Ms. Foster refused to sign CAFs issued on July 16, 2015. In her opinion, Ms. Foster was not making the changes identified in the performance review and she felt that it was "time to call an end to this." T. 181. Ms. Gunn also felt that Ms. Foster's refusal to sign the CAFs was flagrantly insubordinate because Ms. Foster didn't even attempt to apologize, and simply refused to change her behavior. T. 181.

Ms. Gunn prepared the letter informing Ms. Foster of her termination on July 22, 2015 when it was clear that to her that Ms. Foster was not going to sign the CAFs issued on July 16,

2015. T. 203. Ms. Foster was in the office four days after the CAFs were issued—until she was out with strep throat. T. 202. Between July 16, 2015, and July 22, 2015, when Foster was out sick, Ms. Gunn received no response from Ms. Foster on whether she would improve her compliance with the time card policy because Ms. Foster refused to acknowledge the communication. And even though the full 90 days given in Ms. Foster's performance review had not passed, Ms. Gunn felt that failure to sign the forms was a very strong indication that Foster had no intention of following up with the time card policy. Ms. Gunn testified that compliance with the time card policy was important to her because she was responsible for paying employees the hours shown.

She gave the letter to Ms. Foster when Ms. Foster returned to work on the following Monday, July 25, 2015. RX R; T. 183. She could not recall whether she actually conferred with others when she made the decision to terminate, but she normally communicated with the Human Resources division of Legum before she terminated employees. T. 183. She did not include the reason for termination in the letter because Legum's Human Resources department had taught her not to give a reason in termination letters; she had been told only to state the fact that the employee had been terminated, the date of last pay, the last day of work, and that information on COBRA would be coming to them. T. 184. On July 27, 2015, Ms. Gunn prepared the termination form needed to remove Ms. Foster from the payroll and pay her vacation and sick time. The termination form lists the following reason for terminating Ms. Foster's employment: "Failure to improve issues on performance evaluation and policy violations." RX S; T. 182.

Ms. Gunn disavowed any knowledge of Ms. Foster's July 22, 2015, complaint to the EEOC. T. 186. She did not know of the EEOC complaint until she received a notice from the EEOC that a complaint had been filed after she had terminated Ms. Foster. Her best recollection

is that Sumner Village received the EEOC complaint toward the end of 2015 after receiving notice from the Montgomery County Office of Human Rights that a claim had been instituted with that office. T. 187; Exhibit X. T. 186-187. No Sumner Village employees told her of the complaint. T. 187.

Ms. Gunn testified that Ms. Foster could have complained about Ms. Gunn's behavior using the Legum policy, which permitted Ms. Foster to complain to a Legum supervisor. T. 192. A community manager supervised Ms. Gunn onsite and Ms. Foster could have gone to the community supervisor. T. 192. Ms. Foster could have used either the Legum policy or the policy in Sumner Village's handbook to complaint. T. 192-193.

The EEOC issued written notice of Ms. Foster's second complaint to Sumner Village on September 3, 2015. RX W.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hearing Examiner concludes that Ms. Foster has failed to prove that Sumner Village terminated her employment in retaliation for activities protected by the HRCL because most of Ms. Foster's complaints did not concern racial discrimination and because she failed to prove that Sumner Village knew of the activity that was protected by the HRCL.

In her Closing Statement (DKT. 56), Ms. Foster presents a timeline highlighting the fact that her termination occurred on the day that she filed a complaint with the EEOC. The timeline points out (1) that Ms. Foster was paid the entire time she worked for Sumner Village despite her acknowledged infractions of the time card policy, (2) that she was terminated before the full ninety days given for improvement in her performance evaluation, (3) that she was given only six days to comply with the CAFs issued on July 16, 2015, and (4) despite having been continuously paid without complying with the time card policy, she was terminated on the day she filed a complaint

with the EEOC. DKT. 56, pp. 1-2. The Complainant concludes from this evidence that:

> Combining the sheer weight of coincidence with the questionable circumstances of termination powerfully supports a finding of unlawful retaliation for engaging in protected activity. Some lapses in performance are inevitable in any employment situation. In this particular case, the significance and timing of the lapses would have to outweigh the unquestionably massive coincidence. Complainant was terminated on the same date she filed a complaint with the EEOC. Prior to that and learned after the fact, she was given a mere six days to improve her performance before termination and was not told that the reason for termination was failure to adhere to the CAF. Complainant was provided virtually no details as to why she was implicated as violating a key control procedure when the entire custodial and maintenance staff had access to a consistently unlocked key case. The case in question also involved a third party vendor that was unavailable for testimony. These "violations" must outweigh the degree of coincidence in question. It does not.

Id. at 4.

While Complainant's closing statement focuses solely on her complaint to the EEOC as the basis for retaliation, the bulk of her presentation at the hearing included Ms. Foster's correspondence with the Board of Directors of Sumner Village during the spring of 2015. The Hearing Examiner will address both.

The record demonstrates that by far the majority of Ms. Foster's complaints to the Sumner Village's Board relate to disorganization and inefficiency in the office and the failure to receive a performance review. The e-mails between Ms. Foster and Mr. Harbeson discuss almost exclusively Ms. Gunn's failure to conduct performance evaluations for Sumner Village employees. Mr. Harbeson makes only one comment in the e-mails, a remark concerning the reasons for Ms. Young's departure, which could possibly broaden the correspondence to matters of racial discrimination. Yet, Ms. Foster's own interpretation of that remark related it primarily to disorganization with the office. At most, she interpreted the remark also to refer to the "harassment" and feeling of being "brushed off" by Ms. Gunn, but does not specifically state that the harassment was racially discriminatory. Even if Ms. Foster's interpretation of the remark was

intended to include racial discrimination, there is nothing in the record indicating that this is what Ms. Foster complained of to the Board.

The record discloses only three instances of arguably "protected activity" within the scope of the MHRCL. The first occurred in September, 2014, when Mr. Proctor appeared at the office armed and in a SWAT uniform. Ms. Foster testified that she "mentioned the incident to several Board members." T. 29.

There is nothing in this record that specifically ties Mr. Proctor's appearance to racial discrimination, particularly because he claimed (according to Ms. Foster) to be working for President Obama, who is African American. The incident with Mr. Proctor occurred approximately nine months prior to Ms. Foster's termination, well outside the time frame most courts have found that a temporal proximity sufficient to sustain a *prima facie* case of retaliation. Moreover, in the interim, Ms. Foster received a successful performance rating and an increase in pay, both of which dilute any implied causal connection between her complaints surrounding Mr. Proctor's actions and Ms. Foster's termination. The Hearing Examiner finds that there is insufficient evidence that Ms. Foster's discussions with Board members about Mr. Proctor's appearance constituted activity protected by the HRCL or that they had a causal connection to her termination.

The second arguably protected activity occurred when Ms. Foster complained at her initial performance review in March, 2015, about Ms. McDonald's comment that she liked being an "office monkey." Despite Ms. Gunn's contention that the term is not racially discriminatory, Ms. Foster's perception that it was is reasonable and has been recognized by Maryland courts. *See, Boyer-Liberto v. Fontainebleau Corp.,* 786 F.3d 264, 280 (4th Cir. 2015)("[t]he use of the term 'monkey' and other similar words," including the variation "porch monkey," has "been part of

actionable racial harassment claims across the country"), *quoting, Green v. Franklin Nat'l Bank of Minneapolis,* 459 F.3d 903, 911 (8th Cir.2006) (recognizing that "[p]rimate rhetoric has been used to intimidate African–Americans".) Nevertheless, the record does not support a causal connection between the protected activity and Ms. Foster's termination. Ms. Foster's complained of the remark in March, 2015, approximately four months before her dismissal. In the intervening period, she received a "successful" performance rating from Ms. Gunn and an increase in her hourly rate from $15.00 to $17.00 based on the new duties she had assumed since starting with Sumner Village. The Hearing Examiner concludes that the length of time between the complaint and the termination, and the intervening favorable performance evaluation and increase in pay, does not establish that Ms. Gunn's decision to terminate Ms. Foster's employment stemmed from Ms. Foster's complaint about Ms. McDonald's comment.

The final incident that would qualify as activity protected by the HRCL was Ms. Foster's complaint to the EEOC filed on July, 22, 2015. Ms. Foster relies heavily on the timing of the complaint (*i.e.,* filed on the same day that Ms. Gunn decided to terminate Ms. Foster) to raise the inference that Ms. Gunn knew of it and retaliated against Ms. Foster on the same day. The record is devoid of direct evidence from Ms. Foster that Ms. Gunn knew of the EEOC complaint when she made the decision to terminate Ms. Foster on July 22, 2018. Ms. Foster testified from personal knowledge that she called two employees at Sumner Village, one of whom was a manager, and told them she was filing the complaint. She did not ask them to tell Ms. Gunn. Her only evidence that Ms. Gunn knew of the complaint is hearsay: She testified that the two employees she contacted the day she filed the complaint later told her that they informed Ms. Gunn of this. Even assuming that this hearsay testimony is true, there is nothing in the record indicating *when* they may have told Ms. Gunn of the complaint. The Hearing Examiner finds Ms. Gunn's testimony

credible that she decided to terminate Ms. Foster on July 22, 2015 (and not later), because that is the date of the termination letter. The time stamp on the EEOC Intake sheet indicates that the EEOC received Ms. Foster's Intake Sheet and Questionnaire at 11:11 a.m. on July 22, 2015. The time filed leaves open two equally plausible inferences—that either one or both of the employees had opportunity to discuss the EEOC complaint with Ms. Gunn or they didn't. This gossamer of evidence, without any corroborating direct evidence, is insufficient to outweigh Ms. Gunn's direct testimony that she did not know of the complaint.

The *Murphy-Taylor* case, *supra,* is instructive when the circumstantial evidence is based almost entirely on the temporal proximity between the protected activity and adverse employment action. Although *Murphy-Taylor* addressed the issue summary judgment stage, it's holding bears some weight when assessing whether a complainant has met her ultimate burden to prove that the employer's proffered reason is pretextual. The court held that, "'[w]here timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.'" *Murphy-Taylor, supra,* at 720-721, *quoting, Francis v. Booz, Allen & Hamilton, Inc.,* 452 F.3d 299, 309 (4th Cir.2006) (citation omitted) (affirming summary judgment where the "actions that led to [plaintiff's] probation and termination began before her protected activity, belying the conclusion that a reasonable factfinder might find that [defendant's] activity was motivated by [plaintiff's] complaints"). Here, Ms. Foster's job performance had already been at issue in 2014, well before Ms. Foster's complaint to the EEOC or her complaint about the "office monkey" comment, when Ms. Young issued two CAFs, one for failure to comply with the time card policy. Ms. Gunn notified Ms. Foster formally (through her performance evaluation) that failure to punch in and out could result in discipline at least two months before her termination.

On balance, the weight of the evidence here supports Sumner Village's position that its reasons for terminating Ms. Foster were not a pretext for retaliation. Its evidence is more consistent and better documented than Ms. Foster's to the contrary.[5] It reveals that Ms. Foster received CAFs for failure to comply with the time card policy both from Ms. Young, an African American, and Ms. Gunn. Ms. Foster acknowledged in testimony that she did not comply with the policy, as evidenced by the number of time cards in the record that do not include punches. She appeared to assume that her practice of writing in the entries was acceptable to Ms. Young because she continued to receive pay, and her testimony suggests that she felt that time card infractions were minor because the duties she performed and the role she played in the office far outweighed her non-compliance to the policy. T. 208-209. Ms. Gunn refuted Ms. Foster's assertion that Sumner Village had implicitly accepted the practice of handwritten entries (because she regularly received pay) testifying that she preferred to enforce the policy through counseling. This testimony is consistent with the development plan portion of Ms. Foster's performance evaluation. Ms. Gunn's testimony that Ms. Foster's infraction of the policy had not improved is consistent with the number of handwritten entries in the time cards in evidence. Excluding the time cards before Ms. Foster began writing in "no lunch," Ms. Foster's timecards had between 10 and 22 handwritten entries. The handwritten entries for the pay periods after her performance evaluation, ranged between 13 and 22. RX L.

Sumner's evidence is also consistent with Ms. Gunn's demeanor at trial. Ms. Gunn appeared visibly angry when she testified that she realized that Ms. Foster was not going to sign the CAFs issued on July 16, 2015, and that she found Ms. Foster's failure to sign and her continued

[5] Even assuming, *arguendo,* that there may have been some retaliation by Ms. Gunn due to Ms. Foster's correspondence with Sumner Village's Board of Directors and her request for overdue back pay and overtime, none of these activities involved complaints of racial discrimination, and Ms. Foster is not protected by the HRCL from other forms retaliation.

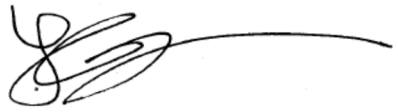
violation of the policy were "flagrantly" insubordinate. T. 181.

Weighing the testimony, evidence, and demeanor of the witnesses, the Hearing Examiner finds that Ms. Foster failed to meet her burden of proof that her termination was based on activity complaining of racial discrimination or that Sumner Village knew of Ms. Foster's July 22, 2015, EEOC complaint at the time she was terminated. Therefore, the Hearing Examiner recommends that the Human Rights Commission find that Sumner Village did not violate Section 27-19(c) of the Montgomery County Code.

V. RECOMMENDATION

For the foregoing reasons, the Hearing Examiner hereby recommends that the Human Rights Commission find that Sumner Village has not violated Section 29-19(c) of the Montgomery County Code. The complaint was not frivolous and each side should bear its own costs and attorney's fees.

Respectfully submitted,



Lynn A. Robeson
Hearing Examiner

Dated: July 2, 2018

COPIES TO:

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