OFFICE OF COMPLIANCE
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Patrick Rager,	)	
	)	
Appellant,	)	
	)	Case No. 17-SN-28 (DA, FM, RP, CV)
v.	)	
	)	
U.S. Senate Sergeant at Arms,	)	
	)	
Appellee.	)	
	)	

Before the Board of Directors: Barbara Childs Wallace, Chair; Barbara L. Camens, Alan V. Friedman, Roberta L. Holzwarth and Susan S. Robfogel, Members.

DECISION OF THE BOARD OF DIRECTORS

The appellant, Patrick Rager ("Rager"), has petitioned the Board to review the Hearing Officer's January 12, 2018 Order, which entered summary judgment in favor of the appellee, the U.S. Senate Sergeant at Arms ("SAA"), on all claims alleging violations the Congressional Accountability Act ("CAA"). Upon due consideration of the Hearing Officer's orders, the parties' briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer's Order in its entirety.

I. Background and Procedural History

Unless otherwise noted, the following facts are undisputed[1]: Rager, a Caucasian male who suffers from Type I diabetes, was employed by the SAA in October 2013. At all times relevant to this appeal, he was employed as a Data Production Specialist ("DPS") in the SAA's Printing Graphics and Direct Mail ("PGDM") facility located in Landover, Maryland. One of Rager's primary job duties was to copy, scan, and print documents received from Senate offices, including Member offices and Senate Committees. The SAA and PGDM have established policies and procedures to ensure the security of these documents, as many of them contain sensitive and confidential information. These policies and procedures specify, among other things, that DPSs are not authorized to save any documents, whether personal or Senate office documents, directly to a production workstation, even on a de minimis basis.

[1] The Hearing Officer's decision contains a thorough recitation of all the undisputed material facts in this case.

SAA management repeatedly reminded Rager about this policy, including through verbal counseling in September 2016; in his written February 2017 performance evaluation; in guidance provided to all DPSs, including Rager, in April 2017; and again through verbal counseling in May 2017. In May 2017, however, the SAA concluded an investigation in which it determined that over the course of 15 months, Rager had saved 10,604 files, 52,070 pages, and 14 gigabytes of personal and Senate office documents to a production workstation in violation of policy. Citing Rager's misconduct in disregarding supervisory instructions to not store personal or Senate office documents on a production workstation, his history with oral counseling and management coaching, and his disciplinary history,[2] the SAA terminated his employment on June 7, 2017.

On October 2, 2017, following counseling and mediation, Rager filed the instant Complaint, in which he alleged the following violations of the CAA: (1) disability discrimination (disparate treatment); (2) disability discrimination (failure to accommodate); (3) race discrimination (disparate treatment); (4) reprisal for opposing practices made unlawful by the CAA; (5) creating a hostile work environment based on his race, disability and participation to protected activity; and (6) interference with rights protected under the Family Medical Leave Act ("FMLA").

Following discovery, by Order dated January 12, 2018, the Hearing Officer granted summary judgment in favor of the SAA on all claims. Rager has filed a petition for review ("PFR") of the Hearing Officer's Order; the SAA has timely filed a brief in opposition to Rager's PFR, and Rager has timely filed a reply to the SAA's responsive brief.

[2] The SAA cites several incidents of unacceptable behavior during Rager's tenure, including refusing to follow his supervisors' instructions on work-related procedures, engaging in insubordinate behavior, frequently interrupting and distracting his co-workers from completing their work assignments, being repeatedly tardy, engaging in unprofessional email correspondences with his supervisors, threatening to fight his Lead Worker after work, and surreptitiously audio recording his meetings with his managers and SAA Human Resources Department employees in violation of an SAA policy.

II. Analysis

A. Summary Judgment Standard

We review a decision granting a motion for summary judgment *de novo*. *Patterson v. Office of the Architect of the Capitol,* No. 07-AC-31 (RP), 2009 WL 8575129, at *3 (OOC Apr. 21, 2009). Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986); OOC Procedural Rule 5.03(d). In determining whether the nonmoving party has raised a genuine issue of material fact, the Board must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *U.S. Capitol Police & Lodge 1, FOP/U.S. Capitol Police Labor Comm.,* No. 16-LMR-01 (CA), 2017 WL 4335144, at *3 (OOC Sep. 26, 2017); *see also Talavera v. Shah,* 638 F.3d 303, 308 (D.C. Cir. 2011).

To defeat a motion for summary judgment, the non-moving party must "designate specific facts showing that there is a genuine issue for trial," *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986), and the moving party can establish its entitlement to judgment by showing the lack of evidence to support the non-moving party's case. *Conroy v. Reebok Int'l,* 14 F.3d 1570, 1575 (Fed. Cir. 1994); *Eastham v. U.S. Capitol Police Bd.*, No. 05-CP-55 (DA, RP), 2007 WL 5914213, at **3-4 (OOC May 30, 2007) (affirming summary judgment when complainant "failed to proffer evidence" that would permit the inference of unlawful conduct required to establish complainant's prima facie case). The non-moving party is required to provide evidence in support of his claims, not merely assertions, allegations, or speculation. *See Solomon v. Architect of the Capitol*, No. 02AC-62 (RP), 2005 WL 6236948, at *8 (OOC Dec. 7, 2005) (holding that at the summary judgment stage, claims must be supported by evidence, which distinguishes a decision on a motion for summary judgment from a decision on a motion to dismiss). This Board, like the Hearing Officer, may not make credibility determinations or weigh the evidence. *See Burley v. Nat'l Passenger Rail Corp.,* 801 F.3d 290, 296 (D.C. Cir. 2015).

B. The Hearing Officer Properly Granted Summary Judgment on Rager's Disparate Treatment Discrimination Claims based on Disability and Race.

On review, Rager reiterates his claims that the SAA discriminated against him based on disability and race. Section 201 of the CAA governs employment discrimination claims. It provides, in relevant part:

> All personnel actions affecting covered employees shall be made free from any discrimination based on –

> (1) race, color, religion, sex, or national origin, within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2002-e); . . . or
>
> (2) disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791) and sections 102 through 104 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12112-12114).

2 U.S.C. § 1311(a). To establish a prima facie case of discrimination under section 201, the employee must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the action gives rise to an inference of discrimination. *Rouiller v. U.S. Capitol Police,* No. 15-CP-23 (CV, AG, RP), 2017 WL 106137, at *8 (OOC Jan. 9, 2017) (citing *Udoh v. Trade Ctr. Mgmt. Assoc.,* 479 F. Supp. 2d 60, 64 (D.D.C. 2007)). If the employee meets this burden of production, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for its action. *Id.* If the employer succeeds, then the plaintiff must "be afforded a fair opportunity to show that [the employer's] stated reason . . . was in fact pretext" for unlawful discrimination. *Id.* The ultimate burden of proving discrimination always remains with the complainant. *See Evans v. U.S. Capitol Police Bd.,* No. 14-CP-18 (CV, RP), 2015 WL 9257402, at *7 (OOC Dec. 9, 2015*).*

As discussed below, the SAA asserts that it suspended Rager because it concluded, after investigation, that he had threatened a Lead Worker in violation of the policy against Workplace Violence; that it terminated him because he saved tens of thousands of pages of confidential and sensitive Senate office documents and personal documents to a production workstation in contravention of repeated directives not to do so; and that his race and disability had nothing to do with it. In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the Hearing Officer need not-and should not-decide whether the plaintiff actually made out a prima facie case. *See Brady v. Office of the Sergeant at Arms,* 520 F.3d 490, 494 (D.C. Cir. 2008). Rather, in considering an employer's motion for summary judgment or judgment as a matter of law in those circumstances, the Hearing Officer must resolve one central question: Has the employee produced sufficient evidence for a reasonable factfinder to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race or disability? *Id.* To answer that question at the summary judgment stage, the Board assesses whether there is evidence from which a reasonable factfinder could find that the employer's stated reason for the firing is pretext and that "unlawful discrimination was at work." *Burley,* 801 F.3d at 296; *see also Barnett v. PA Consulting Grp., Inc.,* 715 F.3d 354, 358 (D.C. Cir. 2013). When determining whether summary judgment or judgment as a matter of law is warranted for the employer, the court considers all relevant evidence presented by the parties. *Brady,* 520 F.3d at 494.

Rager may try in multiple ways to show that the SAA's stated reason for the employment action was not the actual reason --in other words, was a pretext. Often, the employee attempts to produce evidence suggesting that the employer treated other employees of a different race, color, religion, sex, or national origin more favorably in the same factual circumstances. *Brady,* 520 F.3d at 495. Here, Rager asserts that the SAA's proffered reasons for its disciplinary actions were pretextual, pointing to the relatively lenient treatment of other, African American employees whom he views as similarly situated to him as confirmation that his discipline was unjustifiably harsh based on his race.[3] He claims that he was singled out by his managers for more counseling and admonishment meetings than his coworkers, that he was stared at excessively by some of his supervisors, that he was subjected to increased scrutiny at work, that he had more and different restrictions on excessive texting and talking than his coworkers, and that he received harsher discipline, including two counseling memos, a 3-day suspension and termination, as compared with other employees who had allegedly committed similar misconduct.

The Hearing Officer determined, however, that Rager did not establish that he and any of the other employees who were counseled or disciplined were truly similarly situated. We agree. "In order to be considered similarly situated, it is not necessary that the comparators engaged in the exact same offense; what is required is merely that the offenses are of 'comparable seriousness.'" *Wheeler v. Georgetown Univ. Hosp.,* 812 F.3d 1109, 1118 (D.C. Cir. 2016) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, (1973)).

In the instant case, however, Rager did not identify a single coworker or other employee of the SAA who was not a member of his protected classes and who was accused of comparably serious misconduct at work – that is, creating, storing and saving personal documents and Senate Member documents to a shared and unprotected computer workstation, talking excessively to coworkers, disrupting their work, texting excessively, being repeatedly tardy, using poor judgment when confronted with errors, threatening a coworker with violence in the work place, or responding inappropriately in writing when communicating with supervisors. Although the question of whether employees are similarly situated ordinarily presents a question for the finder of fact, *see id.* at 1115; summary judgment for the employer is appropriate, where, as here, there are important qualitative differences between the purported comparators' conduct and the employee's. *See also Baloch v. Kempthorne*, 550 F.3d 1191, 1200-01 (D.C. Cir. 2008) ("But given the sheer number and willfulness of [plaintiff's] recurrent breaches," his proffered comparator was not similarly situated and [plaintiff's] allegedly disparate treatment does not

[3] Rager conceded that he had no information about whether these individuals suffered from any disabilities.

give way to an inference of . . . discrimination in the imposition of discipline.").[4] Thus, the Hearing Officer properly concluded that there is no evidence that other similarly situated DPSs who were not in his protected classes engaged in comparably serious misconduct, but were treated less severely, or that the difference in treatment was because of disability or race. Therefore, Rager's evidence does not support an inference that SAA's proffered reasons for disciplining Rager were pretextual.

Rager also asserts that the investigation into his alleged misconduct as a whole was little more than a cover-up for the real, discriminatory reasons for his discipline. An employee can establish that an employer's stated reason for an adverse employment action was a pretext for discrimination by showing that "the employer is making up or lying about the underlying facts that formed the predicate for the employment decision." *Brady,* 520 F.3d at 495. An employee might also establish pretext with evidence that a factual determination underlying an adverse employment action is egregiously wrong, because "if the employer made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so." *Fischbach v. D.C. Dep't of Corr.,* 86 F.3d 1180, 1183 (D.C. Cir. 1996). However, the issue is not the correctness or desirability of the reasons offered but whether the employer honestly believes in the reasons it offers. *Brady*, 520 F.3d at 496; *Williams v. Office of the Architect of the Capitol*, No. 14-AC-11 (CV, RP), 2017 WL 5635714, at *12 (OOC Nov. 21, 2017).

In the instant case, Rager has failed to present evidence, other than his subjective feelings, that the SAA's reasons for his termination were not honestly held. Therefore, even viewing the record in the light most favorable to Rager, we agree with the Hearing Officer that he failed to proffer any evidence that would warrant an inference of discrimination. *See Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296, 305 (4th Cir. 2016) (a plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate non-discriminatory reasons for a discharge) (quotation omitted); *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 456 (2nd Cir. 1999) (feelings and perceptions of being discriminated against are not evidence of discrimination) (quotation and citation omitted).

On review, Rager also appears to argue that he was discriminated against on the basis of his disability because: (1) the SAA requested medical documentation to support his request to

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[4] Rager also contended below that other evidence of disparate treatment discrimination consisted of a denial of his requests in 2016 and 2017 for reasonable accommodations (to be permitted to inject himself with insulin at his workstation and to bring his cell phone with him in meetings with managers), and his termination before he could submit medical documents to support his accommodation requests. For the reasons discussed below, we agree with the Hearing Officer that these assertions are unsupported by record evidence. In any event, as the Hearing Officer recognized, Rager did not offer evidence that anyone else at his workplace needed or requested similar accommodations.

have his cellphone with him during meetings; (2) the SAA's policy with respect to recording conversations in the workplace only applied to him; and (3) based on the questions asked on the medical questionnaire and the grant of a temporary accommodation, there was no attempt to actually accommodate his need to have his cellphone with him during meetings. Rager never asserted below that he believed that any of these actions constituted adverse actions taken against him because of his disability. Accordingly, they cannot now be raised before the Board. *U.S. Capitol Police & Lodge 1, FOP/U.S. Capitol Police Labor Comm.,* No. 15-LMR-02 (CA), 2017 WL 4335143, at *3 (OOC Sep. 25, 2017) (the Board does not consider issues raised for the first time on appeal).

In any event, Rager has provided no evidence that these policies were enforced solely as to him or because of his disability. *See Antrum v. Washington Metro. Area Transit Auth.*, 710 F. Supp. 2d 112, 119-20 (D.D.C. 2010) (granting summary judgment for employer where plaintiff "has not presented a single argument or piece of evidence" that the employer enforced a policy based on the plaintiff's protected characteristic).[5] Moreover, Rager has failed to explain how requiring him to follow SAA policies that apply to all employees is evidence of discrimination. *See, e.g., Johnson v. Cambridge Indus.*, 325 F.3d 892, 902 (7th Cir. 2003) (holding that the "enforcement of a pre-existing rule" is "not the type of employer actions that our cases label materially adverse").

In sum, the record fully supports the Hearing Officer's conclusion that Rager offered no evidence, beyond his feelings, that could support an inference that the actions taken by his managers at the SAA were motivated by either his race or his disability. Instead, the undisputed record shows that Rager's "conduct was pervasive enough to justify regular scrutiny, meetings with managers, counseling memos and progressive discipline." Accordingly, we affirm the Hearing Officer granting summary judgment for the SAA as to both claims of disparate treatment discrimination.

C. The Hearing Officer Properly Granted Summary Judgment on Rager's Disability Discrimination Claims based on Failure to Accommodate.

The Hearing Officer construed Rager's claim regarding a denial of a reasonable accommodation for his disability as centering on: (1) his request in 2016 for permission to inject himself with insulin at his workstation or to leave his workstation periodically to inject himself

[5] Although Rager indicates on appeal that he was subjected to an adverse action because he was not permitted to have his cellphone with him during meetings with management because they suspected that he was recording these conversations, he conceded that he was in fact permitted to have his cellphone with him during these meetings. Ex. 4 (Rager Deposition) at 253:15-17 ("Q: Were you temporarily allowed to keep your cellphone during meetings? A: That's what HR told me.").

somewhere else; and (2) his request in 2017 for permission to keep his cellphone with him during meetings. To establish a claim of discrimination for failing to reasonably accommodate an employee under the Americans with Disabilities Act, as applied by the CAA, an employee must demonstrate that: (1) he was a qualified individual with a disability; (2) that he requested a reasonable accommodation of that disability; and (3) that the SAA denied his request for reasons other than undue hardship. *Katsouros v. Architect of the Capitol*, No. 07-AC-48 (DA, RP), 2013 WL 5840233, *n.4 (OOC Sep. 19, 2013).

Rager does not address the SAA's accommodation of his request to keep his cellphone with him during meetings, and thus he has waived that claim on appeal. *See Evans,* 2015 WL 9257402, at *8 (arguments not raised on appeal before the Board are waived). Thus, his sole argument on appeal is that the SAA failed to accommodate him because it advised him in 2016 "on where he could and could not treat his condition while in the workplace."

It is undisputed, however, that the SAA allowed Rager to inject himself with insulin in the workplace. *See* Ex. 4, Rager Deposition at 198:12-15 ("I took my insulin everywhere, honestly. Wherever I needed it, I would just treat myself . . . [including] at my workstation."). Moreover, as the Hearing Officer noted, "[b]oth parties agree that this request was accommodated." "An underlying assumption of any reasonable accommodation claim is that the plaintiff-employee has requested an accommodation which the defendant-employer has denied." *Flemmings v. Howard Univ*., 198 F.3d 857, 861 (D.C. Cir. 1999). Therefore, we affirm the Hearing Officer's grant of summary judgment on this claim. *See Eastham,* 2007 WL 5914213, at *2 (OOC May 30, 2007) (affirming grant of summary judgment on employee's failure to accommodate claim because, *inter alia*, the employing office reasonably accommodated his disability).

D. The Hearing Officer Properly Granted the SAA's Motion for Summary Judgment on Rager's Reprisal Claims.

Rager also contends that several SAA managers took several actions against him in reprisal for engaging in activity protected by the CAA, including "target[ing] and … single[ing him] out" from other employees, subjecting him to excessive scrutiny, creating an abusive and hostile work environment, cancelling his flex-time schedule because of tardiness, and unfairly counseling and disciplining him, including his suspension and termination.

Section 207(a) of the CAA governs reprisal claims. It provides:

> It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the

> covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.

2 U.S.C. § 1317. The Board has adopted a Title VII-based approach to analyze all section 207 claims. *See Britton v. Office of the Architect of the Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (OOC May 23, 2005). Therefore, to establish a prima facie claim of reprisal under the CAA, the employee is required to demonstrate that: (1) he engaged in activity protected by Section 207(a) of the CAA; (2) the employing office took action against him that is reasonably likely to deter protected activity; and (3) a causal connection existed between the two. *Id.* If the employee so demonstrates, the employing office thereafter is required to rebut the presumption of reprisal by articulating a legitimate non-retaliatory reason for its actions. *Evans v. U.S. Capitol Police Bd.*, No. 14-CB-18 (CV, RP), 2015 WL 9257402, at *6 (OOC Dec. 9, 2015). The articulation of a legitimate, non-retaliatory reason for the adverse employment action shifts the burden to the employee to show that the employer's reason is merely a pretext for unlawful reprisal. *Id.; see Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

As to the first element of Rager's reprisal claims, the Hearing Officer accepted as undisputed that he engaged in protected activities when he complained to two Human Resources employees about harassment and retaliation in the workplace and when he requested reasonable accommodations. She determined, however, that summary judgment was nonetheless appropriate on Rager's reprisal claim, concluding that (1) most of the actions that Rager alleges were retaliatory, other than the counseling memoranda, the suspension, and the termination, were no more than workplace dissatisfactions, rather than a series of events that would likely deter a reasonable employee from engaging in protected activity; (2) there was little evidence that any of the actions taken by the SAA were causally related to Rager's communications with HR; and (3) the SAA offered a legitimate non-retaliatory reason for each of the actions that Rager identified, in response to which he failed to identify any evidence, other than his self-serving affidavit, that would prove that the SAA's proffered reasons were a pretext for reprisal. We find no basis in Rager's PFR to disturb the Hearing Officer's determination.

As an initial matter, we agree with the Hearing Officer that, with the exception of the counseling memoranda, the suspension, and the termination, Rager failed to demonstrate that the SAA's other actions—either alone or in combination—would deter a reasonable employee from engaging in protected activity. Therefore, to the extent that Rager claims that supervisors stared at him, subjected him to too many meetings, criticized him for talking too much to coworkers or for texting too often, the Hearing Officer correctly concluded that these matters, even in combination, are minor workplace annoyances that are not actionable adverse events sufficient to support a reprisal claim.
See Williams, 2017 WL 5635714, at *12; *see also Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006) ("Petty slights, minor annoyances, and simple lack of good manners" do not constitute materially adverse actions).

To the extent that Rager contends that he suffered from a materially adverse action when the SAA denied him the opportunity to work on a flex-time schedule after he was later reporting to work, we also disagree. Rager has wholly failed to explain how being subject to the same attendance policies that apply to other employees would have dissuaded a reasonable person from engaging in the protected activity. We recently observed in *Paige v. Office of the Architect of the Capitol,* No. 16-AC-17 (CV, RP), 2018 WL 4382908, at *6 n.5 (OOC Sep. 12, 2018), that whether revocation of a flexible workplace schedule is a materially adverse action for a given employee in a given position is a case-by-case factual inquiry, not a foreordained legal conclusion. Here, however, we agree with the Hearing Officer's determination that Rager failed to demonstrate that, under the circumstances of this case, he was subject to a materially adverse action. As stated above, the SAA states that it denied Rager's request for flex time because he was regularly tardy. The Board may not "second-guess an employer's personnel decision absent demonstrably discriminatory [or retaliatory] motive." *Id.* (quoting *Milton v. Weinberger,* 696 F.2d 94 (D.C. Cir. 1982)). Once the employer has articulated a non-retaliatory explanation for its action, as did the SAA here, the issue is not "the correctness or desirability of [the] reasons offered . . . [but] whether the employer honestly believes in the reasons it offers." *Id.* (quoting *McCoy v. WGN Cont. Broad. Co*., 957 F.2d 368, 373 (7th Cir. 1992)); *see also George v. Leavitt*, 407 F.3d 405, 415 (D.C. Cir. 2005) ("an employer's action may be justified by a reasonable belief in the validity of the reason given even though that reason may turn out to be false."); *Pignato*
v. Am. Trans Air Inc., 14 F.3d 342, 349 (7th Cir.1994) ("It is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible. He must show that the explanation given is a phony reason."). We find no evidence in the record that would permit a reasonable finder of fact to conclude that the SAA's stated legitimate reasons for its actions were not the actual ones, or that they are a pretext masking prohibited reprisal.

As for the letter of counseling, the Hearing Officer correctly found that Rager failed to offer any evidence establishing a causal connection between its issuance and his protected activity. In February 2017, Rager received a letter of counseling regarding his tardiness and an unprofessional email he sent to his second-line supervisor, informing him that his tardiness and unprofessional conduct violated SAA policy and could result in progressive discipline. Rager agrees that he had been repeatedly tardy, and he offers no evidence that his tardiness was not the reason for the memo or that the SAA's real motivation was retaliation for contacting the SAA's Human Resources Department a few days prior. Rather, Rager suggests only a possible inference of reprisal based on the progression of events. Viewing the evidence as a whole in the light most favorable to Rager, we agree with the Hearing Officer it does not establish a causal connection between his harassment complaint to HR and his receipt of the subsequent counseling memorandum, given the SAA's undisputed, nonretaliatory reasons for issuing the memorandum. *See Paige,* 2018 WL 4382908, at *8 (viewing the record as a whole, temporal proximity alone

did not establish pretext in light of the employing office's articulated nondiscriminatory reason for its actions).

Rager also argues that his suspension and his supervisor's investigation that led to this suspension were retaliatory. Again, we disagree. It is undisputed that Rager's suspension arose from a report by his Lead Worker in March 2017 that after he identified an error on a work order handled by Rager, Rager threatened him with a confrontation after work. This report was investigated by Rager's supervisors, who interviewed numerous witnesses to the interaction. The SAA contends that the suspension was justified by the conclusions reached after the investigation, that the exchange between Rager and his Lead Worker was threatening and a violation of the SAA policy on workplace violence.

Although Rager clearly disagrees with the conclusions of this investigation, his disagreement is insufficient to carry his burden at summary judgment. As the SAA has articulated a non-retaliatory explanation for its action, the issue is not "the correctness or desirability of [the] reasons offered . . . but whether the employer honestly believes in the reasons it offers." See *Gage v. Office of the Architect of the Capitol*, No. 00-AC-21 (CV), 2001 WL 36175210, 5* (Nov. 14, 2001) (quoting *McCoy v. WGN Cont. Broad. Co.,* 957 F.2d 368, 373 (7th Cir. 1992)); *George v. Leavitt,* 407 F.3d 405, 415 (D.C. Cir. 2005) ("an employer's action may be justified by a reasonable belief in the validity of the reason given even though that reason may turn out to be false."). Rather, the law requires Rager to provide sufficient evidence from which a reasonable factfinder could conclude that the SAA's proffered reasons are false and that the true reason was intentional retaliation. *Brady*, 520 F.3d at 496. Although Rager may disagree with the merits of the conclusions of the investigation, the Hearing Officer correctly found that Rager offered no evidence that his suspension was pretextual or that his suspension was in any way causally related to any protected activity. Accordingly, we affirm the Hearing Officer's grant of summary judgment for the SAA on this claim. *See Eastham*, 2007 WL 5914213, at *4 (upholding summary judgment on retaliation claim when complainant "points to no evidence even remotely suggesting that the USCP's true motive . . . was retaliatory" and complainant's "briefs to the Board offer no legal or evidentiary basis for concluding that an inference of retaliatory motive is warranted").

Finally, although not directly raised on review, to the extent that Rager claims that his termination was retaliatory for his engagement in protected activity, the Hearing Officer also correctly rejected this claim. Rager was terminated on June 7, 2017. Five days earlier, he had requested FMLA forms and information about how to request a reasonable accommodation. As the Hearing Officer correctly concluded, there was temporal proximity between Rager's request for information from HR about the exercise of his rights under the FMLA and his termination.

As discussed above, however, the SAA asserted that Rager was terminated because of his repeated violations of SAA policy regarding scanning and storing personal and Member office documents on the PGDM-Landover workstation, despite verbal and written warnings that he was not permitted to do so. We agree with the Hearing Officer that the SAA clearly provided a legitimate, non-retaliatory reason for its decision to terminate Rager.[6] The undisputed record is clear that the SAA reasonably believed that Rager repeatedly and deliberately violated agency policy regarding documents stored on his workstation. Thus, we agree with the Hearing Officer that the undisputed evidence, circumstantial though it is, is more than sufficient to justify a reasonable and genuinely held conclusion by the SAA that Rager was unwilling to desist in violating agency policy. Rager has offered no evidence that this reason was a pretext for reprisal. Accordingly, we affirm the Hearing Officer's grant of summary judgment on Rager's reprisal claims.

D. The Hearing Officer Properly Granted the SAA's Motion for Summary Judgment on Rager's Hostile Work Environment Claims.

Rager also alleged that he was the victim of a hostile work environment when he was "intimidated, isolated, and retaliated against" by certain of his supervisors, stared at by supervisors, given inconsistent work orders by a supervisor, given numerous counseling memoranda, required to attend numerous meetings with managers, denied access to his cell phone during certain meetings with managers (prior to May 2017), given unfair and inaccurate performance evaluations; and wrongly accused of disruptive behavior (excessive talking to coworkers and excessive texting). The Hearing Officer granted the SAA's motion for summary judgment on this claim. We affirm.

To make out a hostile work environment claim, Rager must show that he was subjected "to discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Williams,* 2017 WL 5635714, at *8; *see also Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23, (1993) (whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances). "In order to be actionable under the statute, an objectionable environment must

[6] Rager disputes whether he had permission to use SAA equipment to scan personal documents, stating that he once received permission to scan personal documents to his workstation. As the Hearing Officer correctly determined, this is not a material fact because the record reveals that Rager received at least one counseling memorandum, a performance evaluation criticism, and an email from HR stating unequivocally that he was not authorized to scan, create, store or save personal documents to his workstation at all. Thus, even accepting as undisputed that he once received permission to scan personal documents to his workstation, such permission was unequivocally rescinded on multiple occasions before Rager was terminated.

be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive." *Faragher v. City of Boca Raton,* 524 U.S. 775, 787 (1998); *see also Baird v. Gotbaum,* 792 F.3d 166, 172 (D.C. Cir. 2015) ("[T]he standard for severity and pervasiveness is an objective one.") (citing *Harris,* 510 U.S. at 21). These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." *Faragher v. City of Boca Raton,* 524 U.S. 775, 787 (1998).

Rager's hostile work environment claim fails for several reasons. A necessary component of a hostile work environment claim is that the allegedly hostile behavior must be "discriminatory"--that is, it must be tied to the complainant's membership in a protected class. *See Williams,* 2017 WL 5635714, at *8; *Baloch*, 550 F.3d at 1201 (plaintiff's hostile work environment claim failed, in part, because "none of the comments or actions directed at [plaintiff] expressly focused on his race, religion, age, or disability"); *Gray v. Foxx*, 637 F. App'x 603, 608 (D.C. Cir. 2015) (plaintiff submitted evidence that her supervisor yelled at her and belittled her, but "[did] not connect his remarks to any protected status."); *Hyson v. Architect of Capitol*, 802 F. Supp. 2d 84, 104 (D.D.C. 2011) ("because [plaintiff] is unable to tie the majority of her allegations to her gender or protected activity, the Court is unable to consider them."). Rager does not allege that any SAA employee made derogatory comments about disabled people or Caucasians or engaged in actions targeted towards such people. *See Williams,* 2017 WL 5635714, at *9.

Viewing Rager's allegations in a light most favorable to him, we agree with the Hearing Officer that they are insufficient to support a claim of hostile work environment harassment. Although Rager cites his performance evaluations, letters of counseling, and allegedly inconsistent orders, the courts have generally rejected hostile work environment claims based on work-related actions by supervisors. *See Williams,* 2017 WL 5635714, at *9*, see also, e.g., Wade v. District of Columbia,* 780 F. Supp. 2d 1, 19 (D.D.C. 2011); *Nurriddin v. Bolden,* 674 F. Supp. 2d 64, 94 (D.D.C. 2009) ("[T]he removal of important assignments, lowered performance evaluations, and close scrutiny of assignments by management [cannot] be characterized as sufficiently intimidating or offensive in an ordinary workplace context."); *Bell v. Gonzales,* 398 F.Supp.2d 78, 92 (D.D.C. 2005) (finding that actions such as exclusion from the informal chain of command, close monitoring of work, missed opportunities for teaching, travel, and highprofile assignments, and reassignment to another unit did not amount to a hostile work environment because "they cannot fairly be labeled abusive or offensive"); *see also Houston v. SecTek, Inc.*, 680 F. Supp. 2d 215, 225 (D.D.C. 2010) ("Allegations of undesirable job assignment or modified job functions and of
[supervisor's] unprofessional and offensive treatment are not sufficient to establish that [plaintiff's] work environment was permeated with discriminatory intimidation, ridicule, and insult.") (citation and quotation marks omitted). Under the circumstances, the workrelated actions that Rager cites were not objectively offensive, abusive, hostile or threatening.

The remaining actions that Rager describes also fall far short of the kind of "severe or pervasive" harassing conduct he is required to show in order to prevail. *Harris,* 510 U.S. at 21-23. *See Brooks v. Grundmann*, 748 F.3d 1273, 1275 (D.C. Cir. 2014) (although the behavior of plaintiff's colleagues may have been "unprofessional, uncivil, and somewhat boorish," it did not "sufficiently demonstrate the sort of severity or pervasiveness needed to prove a hostile work environment."). Although Rager contends that his supervisors' action made him feel "intimidated," general feelings of workplace discomfort or unease are simply not enough to support a claim for hostile work environment. *See Williams,* 2017 WL 5635714, at *9; *Tucker v. Johnson,* 211 F. Supp. 3d 95, 101 (D.D.C. 2016). Accordingly, we affirm the Hearing Officer's grant of summary judgment for the SAA on Rager's hostile work environment claim.

F. The Hearing Officer Properly Held That The SAA Did Not Interfere With Rager's Rights or Benefits under the FMLA.

Finally, Rager contends that the Hearing Officer erred in granting the SAA's motion for summary judgment on his claim that the SAA interfered with his FMLA rights by terminating him within a few days of requesting FMLA forms. To prove an FMLA interference claim, as alleged here, Rager must establish that: (1) he was an eligible employee, (2) the SAA was a covered employer, (3) he was entitled to leave under the FMLA, (4) he gave notice to the SAA of his intent to take leave, and (5) the SAA either denied the requested benefits, or interfered with FMLA rights to which he was entitled. *Jaszczyszyn v Advantage Health Physician Network*, 504 Fed App'x 440 (6th Cir. 2012); *Stewart v. Architect of the Capitol,* 2009 WL 8575130 at *5 (July 30, 2009); *Koshko v. U.S. Capitol Police,* 2014 WL 2169027, *8 (May 14, 2014).[7]

Rager concedes that he never took FMLA leave at any point and that he was never denied FMLA leave. The only evidence in the record of Rager's conversation with the SAA during his employment about the FMLA occurred on June 1, 2017, which was 9 days *after* his termination was recommended, and reads:

Mrs. Lyles,

[7] The Hearing Officer noted that Rager did not appear to raise a retaliatory FMLA violation claim, but even if he did, the claim would fail. We agree. As the Hearing Officer determined, even if it were determined that Rager's termination interfered with his FMLA rights, the undisputed facts established that long before he requested FMLA forms, his supervisors were investigating his misuse of the workstation and recommending that he be terminated.

> On the advice of my attorney, I will need a copy of the SAA's policy on Reasonable Accommodation for Disabilities. I also need all policy and procedures for filing a Harassment claim. Finally, I need paperwork and forms for FMLA. I will need these documents by June 5, 2017. I appreciate your help with these requests.

The Hearing Officer determined that despite the absence of a clear request from Rager for leave under the FMLA, or specific notice of an intent to file such a request, the SAA nonetheless accepted his request for forms as notice of an intent to file a future request for leave under the FMLA. She nonetheless concluded that Rager failed to demonstrate that he had a viable claim for interference with FMLA rights when the SAA terminated him. We agree.

To be entitled to FMLA leave, Rager must show that he was unable to perform the functions of his position because of a serious health condition. 29 U.S.C. § 2612(a)(1)(D). A letter from his Nurse Practitioner describes Rager's condition at the time of his termination as Type 1 diabetes mellitus, a "life-long, chronic disease [that] has no cure. The only treatment is the administration of exogenous insulin." His treatment regimen was described as "perform[ing] glucose testing at least 8 times a day and/or use [of] continuous glucose monitoring technology." As the Hearing Officer noted, however, nothing in the letter suggested that Rager required a leave of absence from his job. In fact, his Nurse Practitioner stated:

> [N]ot only must Mr. Rager have unlimited access to his glucose data (by phone a/o receiver), but he also must have the ability to readily address the situation when required ….
>
> Providing Mr. Rager with unlimited access and ability to properly and discretely monitor his glucose levels and to treat problems as they arise will prevent both hypo- and hyperglycemia crises. This is especially important at the worksite and will allow for Mr. Rager to be fully capable of performing his required/essential tasks with minimal disruption to the workflow. He will be less likely to develop problems with his overall health which leads to increased productivity.

We agree with the Hearing Officer that this language undermines any claim that Rager would have been entitled, even if eligible, to take a leave of absence from his job under the FMLA to address a serious medical condition. To the contrary, Rager's medical provider stated that if he were given an accommodation to keep his cell phone with him at all times, which he was, and allowed to inject himself immediately as needed, which he was, he would be "fully capable of performing" his job. *See Ames v Home Depot U.S.A., Inc.* 629 F.3d 665, 669 (7th Cir. 2011). In any event, Rager's mere mention of the FMLA does not insulate him from discipline for a legitimate, non-discriminatory reason. *See, e.g., Sista v. CDC Ixis N. Am. Inc*., 445 F.3d 161,

175 (2d Cir. 2006) ("[The] FMLA is not a shield to protect employees from legitimate disciplinary action by their employers if their performance is lacking in some manner unrelated to their FMLA leave.") (citation omitted); *Arban v. W. Pub. Corp*., 345 F.3d 390, 401 (6th Cir. 2003) ("An employee lawfully may be disciplined, preventing him from exercising his statutory rights to FMLA leave or reinstatement, but only if the dismissal would have occurred regardless of the employee's request for or taking of FMLA leave.").

Accordingly, the Hearing Officer also properly granted summary judgment to the SAA on this claim.

ORDER

For the foregoing reasons, the Board affirms the Hearing Officer's Order entering summary judgment for the SAA on all claims.

It is so ORDERED.

Issued, Washington, DC, October 3, 2018