UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

DAVE O'BRIAN TINGLING, Complainant, v. CITY OF RICHMOND, VA, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 19B00009

ORDER ON RESPONDENT'S MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

Before the Court is Respondent's Motion for Summary Decision. A brief procedural history of this case follows:

This litigation began on January 15, 2019 when Complainant filed the instant complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). On September 26, 2019, Complainant filed his Amended Complaint to which Respondent filed its Answer on October 10, 2019.

On October 31, 2019, Respondent filed a partial motion for summary decision, largely related to the terms of a release Complainant signed with Respondent in January 2018, and its collateral effects on the scope of purported liability and damages in the instant proceedings. On January 31, 2020, the Court granted Respondent's partial motion for summary decision, limiting the scope of Complainant's case to matters arising from Complainant's employment which occurred after January 19, 2018, and setting a hearing in this matter for March 2020.

As the Yiddish adage goes, "mann tracht, und gott lacht." Proceedings in this matter were considerably delayed due to the global pandemic. On November 18, 2020, the Court extended the deadline for the parties to file dispositive motions. Respondent timely filed a motion for summary decision, submitting the motion on December 15, 2020. Complainant did not file a timely submission, and the Court found that Complainant had not demonstrated good cause for an extension.[1] Complainant timely filed an opposition to Respondent's motion, filing the opposition on January 8, 2021. This matter is fully briefed and therefore ripe for a decision.

[1] Order Den. Complainant's Mot. Extension Time File Mot. Summ, Decision 3–4.

II. FINDINGS OF FACT

A. Complainant's Prior Complaints of Discrimination; Resolution by Dispositive Motions Practice

Many of the underlying facts to Complainant's employment with Respondent were described in the Court's prior Order on Respondent's Partial Motion for Summary Judgment of January 31, 2020. Briefly restated, Complainant worked at Respondent's Fire Department as a Network Engineer. His employment began around 2013; in April 2016 he was terminated. Complainant filed a complaint with OCAHO in late 2016; he settled that dispute via a settlement agreement in 2018. One of the terms of the settlement agreement was that Complainant would be reinstated. In January 2018, Complainant was rehired.

Unfortunately, Tingling's troubles with the City of Richmond continued. On January 15, 2019, Complainant again filed a complaint with OCAHO. He amended his complaint on October 22, 2019. Complainant's Amended Complaint alleges retaliatory harassment and discrete acts of retaliation stemming from his prior complaints of discrimination, as well as a practice of discrimination and harassment both before and after the settlement agreement.

In late 2019, the parties engaged in dispositive motions practice related to the effects of the settlement agreement of 2018 on this instant case. On January 31, 2020, the Court ruled that the settlement agreement precluded Complainant from pursuing any claims made prior to January 19, 2018, the effective date of the settlement agreement.

B. Complainant's Return to Work at Richmond's Fire and Emergency Services Department; Performance Review Delayed

When Tingling returned to work at Respondent, he was again assigned to the Department of Fire and Emergency Services. Respondent Mot. Summ. Decision Ex. R, 35; Respondent Mot. Summ. Decision 3, Opp'n 2. His immediate supervisor was Deputy Chief Dwayne Bonnette. Respondent Mot. Summ. Decision Ex. S, Taylor Dep. 7:22–8:3.

Bonnette was responsible for providing Complainant with a yearly performance evaluation. Id. at Ex. Q, Bonnette Dep. 34:11–22. Bonnette did not complete Complainant's 2018 performance evaluation. He asserts that he did not complete the 2018 performance evaluation because Tingling arrived within 6 months of the review period. Bonnette completed Tingling's 2019 performance evaluation, however it was not done in a timely manner. Bonnette was tardy in completing several other of his subordinates 2019 performance evaluations. Id. at 34:23–35:2; Ex. R, Kindell Dep. 35:9–25.

Complainant disputes this point about Bonnette being late with several other employees, however his citation to the record to reflect this claim, on page three of his opposition, refers to a section of Bonnette's deposition which has no bearing on the tardiness of the performance evaluations. The later section of the same page of Bonnette's deposition and the following page,

which perhaps Complainant intends to reference, does not contradict Bonnette's explanation. On those pages, Bonnette states that he did not complete Complainant's 2018 performance evaluation because Tingling returned to work within six months of the rating period. Respondent Mot. Summ. Decision Ex. Q, Bonnette Dep. 1, 34–35.

By contrast, Human Resources Liaison Erica Kindell states that because Complainant started in January 2018, his performance evaluation was due in January 2019. Respondent Mot. Summ. Decision Ex. R, Kindell Dep. 35:1–8.

Bonnette says that he was late in completing Complainant's 2019 performance appraisal, which should have been completed by July 2019. Bonnette was deposed on August 28, 2019. Respondent Mot. Summ. Decision Ex. Q, Bonnette Dep. 1, 34–35. Kindell asserted that tardiness in completing performance evaluations was commonplace. Respondent Mot. Summ. Decision Ex. R, Kindell Dep. 35.

C. Complainant Experiences Difficulties with Benefits Upon Rehire

Complainant alleged in his Amended Complaint that the following actions occurred upon his return to employment: a) his retirement fund was not reinstated; b) his family benefits payments were not restored; c) "certain deductions were taken from [Complainant's] paycheck, but he was not notified of the nature of those deductions;" d) "Respondent failed to stop certain deductions even after notice from [Complainant] that he wished for the deductions to stop;" and e) his retirement contributions were reduced. Am. Compl. ¶ 36a–e.

During his deposition, Complainant stated that some of the issues with his benefits were resolved, such as his wife's dental coverage and the vesting of his retirement funds, whereas he did not know if other concerns had been fully addressed, such as the rate of accrual of his retirement funds. Respondent Mot. Summ. Decision Ex. T, Tingling Dep. 53–55. At no point in the pleadings presently before the Court did Complainant repudiate his claim that the City of Richmond intentionally created these problems to retaliate against him because of his prior complaints of discrimination.

D. Complainant's Pay is Decreased Following a City-Wide Compensation Study

The City of Richmond hired a contractor to review the civil service positions for city employees, including their classifications and their pay. Respondent Mot. Summ. Decision Ex. N. As a result of the study, in January 2019 the City passed an ordinance that revised their previous civil service classification system, initially adopted in 1993. Id.

The new city classification system and pay plan left sworn firefighters and police officers unchanged, but it altered the job titles and pay potential for all others. This change affected 3,800 employees, including Complainant. Id. at 1–2. According to Robin Redmond, the City Human Resources Division Chief for Compensation and Benefits, Complainant and 24 other employees were above the maximum pay for their classification. Id. at 3. Three persons, not including Complainant, in Complainant's office were above the pay maximum. Respondent Mot. Summ. Decision Ex. R, Kendell Dep. 56–58. Respondent's management attempted to maintain

Complainant's pay by inquiring to Human Resources for a variance from the pay classifications. Id. The request was denied. Id.

E. Complainant Attempts to Depose Managers But Does Not Notify Respondent of His Intended Absence from Work

Tingling engaged in discovery in the present matter. Respondent Mot. Summ. Decision Ex. U. As part of his discovery, Complainant noticed the deposition of Chief of Fire Melvin Carter, Deputy Chief Bonnette, Deputy Chief Elmond Taylor, and Human Resources Liaison Erica Kindell. Id. at 22. Tingling's notice did not provide a date for the depositions. He did not follow up from the notice with a proposed date. Respondent Mot. Summ. Decision Ex. T, Tingling Dep. 60:22–61:2. Tingling did not notify his supervisors that he would be absent on July 8, 2019 and part of July 9, 2019 because of the depositions. Id. at Ex. Q, Bonnette Dep. 17:7–25:11, Ex. T, Tingling Dep. 59:13–25.

Complainant did not show up for work on July 8, 2019. Respondent Mot. Summ. Decision Ex. P, Ex. Q, 17. He was absent from work on the morning of July 9, 2019 as well, but appeared in the afternoon seeking to take depositions. Respondent Mot. Summ. Decision Ex. Q, 18.

Bonnette disciplined Complainant for his unscheduled absence from work on July 8th and 9th. Respondent Mot. Summ. Decision Ex. Q, 25, 32.

F. Complainant Alleges Respondent Did Not Provide Adequate Equipment

Complainant alleged that he did not receive an adequate laptop until five months after he requested it, in August 2018. Am. Compl. ¶ 42. In the interim, he alleges that the City of Richmond provided him with a laptop which did not meet his needs. Id. Complainant further alleged that he requested another computer in late 2018, but Respondent directed him to provide a written justification for the request. Complainant also alleges that he did not receive "data presentation software" for several months. Id. at ¶ 42f.

Concerning the laptop, Respondent asserts that the equipment was delayed because of logistical problems with the order. Respondent Mot. Summ. Decision Ex. C. Respondent produces a lengthy email correspondence related to the equipment — in it, Respondent's employees assert that the equipment was back ordered, and that its procurement would take some time. Id. Concerning the specialized software, Bonnette asserts that it was provided to Complainant. Id. at Ex. Q, Bonnette Dep. 39:25–40:14. Addressing the late 2018 request for another computer, Bonnette asserts that it was a server which was no longer necessary for Complainant's job duties. Id. at 40:15–41:21; Ex. S, 16.

Complainant has alleged that the Department failed to provide him with a uniform allowance. Am. Compl. ¶ 55. The Department does not provide civil employees with uniforms. Respondent Mot. Summ. Decision Ex. Q, Bonnette Dep. 56. However, civilians may request polo shirts. Complainant elected not to do so. Id. at 56–58.

G. Allegations Related to Change of Address

The Department employs a computer system that holds its employees' names, home addresses, and emergency contact information. Respondent Mot. Summ. Decision Ex. R, Kindell Dep. 61. Employees may change their own contact information in that system. Id. Complainant alleged in his complaint that his home address was incorrectly entered in that system and that the Department did not fix the problem after he notified it of the error. Am. Compl. ¶ 54. The computer system had a bug whereby Tingling's zip code could not be entered. Respondent Mot. Summ. Decision Ex. R, Kindell Dep. 61–62. Thus, for some time, numerous employees, including Complainant, had their address incorrectly entered. Id.

III. LEGAL STANDARDS

A. Motion for Summary Decision

Under the OCAHO rules, the administrative law judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c). "An issue of material fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." Sepahpour v. Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (first citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); and then citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).[2] "Subjective and conclusory allegations unsupported by specific, concrete evidence, provide no basis for relief. Neither do such allegations create a genuine factual issue where one does not otherwise exist." Hajiani v. ESHA USA, Inc., 10 OCAHO no. 1212, 6 (2014).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." United States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" United States v. 3679 Commerce Place, Inc., 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

reasonable inferences "in the light most favorable to the non-moving party." United States v. Primera Enters., Inc., 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

B. Retaliation

Section 1324b prohibits intimidation and retaliation "against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." 8 U.S.C. § 1324b(a)(5). "In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination." Chellouf v. Inter Am. Univ. of P.R., 12 OCAHO no. 1269, 5 (2016).

A complainant can prove retaliation with either direct evidence or by circumstantial evidence and the burden shifting test outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973). Breda v. Kindred Braintree Hospital, LLC, 10 OCAHO no. 1202, 7–8 (2013) (citations omitted).

1. Prima Facie Case of Retaliation

To establish a prima facie case of retaliation, the complainant must present evidence that: "1) an individual engaged in conduct protected by § 1324b, 2) the employer was aware of the individual's protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse action." R.O. v. Crossmark, Inc., 11 OCAHO no. 1236, 6 (2014) (citations omitted); *accord* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656–57 (4th Cir. 1998). For causation, the complainant must establish "that the adverse employment action would not have taken place but for the complainant's protected activity." R.O., 11 OCAHO no. 1236 at 16; *accord* Brackman v. Fauquier County, 72 F. App'x 887, 894 (4th Cir. 2003) (citation omitted).

Causation may be inferred from "the degree of proximity in time of the adverse action to the protected act." Ipina v. Mich. Jobs Comm'n, 8 OCAHO no. 1036, 559, 577 (1999) (citation omitted); *accord* Dowe, 145 F.3d at 657.

Once the complainant establishes a prima facie case of retaliation, the burden of production shifts to the employer to provide evidence of a legitimate, nonretaliatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254–55 (1981). "A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must "set forth specific facts showing that there is a genuine issue for trial." Bouchat v. Balt. Ravens Football Club, Inc., 346 F.3d 514, 522 (4th Cir. 2003) (citations omitted); *accord* United States v. Rubio-Reyes, 14 OCAHO no. 1349, 3 (2020). Federal Rule of Civil Procedure 56(e)(2) provides that "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purpose of the motion[.]"[3] "If the defendant has

[3] "The Federal Rules of Civil Procedure may be used as a general guideline[.]" 28 C.F.R. § 68.1.

failed to sustain its burden [of producing evidence of a legitimate nondiscriminatory reason] but reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact does remain, which the trier of fact will be called upon to answer." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509–10 (1993).

2. Retaliatory Hostile Work Environment

In the context of a Title VII claim, creating a hostile work environment can constitute retaliation. *See, e.g.*, Fordyce v. Prince George's County Md., 43 F. Supp. 3d 537, 552 (D. Md. 2014) (citations omitted). This Court is unaware of any prior case law addressing whether a party may maintain a claim of retaliatory hostile work environment under § 1324b's anti-retaliation provisions. While OCAHO's prior jurisprudence appears to foreclose hostile work environment claims based on § 1324b discrimination charges, *see* Costigan v. NYNEX, 6 OCAHO no. 918, 1151, 1156 (1997) ("section 1324b only covers the practices of hiring, discharging or recruitment or referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or *other terms and conditions of employment*, as does Title VII.")(emphasis added)[4], the same does not appear to be the case with regard to § 1324b retaliation claims. Assuming *arguendo* that a party may maintain a retaliatory hostile work environment under § 1324b, the courts generally provide for a four step analysis in determining whether an employer has created a hostile work environment:

> To establish a claim of retaliatory hostile work environment, a plaintiff must show that "'(1) he experienced unwelcome harassment; (2) the harassment was [in retaliation for protected conduct]; (3) the harassment was sufficiently severe or pervasive to alter the conditions of his employment and to create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer.'"

Angelini v. Balt. Police Dep't, 464 F. Supp. 3d 756, 789 (D. Md. 2020) (citations omitted).

The first element of unwelcome conduct "is not a high hurdle" and can be satisfied by the complainant voicing his objection. Id. (citing Strothers v. City of Laurel, 895 F.3d 317, 328–29 (2018)).

As for the third element, a court views the totality of the circumstances to determine whether an environment is subjectively and objectively hostile or abusive. Tawwaab v. Va. Linen Serv., Inc., 729 F. Supp. 2d 757, 774 (D. Md. 2010) (citations omitted). Factors in determining the severity and pervasiveness of the conduct "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. (citations omitted).

[4] *See also* Angulo v. Securitas Sec. Serv., U.S.A., 11 OCAHO no. 1259, 3 (2015) ("§1324b[] does not encompass complaints about the terms and conditions of employment such as work assignments, hostile work environments, pay differentials, and other terms and conditions of ongoing employment.") (*citing* Smiley v. City of Phila., 7 OCAHO no. 925, 15, 35 (1997)).

The Title VII hostile work environment jurisprudence also provides for an affirmative defense for employers, as announced by the Supreme Court in Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998) and Burlington Indus. v. Ellerth, 118 S.Ct. 2257 (1998). The Faragher/Ellerth defense provides a complete defense to hostile work environment claims which do not result in a tangible employment action where the employer: 1) exercised reasonable care to prevent and correct any illegal conduct, and 2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm. Dulaney v. Packaging Corp. of Am., 673 F.3d 323, 328 (4th Cir. 2012) (internal citations omitted) (discussing Faragher/Ellerth in the context of sex harassment).

IV. ANALYSIS

A. Partial Motion for Summary Decision

It is unclear to the Court whether Respondent's motion seeks an order for partial summary decision, or for complete resolution of Complainant's case. Respondent titles its motion as a motion for summary decision, with no additional qualification, and indeed Respondent in the motion discusses it as addressing the claims which remain following the Court's prior ruling granting partial summary decision. Respondent Mot. Summ. Decision 2–3. However, there are several categories of claims which Complainant raises in his Amended Complaint that are not addressed in Respondent's motion, as well as a theory of liability which Complainant advances but which is left undiscussed. Further, the certificate of service for the motion describes it as a "motion for partial summary decision." Id. at 13. This is not a mere question of semantics. Per Rule 56 of the Federal Rules of Civil Procedure, a party may obtain summary decision on a legal or factual question by providing notice to the nonmoving party about "each claim or defense — or the part of each claim or defense — on which summary decision is sought." Fed. R. Civ. P. 56(a). The Court will not grant a motion seeking summary decision without providing the nonmoving party with an opportunity to be heard on the claims at issue. Fed. R. Civ. P. 56(f)(1).

Accordingly, the Court is inclined to view this submission as a partial motion for summary decision. The analysis which follows will address the points for which Respondent has both moved for summary decision and provided facts and legal argument in support of those claims. The Court will also highlight the areas which were unaddressed, and which will necessarily be the subject matter of the hearing.

B. Prima Facie Case of Retaliation

Since Complainant does not claim there is direct evidence of retaliation, the case turns on whether there is indirect evidence of retaliation sufficient to satisfy the *McDonnell Douglas* test.

As to the first element of protected activity, Respondent acknowledges that Tingling's filing of his OCAHO complaint on January 15, 2019 constitutes protected activity. Respondent Mot. Summ. Decision 8. Addressing the second element, Respondent's knowledge of the protected activity, Respondent appears to concede this point for the purposes of the motion, stating that "[t]here is likely to be a dispute in many instances as to whether certain decision-makers knew

about [Complainant's] participation in protected activity."[5] Respondent Mot. Summ. Decision 8–9. Addressing the third element, the adverse employment action, Respondent presents four categories of adverse employment actions: 1) the change in Complainant's position; 2) Complainant's attempt to hold depositions and his alleged discipline for such attempts; 3) changes to Complainant's benefits and pay; and 4) Complainant's access to adequate equipment and various information.[6] Respondent Mot. Summ. Decision 2. Respondent appears not to argue that any of these actions fail to meet the standard of an adverse employment action,[7] and accordingly the Court presumes for the purposes of the motion that Complainant establishes this element. Finally, regarding causation, Respondent presents the but-for causation standard required for retaliation but fails to apply the standard to the facts of the case; rather, Respondent just asserts that Complainant "has no evidence, direct or otherwise, that any action was were taken against him as a direct result of his participation in protected activity." Respondent Mot. Summ. Decision 8–9. Respondent's claim is not supported by evidence, accordingly the Court presumes for the purpose of the motion that Complainant has established the element of causation, and therefore the prima facie case of retaliation.

C. Respondent's Legitimate, Non-Retaliatory Reasons and Complainant's Offer of Pretext

Nevertheless, Respondent asserts that even if Complainant establishes his prima facie case, it has legitimate, non-retaliatory reasons that entitle it to a grant of summary decision. Respondent Mot. Summ. Decision 9.

i. Change in Classification

Respondent offers as a legitimate non-retaliatory reason for the challenged action that it changed Complainant's classification following its performance of a class and compensation study, and that the change to Respondent's classification affected all similarly situated employees. Respondent Mot. Summ. Decision 9. In a sworn affidavit, Respondent's Human Resource Division Chief for Compensation and Benefits stated that the City Council made this decision that affected "all non-Constitutional positions, or about 3,800 employees[,]" and that Complainant "was treated exactly the same as and consistent with similarly situated employees." Respondent Mot. Summ. Decision Ex. N, 1–2.

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[5] In its Motion for Summary Decision, Respondent notes that it is unclear whether Complainant is asserting both opposition activity which constitutes activity protected under § 1324b, or just participation. Respondent Mot. Summ. Decision 8 n.3. Complainant fails to clarify whether he is arguing opposition activity; thus, the Court concludes that Complainant has conceded the issue of opposition activity, and the case will proceed on the protected activity of Complainant's OCAHO complaints.

[6] Respondent represents that the Court limited the scope of the remaining claims of retaliation into four areas. Respondent Mot. Summ. Decision 2. However, the record does not reflect such a narrowing of the Amended Complaint.

[7] *See* Burlington N. & Santa Fe Ry v. White, 548 U.S. 53, 68 (2006) ("In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"") (internal citations omitted).

The burden of production shifts to Complainant to provide evidence of pretext. Complainant disputes this reason but merely makes unsupported allegations; he cites to no evidence in support of these claims. Opp'n 6. Complainant has therefore failed to meet his burden, and Respondent's motion is GRANTED pertaining to the change in Complainant's classification.

ii. Discipline for Missing Work

Turning to the second adverse employment action which Respondent raises, Complainant contends that he was disciplined for missing work on July 8-9, 2019, the date he had scheduled depositions of several of Respondent's managers, due to Respondent's retaliatory animus. Respondent responds that Complainant was disciplined because he failed to notify anyone prior to his absence. Respondent Mot. Summ. Decision 11. Respondent cites to the deposition testimony of Deputy Chief Bonnette where he explains that Complainant was disciplined for not providing management notice of his leave. Respondent Mot. Summ. Decision Ex. Q, 32–33. Complainant admits to not notifying anyone that he would be out of the office on July 8th and 9th. Respondent Mot. Summ. Decision Ex. T, Tingling Dep. 59:13–25. An unauthorized absence from work is a legitimate, nonretaliatory reason for discipline. Hockaday v. Brownlee, 370 F.Supp.2d 416, 425 (E.D.Va. 2004); *see* Lockhart v. Sys. Made Simple, Inc., 66 F. Supp. 3d 847, 859 (W.D. Tex. 2014). With Respondent having articulated its legitimate, nonretaliatory reason, the burden shifts to Complainant to offer evidence which suggests that this reason is pretextual. Complainant again offers no evidence in support of his offer of pretext; he asserts that he did advise his supervisor via email and certified mail of the absence, however, he does not attach any evidence of the notice and (as stated previously) admitted that he did not provide the notice. Opp'n 7–8. Respondent's Motion for Summary Decision is GRANTED regarding Complainant's discipline for his work absence on July 8–9, 2019.

iii. Reduction in Benefits

Regarding the reduction in his benefits and retirement, Complainant alleges that: his retirement fund and family benefit payments were not reinstated when he returned in January 2018, certain deductions were inexplicably taken from his paycheck despite Complainant's objections, and his retirement contribution amounts have been reduced. Am. Compl. 6. Respondent contends that any issues regarding Complainant's compensation have been resolved. Respondent Mot. Summ. Decision Ex. R, 52:10–25. Complainant is unaware if his compensation issues persist. Respondent Mot. Summ. Decision Ex. T, 53–54. The City's argument is not, as the Court understands it, a legitimate non-retaliatory reason for the challenged action. The City is not saying, for instance, that the reduction in compensation and benefits did not happen, or that they occurred because of Complainant having elected different benefits, or because the cost of the benefits changed between the date of Complainant's termination and his reinstatement. The City's argument is that Tingling's issues were ultimately resolved, which may very well be true, but it does not aid in the analysis of whether the City altered his benefits in retaliation for his prior complaints. The Court therefore finds that Respondent has failed to meet its burden of identifying a legitimate non-retaliatory reason, and accordingly the undersigned DENIES the motion on this issue.

iv. Lack of Equipment

Complainant contends that equipment necessary for the performance of his job duties was either delayed or denied. Respondent asserts that Complainant was provided the equipment necessary to perform his duties and any delays were the "result of standard operating procedures or bureaucratic snafus[.]" Respondent Mot. Summ. Decision 10. Respondent presents evidence that Complainant admitted to having the tools he needed to perform his job duties. Respondent Mot. Summ. Decision Ex. S, 16. Respondent also cites to email correspondence documenting Respondents' lengthy process of attempting to obtain the equipment he sought; the emails note that the specific piece of equipment at issue was back ordered. Respondent also offers the affidavit of Deputy Chief Bonnette, who stated that many of Complainant's requests did not cohere to the Department's budget or Complainant's job description. Respondent Mot. Summ. Decision Ex. Q, Bonnette Dep. 35–38. Complainant disputes this issue but does not provide evidentiary support that these explanations are pretextual, or that Respondent was incorrect in its assessment of his job's needs. Opp'n 5. Complainant therefore fails to carry his burden to establish pretext. As such, Respondent's Motion for Summary Decision is GRANTED regarding Complainant's access to equipment.

v. Performance Appraisals

Respondent's evidentiary proffers in support of its legitimate non retaliatory reason for the delay in the 2018 performance appraisal appear to be contradictory. First, Respondent cites to Deputy Chief Bonnette's deposition, where he states that performance appraisals occur every year around June and that Complainant did not receive a 2018 evaluation because he had been with the department for less than six months. Respondent Mot. Summ. Decision Ex. Q, Bonnette Dep. 34:11–35:7. Respondent's also cites to Human Resources Liaison Kindell's testimony that Complainant's 2018 annual review was due in January 2019 because Respondent's administrative regulations require an annual performance review within a year and Complainant started in January of 2018. Respondent Mot. Summ. Decision Ex. R, Kindell Dep. 35. Because Respondent cites to two facially inconsistent evidentiary proffers, the Court cannot say that either support Respondent's legitimate non retaliatory reason. Accordingly, the Court finds that Respondent has not met its burden of offering a legitimate non retaliatory reason for the challenged action which is supported by evidence in the record, and the Respondent's Motion for Summary Decision as it relates to the 2018 performance evaluation is DENIED.

Contrarily, there is no dispute that Complainant's 2019 performance evaluation was late, and Respondent cites to evidence that over half of the Fire Department's employee's performance evaluations were similarly late. Id. at 35:9–25; Respondent Mot. Summ. Decision Ex. Q, Bonnette Dep. 34:23–35:2. Complainant offers no evidence that suggests that the City's rationale is pretextual, and therefore, Respondent's Motion for Summary Decision as it relates to the 2019 performance evaluation is GRANTED.

vi. Incorrect Home Address

Complainant argues that his home address was incorrectly entered into the City's computer system, and that he attempted to correct the problem but the issue persisted. He further contends

that this is another manifestation of the City's retaliatory animus against him. The City responds that there was a software error affecting people residing outside of the city limits of Richmond, and as a consequence it affected many other city employees. Rather than produce evidence of pretext, Complainant attacks the management analyst senior's qualifications as she is not a software coding expert. Opp'n 4. However, a court "cannot weigh the evidence or make credibility determinations" at the motion for summary judgment phase. Jacobs v. N.C. Admin. Off. of the Cts., 780 F.3d 562, 568–69 (4th Cir. 2015) (citations omitted). Given Complainant's lack of evidentiary support, the Court is "obligated for purposes of considering the instant motion to accept as true any unrebutted facts established by documentary evidence[.]" United States v. Century Hotels Corp., 11 OCAHO no. 1218, 8 (2014) (citation omitted); *see* Fed. R. Civ. P. 56(e)(2). Thus, the software coding issue is a legitimate, non-retaliatory reason for which Complainant has not rebutted with evidence of pretext. Respondent's Motion for Summary Decision is GRANTED regarding the incorrect address entry.

vii. Uniform

Pertaining to the denial of Complainant's uniform attire, Respondent asserts that Complainant's job as an IT person is not one for which it provides uniforms. The City further asserts that they provide polo shirts, but that Complainant did not submit a written request for one. Complainant asserts that he did, but he offers no evidence to support his contention. Complainant therefore fails to carry his burden of providing evidence of pretext, and Respondent's Motion for Summary Decision is GRANTED as it pertains to uniforms.

viii. Tax Lien

Finally, regarding the tax lien, the City of Richmond's evidentiary proffer does not establish the arguments it advances — namely that the lien was in Complainant's wife's name and that it was for a property tax matter unrelated to the claims in this case. Respondent's statement of facts includes a statement concerning the allegations of the City of Richmond using a tax lien to harass Respondent. *See* Respondent Mot. Summ. Decision 7, ¶ 25. The statement alleges that Complainant's wife incurred the debt; the City attached a tax bill and notice as exhibits. The name of the persons to whom the letters were addressed have been redacted, accordingly the Court cannot determine based on these evidentiary proffers two arguments that Respondent advanced in its facts section: 1) that the tax liability was in Complainant's wife's name, and 2) that the tax liability is wholly unrelated to the facts of this case. *See* Respondent Mot. Summ. Decision Ex. W. As Complainant has failed to articulate a legitimate non-retaliatory reason by citing to admissible evidence, the motion is DENIED with regard to the tax lien.

V. CLAIMS UNADDRESSED IN RESPONDENT'S MOTION

A. Discrete Acts and Hostile Work Environment Claims

Complainant's Amended Complaint presents several claims which Complainant describes as both discrete acts discrimination and evidence of a retaliatory hostile work environment. They are as follows:

1) Refusing to provide Complainant with a job letter (presumably a letter of recommendation following his separation from Respondent)
2) Failing to give Complainant a job description;
3) "[r]estricting Complainant's ability to access to prior published information on the intranet[;]"
4) "[d]elaying in processing my Application for Outside Employment, which was previously granted on March 25, 2015 and May 13, 2013[;]"
5) Denying Complainant's telework request;
6) Routing Complainant's request for equipment to high levels of management in an attempt to delay the fulfillment of the request; and
7) Claiming that the results of the Gallagher study were not available when in fact they were.

As these claims were unaddressed in Respondent's motion, and not subject to the prior order on dispositive motions, they will survive to the hearing, along with the claims for which the Court denied summary decision.

Complainant has also alleged that Respondent retaliated against him by "maintain[ing] a hostile work environment for [Complainant] on account of his protected activities." Am. Compl. 10. Respondent's motion does not address this theory of liability, accordingly it survives to the hearing.

Insofar as the prior briefing on dispositive motions does not discuss the hostile work environment theory, it does not discuss to what extent (if any) Respondent's arguments concerning the discrete acts claims also apply to the hostile work environment, and moreover whether the Court's ruling has some preclusive effect on parts of the hostile work environment claims. The Court therefore invites the parties to file submissions, by no later than June 11, 2021 at 12:00 pm EST, addressing the applicability of a retaliatory hostile work environment theory to a § 1324b case, and (if so) the effects of the Court's present rulings on the retaliatory hostile work environment claim.

VI. CONCLUSION

Respondent's Motion for Summary Decision is GRANTED in part as it relates to the claims of Complainant's change in classification and concomitant decrease in pay, discipline for work absences on July 8–9, 2019, access to equipment, 2019 performance evaluation, incorrect home address entry, and uniform attire.

The motion is DENIED as it pertains to Complainant's reduction in benefits, 2018 performance evaluation, and tax lien. Additionally, Respondent did not address several of allegations and theories in the Amended Complaint, and such, those unaddressed claims will be addressed at the hearing. Respondent did not address the hostile work environment claim, and it therefore also survives to a hearing.

The case will proceed with a hearing as outlined in the Court's Scheduling Order and Notice of Hearing issued on May 21, 2021.

In light of this order, the parties may amend their final prehearing statements but must do so by June 11, 2021, by no later than 12:00 pm EST.

SO ORDERED.

Dated and entered on June 8, 2021.

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Honorable John A. Henderson
Administrative Law Judge