OFFICE OF COMPLIANCE
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Donald Rouiller, Appellant v. United States Capitol Police, Appellee.	)	Case Numbers: 15-CP-23 (CV, AG, RP)

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

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors ("Board") pursuant to a petition for review filed by Donald Rouiller ("Rouiller") against the United States Capitol Police ("USCP"). Rouiller seeks review of the Hearing Officer's November 9, 2015 Order, which found in favor of the USCP. The Hearing Officer granted the USCP's motion to dismiss in part for claims that were not timely or that were not exhausted. Further, the Hearing Officer granted the USCP's motion for summary judgment on all remaining claims.

Because this matter is before us on a decision dismissing claims for being untimely and granting summary judgment on the remaining claims, we review the Hearing Officer's decision "de novo," viewing the facts in the light most favorable to Rouiller and giving him the benefit of all reasonable inferences that can be made from these facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 150-51 (2000).

Upon due consideration of the Hearing Officer's Order, the parties' briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer's decision on all claims.

I. Background

Relationship with Female Subordinate

The Hearing Officer found that the undisputed facts show that Rouiller began working for the USCP in April 1993 as an officer. Rouiller is a white male and over the age of 40. In 2013, Rouiller was one of five Deputy Chiefs at the USCP. Assistant Chief of Police Daniel Malloy

("AC Malloy") and Chief of Police Kim Dine ("Chief Dine") were his direct line supervisors.[1] Also, Rouiller was the USCP's lead negotiator on collective bargaining agreement ("CBA") issues.

In 2013, there was a female officer who worked for the Uniformed Services Bureau ("USB"). She was married to a male USCP officer, who was also assigned to the USB. The female officer is over the age of 40.

From approximately April or May 2013 until November 2013, Rouiller and the female officer, and their spouses began to socialize together. In mid-October 2013, the USCP assigned Rouiller to the USB, the largest of five bureaus of the USCP. This new assignment then placed approximately 1,100 police officers and officials under Rouiller's command. The female officer and her husband were also then both in Rouiller's chain of command.

In late November 2013, Rouiller and his wife separated. Rouiller moved out of the marital home and into an apartment. A few weeks later, in early December 2013, the female officer separated from her husband and he moved out of the marital home. Rouiller started seeing the female officer socially in December 2013. The two began a dating relationship sometime after that.

Disclosure of Relationship

On April 9, 2014, Rouiller advised then-AC Malloy that he was in a dating relationship with the female officer and that she was in his chain of command. After Rouiller gave input about her reassignment preferences, AC Malloy reassigned the female officer to the background investigation section. At the time, Rouiller did not make AC Malloy aware that the female officer's husband also worked for the USCP and was in Rouiller's chain of command.

On May 1, 2014, AC Malloy met with several USCP officials who expressed concerns about the female officer's husband's potential reaction to rumors that his wife was dating Rouiller. It was at this meeting that AC Malloy learned for the first time that the female officer's husband was Rouiller's subordinate and that the relationship between the female officer and Rouiller had begun several months before Rouiller reported it.

On May 6, 2014, AC Malloy asked the USCP Office of the Inspector General ("OIG") to review Rouiller's disclosure of his relationship with the female officer and his failure to disclose the potential conflict of interest with both the female officer and her husband. That same day, the Chairman of the Fraternal Order of Police ("FOP") sent a letter to Chief Dine indicating that "the adulterous affair of [Rouiller] and a subordinate officer, an officer whose husband also happens to be a Capitol Police officer... has affected morale, harmony, uniformity and trust in the ranks." Shortly thereafter, AC Malloy removed Rouiller as CBA lead negotiator and as Deputy Chief of the USB. AC Malloy detailed Rouiller to his office.

[1] AC Matthew Verderosa later became one of Rouiller's direct line supervisors.

News Publications & Investigation

From June 10-17, 2014, several publications wrote articles about Rouiller's "inappropriate" relationship with a "subordinate married to another officer," stating that because of this relationship, the subordinate received a "coveted" assignment that was the envy of her colleagues. Some of the articles questioned whether senior management would hold Rouiller accountable for having a dating relationship with a subordinate. One article quoted the FOP as stating: "In the past, under difficult leadership, the union has felt that the department hasn't handled allegations of inappropriate personal conduct, relationships, or sexual harassment involving supervisors properly."

The OIG issued a report of investigation ("ROI") on June 18, 2014. The OIG determined that Rouiller violated USCP Policy Directive 2052.002.[2] The next day, AC Malloy advised Rouiller that he was considering sustaining two charges: violations of the Policy Directive and Conduct Unbecoming. He informed Rouiller that he could respond to the charges within five days. In his response, Rouiller claimed that the investigation was politically motivated; that he and the female officer were the victims of a hostile work environment; and that he was being treated differently from other similarly-situated employees.

On July 1, 2014, AC Malloy recommended to the USCP Office of Professional Responsibility ("OPR") that the two charges be sustained against Rouiller. The OPR submitted the matter to Deputy General Counsel and Disciplinary Review Officer Thomas DiBiase ("DGC DiBiase") for a penalty recommendation. A week later, on July 8, 2014, DGC DiBiase recommended that Rouiller be demoted to the position of Inspector. He also recommended that Rouiller be prohibited from applying for a promotion for three years. AC Malloy concurred with the recommendation and issued Rouiller a notice of penalty on July 17, 2014. Upon receiving the notice, Rouiller requested a hearing before the Disciplinary Review Board ("DRB").

On August 31, 2014, AC Malloy reassigned Rouiller to Operational Readiness Projects ("ORP"). With this reassignment, Rouiller maintained that he had no employees under his command, had no projects to lead, and had no responsibilities.

DGC DiBiase's Alleged Comments

Rouiller met with DGC DiBiase on September 26, 2014. He complained that he had been treated unfairly because his request for adequate time to prepare for the DRB hearing and many of his discovery requests were denied. According to Rouiller, DGC DiBiase stated that "it will only

[2] USCP Policy Directive 2052.002 states: "The Department will maintain a high level of operational effectiveness and employee morale by avoiding professional situations in which a potential for a conflict of interest exists, for example ... a supervisor/manager becoming romantically involved with a subordinate, etc..... [N]o potentially conflicting interpersonal relationship can exist between a supervisor/manager and a subordinate.
Supervisors/Managers
Immediately report to a supervisor within your chain of command any potentially conflicting interpersonal relationships involving subordinate employees within your chain of command."

get worse." Rouiller maintained that the men also spoke later that day, and that DGC DiBiase allegedly told Rouiller that by proceeding with the DRB hearing, he would get bad assignments and that if he or the female officer filed a complaint with the Office of Compliance ["OOC"], it would be considered "scorched earth."[3]

Demotion

The DRB hearing took place on October 9 and 10, 2014. After the hearing, the DRB found that the charges should be sustained. Rouiller waived the penalty assessment portion of the hearing and waived his right to appeal the DRB decision to Chief Dine. The USCP forwarded Chief Dine a summary of the DRB findings on October 15, 2014. On October 16, 2014, Chief Dine notified Rouiller that he would be demoted to Inspector. Also, he would not be eligible for promotion for three years.

Procedural Background

On January 28, 2015, Rouiller filed a request for counseling with the OOC. He then filed a request for mediation which later ended in no resolution. Rouiller filed an administrative complaint on September 4, 2015. Generally, he alleged that he was discriminated against on the basis of his age, gender, and race when AC Malloy asked the OIG to investigate his relationship with the female officer; removed him as lead CBA negotiator and as Deputy Chief; provided him only five days to respond to the charges; recommended that the charges be sustained; and reassigned him to ORP. Also, Rouiller maintained that DGC DiBiase only gave him five days to appeal the charges or ask for a DRB hearing. Further, he claimed that the Chief Administrative Officer prevented him from presenting witnesses and evidence at the October 2014 DRB hearing and that Chief Dine demoted him on October 16, 2014.

Also, Rouiller alleged that he was retaliated against when AC Malloy required him to respond to the charges within five days, recommended the two sustained charges, and reassigned him. He also maintained that the USCP retaliated against him when DGC DiBiase notified him that AC Malloy sustained two charges, recommended demotion and offered him less time to appeal or request a DRB hearing. He further alleged that his demotion was retaliatory.

Rouiller also alleged retaliation for the following post-demotion events: Chief Dine refused to meet with him, remove information from his personnel file, and lift the promotion prohibition; Chief Dine and AC Malloy bypassed him for requests for additional equipment; AC Malloy did not ask for his input at a meeting; Employment Counsel failed to respond to his emails; and DGC

[3] DGC DiBiase admits making the statement about things getting worse but denies that he made any statements about bad assignments or "scorched earth." Although DGC DiBiase's alleged comments were cited in the Undisputed Facts Section of the Hearing Officer's February 1, 2016 Order on the Motion to Dismiss and for Summary Judgment, these particular facts are in dispute so we will accept Mr. Rouiller's version for purposes of deciding whether summary judgment was appropriately granted.

DiBiase told Rouiller's wife about a USCP settlement offer that Rouiller rejected that would have allowed him to retain his pre-demotion salary.[4]

On November 9, 2015, the Hearing Officer granted in part and dismissed in part the USCP's motion to dismiss. But, the Hearing Officer granted the USCP's motion for summary judgment and dismissed the case. Rouiller filed a petition for review and later a brief in support of his petition on December 28, 2015. On January 19, 2016, the USCP filed an opposition. Rouiller filed a reply brief on January 29, 2016.

II. Hearing Officer's Decisions and Orders

Timeliness and Exhaustion

The Hearing Officer granted the USCP's motion to dismiss in part, on timeliness and exhaustion grounds. The Hearing Officer found that the only claims that were timely were those that arose between August 1, 2014 and January 28, 2015 (180 days within the request for counseling). Thus, according to the Hearing Officer, the only timely discrimination claims were the August 31, 2014 reassignment; the October 2014 DRB hearing; and the October 16, 2014 demotion.

Also, the Hearing Officer found that the only timely retaliation claims were the reassignment; the comments by DGC DiBiase; the DRB hearing; the demotion; the refusal by Chief Dine to meet; the decision by Chief Dine and AC Malloy to bypass Rouiller to request more concert equipment; and the refusal by Employment Counsel to respond to Rouiller's emails.[5]

Disparate Treatment Discrimination - Similarly-situated

Next, the Hearing Officer determined that Rouiller did not offer any reasonable comparators who were genuinely similarly-situated in all material respects, and that Rouiller would be unable to prove that he was the victim of disparate treatment. Rouiller alleged that he was comparable to several supervisors who dated subordinates but were not disciplined. For example, he compared himself to a male Inspector whose wife also worked for the USCP. The Hearing Officer found, however, that the male Inspector was not comparable because Rouiller failed to report an interpersonal relationship with a subordinate officer to whom he was not married. Yet, the male

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[4] Rouiller also alleged that the USCP retaliated against him after his demotion when AC Matthew Verderosa failed to reply to a memorandum he submitted; circumvented him to directly advise his subordinates; and did not make him an Acting Bureau Commander when the Director resigned. Further, Rouiller claimed that both Chief Dine and AC Verderosa retaliated against him when they rejected a request from another Deputy Chief that Rouiller serve on the CBA negotiations team.

[5] The Hearing Officer also rejected Rouiller's continuing violation and hostile work environment claims. In addition, the Hearing Officer found that events that occurred after the filing of the counseling request were not exhausted with the OOC.

Inspector's supervisor was checking to see if he could properly assign the male Inspector's wife to his command on an ad hoc basis.

In another example, the Hearing Officer rejected Rouiller's arguments that AC Malloy and another former AC were appropriate comparators because they had spouses who worked at the USCP. The Hearing Officer determined that Rouiller misconstrued the policy directive as an anti-fraternization policy and not as a disclosure policy that allows the USCP to ensure that those of different ranks who fraternize with one another are not in the same chain of command. The Hearing Officer found that Rouiller did not offer any information regarding when and how the two ACs formed their relationships with their wives, or whether their wives were ever subordinates of their husbands in their chain of commands and whether the husbands failed to disclose the relationships.

The Hearing Officer also did not accept Rouiller's contention that he was comparable to another current Deputy Chief who allegedly dated subordinates on two different occasions. With regard to the first relationship, the Hearing Officer stated that this current Deputy Chief was an Inspector at the time of the relationship. The Hearing Officer, however, determined that Rouiller did not cite when the relationship began and whether AC Malloy was the AC at the time. Further, the USCP stated that AC Malloy was not the alleged comparator Deputy Chief's supervisor when he was an Inspector. For the second relationship, the Hearing Officer noted that the relationship ended before the subordinate became under the alleged comparator Deputy Chief's command. Further, the Hearing Officer stated that Rouiller failed to allege when the incident occurred, or that AC Malloy made the decision to not discipline the alleged comparator.[6] Moreover, the Hearing Officer concluded that Rouiller was not comparable to other alleged comparators because they were not similarly-situated in grade and rank, and AC Malloy was not the official who could decide discipline.[7]

Adverse Action

The Hearing Officer found that the only adverse actions that Rouiller would be able to possibly prove were his August 31, 2014 reassignment and his October 16, 2014 demotion. The Hearing Officer reasoned that Rouiller did not offer anything to prove that the terms, conditions, or privileges of his employment were affected such that he could prove that he was objectively harmed with respect to the other alleged adverse actions. The Hearing Officer also noted that

[6] Also, the Hearing Officer found that because Rouiller alleged the male Deputy Chief engaged in the same misconduct but did not suffer the same discipline, this shows gender had nothing to do with Rouiller's discipline.

[7] In addition, the Hearing Officer found that Rouiller weakened his age claims when he alleged that the female officer he was dating, who shares the same age protected group as him, only received a three-day suspension. The Hearing Officer stated that if age were a motivating factor in the discipline imposed on Rouiller, then the female officer, who was older than Rouiller, would have likely received similar discipline.

Rouiller accepted the demotion and the promotion restrictions, and waived his DRB appeal rights.

Legitimate Non-Discriminatory Reasons

The Hearing Officer stated that the policy directive was unequivocal and unambiguous in holding that relationships between employees of differing ranks are permissible, so long as the subordinate is not in the supervisor's chain of command. If a relationship develops between a supervisor and a subordinate in his or her chain of command, the directive requires that the supervisor immediately notify his superiors in order to permit them to make a change in assignment to eliminate any "potentially conflicting interpersonal relationship." The Hearing Officer found it unlikely that Rouiller could prove that he did not knowingly violate the policy directive, or was legitimately confused about it. Also, the Hearing Officer determined that Rouiller did not address the Conduct Unbecoming charge nor allege that he did not violate the policy.

The Hearing Officer concluded that Rouiller provided no evidence to show that the legitimate non-discriminatory reasons given by the USCP for its adverse employment decisions were pretext. The Hearing Officer found Rouiller offered no evidence to prove that the motivation for the reassignment and demotion was anything other than a policy violation by a senior USCP official that resulted in concerns by the FOP that were reported in news publications. The Hearing Officer stated Rouiller did not offer any evidence to show that the real motivation was discrimination. The Hearing Officer granted summary judgment.

Retaliation

The Hearing Officer concluded that all the claims made by Rouiller, other than the allegations concerning his reassignment, the statements by DGC DiBiase, and the demotion, were trivial and would not support a finding of materially adverse actions. Further, the Hearing Officer determined that Rouiller could not prove any claims of retaliation based on the manner in which the DRB hearing was held. For the post-demotion allegations, the Hearing Officer found that each complaint was nothing more than a petty slight that did not establish an adverse action.

As for the alleged comments made by DGC DiBiase, the Hearing Officer found, based on undisputed evidence, that DGC DiBiase was not directly in Rouiller's chain of command and could not affect his assignments, promotions, or performance evaluations. The Hearing Officer found DGC DiBiase only made an "empty" threat. Also, the Hearing Officer concluded that in the absence of any claim that DGC DiBiase's claims were reported to someone at the USCP in a position to take corrective action, or that the comments were condoned, encouraged or tolerated by Rouiller's supervisors, Rouiller could not prove his claim. Finally, the Hearing Officer reasoned that Rouiller did not offer sufficient evidence to overcome the legitimate non-retaliatory reasons offered by the USCP for the reassignment and demotion.

III. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c); *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), at *3 (Jan. 21, 2011).

IV. Analysis

Untimeliness

The Hearing Officer properly dismissed some of Rouiller's claims for untimeliness. Under the CAA, a request for counseling must be filed with the OOC within 180 days of the alleged adverse employment action. *See Patterson v. Architect of the Capitol*, 08-AC-48 (RP) (June 23, 2010). Rouiller filed his request for counseling on January 28, 2015. Thus, Rouiller can only seek relief for claims that arose between August 1, 2014 and January 28, 2015. As a result, all the discrimination claims, except for the following, were appropriately dismissed: August 31, 2014 reassignment; October 2014 DRB hearing; and October 16, 2014 demotion.

Further, the Hearing Officer properly found that only the following retaliation claims were timely: the reassignment; the September 2014 DGC DiBiase statements; the DRB hearing; the demotion; Chief Dine's refusal to meet with Rouiller; Chief Dine and AC Malloy's decision to bypass Rouiller to request additional concert equipment; and the Employment Counsel's refusal to respond to Rouiller's emails.[8]

Hostile Work Environment

In addition, the Hearing Officer correctly rejected Rouiller's continuing violation hostile work environment claim. Under the continuing violation doctrine, there is subject-matter jurisdiction over any discrete claims falling within the statutory period for which the plaintiff has exhausted administrative remedies, and any continuing violation claims that collectively constitute a hostile work environment claim, so long as one of the allegedly discriminatory acts underlying the hostile work environment claim occurred during the statutory time period. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)). To prevail on a hostile work environment claim, a complainant must show that the employer subjected him to "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Baird v. Gotbaum*, 662 F.3d 1246, 1250-51 (D.C. Cir. 2011); *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (DC. Cir. 2008) (quoting

[8] Also, Rouiller provided no evidence that he exhausted his administrative remedies for the post-January 28, 2015 events. Thus, the Hearing Officer also properly dismissed these post-January 28, 2015 claims.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). A hostile work environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). A court will examine the "totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance," to determine whether the plaintiff was subject to a hostile work environment. *Baloch*, 550 F.3d at 1201. Title VII is not intended to create a "general civility code for the American workplace." *Taylor v. Solis*, 571 F.3d 1313, 1323 (D.C. Cir. 2009).

Here, none of the laundry list of alleged adverse employment actions raised either alone or in combination by Rouiller was sufficiently severe or frequent enough to establish a hostile work environment. Rouiller primarily complains about trivial matters or minor slights such as AC Malloy asking the OIG to conduct an investigation into Rouiller's relationship with his subordinate, Chief Dine and AC Verderosa not forwarding information to Rouiller, and Employment Counsel not responding to Rouiller's emails. These alleged harassing actions were conducted by different managers and non-managers. Further, some of these actions were dictated by USCP procedures or influence from third parties such as the FOP. Rouiller's continuing violation and hostile work environment claims fail. *See Baloch*, 550 F.3d at 1201.

Disparate Treatment Discrimination

Rouiller's remaining timely claims were properly dismissed on summary judgment. In order to obtain summary judgment, the moving party must establish that there are no genuine disputes of material fact and that judgment is required as a matter of law. *Celetox Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A material fact is disputed if, when resolved in the non-movant's favor, it has the potential to alter the outcome of the claim under the governing substantive law. *Anderson*, 477 U.S. at 255. In evaluating a motion for summary judgment, the facts are interpreted in the light most favorable to the nonmoving party. *Id.* at 249; *Reeves*, 530 U.S. at 150-51.

The USCP did not subject Rouiller to disparate treatment discrimination for primarily two reasons. First, Rouiller cannot establish that he was similarly-situated to his alleged comparators. Second, he cannot show that any alleged adverse actions taken against him were motivated by his age, gender, or race.

To establish a *prima facie* case of discrimination, the complainant must show that he is (1) a member of a protected class; (2) suffered an adverse employment action; and (3) the action gives rise to an inference of discrimination. *Udoh v. Trade Ctr. Mgmt. Assoc.*, 479 F.Supp.2d 60, 64 (D.D.C. 2007). The plaintiff "must carry the initial burden ... of establishing a prima facie case of racial discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the plaintiff meets this burden, "[t]he burden then must shift to the employer to articulate some

legitimate, nondiscriminatory reason" for its action. *Id.* If the employer succeeds, then the plaintiff must "be afforded a fair opportunity to show that [the employer's] stated reason ... was in fact pretext" for unlawful discrimination. *Id.* at 804. Discrimination can be proved either with direct or circumstantial evidence. *Id.*

In order to prove disparate treatment discrimination, a plaintiff must show that the individual with whom he seeks to compare his treatment "must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without differentiating or mitigating circumstances that would distinguish his conduct or the employer's treatment of [him] for it." *Dobbs v. Roche*, 329 F.Supp.2d 33, 43 (D.D.C. 2004) (citing *Holbrook v. Reno*, 196 F.3d 255, 261 (D.C. Cir. 1999). The plaintiff must show that "all of the relevant aspects of [his] employment situation were nearly identical" to the proferred comparator. *Augustus v. Locke*, 934 F.Supp.2d 220, 232 (D.D.C. 2013) (citing *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995).

First, Rouiller is unable to show that he was similarly-situated to any of the alleged comparators. Rouiller was one of five Deputy Chiefs at the USCP. He reported directly to AC Malloy and Chief Dine. Also, he was responsible for representing the USCP in CBA negotiations. Rouiller was a high-ranking official at the USCP. On the other hand, none of the alleged comparators raised by Rouiller held a high-ranking position while that person dated a subordinate in his or her chain of command.

Furthermore, none of the alleged comparators proposed by Rouiller engaged in similar behavior. Rouiller failed to disclose to his superiors for some time that he was in a dating relationship with a female officer who was in his chain of command. Also, Rouiller failed to ever disclose that the husband of the female officer was also a USCP police officer in Rouiller's chain of command. None of the alleged comparators engaged in this type of behavior.

Lastly, Rouiller is unable to establish discrimination due to his age, gender, or race. Rouiller failed to provide sufficient evidence that the USCP did not reassign and demote him because of the violation of policy, the tension with the FOP, and the bad press from news publications. The USCP had the right to discipline Rouiller. *See Evans v. United States Capitol Police Board*, 14-CP-18 (CV, RP), 13-CP-61 (CV, RP), 13-CP-23 (CV, RP) (Dec. 9, 2015) (dismissal of race and sex discrimination claims affirmed where captain was held to a higher standard and demoted for making inappropriate comments). The discrimination claims fail.

Retaliation

The dismissal of the retaliation claims is affirmed. To establish a claim for retaliation under the CAA, an employee is required to demonstrate that: (1) he engaged in activity protected by Section 207(a) of the CAA; (2) the employing office took action against him that is "reasonably likely to deter" protected activity; and (3) a causal connection existed between the two. *See*

Britton v. Office of the Architect of the Capitol, 02-AC-20 (CV, RP) (May 23, 2005). If the employee so demonstrates, the employing office thereafter is required to rebut the presumption of retaliation by articulating a legitimate non-retaliatory reason for its actions. *Frazier v. United States Capitol Police*, Case No. 12-CP-63 (CV, AG, RP) (Feb. 11, 2014).

Before evaluating the retaliation claims, the Board has decided to address the impact of the Supreme Court's decision in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006) on the Board's retaliation standard as articulated in *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP) (May 23, 2005). At the outset, we believe it is important to explain how the Board arrived at its current retaliation standard.

In *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP) (May 23, 2005), we noted that in drafting the CAA, Congress chose *not* to incorporate verbatim each of the retaliation provisions that exists in the labor and employment laws made applicable by the CAA. Instead, Congress adopted Section 207(a), which provides:

> It shall be unlawful for an employing office to *intimidate, take reprisal against, or otherwise discriminate against*, any covered employee because the covered employee has opposed *any practice made unlawful by this Chapter*, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this Chapter. (Emphasis added.)

We found that the legislative history of the CAA supported the conclusion that Section 207(a) unambiguously extends its protections to retaliation claims based on activities protected by the Title VII provisions in Section 201 of the CAA, 2 U.S.C. § 1311; retaliation claims based on the Occupational Safety and Health Act (the "OSH Act") provisions in the CAA, 2 U.S.C. § 1341; retaliation claims based on the labor-management relations provisions in the Act, 2 U.S.C. § 1351; as well as retaliation claims based on any of the other statutory provisions made applicable to the Legislative Branch by the CAA. After reviewing several approaches, the Board ultimately adopted a Title VII-based approach to analyze all Section 207 claims, in order to provide consistency among Section 207 claims and to provide a framework with extensive precedent for assessing the sufficiency of an employee's *prima facie* case. *See Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP) (May 23, 2005). The remaining issue for the Board was how to define a "material adverse action." *Id.*

Prior to the United States Supreme Court's decision in *Burlington*, 548 U.S. 53, the United States Circuit Courts of Appeal were split regarding how to define an adverse action in a retaliation claim. The Board in *Britton* adopted the United States Equal Employment Opportunity Commission's ("EEOC") standard for adverse action, which at the time was "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." *Id.* The Board adopted this standard because it provided protection from a broad range of retaliatory actions and harm, not just those that concern an "ultimate employment decision" or a "materially adverse change in the terms of

employment." *Id.* This determination was based on the statutory language in Section 207, which prohibits "intimidation" as well as reprisals and discrimination for engaging in protected activity, and thus is broader than the language in other anti-discrimination and anti-retaliation laws, and the Board's understanding that a broader standard would more fully serve the policy reflected in Section 207. At the same time, we cautioned that our adoption of a more flexible standard should not be understood as an invitation to transform the CAA into a "civility code", thereby expressing a requirement that the adverse action be material. *Id.*

Subsequently, in 2006, the United States Supreme Court issued its *Burlington* decision, which defined a "materially adverse" action as one that could "'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination.'" 548 U.S. at 68.

The courts that have compared the EEOC's earlier "reasonably likely to deter" standard and the Supreme Court's "could dissuade a reasonable employee" standard have found no functional difference between them. *See Turner v. United States Capitol Police*, 653 Fed. Appx. 1 (D.C. Cir. 2016) (*Britton* standard is indistinguishable from the standard applied by the district court, that a "materially adverse" action was one that could "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination.'"). In reviewing the allegations in the claim before us, the Board also sees no functional distinction between the "reasonably likely to deter protected activity" standard in *Britton* and the "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination" standard in *Burlington*.

Applying these standards, we find that the Hearing Officer was correct that the undisputed evidence shows that all of the timely retaliatory claims made by Rouiller, aside from the reassignment, the statements from DGC DiBiase, and the demotion are trivial and could not support a finding of materially adverse action. The same is true for the alleged post-demotion retaliatory acts such as Employment Counsel not responding to Rouiller's emails. *See Taylor*, 571 F.3d at 1323 ("Title VII is not intended to create a 'general civility code for the American workplace.''). Summary judgment was properly granted for these claims.

As for the reassignment and demotion, even when the facts are viewed in the light most favorable to Rouiller, he is unable to show a causal connection between his protected activity and the alleged actions taken against him. This case is about Rouiller objecting to the USCP's treatment of him after the USCP learned that he was in a relationship with a female subordinate who was in his chain of command. Rouiller failed to disclose this relationship to his superiors for some time and never disclosed that the female subordinate was married to another USCP officer who was also in Rouiller's chain of command. Rouiller violated policy, created tension with the FOP, and generated several embarrassing news stories for the USCP. The record shows that Rouiller's reassignment and demotion were influenced by these factors and not retaliation. As a result, the Board will not interfere with the USCP's legitimate non-retaliatory decision to discipline Rouiller for his actions. *Stephens v. Erickson*, 569 F.3d 779, 788 (7th Cir. 2009) (role

of the court is "not to act as a super personnel department that second-guesses employers' business judgments.").[9]

ORDER

For the foregoing reasons, the Board affirms Hearing Officer's decision to dismiss all claims.

It is so ORDERED.

Issued, Washington, DC January 9, 2017.

[9] Lastly, the Board finds DGC DiBiase's alleged comments had no impact on Rouiller's fate. The alleged comments were made after AC Malloy had already asked for an investigation into Rouiller's actions, removed Rouiller from being the lead CBA negotiator, removed Rouiller from his command as Deputy Chief, sustained the charges against Rouiller, supported the demotion penalty, and reassigned Rouiller. In addition, the DRB sustained charges against Rouiller. Moreover, Rouiller apologized for his actions after the DRB's findings and stated he would accept the penalties. Thus, the record shows that, even if viewing the facts most favorably to Rouiller, DGC DiBiase's comments had no influence over Rouiller's employment because the decisions taken against Rouiller were motivated by the policy violations he committed, the problems he caused with the FOP, and the negative press he created for the USCP.