

OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

_____)	
Andrea Koshko)	
Appellant)	
)	
v.)	
)	Case Numbers: 11-CP-136 (CV, DA, FM, RP)
United States Capitol Police,)	12-CP-02 (RP)
Appellee)	12-CP-19 (CV, DA, FM, RP)
)	12-CP-27 (DA, FM, 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 Andrea Koshko (“Koshko”), against the United States Capitol Police (“USCP”). Koshko seeks review of the Hearing Officer’s June 17, 2013 Order, dismissing her Family Medical Leave Act (“FMLA”), disability and gender discrimination, retaliation, and hostile work environment claims.

Upon due consideration of the Hearing Officer’s Order, the parties’ briefs and filings¹, and the record in this proceeding, the Board affirms the Hearing Officer’s dismissal of all claims.

I. Background

In June 2007, Koshko began working for the USCP as a civilian administrative assistant.² There are three work shifts at the USCP: (i) day shift 6:00 a.m. to 2:00 p.m.; (ii) evening shift 2:00 p.m. to 10:00 p.m.; and (iii) midnight shift 10:00 p.m. to 6:00 a.m. The USCP assigned Koshko to the day shift which made her hours 6:00 a.m. to 2:00 p.m. At the time of her hire, Koshko was living with her husband, and their three children. As of 2012 when this case arose, the couple had a 17 year-old daughter, a 12 year-old daughter, and a 9 year-old son. The then 12 year-old daughter has type 1 diabetes.

¹ Koshko’s brief in support of her petition exceeded the page limitation set out in the OOC Procedural Rules and Koshko did not seek permission to exceed. Nonetheless, the Board considered all arguments made by Koshko.

² The background facts are largely taken from the factual summary of the Hearing Officer’s July 17, 2013 Decision.

On August 3, 2008, the USCP moved Koshko to the midnight shift which made her hours 10:00 p.m. to 6:00 a.m. Koshko asserts that she was permanently transferred to the midnight shift. The USCP maintains that she was detailed to the midnight shift because the move was temporary.

There is a USCP Division Correspondence Log (“DC Log”) maintained by USCP staff members, including Koshko. The DC Log references the transmission of a CP-531³ for “Andrea Koshko” to the Operational Service Bureau on July 30, 2008, with a reply received on August 1, 2008. The DC Log also references the transmission of a CP-531 for “Andrea Koshko” to Human Resources (“HR”) on August 5, 2008, with no date of reply indicated. Koshko made these two entries in the DC Log and maintains that these entries prove that she was transferred to the midnight shift on a permanent basis. The USCP contends that the actual CP-531 does not exist.⁴

On December 9, 2009, the USCP moved Koshko to an irregular day shift which made her hours 10:00 a.m. to 6:00 p.m. The move was made under the USCP’s hardship procedures which are intended to allow temporary changes to an employee’s schedule. Koshko and her husband separated in October 2009. The husband moved from the marital home while Koshko remained with the children. Koshko wanted this new schedule to better assist her with caring for her children, including her 12 year-old daughter with diabetes.

In March 2010, Koshko submitted a FMLA request for 480 hours of intermittent leave (unpaid) during the year to care for her 12 year-old daughter. The Human Resources Department (“HR”) granted the request on the condition Koshko give at least 30-day advance notice, when practicable. From March 2010 to March 2011, the USCP granted all FMLA requests.

On March 22, 2010, the USCP moved Koshko back to the day shift which made her hours 6:00 a.m. to 2:00 p.m. Fridays and Saturdays were Koshko’s days off. Koshko later moved from the marital home to live with her new boyfriend who worked for the USCP as a police officer. Koshko and her husband agreed that the husband would have primary custody of the children

³ A CP-531 is a USCP Personnel Action Request Form which contains a section for the employee to complete by providing personal information and information regarding the request being made. A CP-531 also contains other sections for recommended approval/disapproval for those officials in the requester’s chain of command.

⁴ The USCP maintains that the process for transferring civilian employees is different than transferring uniformed police officers. According to the USCP, police officers use the CP-531 form, while transfers for civilian employees are processed through an electronic transfer system called the AVUE. Also, if a civilian employee seeks a transfer to another position, there must be a vacancy for that position and the issuance of a formal vacancy announcement. A former civilian employee testified that in August 2006, a vacancy announcement for a position on the midnight shift was publicly posted and she applied for the position through the AVUE process. She also testified that she received the midnight shift position and remained on that shift until she was hired as a USCP police officer. Koshko’s immediate supervisor testified that the same process was used to select two candidates for civilian openings in 2010 (the candidates never began work due to a hiring freeze). Also, Koshko’s second-level supervisor and the Chief of Police testified that civilian employees must apply for a position in response to a vacancy announcement through the AVUE process. Her third-level supervisor testified that he had only sent people to the midnight shift via details. Koshko testified that she did not know what was stated on her behalf in the CP-531 form that cannot be located and she could not remember seeing the form.

while living in the marital home, and Koshko would have the children every other weekend from Friday to Sunday.⁵

In October 2010, Koshko asked her immediate supervisor⁶ and third-level supervisor if she could be moved to the midnight shift.⁷ She made the same request in December 2010. Both men denied her request. On December 6, 2010, Koshko made a written request to the Deputy Chief (through her third-level supervisor) to be transferred to the midnight shift. Also, in December 2010, the immediate supervisor prepared a memorandum addressed to the third-level supervisor and the Deputy Chief, which stated that Koshko's August 2008 move to the midnight shift was a detail and not a transfer. The immediate supervisor indicated that if Koshko wished to transfer to the midnight shift, she would have to follow the transfer procedures, which would have required that she submit an application only if there was an opening.

In March 2011, Koshko once again requested 480 hours of intermittent FMLA leave (unpaid) for the upcoming year. HR approved the request, but on the condition that Koshko provide at least 30-day advance notice for the requested leave, when practicable. Koshko then submitted approximately 11 FMLA leave slips for Sundays (typically for every other Sunday, but some consecutive Sundays as well, for the period of March through July 2011). None of the requests were submitted 30 days in advance. The USCP approved all 11 FMLA leave requests.

The immediate supervisor, however, testified that he became concerned that Koshko was taking FMLA leave nearly every Sunday; that the leave slips were not submitted in a timely manner, which caused staffing problems; and that the March 2011 request made no mention of the need to care for her 12 year-old daughter on a 24 hour basis or that Koshko would need leave on many Sundays.⁸ In mid-July 2011, the immediate supervisor and an HR representative informed Koshko that she needed to supply additional medical documentation to support her need for FMLA leave on Sundays and to try to provide at least 30 days advance notice for leave requests.

On Thursday, July 21, 2011, three key events occurred. First, Koshko's second-line supervisor issued a letter to Koshko denying her December 6, 2010 request to return the midnight shift. Second, that same day, Koshko submitted a hardship request to the second-level supervisor to be temporarily transferred to the midnight shift.

Third, also on July 21, 2011, Koshko sought FMLA leave for Sunday, July 24, 2011. Koshko put the leave slip in the immediate supervisor's in-box after the immediate supervisor had left for the day. Koshko expected that her 12 year-old daughter would be with her on July 24, but

⁵ This informal agreement became part of the final divorce decree in October 2010.

⁶ In 2010, Koshko's chain of command included her immediate supervisor, second-level supervisor, third-level supervisor, and fourth-level supervisor who was the Deputy Chief of Police ("Deputy Chief").

⁷ Koshko alleges that she sought the schedule change to limit the amount of FMLA leave she might have to take.

⁸ Koshko did not request FMLA leave to care for her 12 year-old daughter on Sundays from March 2010 to March 2011 because her 17 year-old daughter and her neighbors were trained to care for her 12 year-old daughter while she was in Koshko's custody and Koshko was scheduled to work.

Koshko was scheduled to work that day. Koshko did not submit additional medical documentation certifying a need to be with her 12 year-old daughter on Sundays with the July 21 request. Upon learning of the leave request, the immediate supervisor instructed another employee to notify Koshko that her request for FMLA leave on July 24, 2011 was being postponed. Because Koshko was scheduled to be off from work for the next two days, the other employee sent an email to Koshko's boyfriend who was living with Koshko at the time. Other addressees on the email were Koshko, the immediate supervisor, the second-level supervisor, the third-level supervisor, and the HR representative. The email stated:

[the immediate supervisor] asked me to send you an email stating that Andrea's FMLA leave for Sunday is postponed. He left a message on her cellphone. She needs to submit new FMLA paperwork stating [her 12 year-old daughter] needs 24 hour care while she is in her custody. Her leave request is being postponed due to the needs of the department. Intermittent FMLA leave is to be submitted 30 days in advance where applicable. Failure to come to work on Sunday will result in her being AWOL unless she brings in the FMLA paperwork stating that [her 12 year-old daughter] needs 24 hour care. If she has any questions she needs to speak to the [the immediate supervisor].

Koshko did not respond to the email or the phone message. On Saturday, July 23, 2011, Koshko's 12 year-old daughter became ill and was taken that evening to a medical center where she was treated for pharyngitis/tonsillitis and cellulitis, abscesses. The next day, the daughter was treated at another medical center for an allergic reaction to the medication she had received the previous day. Koshko did not report to work on July 24, 2011, but did call the USCP and request leave to tend to her 12 year-old daughter's illness.

On Monday, July 25, 2011, Koshko returned to work and provided paperwork from the two medical centers to her immediate supervisor. Koshko requested FMLA leave for July 24, 2011. The immediate supervisor reviewed the information and determined that Koshko's time off on July 24, 2011 should not be designated as FMLA because the documentation did not reflect that the 12 year-old daughter's treatment was for diabetes. The immediate supervisor authorized paid emergency annual leave for July 24 and informed Koshko that if she provided a health care certificate which showed that the medical visits were related to her 12 year-old daughter's diabetes, he would give her unpaid FMLA leave.

In early August 2011, Koshko submitted another medical certification to support FMLA leave to care for her 12 year-old daughter. Also, on August 2, 2011, Koshko provided her immediate supervisor with a publication about type 1 diabetes. The immediate supervisor again determined that Koshko's time off on July 24, 2011 should not be designated as FMLA based on his assessment that the additional documentation failed to link the 12 year-old daughter's illness on July 23-24 to her diabetes. He granted Koshko paid annual leave for July 24, 2011. After receiving the August 2011 certification, however, the USCP approved all FMLA leave slips submitted by Koshko from August 2011 to October 2011.

On September 26, 2011, the second-level supervisor denied Koshko's July 21, 2011 hardship request for a temporary transfer to the midnight shift. On October 5, 2011, the third-level supervisor notified Koshko that her days off were going to be changed from Friday and Saturday to Saturday and Sunday to accommodate her FMLA request of intermittent leave every other Sunday and all holidays. The change in days off became effective October 23, 2011.

Koshko submitted four requests for counseling to the Office of Compliance ("OOC") on September 1, 2011, October 14, 2011, January 13, 2012, and March 7, 2012⁹ and engaged in mediation as required by the CAA.

On April 20, 2012, Koshko filed an administrative complaint with the OOC based on the allegations made in her September 1, 2011 and October 14, 2011 requests for counseling. She claims interference with and denial of FMLA leave, disability discrimination, sexual discrimination, retaliation, harassment, and hostile work environment on each basis. Specifically, Koshko alleges that starting in February 2010; her immediate supervisor began subjecting her to harassment based on her gender and care-taking responsibilities for her disabled daughter. She also claims that her immediate supervisor objected to her dating her boyfriend, and closely scrutinized the whereabouts of the couple. She further claims that her immediate supervisor continued to harass her on other occasions which includes, but is not limited to, changing her long established work location, giving her assignments that are not in her job description, reprimanding her for not performing those assignments to the immediate supervisor's satisfaction, and subjecting her to more negative treatment than other employees.

She also alleges that since December 2010, the USCP interfered with her FMLA leave and taking care of her disabled daughter by improperly refusing to return her to her permanent position on the midnight shift. Koshko maintains that, as a result, she was forced to take weeks of unpaid leave to care for her 12 year-old daughter.¹⁰

⁹ Under the Congressional Accountability Act ("CAA"), an employee must submit a request for counseling within 180 days of the alleged adverse employment action. 2 U.S.C. § 1402(a) (2000). Because the 180 day time frames of the requests for counseling overlapped with each other, only acts that occurred between March 5, 2011 (180 days before the first counseling request) and March 7, 2012 (the date of the last counseling request) can serve as a basis for recovery if it is shown that any of the alleged actions violated the CAA. The Hearing Officer referred to this period of March 5, 2011 to March 7, 2012 as the "time window."

¹⁰ Koshko also asserts that her immediate supervisor violated her privacy and confidentiality by sending an email to other employees which announced that he was delaying Koshko's request for FMLA leave for July 24, 2011; denied her authorized FMLA leave for July 24, 2011; and prevented her from working a short work day to attend a diabetes camp with her 12 year-old daughter. She further asserts that the USCP called her 12 year-old daughter's doctor without Koshko's permission and that her immediate supervisor has inappropriately subjected her to unwarranted scrutiny, unfairly criticized her work, and improperly issued her CP-550s. CP-550s are personnel performance notes used by USCP supervisors to provide subordinate employees with written documentation of general informational performance and conduct matters, to include such issues as noteworthy performance or conduct, unsatisfactory performance of duty or conduct, and non-routine activities that are neither positive nor negative.

On June 6, 2012, Koshko filed a second administrative complaint based on the allegations made in her January 3, 2012 and March 7, 2012 requests for counseling. She alleges that the USCP committed the following: allowing attorneys from the USCP's Office of General Counsel to improperly block the reasonable accommodation/FMLA shift change after the Chief of Police committed to providing the accommodation; permitting the USCP's General Counsel to interfere with and delay the start of the USCP Office of Professional Responsibility's ("OPR") internal investigation; letting officials in the OPR disclose confidential information and records; allowing her 12 year-old daughter's confidential medical records to be left on a copier; subjecting Koshko to unwarranted scrutiny and criticism; displaying verbal abuse; and enabling the USCP's Counsel to threaten to revoke the FMLA leave Koshko had been granted one day for medical treatment. The Hearing Officer consolidated the two administrative complaints and later denied the USCP's motions to dismiss and for summary judgment.

II. Hearing Officer's Decision and Order

On June 17, 2013, the Hearing Officer issued a Decision and Order dismissing Koshko's FMLA, disability and gender discrimination, retaliation, and hostile work environment claims.

Koshko's Move to the Midnight Shift & Permanent Transfer Requests

The Hearing Officer found Koshko's contention that her August 2008 move was a permanent transfer to not be credible. The Hearing Officer determined that the CP-531 document never existed and Koshko made up the allegation. The Hearing Officer stated that his conclusion was bolstered by the testimonies of the former civilian employee from 2006 and Koshko's supervisors who stated that civilian employees must apply for a position in response to a Vacancy Announcement through the AVUE process and not by submission of a CP-531. The Hearing Officer also credited the immediate supervisor's December 2010 memorandum explaining that Koshko's August 2008 move to the midnight shift was a detail, because the memorandum was prepared long before her first September 1, 2011 request for counseling.

The immediate supervisor issued the following CP-550s and/or verbal counseling to Koshko: (i) 10/12/10 Koshko's children are not to be at the workplace during her working hours; (ii) 12/14/10 written request for a return to the midnight shift was not through the proper chain of command of the immediate and second-level supervisors; (iii) 01/25/11 needs to pay attention to detail when completing time and attendance entries; (iv) 07/26/11 should address issues through her chain of command; (v) 08/02/11 second corrective action for failing to pay attention to detail when completing time and attendance entries; (vi) 08/02/11 documentation provided on tonsillitis and abscess does not meet FMLA requirements and Koshko will be given emergency annual leave instead, Koshko's annual and sick leave balances, Koshko's request for FMLA leave for July 24, 2011 instead of Family Friendly Leave, and the new health care certificate provided by Koshko on August 1, 2011 could not be read; (vii) 08/17/11 needs to provide on the first day of each month the days she is requesting FMLA leave, and informing Koshko of her current FMLA leave balance; (viii) 10/06/11 verbal warnings given to Koshko and another female employee because the statistical information they entered on a report was in error; (ix) 10/13/11 attention to detail must improve because the radio log and staffing reports Koshko submitted had many errors; and (x) 02/08/12 follow instructions with respect to processing missing police reports.

Next, the Hearing Officer determined that the claims based on the October and December 2010 midnight shift requests were untimely because those events took place more than 180 days before the first September 1, 2011 request for counseling. The Hearing Officer also found that the claim based on the July 2011 denial of Koshko's written transfer request was untimely because Koshko had cited no authority that would allow her to subsequently file repeated requests seeking the same previously denied relief, until she finally submitted a timely request.

FMLA

The Hearing Officer found that Koshko was working her assigned day shift when she made her 2010 transfer requests and had no entitlement to a return to the midnight shift. In addition, the Hearing Officer determined that the USCP did not act inappropriately by denying Koshko's request for a temporary transfer on September 26, 2011 and that the USCP later accommodated Koshko by changing her days off to Saturday and Sunday.

The Hearing Officer concluded that there was no medical documentation submitted by Koshko in March 2011 that indicated that her 12 year-old daughter needed her constant attention which would entitle Koshko to FMLA leave any time she had custody of her 12 year-old daughter. The Hearing Officer also did not find it unreasonable for the USCP to deny Koshko FMLA leave on July 21 and again on July 25 for Koshko's absence on July 24, 2011. The Hearing Officer stated Koshko presented no medical evidence that indicated Koshko must always be with her 12 year-old daughter to care for her. The Hearing Officer reasoned that neither the additional medical evidence the immediate supervisor requested as justification for Koshko's absence on July 24 or the medical evidence he requested linking the 12 year-old daughter's illness on July 23 and 24 to her diabetes had been produced at the time he made the decision to charge Koshko with paid annual leave. Also, the Hearing Officer found that Koshko failed to cite any evidence or authority to show that she was prejudiced or harmed by the denial of FMLA leave for July 24, 2011. The Hearing Officer therefore concluded that Koshko's FMLA rights were not violated.

Disability Discrimination

Although the Hearing Officer found that the evidence relied upon by the USCP to argue that Koshko's 12 year-old daughter was not disabled within the meaning of the ADA to be convincing, the Hearing Officer reasoned that it was not necessary to decide that issue because Koshko's disability association claim failed due to her untimely transfer requests and non-entitlement to the midnight shift.

Gender Discrimination

The Hearing Officer ruled that Koshko's gender discrimination claims that the USCP discriminated against her by refusing to return Koshko to her previous accommodating schedule, interfering with approving her future leave requests, and denying her leave requests also failed for the same reasons that the FMLA and disability claims failed. The Hearing Officer found that

Koshko did not establish that she had suffered any adverse actions or that any of the asserted actions were based on her gender. The Hearing Officer then found that the occupant of the position that Koshko sought at the time was a female, and that Koshko had failed to identify any male who received more favorable treatment under these circumstances than Koshko.

Retaliation

The Hearing Officer found no retaliation. Specifically, the Hearing Officer stated that the earliest that Koshko could have engaged in protected activity was August 2, 2011 and he determined that any conduct by the USCP prior to that date could not serve as a basis for a retaliation claim.¹¹ The Hearing Officer then asserted that the remaining allegations also failed because Koshko was not subjected to an adverse action reasonably likely to deter protected activity nor did she prove that protected activity caused the asserted adverse actions.

The Hearing Officer also determined that with respect to the causal element of the claim, Koshko failed to show that her second-level supervisor knew of Koshko's alleged protected activity when he denied Koshko's request for a hardship transfer on September 26, 2011, and that the HR representative had no knowledge of Koshko's alleged protected activity when she attempted to clarify aspects of the medical recertification documents in early August 2011.

Hostile Work Environment

The Hearing Officer concluded Koshko could not establish that the asserted acts were of such severity or pervasiveness as to alter the conditions of employment and create an abusive work environment to prove her hostile work environment claim.

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).

IV. Analysis

Allegations Regarding the August 3, 2008 Move to the Midnight Shift & Timeliness of Permanent Transfer Requests

The record supports the finding that Koshko's move to the midnight shift in August 2008 was a detail. The Hearing Officer properly relied upon the credibility of the USCP's witnesses such as the civilian employee from 2006 and Koshko's supervisors who all confirmed that civilian

¹¹ The Hearing Officer determined that Koshko engaged in protected activity on August 2, 2011 when she gave her immediate supervisor a publication about diabetes.

transfers are governed through the AVUE process. *See Sheehan v. Office of the Architect of the Capitol*, 08-AC-58 (CV, RP) (Jan. 21, 2011) (observing that “credibility determinations are entitled to substantial deference, because it is the Hearing Officer who ‘sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.’” (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)); *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005) (observing that the court “will not disturb the Board's adoption of an ALJ’s credibility determinations ‘unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable.’” (quoting *United Servs. Auto. Ass’n v. Nat’l Labor Relations Bd.*, 387 F.3d 908, 913 (D.C. Cir. 2004)) (internal quotations omitted)).

The finding was well supported in the record through the testimony of the civilian employee and the supervisors. Further, Koshko failed to prove that the CP-531 form ever existed. Therefore, the Hearing Officer was correct to conclude that Koshko’s August 2008 move was not a permanent transfer.

Next, while the Hearing Officer properly concluded that the October 2010 and December 2010 denials of Koshko’s requests to be moved to the midnight shift were untimely, he erred in concluding that the July 21, 2011 written transfer denial was also untimely. The Supreme Court has held, for the purposes of Title VII, that an adverse employment action occurs and the filing period limitation of the statute begins to run on the date a person is notified of an employment decision. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (“the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to the [employee.]”); *Katsouros v. Office of the Architect of the Capitol*, 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP) (Jan. 21, 2011) (the 180 day limitations period began to run at the time the termination decision was made and *communicated* to the employee). The USCP did not definitively make a decision on Koshko’s December 6, 2010 request until the second-level supervisor forwarded a July 21, 2011 denial letter to her. The July 21, 2011 denial of the transfer occurred within 180 days of the first September 1, 2011 request for counseling and is therefore timely. *See Davidson v. American Online, Inc.*, 337 F.3d 1179, 1187 (10th Cir. 2003) (quoting *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557 (10th Cir. 1994) ([a] cause of action accrues on “the date the employee is notified of an adverse employment decision” by the employer)).

FMLA

The Hearing Officer properly determined that Koshko did not show that the USCP was required to either permanently or temporarily transfer her to the midnight shift. Also, the Hearing Officer’s finding of no FMLA violation is affirmed because Koshko cannot show that she was actually prejudiced or harmed by the denial.

Koshko has not shown that the USCP was required to grant her request to permanently transfer to the midnight shift. While OOC FMLA Regulation 825.204 states that an *employing office*

may transfer an employee to an alternative position in order to accommodate intermittent leave or a reduced leave schedule pursuant to an approved FMLA request, Koshko has failed to cite to any authority that requires an employing office to grant an *employee's* request for a transfer to an alternative position.

Next, the immediate supervisor denied Koshko FMLA leave for July 24, 2011. OOC FMLA Regulation 825.114(a)(2)(iii) states that for purposes of FMLA, "serious health condition" includes any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

- (A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
- (B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).¹²

Koshko submitted documentation from her 12 year-old daughter's medical center visits that show she was treated for cellulitis, abscess, and pharyngitis/tonsillitis on July 23, 2011 and that she returned for follow up care the next day due to an allergic reaction from the medication given on July 23, 2011. We recognize that the record could be better developed on the issue of whether Koshko's daughter was treated for a serious health condition on July 23 and 24, 2011. Nevertheless, assuming for the sake of argument that Koshko's daughter was treated for a serious health condition, Koshko's FMLA claim still fails because she cannot show that she was prejudiced by the July 24, 2011 denial of FMLA leave.

To succeed on her FMLA interference claim, Koshko must prove both that the USCP interfered with her exercise of protected rights and that the interference caused prejudice. *McFadden v. Ballard, Spahr, Andrews & Ingersoll, LLP*, 611 F.3d 1, 7 (D.C. Cir. 2010). Prejudice exists where an employee loses compensation or benefits by reason of the violation, sustains other monetary losses as a direct result of the violation, or suffers some loss in employment status remediable through appropriate equitable relief. 29 U.S.C. § 2617(a)(1); *Cobbs v. Bluemercury, Inc., et al.*, 746 F.Supp.2d 137, 144 (D.D.C. 2010). In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002), the United States Supreme Court stated:

"To prevail under the cause of action set out in § 2617, an employee must prove, as a

¹² The OOC FMLA Regulations cited in this Order track those promulgated by the Department of Labor ("DOL") in 1995. The DOL thereafter amended its FMLA Regulations. To the extent that there is any question regarding the regulations that should govern, the Board cites to the pre-amendment OOC Regulations here because the amended regulations are not relevant to the instant claims. Accordingly, all citations to regulations referencing the FMLA that appear in this decision are to the OOC Regulations, unless otherwise stated.

threshold matter, that the employer violated § 2615 by interfering with, restraining, or denying his or her exercise of FMLA rights. Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost “by reason of the violation,” § 2617(a)(1)(A)(i)(I), for other monetary losses sustained “as a direct result of the violation,” § 2617(a)(1)(A)(i)(II), and for “appropriate” equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B).”

Even assuming that the USCP interfered with Koshko’s FMLA rights by denying her request for FMLA leave on July 24, 2011, we hold that Koshko is not entitled to relief because she has not proven that she was prejudiced by the denial. Koshko has provided no evidence that she lost compensation or benefits or was otherwise harmed as a result of the denial of her FMLA request. *See Ragsdale*, 535 U.S. at 89 (no relief in a FMLA interference claim unless the plaintiff has been prejudiced by the violation). Thus, Koshko’s FMLA claim must fail.

Disability Discrimination

Koshko alleges two disability claims. First, she alleges that she was discriminated against based on her association with her alleged disabled 12-year old daughter. Second, she alleges that she was discriminated against because the USCP failed to provide her a reasonable accommodation to care for her alleged disabled 12 year-old daughter. Both claims fail based on the evidence in the record and supporting case law.

(i) Association Disability

Koshko cannot prevail on her association disability claim. To prove association disability discrimination, the plaintiff must present evidence that shows that the employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person. *Larimar v. IBM*, 370 F.3d 698, 702 (7th Cir. 2004).¹³

Here, Koshko has not shown that her association with her 12 year-old daughter was a determining factor in the USCP’s decision to not transfer her to the midnight shift. The Hearing Officer reasonably determined that Koshko’s move in August 2008 from the day shift to the midnight shift was a detail and not a permanent transfer. Further, the USCP had previously accommodated Koshko with schedule changes in December 2009 and October 2011 to assist her with raising her 12 year-old daughter whom the USCP was aware had diabetes. Therefore,

¹³ To establish a *prima facie* case of association disability discrimination, a plaintiff must establish: (1) that she was subjected to an adverse employment action; (2) that she was qualified for the job at that time; (3) that her employer knew at that time that she had a relative with a disability; and (4) that “the adverse employment action occurred under circumstances which raised a reasonable inference that the disability of the relative was a determining factor in [the employer's] decision.” *Wascura v. City of S. Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001).

Koshko is unable to show the requisite disability animus to support her association disability claim.¹⁴

(ii) Failure to Accommodate

The ADA does not require an employer to make any “reasonable accommodation” for the disabilities of relatives or associates of an employee who is not himself disabled. Specifically, 42 U.S.C. § 12112(b)(5)(A) defines the term “discriminate” to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability *who is an applicant or employee.*” (Emphasis added). Further, 42 U.S.C. § 12112(b)(5)(B) defines “discriminate” to include “denying employment opportunities to a *job applicant or employee* who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the *employee or applicant.*” (Emphasis added). The plain language of these provisions suggest that only job applicants or employees, but not their relatives or associates, need be reasonably accommodated. *See Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1084 (10th Cir. 1997). Koshko was not entitled to a reasonable accommodation in the form of a transfer to the midnight shift because she is not disabled. Moreover, Koshko has failed to cite to any authority which states that, Koshko, as a non-disabled employee, was entitled to a reasonable accommodation for her relatives or associates. *Id.* For this reason, Koshko’s reasonable accommodation claim fails.

Gender Discrimination

The Hearing Officer properly found that Koshko was not subjected to gender discrimination because Koshko cannot show that the actions that the USCP took against her were based on her gender. A plaintiff in a gender discrimination case always bears the burden of proving that the defendant intentionally discriminated against the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993). Here, there is no evidence which suggests that Koshko was treated differently because of her gender. The USCP had approved every FMLA request made by Koshko in 2010 and 2011, except for one. Thus, Koshko has not proven gender discrimination.

Retaliation

The Hearing Officer properly found no retaliation. To establish a claim for retaliation under the CAA, an employee is required to demonstrate that: (1) he engaged in activity protected by

¹⁴ In denying Koshko’s association disability claim, the Hearing Officer observed that Koshko’s 12 year-old daughter was likely not disabled by her type 1 diabetes. Although the Americans with Disability Amendments Act made applicable under the CAA broadened the statutory definition of a protected disability, *see* 29 C.F.R. § 1630.2(j)(3)(iii) (concluding that individuals with diabetes should easily be found to have a disability within the meaning of the Act as they are substantially limited in the major life activity of endocrine function), the Board need not decide whether Koshko’s daughter was disabled in ruling against Koshko’s disability claim, as Koshko has failed to show that the USCP displayed the requisite disability bias against her.

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. *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-discriminatory reason for its actions. *Id.* Koshko must show that the necessary causal connection exists between her engaging in what she claims was protected activity (i.e. giving her immediate supervisor a publication on diabetes on August 2, 2011)¹⁵, and the alleged adverse actions she claims were taken against her that she maintains are reasonably likely to deter protected activity.¹⁶

Here, Koshko has not established the requisite causal connection that would establish retaliatory animus. The Hearing Officer found that the USCP witnesses testified credibly that civilian transfers are processed through the AVUE process and that there must be a vacancy for an employee to permanently transfer. *Sheehan*, 08-AC-58 (CV, RP) (credibility determinations are entitled to substantial deference). Further, the immediate supervisor submitted a memorandum in December 2010 (months before the first request for counseling) explaining that Koshko’s August 2008 move was not a permanent transfer. Finally, after Koshko sought FMLA leave and transfer requests to the midnight shift, the USCP granted every FMLA leave request made by her except for the request for July 24, 2011.¹⁷ Thus, Koshko’s retaliation claim fails.

Hostile Work Environment

The Hearing Officer properly concluded that Koshko did not establish a hostile work environment. To prevail on such a claim, a plaintiff must show that her employer subjected her 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.” *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (DC. Cir. 2008) (quoting *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

¹⁵ While Koshko alleges that she engaged in protected activity by giving her immediate supervisor a publication on diabetes and the Hearing Officer found that this was the earliest date Koshko engaged in protected activity, the Board need not decide whether Koshko actually engaged in protected activity because she is unable to prove the additional elements of her retaliation claim. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁶ Koshko claims that because she was not granted her requests for transfer, she lost over a month’s pay she would otherwise have earned, caring for her daughter while on unpaid FMLA leave.

¹⁷ While Koshko’s immediate supervisor denied Koshko FMLA leave for this one request, there is no evidence to suggest that the denial was committed with retaliatory animus.

code for the American workplace.” *Taylor v. Solis*, 571 F.3d 1313, 1323 (DC Cir. 2009) (quoting *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998)).

Koshko has not shown that the USCP’s conduct was sufficiently severe or pervasive to rise to the level necessary to support a hostile work environment claim. Her numerous claims (i.e. receiving unwarranted discipline or criticisms about her work performance) did not cause objectively tangible harm to the terms or conditions of her employment. *See Holmes–Martin v. Sebelius*, 693 F.Supp.2d 141, 165 (D.D.C. 2010) (finding that plaintiff’s claims that her job responsibilities were reduced, that she was publicly criticized, excluded from meetings, received unrealistic deadlines, and received unwarranted criticism in her performance evaluations are not sufficiently severe or pervasive to support a hostile work environment claim); *Pearsall v. Holder*, 610 F.Supp.2d 87, 98 n.10 (D.D.C. 2009) (dismissing hostile work environment claim when plaintiff alleged the assignment of an inferior office, the denial of training, exclusion from meetings, and generally underutilization of his skills and experience). Koshko’s hostile work environment claim fails.

ORDER

For the foregoing reasons, the Hearing Officer’s decision to dismiss the FMLA, disability and gender discrimination, retaliation, and hostile work environment claims **is affirmed**.

It is so ORDERED.

Issued, Washington, DC on May 14, 2014