APP. A

1.04156. 19.° 1.

1.00 8.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 18-CV-630

JEREMIAH BRYANT, APPELLANT,

v.

DISTRICT OF COLUMBIA OFFICE OF HUMAN RIGHTS

and

BORGER MANAGEMENT, INC., APPELLEES.

Appeal from the Superior Court
of the District of Columbia
(CA-882-17)

(Hon. John M. Campbell, Reviewing Judge)

(Submitted October 31, 2019 Decided February 7, 2020)

Before THOMPSON and BECKWITH, *Associate Judges*, and WASHINGTON, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Jeremiah Bryant appeals from a decision of the Superior Court affirming determinations by the District of Columbia Office of Human Rights ("OHR") that there was no probable cause to believe that appellant's employer, appellee Borger Management, Inc. ("Borger"), retaliated against him in violation of the District of Columbia Human Rights Act ("DCHRA") when it suspended him with pay for three days, and later terminated his employment, in retaliation for his having complained to OHR.[1] We affirm.

---

[1] Appellant also includes in his "Statement of the Issue" whether the Superior Court erred in affirming OHR's finding of no probable cause of discrimination. However, appellant presents no arguments as to why OHR's determination was in error, and we agree with Borger that appellant has waived the

(continued...)

20.2.

I.

The record shows that appellant was employed by Borger for about twenty-five years as porter/maintenance technician and worked as one of four employees at the Borger-managed apartment building known as "Chillum Manor," located at 21 Riggs Road, N.E. The other employees were Nathanial Matthews, the community manager, Minh Dao, a live-in maintenance technician, and Christopher Nichols, a porter. The events underlying appellant's OHR complaints occurred when he was fifty-nine years old.

The OHR record indicates that in October 2015, Matthews received reports that appellant had accessed the management office after-hours and duplicated apartment keys without prior authorization. In response to the reports, Matthews changed the locks to the management office and gave a key only to Nichols, who was responsible for daily cleaning of the management office. At a staff meeting on November 4, 2015, Matthews also informed the apartment staff that he had received reports about unauthorized activity in the management office and reminded staff that no after-hours access was permitted, except in the event of an emergency.[2] Appellant reported to OHR that on the same day, he told his co-worker Nichols he was going to file a complaint about discriminatory access to keys (and OHR intake forms show that appellant did contact OHR the same day and the next day complaining of disparate treatment on the basis of age, with respect to "a new master key to the rental office" that appellant alleged was "important to the functions of his job" and also of retaliation, though he did not file

---

(...continued)
claim. *See Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 554 n.9 (D.C. 2001) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). Appellant also adverts in a perfunctory way to OHR's "fail[ure] to schedule a mediation for his claims[,]" but, as the Superior Court found, the OHR record shows that the parties attended mediation sessions.

[2] Appellant admits that he had been in the management office after hours and that he had keys to vacant apartments

his formal "Charge of Discrimination" based on retaliation until December 18, 2015).[3]

After the unauthorized access, key duplication, and lock-change were brought to the attention of Borger executives (Borger Assistant Vice President Gloria Dunbar and Executive Vice President Arianna Royster), they met with appellant on November 5, 2015, and thereafter notified him that he would be suspended with pay pending an investigation. After the investigation concluded, appellant's suspension was lifted and he returned to work, where he (and all the other employees) received access to the management office through a system called KeyTrak. When appellant filed his formal OHR complaint on December 18, 2015, he alleged that his three-day suspension with pay was in retaliation for his having engaged in protected activity by signaling his intent to file a charge of discrimination with OHR.

On or about April 8, 2016, appellant filed a second complaint with OHR arising out of the lock change/key incident. In his second complaint, appellant alleged that Borger had discriminated against him based on his age when Matthews gave Nichols (who was in his thirties and thus much younger than appellant) a key to the management office but did not give appellant one. Appellant also claimed that Matthews had made statements about appellant being old and moving slowly.

On June 22, 2016, appellant became hostile with Dao and "threatened [him] with physical violence" after Dao questioned him about his work on a maintenance request. Royster told OHR that she made the decision to terminate appellant after that "threatening altercation," which was a "repeated" problem. Appellant was terminated effective June 27, 2016. On or about July 13, 2016, appellant filed a third complaint with OHR, alleging that Borger terminated him out of retaliation for having previously filed two OHR complaints against the company. On September 15, 2016, OHR, having conducted an investigation, issued determination letters as to each of the three complaints, finding "no probable cause" in each case. After unsuccessfully seeking reconsideration by OHR, appellant filed his Petition for Review with the Superior Court on February 13, 2017. On May 29, 2018, the Superior Court affirmed OHR's determinations. This appeal followed.

---

[3] Appellant's brief refers to his compliant for "racial discrimination," but the record does not indicate that he complained of discrimination on that basis.

II.

This court reviews a Superior Court ruling on an OHR decision in the same manner in which we would review the OHR decision if it were appealable directly to us. *District of Columbia Dep't of Pub. Works v. District of Columbia Office of Human Rights* ("*DPW*"), 195 A.3d 483, 490 (D.C. 2018). OHR's action must be affirmed "if it is supported by substantial evidence and otherwise in accordance with law." *Id.*

III.

Appellant makes three arguments in this appeal: that OHR (1) erred by determining that his suspension without pay did not constitute an adverse action; (2) erred in finding no probable cause to believe that his suspension was retaliatory; and (3) improperly concluded that his showing of "temporal proximity" between his termination and his second OHR complaint did "not support a reasonable inference of a retaliatory nexus." We address each argument in turn.

A.

In order to establish a prima facie case of retaliation within the meaning of the DCHRA, a complainant "must demonstrate by a preponderance of the evidence that: (1) he was engaged in a protected activity or that he opposed practices made unlawful by the DCHRA, (2) the employer took an adverse action against him, and (3) a causal connection existed between his opposition or protected activity and the adverse action taken against him." *Propp v. Counterpart Int'l*, 39 A.3d 856, 863 (D.C. 2012). There is no adverse action unless there are "materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." *DPW*, 195 A.3d at 491. "[A]n action is adverse if it would have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Walker v. District of Columbia*, 279 F. Supp. 3d 246, 266 (D.D.C. 2017) (internal quotation marks omitted).

OHR found that appellant failed to allege an adverse action because appellant "suffered no material harm when he was suspended [for only three days], with pay." This determination was not legally erroneous. As Borger argues, a

suspension with pay is the equivalent of paid administrative leave. "[P]lacing an employee on paid administrative leave does not, in and of itself, constitute a materially adverse action for purposes of a retaliation claim." *Hornsby v. Watt*, 217 F. Supp. 3d 58, 66 (D.D.C. 2016). Further, appellant does not assert that he suffered any harm or injury caused by the three-day suspension with pay. *See Patzy v. Hochberg*, 217 F. Supp. 3d 357, 361 (D.D.C. 2016) (explaining that retaliation claims do not "protect[] an individual [] from all retaliation, but from retaliation that produces an injury or harm" (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006))).[4] In fact, the record supports Borger's contention that appellant was not dissuaded from "making or supporting a charge of discrimination" because he filed his first formal OHR complaint and his subsequent one complaining of age discrimination *after* he returned from his suspension. *Walker*, 279 F. Supp. 3d at 266. The Superior Court did not err in upholding OHR's determination that appellant failed to establish a prima facie case that his suspension constituted actionable retaliation.

B.

Still focusing on his retaliatory-suspension claim, appellant also argues that the Superior Court erred in affirming OHR's determination that he failed to make a prima facie showing that management knew of his OHR complaint when it

---

[4] As noted in *Mosunic v. Nestle Prepared Foods Co.*, 274 F. Supp. 3d 22, 27 (D.R.I. 2017), a case on which appellant relies, a paid suspension/paid administrative leave could constitute an adverse employment action if it results in a loss of experience while on leave. *Id.* at 27 n.3 (citing *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013) (reasoning that where plaintiff's "administrative leave prevented him from taking the sergeant's exam, required him to forfeit on-call and holiday pay, and prevented him from furthering his investigative experience," it would constitute an adverse employment action)). Here, by contrast, appellant's paid suspension lasted only three days, and appellant does not cite any detriment on account of it. *Dilettoso v. Potter*, No. CV 04-0566-PHX-NVM, 2006 U.S. Dist. LEXIS 2973 (D. Ariz. Jan. 25, 2006), is similarly distinguishable; the plaintiff in that case was placed on administrative leave for nine months and missed an opportunity to earn a $1,000 bonus. *Id.* at *22.

suspended him without pay.[5] Again, we discern no error. Appellant reported to OHR that he told Nichols during the November 4, 2015, meeting that he was going to file a discrimination complaint and that he believed Nichols relayed this information to management. But when interviewed by OHR, Nichols denied that appellant told him this. Appellant also reported to OHR that he saw Nichols and Matthews talking after the November 4, 2015, meeting. However, appellant has pointed to no evidence that Borger management actually learned of his intent to file a discrimination charge with OHR before management determined to suspend him while investigating the unauthorized-access matter. Without more, appellant's evidence that he was suspended on the same day he filed his informal OHR complaint did not compel OHR to find a retaliatory nexus between appellant's initial complaints to OHR and his suspension. This was especially so in light of the information OHR obtained through interviews that appellant had been seen in the management office after hours "going through the business drawer" and "making copies of the keys" to apartments and in light of what OHR found was Borger's "objective[] concern[] about security based on reports that [appellant] had been accessing the [management] office after hours for unknown purposes, and had a stash of unauthorized keys." *See V.K. v. Child & Family Servs. Agency of the District of Columbia*, 14 A.3d 628, 633 (D.C. 2011) ("[W]e will disturb the administrative finding . . . only if the record compels a contrary conclusion."). Rather, and contrary to appellant's assertion on page six of his brief, OHR could reasonably find that Borger had a legitimate, non-discriminatory reason for suspending appellant and that its explanation of why it did so was not a pretext.

C.

With respect to his retaliatory-termination claim, appellant argues that the Superior Court erred in upholding OHR's determination that the temporal proximity between his termination and the dates of his first and second OHR complaints was insufficient to support an inference of a causal link between his protected activity and his termination. It is true that a complainant may establish a prima facie claim of retaliation by "showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity." *Taylor v. District of Columbia Water & Sewer Auth.*,

---

[5] *See McFarland v. George Wash. Univ.*, 935 A.2d 337, 358 (D.C. 2007) ("[Appellant] must provide evidence that the decision-makers who took the adverse action knew about his protected activity.").

957 A.2d 45, 54 (D.C. 2008) (internal quotation marks omitted). But appellant's termination did not occur "shortly after" he initiated his first OHR complaint: his termination occurred more than seven months after his informal complaint to OHR and more than six months after his first formal complaint was filed. *See, e.g., Richmond v. Oneok, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (affirming district court's holding that three-month period of time between plaintiff's protected activity and her termination was insufficient to establish a causal connection); *Hughes v. Derwinski*, 967 F.2d 1168, 1174–75 (7th Cir. 1992) (lapse of four months between filing of discrimination claim and receipt of disciplinary letter did not sufficiently raise inference that filing was the reason for the adverse action).

Further, even if we assume appellant established a prima facie case of retaliation by pointing to his termination a little over two months after he filed his second complaint with OHR, OHR could reasonably find that appellant did not carry his ultimate burden of proving retaliation by a preponderance of the evidence after Borger "show[ed] a legitimate, non-retaliatory reason" for the termination. *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 368 (D.C. 1993). Responding to the OHR investigation, Borger showed that the termination came on the heels of a repeated instance of appellant's aggressive conduct toward a co-worker.[6] The record shows that in February 2016, Duncan admonished appellant for insubordination and aggressive conduct after an incident on February 17, 2016, in which appellant became hostile and took several steps toward Matthews with clenched fists after Matthews questioned him about an uncompleted work assignment. That was followed on June 22, 2016, by the incident in which appellant "threatened Dao with physical violence" after Dao questioned him about his work on a maintenance request. Although appellant denies that he threatened Dao, he admitted to OHR that Dao told Matthews that appellant threatened and wanted to fight him (and appellant's brief acknowledges that Dao "reported [a]ppellant as acting in a 'hostile' manner towards him"). The record thus contains substantial evidence to support OHR's determination that Borger terminated Bryant as a result of his insubordination and hostility towards his co-workers and

[6] Under Borger's employee handbook, "It is the policy of the Company that workplace violence of any kind will not be tolerated. Any employee who participates in workplace-related violence will be subject to disciplinary action, up to and including termination. This includes, but is not limited to, such actions as abusive or offensive comments, threats, and stalking, or aggressive and/or unwelcome physical contact. To the extent possible, employees should avoid, or attempt to avoid, any violent or potentially violent situations."

supervisors. Accordingly, OHR was not compelled to find that appellant's April 2016 complaint, rather than his June 2016 "repeated" aggression, explained his termination.

Wherefore, the judgment of the Superior Court is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable John M. Campbell

Director, Civil Division
QMU

Jeremiah Bryant
301 G Street, SW
Apartment 516
Washington, DC 20024

Copies e-served to:

Amanda Vaccaro, Esquire

Loren L. AliKhan, Esquire
Solicitor General for DC

APP. B

2 of 2

29

149

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEREMIH BRYANT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 14-cv-0424 (KBJ)
	)	
BORGER MANAGEMENT, INC.,	)	
	)	
Defendant.	)	

ORDER

In this case, Plaintiff is proceeding *pro se*. Defendant has filed a motion to dismiss. (*See* Def.'s Mot. to Dismiss Pl.'s Compl., ECF No. 4.) In *Fox v. Strickland*, 837 F.2d 507 (D.C. Cir. 1988), the U.S. Circuit Court of Appeals held that a district court must take pains to advise a *pro se* party of the consequences of failing to respond to a dispositive motion. "That notice . . . should include an explanation that the failure to respond . . . may result in the district court granting the motion and dismissing the case." *Id.* at 509. In addition, the local rules state that "[w]ithin 14 days of the date of service or at such other time as the court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion [or] the Court may treat the motion as conceded." LCvR 7(b). Accordingly, it is

ORDERED that Plaintiff shall file a response to the motion to dismiss no later than **April 17, 2017**. If he does not respond by that date, the Court will treat the motion as conceded and may summarily dismiss the case.

DATE: March 17, 2017

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

JEREMIAH BRYANT, **Plaintiff,** **v.** **BORGER MANAGEMENT INC.,** **Defendant.**	**Case No.: 1:17-cv-00424 (KBJ)**

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Pursuant to the Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant Borger Management Inc. ("Borger" or "Defendant") submits this Motion to Dismiss, respectfully requesting that this Court dismiss all of Plaintiff's claims for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted.

Plaintiff's claim that he suffered from age discrimination, in violation of Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (Count I), should be dismissed with prejudice because Plaintiff fails to plead an actionable adverse action. Similarly, Plaintiff's claim that he was terminated in retaliation for filing two charges with the D.C. Office of Human Rights ("DC OHR") in violation of the D.C. Human Rights Act of 1977 ("DCHRA"), D.C. Code § 2-1401 *et seq.* (Count II), should be dismissed with prejudice because this Court lacks subject matter jurisdiction as Plaintiff already elected to have this complaint proceed through the administrative process provided by the DC OHR in lieu of filing a complaint in court.

Furthermore, Plaintiff's claim that he was subjected to a hostile work environment claim in violation of the DCHRA (Count III) also should be dismissed with prejudice because this Court lacks subject matter jurisdiction as the facts show that Plaintiff's claim is premised on discrete acts already disposed of by the DC OHR. Count III also should be dismissed with prejudice because

1c of 14c

133.

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JEREMIAH BRYANT,	
Petitioner,	Civil Case No. 2017 CA 000882 P(MPA)
v.	Calendar 13
	Judge John M. Campbell
BORGER MANAGEMENT, *et al.*,	
Respondents.	

ORDER

This matter comes before the Court on Jeremiah Bryant's Petition for Review pursuant to Super. Ct. Agency Rev. R. 1. For the reasons stated below, the Court holds that the respondent District of Columbia Office of Human Rights' ("OHR") decision to find no probable cause of discrimination or retaliation is AFFIRMED.

I. Background

This Petition for Review concerns the OHR's "no probable cause" determinations on three charges filed by Petitioner against the respondent Borger Management, Inc. ("BMI"). BMI owns and operates the apartment building located at 21 Riggs Road, N.E. and commonly known as "Chillum Manor." Throughout the time period at issue in Petitioner's three charges, Chillum Manor was staffed by four BMI employees: 1) Nathanial Matthews ("Matthews"), the community manager, 2) Minh Dao, a maintenance technician, 3) Christopher Nichols ("Nichols"), a porter, and 4) Petitioner, a porter/maintenance technician. Under BMI's policy regarding employee actions that merit disciplinary action, grounds for termination include: insubordination and engagement in any act of physically abusive conduct, discourteous conduct,

(1.) of (2.) (1.) 30. 134.

District of Columbia
Court of Appeals

No. 18-CV-630

JEREMIAH BRYANT,

Appellant,

v. **CAP882-17**

BORGER MANAGEMENT, *et al.*,

Appellees.

ORDER

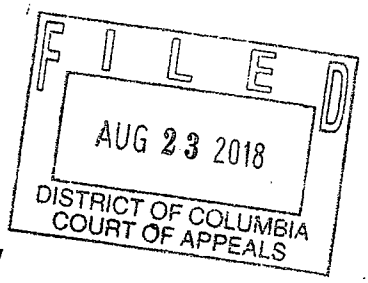
On consideration of the notice of appeal and mediation screening statement, it has been determined that this case is no appropriate for appellate mediation, it is

ORDERED that appellant shall, within 20 days from the date of this order, complete and file with this court a single copy of the attached statement regarding transcripts. Where transcript(s) necessary for this appeal have been ordered and completed for non-appeal purposes, appellant must advise the Court Reporting and Recording Division to forward said transcript(s) for inclusion in the record on appeal. If partial transcript(s) are being ordered, appellant must file a statement of issues to be presented before this court within 10 days from the date of this order. *See* D.C. App. R. 10 (b)(3)(A). It is

FURTHER ORDERED that appellant's failure to respond to any order of this court shall subject this appeal to dismissal without further notice for lack of prosecution. *See* D.C. App. R. 13 (a).

FOR THE COURT
Julio A. Castillo
JULIO A. CASTILLO
CLERK OF THE COURT

District of Columbia
Court of Appeals



No. 18-CV-630

JEREMIAH BRYANT,

Appellant,

v.

CAP882-17

BORGER MANAGEMENT, *et al.*,

Appellees.

ORDER

On consideration of appellant's motion for the appointment of counsel, and there being is no statutory right to court-appointed counsel in this civil matters, it is

ORDERED that appellant's motion for the appointment of counsel is denied. In order to assist appellant, a list of possible pro bono or low cost legal providers is attached to this order.

BY THE COURT:

ANNA BLACKBURNE-RIGSBY
Chief Judge

Copies e-served to:

Loren L. AliKhan, Esquire
Solicitor General for DC
441 4th Street, NW
Suite 600S
Washington, DC 20001

Amanda Vaccaro, Esquire
10701 Parkridge Blvd
Suite 300
Reston, VA 20191

1 of 2.

District of Columbia
Court of Appeals

No. 18-CV-630

JEREMIAH BRYANT,

Appellant,

v.

CAP882-17

BORGER MANAGEMENT, *et al.*,

Appellees.

ORDER

On consideration of the motion of *pro se* appellant requesting leave to present oral argument, and it appearing that this matter is scheduled on the Summary Calendar of October 31, 2019, it is

ORDERED on behalf of the merits division assigned to consider this matter that the motion is denied and this matter shall be submitted for decision on October 31, 2019, without oral argument by either party, on the record and briefs alone.

FOR THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies e-served to:

Loren L. AliKhan, Esquire
Solicitor General for DC

Amanda Vaccaro, Esquire

Linda U. Okoukoni, Esquire

1.K of 2.K 1.K 35. 3.

137.

District of Columbia
Court of Appeals

No. 18-CV-630

JEREMIAH BRYANT,

Appellant,

v.

CAP882-17

BORGER MANAGEMENT, *et al.*,

Appellees.

ORDER

It appearing that the complete record on appeal has been filed with this court, it is

ORDERED that appellant's brief and appendix including the documents required by D.C. App. R. 30 (a)(1), shall be filed within 40 days from the date of this order, and appellees' briefs shall be filed within 30 days thereafter. *See* D.C. App. R. 31.

FOR THE COURT
Julio A. Castillo
JULIO A. CASTILLO
CLERK OF THE COURT

Copies e-served to:

Loren L. AliKhan, Esquire
Solicitor General for DC
441 4th Street, NW
Suite 600S
Washington, DC 20001

Amanda Vaccaro, Esquire
10701 Parkridge Blvd
Suite 300
Reston, VA 20191

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEREMIAH BRYANT,

Plaintiff,

v.

BORGER MANAGEMENT, INC.,

Defendant.

No. 17-cv-0424(KBJ)

ORDER GRANTING MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND MOTION FOR REMAND

Upon consideration of Plaintiff's [10] Consent Motion for Leave to File Amended Complaint and Motion for Remand, and the entire record herein, it is hereby

ORDERED that Plaintiff's [10] Motion to for Leave to File an Amended Complaint is **GRANTED**, and the Clerk of this Court is instructed to Docket ECF No. 10-1 as an Amended Complaint. It is

FURTHER ORDERED that Borger Management, Inc.'s [4] Motion to Dismiss is **DENIED** as moot. It is

FURTHER ORDERED that Plaintiff's [10] Motion for Remand is **GRANTED**, and this case is **REMANDED** to the Superior Court of the District of Columbia.

DATE: May 10, 2017

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

Remanded back to D.C Superior Court.

Additional material from this filing is available in the Clerk's Office.