[Cite as *O'Brien v. Ohio Bur. of Workers' Comp.*, 2025-Ohio-2918.]

IN THE COURT OF CLAIMS OF OHIO

HAGEN O'BRIEN Plaintiff v. OHIO BUREAU OF WORKERS' COMPENSATION Defendant	Case No. 2023-00659JD Judge David E. Cain DECISION

{¶1} On February 28, 2025, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiff filed a memorandum in opposition, and defendant filed a reply in support. Pursuant to L.C.C.R. 4(D), the motion for summary judgment is now fully briefed and is before the Court for a non-oral hearing. For the reasons stated below, the Court GRANTS defendant's motion.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996).

{¶3} To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. at 292-293. If the moving party meets its initial burden, then the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which provides that "an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

{¶4} When considering the evidence, "[a]ny doubt must be resolved in favor of the non-moving party." *Pingue v. Hyslop*, 2002-Ohio-2879, ¶ 15 (10th Dist.). It is well-established that granting summary judgment is not appropriate unless, construing the evidence most strongly in favor of the nonmoving party: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Robinette v. Orthopedics, Inc.*, 1999 Ohio App. LEXIS 2038, *7 (10th Dist. May 4, 1999).

Statement of Facts

{¶5} In 2016, defendant hired plaintiff as a Bureau of Workers' Compensation (BWC) Medical Claims Specialist. Complaint, ¶ 4-5; O'Brien Deposition, 8:1-2. In 2018, plaintiff was promoted to the position of Claims Service Specialist. O'Brien Deposition, 10-11. Plaintiff was then recruited by Karen Thrapp and Amy Phillips to work on BWC's Special Claims team. *Id.* at 10:15-22. Amy Phillips served as plaintiff's immediate supervisor until April 2021. Complaint, ¶ 8; O'Brien Deposition, 11:1-5; 12:13-14. In 2023, plaintiff was promoted to a BWC Underwriter and later, to the position of Business Process Analyst and continues to hold this position as of filing this action. O'Brien Deposition, 11:16-21.

{¶6} In January 2019, plaintiff applied for a BWC Information Supervisor position. Complaint, ¶ 7; O'Brien Deposition, 12:8-10. Scott McFadden interviewed plaintiff and asked plaintiff his opinion regarding "diversity in the workplace." *Id.* Plaintiff states that his response was effectively "as a gay man, I tend to have a closeness or empathy for other marginalized groups. I enjoy working for women, people of color." *Id.* at 12:13-15.

Phillips informed plaintiff that McFadden stated after the interview, "I don't need Hagen coming to interviews saying 'as a gay man' and that he 'loves black women.'" *Id.* at 13:2-4. Plaintiff never spoke with McFadden regarding these alleged comments and Phillips averred that it was her opinion that these comments negatively impacted plaintiff's interview. *Id*. at 16:7-17; Memorandum Contra in Opposition, Amy Phillips Affidavit, ¶ 7-8. McFadden stated that his comments were taken out of context as he was describing plaintiff's responses as disconnected, since he was applying to a position whose supervisor was a male and that plaintiff's comments had no impact on his interview. McFadden Deposition, 19:3-8.

{¶7} In February 2020, plaintiff met with Thrapp and Phillips about various verbal and written requests he made for assistance and scheduling adjustments. O'Brien Deposition at 11-15. According to plaintiff, Thrapp's tone and sternness during this meeting indicated that his request was not looked at favorably. *Id.* at 23:10-15.

{¶8} Due to the outbreak of COVID-19, BWC transitioned all staff to work from home and beginning on March 31, 2020, BWC's claims specialist division began taking on COVID-19 occupational disease claims. *Id.* at ¶ 13-19. Two team members were reassigned to solely handle these claims with their caseloads redistributed to plaintiff and Mary Manson. *Id.*

{¶9} In August 2020, plaintiff was separately disciplined for an unprofessional email communication and unauthorized overtime work. Complaint, ¶ 22; O'Brien Deposition at 19-22; Phillips Affidavit, ¶ 15-16. Plaintiff received a two-day working suspension and three-day working suspension, but he served his suspensions concurrently. *Id.*

{¶10} In December 2020, Phillips resigned from BWC. *Id.* at 26:15-16. Dustin Valley temporarily stepped in as plaintiff's supervisor. *Id.* at 16:18-19. During this time plaintiff informed Valley that he was behind on his work and that it was impacting his anxiety and depression. *Id.* at 28:18-29:8. Valley instructed plaintiff to continue doing his best. *Id.* In April 2021, Plaintiff was informed that Melody Dials would be his new supervisor. *Id.* at 20:20-22.

{¶11} Shortly after Dials began her role as plaintiff's supervisor, plaintiff and Dials had a one-on-one meeting where plaintiff expressed his concerns over his workload and

how it was impacting his mental health. Complaint, ¶ 28-32. Plaintiff also informed Dials that he was searching for a new job within the agency. *Id.* at ¶ 33.

{¶12} Shortly afterwards, Dial's supervisor, Claims Director Wilma Perez-Rhone, presented Dials with one of plaintiff's files she had flagged for review. Dials Deposition, 70:16-71:15. Perez-Rhone had concerns regarding an April 26, 2021 email exchange plaintiff had with an injured worker. *Id.* Four supervisors, including Dials, reviewed plaintiff's email exchange. Dials Deposition, Exhibit 6. All four determined it to be in violation of BWC policy. *Id.* On May 18, 2021, a second disciplinary investigation was opened into plaintiff's April 26, 2021 email exchange. *Id.* at ¶ 43. Labor management informed plaintiff they would be seeking a five-day working suspension. *Id.* at ¶ 46. In response, plaintiff began the grievance process pursuant to his collective bargaining agreement. *Id.* at ¶ 49. On June 9, 2021, plaintiff initiated an EEO complaint alleging gender and disability discrimination. *Id.* at ¶ 51. Motion for Summary Judgment, Exhibit A.

{¶13} On June 14, 2021, on a phone call with Dials, plaintiff allegedly requested ADA accommodations for his anxiety and depression. *Id.* at ¶ 52. Plaintiff requested accommodation sought to redistribute half of his cases with Manson, believing she was being assigned less complex claims. Motion for Summary Judgment, Exhibit A; Dials Deposition, Exhibit 10. At the time of plaintiff's request, claims were assigned sequentially, with no regard for complexity. Dials Deposition, 114:9-11. Additionally, plaintiff and Manson oversaw the same claim types. Motion for Summary Judgment, Dials Affidavit, ¶ 8; Dials Deposition, Exhibit 47. BWC never considered swapping half of plaintiff's caseload with Manson. O'Brien Deposition, at 77.

{¶14} In response to plaintiff's request for accommodations and assistance with his workload, on July 15, 2021, plaintiff's supervisors discussed plaintiff's recent disciplinary action as well as what next steps they should take to address plaintiff's concerns regarding his workload. Dials Deposition, Exhibit 10-11. Ultimately, BWC placed plaintiff on a 14-day action plan beginning on July 19, 2021, and would end on August 2, 2021. *Id.*, Dials Deposition, Exhibit 47. To comply with his action plan, plaintiff was instructed to return to the office beginning July 29, 2021. Complaint at ¶ 55-57. After being informed of the return to office requirement, plaintiff requested another

accommodation, to continue working from home. O'Brien Deposition, 84:7-11. Plaintiff's request was denied as BWC policy required recently disciplined employees and employees on action plans to work in the office. Motion for Summary Judgment, Dials Affidavit, ¶ 7. On or about July 15, 2021, when plaintiff was informed about the Action Plan, plaintiff finally began the process of officially requesting a disability accommodation and was informed of the proper paperwork he needed to file. Memorandum Contra in Opposition, p. 7.

{¶15} The Action Plan laid out concrete steps to begin addressing and tackling plaintiff's backlog of work and better manage his caseload through prioritization. Dials Deposition, Exhibit 47. Additionally, the Action Plan notes how and when plaintiff and Dials would meet to discuss his progress. *Id.* Plaintiff acknowledged that the Action Plan would address some of his issues but was not sufficient in addressing all his concerns. O'Brien Deposition, 84:1-3. As a result, plaintiff sought to amend his EEO charges to include claims of retaliation on July 23, 2021. Complaint at ¶ 59.

{¶16} On July 29, 2021, on his first day back in office, plaintiff began having medical issues and severe anxiety resulting in him leaving the office mid-way through the day. Complaint, ¶ 64-67; Dials Deposition, Exhibit 57. Plaintiff sought short term disability leave the following day. *Id.* Plaintiff's short term disability leave was approved and granted retroactively. *Id.* at ¶ 68. On September 22, 2021, plaintiff filed an EEO charge alleging discrimination based on disability, sexual orientation, and retaliation. *Id.* at ¶ 70.

{¶17} An arbitration was held in 2022 to address plaintiff's grievance related to his April 26, 2021 email exchange and 5-day working suspension. *Id.* at ¶ 71. It was determined that plaintiff's discipline was not warranted and his suspension was rescinded. *Id.*

{¶18} On August 9, 2022, plaintiff was informed that a meeting was scheduled to discuss involuntary disability separation as he remained on medical leave. *Id.* at ¶ 73. Plaintiff requested to return to work with accommodations, which were granted. *Id.* at ¶ 73-75. Plaintiff returned to work after being on short term disability leave for over a year. *Id.* at ¶ 64-67.

{¶19} On January 1, 2023, plaintiff was promoted to Workers' Compensation Underwriter. *Id.* at ¶ 82. During plaintiff's most recent performance review, Jay Kemo,

plaintiff's new supervisor, stated that HR instructed him that plaintiff could only receive an "exceeds expectations" in one category. *Id.* at ¶ 83. Plaintiff believes other employees were allowed to receive an "exceeds expectations" in more than one category. *Id.* at ¶ 83-84.

Law and Analysis

{¶20} In its motion, defendant argues that plaintiff cannot prevail on his state and federal claims of employment discrimination, failure to accommodate, retaliation, and sex discrimination.

Disability Discrimination

{¶21} Under federal law, the ADEA states that it is unlawful for an employer to "discriminate against a qualified individual on the basis of a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). "Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against any employee with respect to her terms, conditions, or privileges of employment, because of the employee's sex. 42 U.S.C. § 2000e-2(a)(1)." *Million v. Warren Cty.*, 440 F.Supp.3d 859, 869 (S.D.Ohio 2020).

{¶22} Similarly, R.C. 4112.02 provides, in pertinent part, that:

> It shall be an unlawful discriminatory practice: (A) For any employer, because of the . . . sex . . . disability . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Little Forest Med. Ctr. v. Ohio Civil Rights Comm.*, 61 Ohio St.3d 607, 609-610 (1991). "'To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent' and may establish such intent through either direct or indirect methods of proof." *Dautartas v. Abbott Labs.*, 2012-Ohio-1709, ¶ 25

(10th Dist.), quoting *Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766 (10th Dist. 1998).

{¶23} "[D]irect evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir.1999). Direct evidence "does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Johnson v. Kroger Co*., 319 F.3d 858, 865 (6th Cir. 2003). In order for a statement to be evidence of an unlawful employment decision, plaintiff must show a nexus between the improper motive and the decision making process or personnel. *Birch v. Cuyahoga Cty. Probate Court.*, 2007-Ohio-6189, ¶ 23 (8th Dist.). "Accordingly, courts consider: (1) whether the comments were made by a decision maker; (2) whether the comments were related to the decision making process; (3) whether they were more than vague, isolated or ambiguous; and (4) whether they were proximate in time to the act of alleged discrimination." *Id*. "[S]tray remarks, remarks by non-decision makers, comments that are vague, ambiguous, or isolated, and comments that are not proximate in time to the act of termination" do not constitute direct evidence. *Johnson v. Kroger Co.,* 160 F. Supp.2d 846, 853 (S.D.Ohio 2001), rev'd on other grounds, 319 F.3d 858 (6th Cir. 2003).

{¶24} Establishing discriminatory intent through the indirect method of proof is subject to the burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Nist v. Nexeo Solutions, LLC*, 2015-Ohio-3363, ¶ 31 (10th Dist.). "Under *McDonnell Douglas*, a plaintiff must first present evidence from which a reasonable [trier of fact] could conclude that there exists a prima facie case of discrimination." *Turner v. Shahed Ents.*, 2011-Ohio-4654, ¶ 12 (10th Dist.). "In order to establish a prima facie case, a plaintiff must demonstrate that he or she: (1) was a member of the statutorily protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) was replaced by a person outside the protected class or that the employer treated a similarly situated, non-protected person more favorably." *Nelson v. Univ. of Cincinnati*, 2017-Ohio-514, ¶ 33 (10th Dist.). "If the plaintiff meets her initial burden, the burden then shifts to the defendant to offer 'evidence of a

legitimate, nondiscriminatory reason for' the adverse action . . . . If the defendant meets its burden, the burden then shifts back to the plaintiff to demonstrate that the defendant's proffered reason was actually a pretext for unlawful discrimination." *Turner* at ¶ 14.

{¶25} "Employees can prove discrimination in two ways, either directly or indirectly, and each has its own test." *Blanchet v. Charter Communications, LLC*, 27 F.4th 1221, 1227 (6th Cir.2022). "Since failure to accommodate is expressly listed in the Act's definition of disability discrimination, *see* 42 U.S.C. § 12112(b)(5)(A), 'claims *premised* upon an employer's failure to offer a reasonable accommodation necessarily involve direct evidence (the failure to accommodate) of discrimination.'" *Id.*, quoting *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir.2007). The direct evidence framework under which plaintiff's failure to accommodate claim is analyzed requires her to "establish that (1) she 'is disabled,' and (2) that she is '"otherwise qualified" for the position despite * * * her disability: * * * (c) with a proposed reasonable accommodation.'" *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 417 (6th Cir.2021), quoting *Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 417 (6th Cir.2020), quoting *Kleiber* at 869.

{¶26} Additionally, Ohio employers are required to make reasonable accommodations. *See* 42 U.S.C. § 12112(b)(5)(A); R.C. § 4112.02(A)(13); O.A.C. § 4112-5-08(E)(1). Plaintiff "bears the initial burden of suggesting an accommodation and showing that the accommodation is objectively reasonable." *Nighswander v. Henderson*, 172 F.Supp.2d 951, 963 (N.D.Ohio 2001). Examining the reasonableness of plaintiff's request for accommodation, "[r]easonable accommodations consist of '[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position . . . is customarily performed, that enable an individual with a disability . . . to perform the essential functions of that position.'" *Obnamia v. Shinseki*, 569 Fed.Appx. 443, 445 (6th Cir.2014), quoting 29 C.F.R. 1630.2(o)(ii). An ADA plaintiff has the burden of "showing 'that the accommodation is reasonable in the sense both of efficacious and of proportional to costs.'" *Keith v. Cty. of Oakland*, 703 F.3d 918, 927 (6th Cir.2013), quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir.1996). If a disabled employee makes a reasonable accommodation request, the employer is obligated to engage in the "interactive process," which requires "communication and good-faith

exploration of possible accommodations." 29 C.F.R. § 1630.2(o)(3); *Kleiber*, 485 F.3d at 871.

{¶27} In its motion, defendant states that plaintiff must prove his case indirectly as he has failed to point to any direct evidence of disability discrimination. Defendant argues that plaintiff cannot establish a prima facie case as he fails to satisfy the second prong of the *McDonnell Douglas* test as plaintiff did not suffer an adverse employment action as defined by R.C. 4112. Motion for Summary Judgment, p. 9. Defendant further argues that even if plaintiff were to make out a prima facie case, defendant is entitled to summary judgment as plaintiff cannot present evidence to support a finding that defendant's reasons for disciplinary actions and placing plaintiff on a 14-day action plan were pretext of disability discrimination. Motion for Summary Judgment, p. 2. In response, plaintiff argues the five-day suspension as well as the 14-day action plan were adverse employment actions and direct evidence of pretext. Memorandum Contra in Opposition, p. 13-15.

{¶28} Upon review, the Court need not resolve whether plaintiff can establish a prima facie case, as defendant's latter argument is dispositive since plaintiff does not meet the ultimate burden of demonstrating pretext in this case. *See Tanksley v. Howell*, 2020-Ohio-4278, ¶ 25 (10th Dist.) (finding no need to address plaintiff's prima facie case as plaintiff did not meet the ultimate burden of demonstrating pretext). Plaintiff neither demonstrates there exists any question of material fact that repudiates defendant's evidence that they had legitimate, nondiscriminatory reasons for placing plaintiff on remedial work plans due to plaintiff's persistent workplace issues and requests; nor does plaintiff demonstrate that defendant's proffered reasons were pretext for discrimination on the basis of plaintiff's disabilities.

{¶29} Defendant asserts that neither the five-day working suspension plaintiff received for his April 26, 2021 email, nor the 14-day action plan were pretextual, as there were legitimate business reasons for defendant's actions. Motion for Summary Judgment, p. 10-11. Defendant further argues that the disciplinary process for plaintiff's violation of BWC policy was initiated prior to plaintiff filing his EEO complaint, and that the 14-day action plan was in direct response to plaintiff's requests, thus could not be pretextual. *Id.*

Disciplinary Action for April 26, 2021, "Discourteous" Emails

{¶30} There is no dispute that on October 15, 2020, plaintiff sent an email to a claimant's attorney that was found by his supervisors to be "discourteous." Complaint, ¶ 22; O'Brien Deposition at 19:4-22. There is also no dispute that plaintiff was issued a three-day working suspension for the incident, served concurrently for an unrelated second BWC policy violation. *Id.* 20:5-8. Plaintiff's supervisor at the time, Phillips, avers in pertinent part:

> 15. In July 2020, while I was out on vacation, former Injury Management Supervisor John Bittengle and former Claims Director Karen Thrapp initiated the disciplinary process after BWC received a complaint about an email Hagen sent to an attorney. The email was found to be "rude and discourteous."
>
> 16. Although *I agreed that the email was rude* . . . I felt that being rude was out of his character and felt a warning would be sufficient to get his attention.

(Emphasis Added) Phillips Affidavit, ¶ 15-16. However, this was not the only incident where plaintiff sent emails which his supervisor's deemed "discourteous" and in violation of BWC policy.

{¶31} There is no dispute that on April 25, 2021, an injured worker emailed plaintiff stating that they had tried multiple times to contact BWC regarding their injury treatment and had not received a response. Dials Deposition, Exhibit 6. On April 26, 2021, plaintiff responded:

> Please do not imply that we have been unresponsive to you. You contacted me once on April 6, 2021, at which time I spoke to you and provided instruction on what is needed to request reactivation of your claim. That interaction is documented in detail in claim notes. It also appears that you contacted MCO Case Manager Heather P. around April 12, 2021 - April 13, 2021. Claim notes indicate that she attempted to reach you on April 12, 2021, then called again on April 13, 2021, and your voice mail was full and unable to accept messages.

> Secondly, there is no reason for you to contact anyone who has serviced your claim in the past. Myself and my supervisor are the only persons at BWC who should be accessing your claim, and this is only done on an as needed basis. So, Sara will not be of assistance to you going forward. Thus, I have removed her from this email and future emails/calls should be directed to me for as long as I'm your assigned Claims Specialist.
>
> Regarding your message below, the Motion (C-86) which you have sent me is blank. Please complete the C-86, requesting reactivation of the claim and stating which, if any medical services you are needing. This document also requires your signature and must be dated in order to be valid. Once I have your completed C-86, I will forward it to Heather P. at Sedgwick so that they may initiate their review and respond with the recommendation of whether or not we should reactive your claim.

Id.

{¶32} Dials stated that while she did not remember the specifics as to why this file was flagged, Dial's supervisor, Claims Director Wilma Perez-Rhone, had flagged plaintiff's email exchange for review. Dials Deposition, 70:16-71:15. Dials further stated:

> Q. So did [Perez-Rhone] characterize it as rude?
>
> A. I remember rude, discourteous being a part.
>
> Q. And you said you were concerned about it from a customer service standpoint?
>
> A. Correct.
>
> Q. Why?
>
> A. Because it did come off as rude and discourteous in my opinion.
>
> Q. What part of it?
>
> A. Well, the initial sentence, "Please do not imply that we have been unresponsive to you," that's alarming initially to receive that.
>
> Q. Why?
>
> A. To me it is not our job to invalidate our customer's point of view or opinion. It is to hear them out.

Id. at 72:11-73:2. Dials and Perez-Rhone were not alone in their assessment as four supervisors in total reviewed plaintiff's email exchange and all reached the same conclusion, that it violated BWC policies. Dials Deposition, Exhibit 6. ("Mr. O'Brien's supervisor stated the above note was reviewed by four members of management and deemed to be inappropriate and discourteous.")

{¶33} Accordingly, the Court finds that defendant has presented evidence that its discipline of plaintiff for his April 26, 2021, email exchange was for legitimate, non-discriminatory reasons, i.e. violation of BWC policies. *See, e.g., Tanksley v. Howell*, 2020-Ohio-4278, ¶ 26 (10th Dist.) (The violation of workplace policies is a legitimate, non-discriminatory reason to investigate and/or discipline an employee). The burden therefore shifts to plaintiff to demonstrate that there is a genuine issue of material fact as to whether defendant's proffered reason for disciplining plaintiff was merely pretext for discrimination on the basis of disability.

{¶34} To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000). "Regardless of which option is used, the plaintiff retains the ultimate burden of producing 'sufficient evidence from which the jury could reasonably reject [the defendants'] explanation and infer that the defendants intentionally discriminated against [her].'" *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir. 2003), quoting *Braithwaite v. Timken Co.*, 258 F.3d 488, 493 (6th Cir. 2001). A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)*; see also Knepper v. Ohio State Univ.*, 2011-Ohio-6054, ¶ 12 (10th Dist.). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

{¶35} In his response, plaintiff argues that Perez-Rhone and Dials initiating an investigation into his April 26, 2021 email is evidence of pretext because plaintiff was at the time engaged in protected activities, including "his internal complaints of discrimination and, importantly, his requests for accommodation." Memorandum Contra

in Opposition, p. 13. However, it has long been held that failure to follow policies constitute legitimate, non-discriminatory reasons for the actions taken by defendant. *See Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 652 (6th Cir. 2015) ("We have long held that an employer has legitimate cause to discipline or terminate an employee who refuses to follow through on an employer's expressed directions."); *Goldblum v. Univ. of Cincinnati*, 62 F.4th 244, 252 (6th Cir. 2023) ("an employee's insubordination and her failure to follow company policies constitute legitimate, nonretaliatory reasons to terminate employment.").

{¶36} Outside the temporal relation between the two events, plaintiff fails to point to any evidence refuting defendant's proffered reasoning for discipline. Additionally, upon thorough review, the Court finds no instance where Perez-Rhone, Dials, or any other employee mentions plaintiff's disability in relation to the investigation and subsequent disciplinary actions taken.[1] Accordingly, plaintiff fails to provide evidence demonstrating that defendant's actions had no basis in fact, were not motivated by plaintiff's email, nor that the 5-day suspension was unwarranted given this was the second instance of plaintiff sending emails which were believed to have violated BWC policies. While plaintiff may have requested accommodations around the April 26, 2021 incident, construing the facts most strongly in plaintiff's favor there exists no relationship between plaintiff's disability requests and defendant's decision to discipline plaintiff.

{¶37} In further support of his arguments, plaintiff argues that the fact his disciplinary action was rescinded following arbitration, that defendant refused to identify all the supervisors who determined plaintiff's email violated BWC policies, and Valley's testimony that he did not believe plaintiff's emails warranted discipline are evidence of pretext. However, plaintiff's arguments are without legal merit as they do not create an issue of material fact. "Consequently, where the employer holds an honest belief in its proffered reason, the employee cannot establish that the reason is pretextual even if it is later shown to be mistaken or baseless." *Smith v. Dept. of Pub. Safety*, 2013-Ohio-4210,

[1] The Court notes that while there is testimony acknowledging recognition of plaintiff's disability, plaintiff points the Court to no evidence that plaintiff's disability was discussed, much less the reason behind the initiation of disciplinary proceedings in relation to this event.

¶ 78 (10th Dist.), citing *Tibbs v. Calvary United Methodist Church*, 505 Fed.Appx. 508, 513-14 (6th Cir.2012).

{¶38} Here, defendant has proffered evidence that Dials held an honest belief (and maintains said belief) that plaintiff's April 26, 2021 email was discourteous and rude. Dials Deposition, 72:13-75:4. Plaintiff's arguments regarding his discipline rescinded following arbitration, identification of all supervisors who determined plaintiff violated BWC policies, and Valley's personal opinion are without merit. None of plaintiff's arguments address or identify evidence that can reasonably be construed as showing defendant's actions had no basis in fact and were not motivated by plaintiff's email, or that the 5-day suspension was unwarranted. Plaintiff presents no factual dispute which refutes Dials and Perez-Rhone's honest belief was that plaintiff's email correspondence was "discourteous and rude." *See Wigglesworth v. Mettler Toledo Intl., Inc.*, 2010-Ohio-1019, ¶ 19 (10th Dist.). Accordingly, plaintiff fails to establish that defendant's disciplinary actions taken regarding the April 26, 2021 email were pretextual.

14-Day Action Plan

{¶39} It is undisputed that plaintiff discussed his workload before July 1, 2021. Neither party denies that in many of plaintiff's conversations, he highlighted issues he was facing in tackling his worklog while simultaneously mentioning his anxiety and depression. While the parties contest when plaintiff's commentary to colleagues and supervisors constitutes official requests, rather than simply passing commentary, it is uncontested that the first-time plaintiff began the process for accommodation was on May 24, 2021, when plaintiff submitted his initial EEO complaint. Dials Deposition, Exhibit 2.

{¶40} In response to plaintiff's EEO filing, on June 2, 2021, plaintiff was instructed to submit a BWC Internal EEO & Antidiscrimination Policy Violation Complaint Form no later than June 4, 2021. *Id.* Plaintiff failed to do so despite multiple attempts by BWC EEO Officers reaching out to plaintiff. *Id.* On June 24, 2021, almost a month after the deadline, plaintiff finally submitted the requested form. *Id.* However, plaintiff's complaint did not include his request for disability accommodation. Plaintiff first officially sought accommodation for his disability on or about July 15, 2021, when he met with BWC's EEO

Program Administrator and was informed of the proper paperwork and route to request his accommodation. Memorandum Contra in Opposition, p. 7.

{¶41} In response to plaintiff's requests, on July 19, 2021, Dials placed plaintiff on a 14-Day Action Plan. Motion for Summary Judgment, Dials Affidavit, ¶ 6. Dials avers in pertinent part:

> 6. On July 19, 2021, I provided a 14-day Action Plan to O'Brien. The Action Plan was created as a tool for O'Brien to address a significant backlog of overdue cases and tasks and simultaneously not fall further behind on his workload. As Action Plans are not part of the BWC discipline process, this Plan was not a disciplinary measure. I never issued any discipline to O'Brien regarding overdue tasks or any other matter related to his workload.

Id. Additionally, Dials testified that:

> So the action plan was developed to find out where the holes were, where the deficiencies were.
>
> . . .
>
> The action plan was developed to identify the areas of concern and come up with a plan to get Hagen caught up.
>
> . . .
>
> Action plans can be extended as well, so it's not a hard, yes, this is the number, the number that's listed or the time frame that's listed on the answer plan as final. Those can be extended. If we're seeing progress being made and we still want to have additional coaching and mentoring dedicated to the items listed on the action plan, those can be extended beyond the time frame listed on the action plan.

Dials Deposition, 144:4-145:1.

{¶42} Accordingly, the Court finds that defendant has presented evidence that its decision to place plaintiff on a 14-Day Action Plan in response to his request for accommodations and for help with this workload was for legitimate, non-discriminatory reasons. The burden therefore shifts to plaintiff to demonstrate that there is a genuine

issue of material fact as to whether defendant's proffered reason for disciplining plaintiff was merely pretext for discrimination on the basis of disability.

{¶43} In his response, plaintiff points to an email exchange on July 15, 2021, between Chief Operating Officer Patricia Harris and Perez-Rhone in response to plaintiff's request for disability accommodations as evidence of pretext.

> We had Hagen's step 2 grievance meeting on the 13th. Clearly his behavior isn't going to change. He has a 5 day suspension that he is trying to fight. He and Mary are close in their caseload but their tasks is another story. He has much overdue tasks and part of the issue is the long winded responses. It is so unfair for him to assume that Mary's claims aren't complex where his are when they handle the same claim type.
>
> I am getting the feeling that this email is a way to catch [Dials] in a snare with his language about him being discriminated, harassed, retaliated against, etc. I don't want [Dials] to reply to this email and will help [Dials] come up with an email that will provide him work direction and not engage in any type of communication where she is refuting or debating him and merely sharing with him what is expected of him regarding his work product. Do you feel that is a good approach?

Dials Deposition, Exhibit 10. While Perez-Rhone does mention plaintiff's recent disciplinary action and her belief that plaintiff was setting up his legal case, the email plaintiff points to largely supports defendant's argument, that plaintiff's supervisors were seeking to assist plaintiff. Later that same day, Perez-Rhone sent a follow-up email to Krista Downs stating:

> We feel at this point that [O'Brien] needs to be placed on an action plan as he isn't meeting the expectations or keeping up with his work tasks. He is making quite a bit of assumptions on what his coworkers on working on when in reality he isn't completing his work. He is behind on travel reimbursements and Melody has shared this with him. Since he is unable to organize his work it seems necessary for us to direct his work.

Dials Deposition, Exhibit 11.

{¶44} Yet, both emails plaintiff points to as evidence of pretext support defendant's arguments that plaintiff was far behind in his work and requesting support for which his supervisors were working on finding a solution. *See Reynolds v. Extendicare Health Servs.*, 2006 U.S.Dist. LEXIS 81007, *13-14 (S.D.Ohio Nov. 1, 2006) ("the fact that Reynolds was fired one week before the thirty-day PIP expired . . . does not throw into question Defendants' proffered explanation for her dismissal. The evidence shows Reynolds was working under a PIP *because her performance needed improvement, and that she was not progressing*."). Similarly, plaintiff acknowledges that his anxiety and depression were worsening because of plaintiff's problems in managing his time and workload. Memorandum Contra in Opposition, p. 4-5. These very issues are highlighted in the 14-Day Action Plan Plaintiff received, which states:

> **Statement of Performance Issues – Employee has been exhibiting problems in the following areas:**
>
> **Claims Policy/Accountability** Communication with Customers
>
> - **Claims Policy/Accountability**
> - Decisions are not made on incoming applications in a timely fashion according to the agency's claims policies.
> - Must have a greater sense of responsibility for work and work expectations. Must be accountable for all work included on worklist and timelines
> - **Communication with Customers**
> - Does not appropriately communicate via email with internal and external customers, fostering team environment and demonstration of respect
>
> **<u>Improvement Desired – Effectively perform job duties</u>**
>
> - **Claims Policy/Accountability**
> - Address items included on individual worklist in a timely manner
> - Become more accountable for claims management (processing, decision-making, role and responsibilities) as this is important in effectively performing your job duties and providing excellent customer service.
> - Identify each application type and their determination timelines
> - Identify the appropriate process and method to address items on work list.

- Identify individual strengths and weaknesses in:
  - Work performance in overall or various parts of claims process
  - Time Management

Goal Measurement

- To encompass all bullets above, over the course of the next 14 days, work assignments will be provided to address all overdue and backlogged items. Employee will be measured on the completion of the following tasks:
  - Overdue compensation extensions
  - Overdue initial determinations
  - Overdue C-60 applications
- Complete training on time management skills.
  - Provide summary of training, along with two takeaways and two methods that can be implemented in daily work.

Dials Deposition, Exhibit 47.

{¶45} The evidence cited by plaintiff is insufficient in demonstrating pretext, rather it supports defendant's argument that Dials instituted the action plan as a response to plaintiff's workflow issues. Indeed, the Action Plan is largely tailored to plaintiff's professed issues, i.e. timely completing his work backlog. Accordingly, plaintiff's proffered evidence largely undermines his own position and supports defendant's position as it does not demonstrate that defendant's explanation had no basis in fact, and was not motivated by plaintiff's email requesting assistance, or that the 14-day Action Plan was unwarranted given plaintiff's significant backlog.

{¶46} In the Court's view, plaintiff's issue is not really that he was placed on an Action Plan, but rather that BWC management did not agree with his suggestion to swap half his case load with another employee who he believed was receiving less complex work. Yet, plaintiff's arguments on the topic are wholly unsubstantiated as the only evidence plaintiff points to is the assignment of less complex claims to Manson during her training period, well over a year prior to the alleged events. Memorandum Contra in Opposition, Phillips Affidavit, ¶ 12.

{¶47} In viewing the facts in a light most favorable to plaintiff, the Court finds that plaintiff has failed to identify a genuine issue of material fact for trial. Defendant met its burden of proffering evidence that disciplining plaintiff for his April 26, 2021 email and placing plaintiff on a 14-Day Action Plan were for legitimate, non-discriminatory reasons, i.e. Dial's belief that plaintiff's correspondence was "discourteous" and violated BWC policy and plaintiff's own request for assistance. Defendant put forward evidence that there was a genuine belief on the part of Dials that plaintiff's email was "discourteous" and violated BWC policy regarding communications, and that the 14-Day Action Plan was tailored to, and in response to, plaintiff's July 15, 2021 request for assistance. Plaintiff did not meet his reciprocal burden of coming forward with evidence that defendant's proffered reasons have no basis in fact, were not motivated by plaintiff's actions, and were not unwarranted. Thus, plaintiff fails to demonstrate that defendant's actions were pretextual and that discrimination on the basis of disability was the real reason. Accordingly, reasonable minds can therefore only conclude that plaintiff cannot prevail on his claims of employment discrimination.

Failure to Accommodate

{¶48} Plaintiff argues that defendant failed to accommodate plaintiff's disability by failing to re-evaluate/re-distribute his workload and denying his request to continue working from home. Complaint, ¶ 96.

{¶49} For purposes of the direct evidence framework, the Court finds that plaintiff satisfies the first two requirements necessary. There is no dispute that plaintiff is disabled and was qualified as a Claims Service Specialist. The issues presently are whether plaintiff requested *reasonable* accommodations under the circumstances and whether plaintiff fulfilled his obligations to participate in the interactive process. It is uncontested that plaintiff requested the following accommodation:

> I'm asking that half of the active claims which I support be transferred to the other W.C. Claims Specialist assigned to my job role on the Special Claims Interstate Jurisdiction Team, and that I receive half of the active claims to which the other W.C. Claims Specialist is assigned, until we onboard a new team member to fill the current vacancy. Going forward, efforts should be

> made to more equitably distribute claims receiving compensation versus those not receiving compensation in any such case that we lose a team member to a promotion or resignation/termination. . .

Motion for Summary Judgment, Exhibit A.

{¶50} However, plaintiff presents no evidence corroborating his statements that his assigned workload was more difficult or complex than that assigned to Manson. While plaintiff argues that identical requests, i.e. transferring half of plaintiff's workload, began in 2020 when Phillips was plaintiff's supervisor. Yet, outside of vague remarks regarding his workload, plaintiff fails to provide evidence that he suggested an accommodation at such time. *Nighswander*, 172 F.Supp.2d 951 at 963 ("[plaintiff] bears the initial burden of suggesting an accommodation and showing that the accommodation is objectively reasonable.") It is uncontested that the first-time plaintiff proposed an accommodation was in 2021, when plaintiff sought to transfer half his caseload to Manson. Additionally, plaintiff fails to meet his burden in demonstrating that his request to transfer half his caseload, much of which he admits is long overdue, would aid his problems. And he presents no evidence that defendant could even reasonably accommodate his request. Memorandum Contra in Opposition, Phillips Affidavit, ¶ 12. Indeed, the evidence provided indicates that due to plaintiff's backlog it would not be efficacious or *reasonable* to transition half of plaintiff's long overdue cases to his sole colleague, who was timely in her work. *See Keith*, 703 F.3d 918, 927 (6th Cir.2013).

{¶51} At the time of Dial's promotion in April, plaintiff and Manson's case assignments were done round robin.[2] Dials Deposition, 114:9-116:17. When Dials investigated plaintiff's workload it was found that plaintiff and Manson had roughly the same amount of claims, with one key distinction—plaintiff's claims were generally long overdue. *Id.* While plaintiff argues this is evidence of his more complex caseload, the Court is unpersuaded. Dials averred that: "During the time I supervised O'Brien, an automated system assigned claims to specialists by rotation within a given specialty area based solely on the order in which the claims were received by BWC. No one specialist

[2] Round robin is a distribution method where items are assigned sequentially ensuring an equal distribution.

is assigned more claims than another as claims are received." Motion for Summary Judgment, Dials Affidavit, ¶ 8.

{¶52} Additionally, plaintiff's proffered evidence shows that at the time of plaintiff's requested accommodation Manson oversaw two claim types: Special Claims and Special Claims – OOS. Dials Deposition, Exhibit 47. At the time of Dials' review, Manson had 238 claims with 83 tasks related to her Special Claims and 24 claims with 4 tasks related to her Special Claims – OOS. *Id.* In contrast, plaintiff oversaw the same two claim categories. *Id.* There is no evidence of plaintiff handling any other claim categories or that these categories differed in any meaningful way from those handled by Manson. At the time of Dials' review, plaintiff had 300 claims with 232 tasks related to his Special Claims and 24 claims with 18 tasks related to his Special Claims – OOS. *Id.* Plaintiff offers no evidence to indicate that in spring/summer of 2021, he received a disproportionate number of complex cases. In fact, the evidence supports the opposite. At the time of plaintiff's allegations, Manson and plaintiff were receiving a roughly equal number of cases. The only key difference was that Manson was completing her work/tasks more effectively. Plaintiff's unsupported suspicions about Manson's caseload verses his own does not create a factual dispute. Accordingly, the Court finds that plaintiff fails to demonstrate that his requested accommodations were reasonable and would have likely been efficacious under the circumstances.

{¶53} Even assuming arguendo that plaintiff had provided evidence to support his claim that his request for accommodations was reasonable, his claims fail as a matter of law. It is undisputed that plaintiff, not defendant, was responsible for the breakdown of the interactive process. *See Lockard v. Gen. Motors Corp.*, 52 Fed.Appx. 782, 788 (6th Cir.2002) ("To bear liability for a failure to accommodate, an employer must be responsible for a breakdown in the interactive process. In this regard, courts have held that an employer is not responsible for a breakdown in the interactive process unless the employer actually failed to offer a reasonable accommodation."). Initially, the Court finds that defendant had offered reasonable accommodations to address plaintiff's workflow issues. While plaintiff disagrees with the method selected to address plaintiff's issues, that is of no consequence. An employer is not obligated to acquiesce to plaintiff's requested accommodation, only that they make a good-faith exploration of possible

accommodations. *Taylor v. Principal Fin. Group*, 93 F.3d 155, 319-320 (5th Cir.1996); *Kleiber*, 485 F.3d at 871. Additionally, while the Action Plan was disagreeable to plaintiff, plaintiff acknowledges that it would address some of his issues. ". . . I agree, prioritization is a component of the assistance, but it is not sufficient." O'Brien Deposition, 84:1-3.

{¶54} The Action Plan created by defendant laid out concrete steps to begin addressing plaintiff's self-acknowledged deficiencies in handling his work and ways to better manage his caseload. Dials Deposition, Exhibit 47. The Action Plan began on July 19, 2021, and would end on August 2, 2021. *Id.* The Action Plan additionally notes how and when plaintiff and Dials would meet to discuss his progress.

> Over the next 14 days, employee's supervisor will work with employee. As work is being monitored, the employee and the immediate supervisor will meet every week to discuss employee's progress. These weekly meetings will touch on the concepts listed above, performance of overall job duties, and expectations moving forward. These meetings will be conducted on a standing schedule of every Monday at 9:30 a.m.

Id. However, on July 29, 2021, before the Action Plan could be completed or Dials evaluate and continue working with plaintiff, plaintiff took an extended leave of absence for short term disability, removing himself from the interactive process. O'Brien Deposition, 85:18-24. Thus, plaintiff fails to bring a prima facie case for failure to accommodate.

{¶55} Next, plaintiff argues that defendant further failed to accommodate his needs by revoking plaintiff's telework status and ordering plaintiff back into the office. Complaint, ¶ 57-58. After being informed of the return to office requirement, plaintiff requested another accommodation. To continue working from home. O'Brien Deposition, 84:7-11. However, Dials averred:

> I requested O'Brien return to work in the office by July 29, 2021. I did so to assist O'Brien to address his caseload, minimize distractions, and facilitate meetings on his progress. Further, *pursuant to BWC policy, employees who were recently disciplined, as O'Brien had been, or were on an Action Plan, as O'Brien was, were not permitted to work remotely*.

(Emphasis Added) Motion for Summary Judgment, Dials Affidavit, ¶ 7.

{¶56} The Court notes that plaintiff only returned to work in-office for one day, July 29, 2021. Complaint, ¶ 60. Halfway through the workday, plaintiff messaged Dials stating "I am shaking at my desk with anxiety. I can't make any REAL progress. An aneurysm or heart attack might just be a gift. Is there a nurse or someone I can talk to?" Dials Deposition, Exhibit 57. Dials replied to plaintiff stating that she would "check with BWC security and see if the nurse is in office." *Id*. However, plaintiff had already left prior to the conclusion of the workday. O'Brien Deposition, 85:18-24. Plaintiff did not return to the office that day and began his extended leave of absence the following day. *Id.*

{¶57} Accordingly, the Court finds that defendant has presented evidence demonstrating a legitimate policy reason regarding plaintiff's return to work; however, plaintiff has not presented evidence demonstrating the reasonableness of his disability and requested work from home accommodations. *See* O'Brien Deposition, 84:4-18; *see also* Motion for Summary Judgment, Attachment B, ¶ 12. Even if plaintiff had presented such evidence, it is uncontested that the return-to-work requirement was to assist plaintiff in limiting potential telework distractions, was required by BWC policy, and a necessary part of the accommodations provided by defendant. Motion for Summary Judgment, Dials Affidavit, ¶ 7. Moreover, plaintiff's requirement to return to the office cannot be considered an adverse employment action as "employment actions that result in *mere inconvenience* or an alteration of job responsibilities are not disruptive enough to constitute adverse employment actions." *Canady v. Rekau & Rekau, Inc.*, 2009-Ohio-4974, ¶ 25 (10th Dist.), citing *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004). As return to work was part of the interactive process, plaintiff's failure to participate by taking his short-term disability leave renders moot any argument regarding the reasonableness of his request to continue working remote. Plaintiff's removal of himself from the interactive process means, as a matter of law, his claim of failure to accommodate his request to continue working from home fails.

{¶58} Accordingly, the Court finds that after construing the facts most strongly in his favor, plaintiff has failed to establish a prima facie case for failure to accommodate.

Retaliation

{¶59} Plaintiff argues that defendant retaliated against him for engaging in a protected activity. Specifically, plaintiff's internal complaints of discrimination and requests for accommodation. Complaint, ¶ 50-51, 59, 70; Memorandum Contra in Opposition, p. 13.

{¶60} R.C. 4112.02(I) states that it shall be an unlawful discriminatory practice: "For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code." "Absent direct evidence of retaliatory intent, Ohio Courts analyze retaliation claims using the evidentiary framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 * * *." *Veal v. Upreach LLC*, 2011-Ohio-5406, ¶ 16 (10th Dist.). Indirect proof of retaliation is thus examined via a similar burden-shifting analysis to discrimination. Here, the elements of the prima facie case that plaintiff must establish are: "(1) [he] engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action." *Id.* at ¶ 16.

{¶61} Protected activity involves either the "opposition clause," when an employee has opposed any unlawful discriminatory practice, or the "participation clause," when an employee has made a charge, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code. *See Motley v. Ohio Civ. Rights Comm'n*, 2008-Ohio-2306, ¶ 10 (10th Dist.), citing *Coch v. GEM Indus., Inc.*, 2005-Ohio-3045, ¶ 29 (6th Dist.). After a plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *Veal* at ¶ 17.

{¶62} Plaintiff seemingly argues that the disciplinary action taken against him related to his EEO filing is evidence of retaliation. Initially the Court notes that plaintiff's email exchange with the injured worker occurred on April 26, 2021. The decision to begin disciplinary proceedings against plaintiff occurred on May 18, 2021. Complaint, ¶ 42.

Plaintiff filed his EEO form on June 9, 2021. *Id.* at ¶ 50. While the timing of an employer actions can contribute to an inference of retaliation, temporal proximity alone is not sufficient to demonstrate a causal connection, and this is especially true where there are intervening performance concerns. *Sells v. Holiday Mgt. Ltd.*, 2011-Ohio-5974, ¶ 35 (10th Dist.). If an adverse action was considered *before* plaintiff engaged in protected activity, there is no inference of causation. *See Prebilich-Holland v. Gaylord Entertainment Co.,* 297 F.3d 438, 443-444 (6th Cir. 2002) (finding that close proximity creates no inference of causation when the termination procedure was instituted several days before knowledge of protected status or activity). "[E]vidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity." *Sosby v. Miller Brewing Co.,* 415 F. Supp. 2d 809, 822 (S.D.Ohio 2005), citing *Smith v. Alien Health Sys., Inc.,* 302 F.3d 827, 834 (8th Cir. 2002).

{¶63} Accordingly, the Court finds that plaintiff fails to meet the first and second prong necessary in establishing a prima facie case of retaliation. At the time of the discipline, plaintiff was not engaged in a protected activity, nor could defendant have known about his EEO filing as it had yet to happen. Insofar as plaintiff argues that the retaliation was related to his request for disability accommodation, it is unpersuasive. As noted previously, plaintiff points to no evidence, nor could this Court find any reference to plaintiff's requests until July 2021 at earliest. Thus, plaintiff fails to demonstrate retaliation (for the same reasons stated previously). Dials Deposition, Exhibit 10.

{¶64} Additionally, plaintiff argues that the disciplinary action related to his April 26, 2021 email exchange was overturned in arbitration on July 7, 2022. Complaint, ¶ 71-72. "Consequently, where the employer holds an honest belief in its proffered reason, the employee cannot establish that the reason is pretextual *even if it is later shown to be mistaken or baseless*." (Emphasis Added.) *Smith v. Dept. of Pub. Safety*, 2013-Ohio-4210, ¶ 78 (10th Dist.), citing *Tibbs v. Calvary United Methodist Church*, 505 Fed.Appx. 508, 513-14 (6th Cir.2012). Plaintiff's arguments are unpersuasive. The record demonstrates that disciplinary action was considered, and began, before plaintiff participated in a protective activity, and as noted above, any argument related to the revocation of plaintiff's discipline is without legal merit.

{¶65} Next, plaintiff argues that the 14-Day Action Plan itself is evidence of retaliation. Memorandum Contra in Opposition, p. 13-14. As noted previously, defendant has presented evidence demonstrating that the 14-Day Action Plan was in response to plaintiff's request for accommodations. Motion for Summary Judgment, Dials Affidavit, ¶ 6-7.

{¶66} In response, plaintiff points to the email exchange between Perez-Rhone and Dials which discuss his pending appeal of the disciplinary action and how to respond to plaintiff's request for accommodations. Dials Deposition, Exhibit 10-11. However, as noted previously, the substance of the emails deals with addressing plaintiff's pending request for accommodation and how best to respond. *Id.* While plaintiff argues that the 14-Day Action Plan was a first and "unprecedented," plaintiff's argument is legally bereft. Plaintiff cites no law, nor has this Court found any law, which states that when an employer decides to utilize a unique responsive plan to assist an employee it is inherently an adverse employment action simply by being the first of its kind. Insofar as plaintiff argues that no other employee had been or has been placed on a 14-Day Action Plan, it is unpersuasive. Plaintiff's disagreement with being placed on the 14-Day Action Plan does not make it an adverse employment action. Accordingly, the Court finds that plaintiff fails to meet the third prong necessary in establishing a prima facie case of retaliation.

{¶67} Plaintiff next argues that the increased scrutiny of his work by defendant was retaliatory. Memorandum Contra in Opposition, p. 15. However, as noted previously, plaintiff requested assistance with his overdue and backlogged work. Such a request inherently required defendant to examine and monitor plaintiff's work more closely. Plaintiff offers no evidence which shows that even if defendant had accepted plaintiff's original suggested accommodation, i.e. swapping half of his case load, that increased monitoring of both him and Manson would be unnecessary. Accordingly, the Court finds that plaintiff fails to meet the third prong necessary in establishing a prima facie case of retaliation. Increased scrutiny of plaintiff's work is not an adverse employment action as it was not only indirectly requested by plaintiff but it would be required to assist and accommodate plaintiff.

{¶68} Finally, seemingly in support of his arguments involving retaliation, plaintiff states that in his most recent performance review, plaintiff's new supervisor, Jay Kemo,

informed plaintiff that HR informed him that plaintiff could only receive an "exceeds expectations" in one category, not multiple categories. Complaint, at ¶ 83-84. Plaintiff states that he received only one "exceeds expectations" but believes other employees were allowed to receive an "exceeds expectations" in more than one category. *Id.* Plaintiff's argument is unpersuasive. Plaintiff's belief is uncorroborated as plaintiff presents no evidence that other similarly situated employees received more than one "exceeds expectations." Accordingly, the Court finds that plaintiff fails to meet the fourth prong necessary in establishing a prima facie case of retaliation. Plaintiff fails to proffer any evidence to substantiate his belief or demonstrate that it has any connection to the aforementioned events at issue.

{¶69} In viewing the facts in a light most favorable to plaintiff, the Court finds that plaintiff has failed to identify a genuine issue of material fact for trial. Defendant met its burden of proffering evidence that disciplining plaintiff for his April 26, 2021 email and placing plaintiff on a 14-Day Action Plan were for legitimate, non-retaliatory reasons. Defendant put forward evidence that disciplinary proceedings began prior to plaintiff engaging in a protected activity and that the 14-Day Action Plan was tailored to, and in response to, plaintiff's July 15, 2021 request for assistance. Plaintiff did not meet his reciprocal burden of coming forward with evidence that defendant's proffered reasons for discipline and placing him on an Action Plan were pretextual, and that retaliation was the real reason. Accordingly, reasonable minds can therefore only conclude that plaintiff cannot prevail on his claims of retaliation.

Sex Discrimination

{¶70} Defendant argues that plaintiff's claims fail as he cannot satisfy the fourth prong of the *McDonnell Douglas* test. *Id.* Plaintiff did not address defendant's arguments. *See Geller v. Henry Cty. Bd. of Ed.*, 613 Fed.Appx. 494, 499 (6th Cir. 2015) ("Geller does not argue that he has direct evidence of age discrimination. Accordingly, his case is reviewed under the standard for circumstantial evidence.").

{¶71} Defendant argues that plaintiff cannot satisfy the fourth prong of the *McDonnell Douglas* framework as plaintiff has failed to demonstrate that other Claims Service Specialists were of a different, non-protected class. Defendant additionally

argues that, even if plaintiff were able to make out a prima face, defendant is entitled to summary judgment on the basis that plaintiff cannot present evidence to support a finding any adverse employment action plaintiff received was pretext for discrimination based on his sexual orientation. Motion for Summary Judgment, p. 15.

{¶72} Plaintiff argues that he was subjected to sex discrimination and subjected to adverse employment action due to his sexual orientation. Complaint, ¶ 7-11, 126. Plaintiff states that while interviewing for a position in January 2019, Phillips pulled him aside after his interview and informed him that McFadden, was "displeased that O'Brien mentioned his sexual orientation during the interview." *Id.* at ¶ 8.

{¶73} The only relevant fact plaintiff points to is an alleged comment made by McFadden. Memorandum Contra in Opposition, Amy Phillips Affidavit, ¶ 7-8. Phillips averred:

> After Hagen's interview, McFadden told me that Hagen mentioned being gay when answering a question during the interview. McFadden told me he ". . . didn't need Hagen saying 'as a gay man'" when answering questions. My interpretation of McFadden's comment was that he did not appreciate Hagen's reference to his sexual orientation and that Hagen's comments had an adverse effect on his interview.

Id. But the statements plaintiff points to in Phillip's affidavit are hearsay when offered for the truth of the matters asserted.

{¶74} Regardless, McFadden's testimony supports defendant's position that his alleged statements regarding plaintiff's sexual orientation were not discriminatory and did not adversely affect plaintiff. McFadden stated that "Amy asked how the interview went. I had said, 'I don't care about sexual orientation, it doesn't matter to me.' And that it -- it was mentioned that he likes to work for Black and Asian women, which seemed odd in response, considering the hiring manager was -- was a male." McFadden Deposition, 19:3-8. McFadden further stated that plaintiff's commentary regarding his sexual orientation had no impact on his interview. Ultimately was not selected for the Information Supervisor position as there was a more qualified candidate.

Q. Why was Hagen not selected for that position?

A. Because there was a more qualified candidate.

Q. Do you feel you had a negative reaction to Hagen's openness about being gay?

A. No.

Id. at 19:19-25.

{¶75} Further, plaintiff himself testifies that he is unable to demonstrate that any non-protected members were treated more favorably. O'Brien Deposition, 18:6-10. Thus, plaintiff fails to satisfy the fourth prong of the *McDonnell Douglas* test and establish a prima facie case for sex discrimination.

{¶76} Upon thorough review, and after construing the facts in a light most favorable to plaintiff, the Court finds that plaintiff has failed to identify a genuine issue of material fact for trial. Defendant met its burden of proffering evidence that stray remarks regarding plaintiff's sexual orientation were inconsequential. Plaintiff did not meet his reciprocal burden of coming forward with any evidence to refute defendant's evidence or McFadden's testimony. Indeed, plaintiff's only evidence is the subjective belief and hearsay of Amy Phillips that plaintiff's responses regarding his sexual orientation negatively impacted his interview. Memorandum Contra in Opposition, Amy Phillips Affidavit, ¶ 7-8. Accordingly, reasonable minds can therefore only conclude that plaintiff cannot prevail on his claims of sex discrimination.

Conclusion

{¶77} Based upon the foregoing, the Court concludes that there are no genuine issues of material fact, and that defendant is entitled to judgment as a matter of law. Therefore, defendant's motion for summary judgment shall be GRANTED.

DAVID E. CAIN
Judge

[Cite as *O'Brien v. Ohio Bur. of Workers' Comp.*, 2025-Ohio-2918.]

HAGEN O'BRIEN Plaintiff v. OHIO BUREAU OF WORKERS' COMPENSATION Defendant	Case No. 2023-00659JD Judge David E. Cain JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶78} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED. All other pending motions are DENIED as moot. Judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DAVID E. CAIN
Judge

Filed July 2, 2025
Sent to S.C. Reporter 8/18/25