

OFFICE OF COMPLIANCE
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_____)	
Radford Kemp,)	
Appellant,)	
)	
v.)	
)	Case Numbers: 13-AC-01(CV, FL, RP); 13-AC-35
)	(AG, CV, RP)
Architect of the Capitol,)	
Appellee.)	
_____)	

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

There are two related cases before the Board. The first case is on a Petition for Review of the Hearing Officer’s January 23, 2014 Order in *Radford Kemp v. Architect of the Capitol*, Case No. 13-AC-01 (CV, FL, RP) (“*Kemp I*”), denying, in part, claims under the Fair Labor Standards Act (“FLSA”), and, in full, claims of retaliation and hostile work environment. These allegations primarily stem from the Architect of the Capitol’s (“AOC”) delay in paying Radford Kemp (“Kemp”) 17 hours of overtime worked on August 12, 2012 in AOC pay period (“pay period” or “PP”) 17. The delay in Kemp’s overtime payment lasted from approximately August 26, 2012 to February 6, 2013 (PPs 18-27 in 2012 - PP 1 in 2013).¹ The Hearing Officer found that the AOC

¹ The relevant PPs are the following:
PP 17 (08/12/12-8/25/12);
PP 18 (08/26/12-9/08/12);
PP 19 (09/09/12-09/22/12);
PP 20 (09/23/12-10/06/12);
PP 21 (10/07/12-10/20/12);
PP 22 (10/21/12-11/03/12);
PP 23 (11/04/12-11/17/12);
PP 24 (11/18/12-12/01/12);
PP 25 (12/02/12-12/15/12);
PP 26 (12/16/12-12/29/12);
PP 27 (12/30/12-01/12/13);
PP 1 (01/13/13-01/26/13);
PP 2 (01/27/13-02/09/13).

violated the FLSA for the delayed payment in PPs 18 and 19 (counts 2-3). The Hearing Officer found for the AOC on the other FMLA, retaliation, and hostile work environment claims.

The second case is on a Petition for Review of the Hearing Officer's August 22, 2014 Order in *Radford Kemp v. Architect of the Capitol*, 13-AC-35 (AG, CV, RP) ("*Kemp III*")², in which the Hearing Officer determined that the AOC retaliated against Kemp, in violation of Section 207 of the Congressional Accountability Act ("CAA") when, after becoming aware that Kemp sought mediation in *Kemp I*, it delayed payment in PPs 24-27 in 2012 and PP 1 in 2013 for the 17 hours of overtime worked in PP 17 (counts 29-33). The Hearing Officer ordered that the AOC pay Kemp \$500 in compensatory damages for each of the five pay periods that payment was delayed after Kemp sought mediation in *Kemp I*, for a total of \$2,500 in compensatory damages. Kemp appeals the Hearing Officer's dismissal of the remaining retaliation, failure-to-promote, and hostile work environment claims.

The Board hereby consolidates and joins *Kemp I* and *Kemp III* and upon due consideration of the Hearing Officer's Orders, the parties' briefs and filings, and the record in these proceedings, the Board reverses and remands counts 19 and 27 in *Kemp I*. However, the Board dismisses all the remaining counts in *Kemp I* and *Kemp III*. The Board finds no reason to disturb the Hearing Officer's findings and dismissals for counts 1, 4-9, 10, and 28 in *Kemp I* and 34-39 in *Kemp III*. Also, the Board dismisses counts 11-18, 20-26 in *Kemp I*, and dismisses counts 1-28 in *Kemp III*.

I. Background

Kemp's Employment History

In April 2004, Kemp (black) began working as an Instrument Mechanic with the Capitol Power Plant of the AOC. In March 2009, Kemp was promoted to his current position, a GS-12 Equipment Specialist in the Utilities Distribution System (UDS) in the Capitol Power Plant. That promotion was part of a settlement of a race discrimination and retaliation case Kemp brought against the AOC in 2008. At all relevant times of employment, Kemp has been evaluated as "Fully Successful." He has also received merit awards and within-grade increases.

Kemp is a member of the UDS team, which also includes S.K., K.P., J.L., G.E., T.B., and E.S. Kemp is the only team member responsible for most of the steam and water pipe meters throughout the Capitol Office buildings. From late 2011 to November 4, 2013, Plant Engineer David Willard ("Willard") was Kemp's first-line supervisor. Until mid-2013, the Assistant Plant Manager was Kemp's second-line supervisor. The Plant Manager was his third-line supervisor.

² Kemp filed complaints in *Kemp v. Architect of the Capitol*, 13-AC-28 (AG, CV, RP) ("*Kemp II*"); and *Kemp v. Architect of the Capitol*, 13-AC-35 (AG, CV, RP) ("*Kemp III*"). The Hearing Officer dismissed *Kemp II*, because all the allegations in *Kemp II* were contained in *Kemp III*. Kemp has not filed a Petition for Review on the dismissal of his claims in *Kemp II*.

New Office Space

In March 2012, the AOC moved Kemp's office from the Capitol Power Plant library to a space on the third floor of the Operations Building. The new space was renovated specifically for Kemp as part of a plan of the former Capitol Power Plant Manager for Kemp to supervise new employees in that space. Upper management later denied the request for new hires. The current Plant Manager stated that once it was decided that there would be no employees reporting to Kemp, there was no longer any reason for Kemp to have the large office space. In May 2012, the Plant Manager arranged for all UDS members to have all their offices consolidated on the second floor of the Administration Building. Kemp claimed that his new office is inadequate.

Disclosure of Kemp's 2008 Case

Also in May 2012, two coworkers told Kemp that at a meeting of the entire UDS team, Willard stated that the only reason Kemp was promoted to his current position was because he had sued the former Director, and that Kemp did not really know his job. Kemp was not present at this meeting, but alleges that Willard breached confidentiality in discussing the case settlement with Kemp's coworkers. Kemp maintains that this disclosure occurred in April 2012.

Delayed 17 Hours of Overtime Pay

Kemp worked 17 hours of overtime on August 18, 2012 (PP 17) along with some of his UDS team members.³ Yet, when he submitted an overtime sheet for those hours, he did not receive a payment. Kemp learned from the timekeeper that Willard disapproved the overtime payment. He called Willard during the next week to ask him to approve it. He stated that Willard became angry, raised his voice and said he would not pay for the overtime because it had not been preapproved.⁴

Willard consulted with the Assistant Plant Manager, who at first agreed that Kemp's request for overtime payment should not be paid because he had not received preapproval. Willard told Kemp that he would not pay him. Kemp, however, complained to the Plant Manager, who agreed that he should be paid, if he actually worked the overtime hours. In PP 19 (September 9 –

³ Willard had informed the UDS team at a meeting in the second week of August 2012 of an overtime opportunity for three employees the upcoming weekend. Kemp and two other employees offered to work overtime. Willard did not affirmatively approve the offers during the meeting but also did not deny the requests. Kemp testified that he "clearly understood" that he was approved to work the overtime.

⁴ Willard denied raising his voice at any time when he spoke with Kemp. Also, Willard claimed both K.P. and S.K. told him that they did not see Kemp at work on that weekend. K.P., however, testified that he saw Kemp on the morning of August 18 in the parking lot of the Capitol Power Plant and in the Madison Office Building steam station. K.P. also testified that he saw Kemp's car in the parking lot that evening.

22, 2012), the Plant Manager advised Willard to approve the overtime payment and to reemphasize the overtime preapproval policy to Kemp.⁵

Willard then told Kemp to resubmit the overtime request and that he would sign it. Kemp submitted a second written request for overtime; however, when Kemp was still not paid, he again spoke to the Plant Manager. The Plant Manager told Kemp to submit a third request, which he did. Kemp's request for overtime was eventually signed and approved by Willard. The document was dated September 28, 2012, but it is unclear when the document was actually signed. On February 6, 2013, in PP 2 of 2013, the AOC paid Kemp his 17 hours of overtime worked on August 18, 2012.

Kemp testified that he felt that the agency's delay in paying him for overtime was retaliatory and was intended to make him quit his job. He believed that his work environment was hostile because of how long he waited before he was finally paid. He also stated that he felt "singled out" and like a "field hand." He further stated that he believed that his work environment was also made hostile by the fact that after he complained about the unpaid overtime, the AOC moved his office out of the space that was designed especially for him.

Kemp sought counseling, in *Kemp I*, on October 2, 2012, and then requested mediation. The AOC obtained the Notice of Mediation on November 14, 2012. Mediation was unsuccessful.

Non-Promotion to GS-13 Classification

In spring 2012, the AOC arranged for a position classification audit of the job positions on the UDS team. Oliver Lewis ("Lewis") from FMPI Solutions, Inc. conducted the audit. Team members, who were all paid at a GS-12 level, had been receiving "hazardous duty pay," equal to 25% of their salaries above their base pay, for repair work they had been doing in some of the Capitol building tunnels. The AOC had recently eliminated the hazardous duty pay because the AOC determined that all hazards had been abated. When the UDS team members objected to the elimination of hazardous duty pay, the AOC offered to arrange for a desk audit of their positions as a way to increase their pay grades and account for the loss in hazardous duty pay.⁶

Lewis reviewed the input from all the UDS team members about their specific work requirements and position descriptions for their jobs and related jobs at the AOC.⁷ The Plant

⁵ Although the AOC had a formal policy on preapproval of overtime, that policy was only sporadically and inconsistently enforced.

⁶ Willard and G.E. testified that immediately after the hazardous duty pay was eliminated, all UDS team members were evaluated as performing "Outstanding" work and were given either an annual performance bonus of five thousand dollars gross or a within grade increase ("WIG") for the same amount as a way to compensate them for the loss of premium pay. Kemp took a WIG that he asserted was "slightly more than \$2500 after taxes."

⁷ Kemp separately submitted information about his position description and job responsibilities, while the other UDS team members submitted information about their job responsibilities as a group.

Manager and Willard both testified that they disagreed with many of the assertions that Kemp had made about his job duties. Willard determined that Kemp had suggested to Lewis what he was capable of doing or had done; not what he was currently responsible for doing.

At the end of the classification audit, Lewis concluded that Kemp's position did not require him to perform the work of a GS-13 and therefore did not warrant a grade increase. According to Lewis, even if he had taken into account all of the duties that Kemp claimed, including those that were disputed by his supervisors, Kemp still would not have merited a grade increase to a GS-13. Also, Lewis testified that there appeared to be a typographical error in his calculations that would have required him to lower Kemp's assigned job duties by 200 points. This would have reduced Kemp's total points to a score below a GS-12. Yet, Lewis did not apply this 200 point reduction to Kemp's score.⁸ No team member received a grade increase.

Kemp objected to the audit results. He asserted that Lewis did not conduct an independent audit, but rather a "shadow" and "stealth" audit to aid the AOC in its efforts to retaliate against him after the AOC learned in November 2012 that he had filed a request for counseling in *Kemp I*. Kemp, however, testified that he had no reason to believe that Lewis had any animus against him. He also testified that he had no evidence that the results of the desk audit were the product of retaliation or that Lewis was aware of any of his protected activities.

Hostile Work Environment

Kemp claims that he was the victim of a hostile work environment. He asserts that the AOC created a hostile work environment when it failed to pay him overtime for six months; when it moved him out of his office space; and when the desk audit did not recommend a grade increase for any UDS members. Kemp also alleges that Willard was hostile towards him on numerous occasions: yelling at him and mentioning his 2008 case. Kemp also claims, among other things, that he was mistreated by coworkers; was called the "N-word;" had his car "keyed"; and was tripped by coworkers during a meeting. He also alleges that boxes of his materials were moved and damaged; and someone stole his toolbox more than once.

Kemp I Administrative Complaint

On July 25, 2013, Kemp filed an administrative complaint in *Kemp I*, which included 28 counts. First, the complaint alleged that the AOC violated the FLSA for failure to pay overtime for PPs 17-25 related to the delayed payment of the 17 hours of overtime (counts 1-9). Second, the complaint alleged that the AOC failed to pay Kemp overtime in PPs 18-25 in retaliation for Kemp's opposition to the delayed payment (counts 10-17). Third, the complaint alleged that the AOC failed to pay Kemp overtime in PPs 17-25 in retaliation for Kemp's participation in his

⁸ Lewis did recommend that a new GS-13 "Leader" position be created and that both G.E. and K.P. might qualify for this position. The AOC declined to adopt this recommendation.

2008 case against the AOC (counts 18-26). Finally, the complaint alleged retaliation for breach of confidentiality (count 27) and a retaliatory hostile work environment (count 28).

II. Hearing Officer's Order in *Kemp I*

On August 31, 2013, pursuant to the AOC's Motion to Dismiss, the Hearing Officer dismissed counts 4-9, 12-17, and 21-27. The Hearing Officer found no jurisdiction over counts 4-9, 12-17, and 21-26 because they pertained to events occurring after the request for counseling for *Kemp I* and were not subject to later counseling. Further, the Hearing Officer dismissed count 27 because Kemp did not comply with the OOC Procedural Rules or timely complain to the OOC Executive Director about Willard's alleged breach of confidentiality based on his disclosure to Kemp's co-workers of Kemp's 2008 case settlement.

The Hearing Officer issued a Final Order on January 23, 2014 that found for Kemp on his count 2 FLSA claim.⁹ The Hearing Officer awarded Kemp liquidated damages in an amount equal to 17 hours of overtime in accordance with Section 203(b) of the CAA. The Hearing Officer found for the AOC on all remaining claims.

***Kemp III* Administrative Complaint**

While *Kemp I* was pending, Kemp filed a request for counseling and then later an administrative complaint in *Kemp III*. In *Kemp III*, Kemp asserted 39 counts. First, the complaint alleged that the AOC failed to pay Kemp overtime in PPs 18-27 of 2012 and PP 1 in 2013 in retaliation for opposing the delayed overtime payment in PP 18 (counts 1-11). Second, the complaint alleged that the AOC failed to pay Kemp overtime in PPs 18-27 of 2012 and PP 1 in 2013 in retaliation for Kemp's participating in his 2008 case (counts 12-22). Third, the complaint alleged that the AOC failed to pay Kemp overtime in PPs 18-27 of 2012 and PP 1 in 2013 in retaliation for Kemp's participation in *Kemp I* (counts 23-33). Fourth, Kemp alleged that the AOC retaliated against him by failing to "promote" him to a GS-13 classification (counts 34-36). Lastly, Kemp alleged a retaliatory hostile work environment (counts 37-39).

On January 13, 2014, the Hearing Officer issued a Motion to Dismiss Order in *Kemp III*, dismissing certain counts on res judicata grounds because the Hearing Officer believed they were fully litigated in *Kemp I*. These included: counts 1-2 (retaliation - nonpayment of overtime in PPs 18 and 19 based on Kemp's complaints about not being paid); and counts 12-13 (retaliation - nonpayment of overtime in PPs 18 and 19 based on Kemp's participation in the 2008 case).

Also, the Hearing Officer later dismissed on collateral estoppel grounds counts 3-11 (retaliation - nonpayment of overtime in PPs 20-27 in 2012 and PP 1 in 2013 based on Kemp's complaints

⁹ The Hearing Officer later amended this decision to award judgment for Kemp on two FLSA counts, with no change in the monetary award for the failure to pay Kemp in counts 2-3 (PPs 18 and 19).

about not being paid). The Hearing Officer determined that Kemp's informal complaints to AOC management about not receiving overtime did not amount to protected activity. The Hearing Officer later dismissed counts 14-22 (retaliation - nonpayment of overtime in PPs 20-27 in 2012 and PP 1 in 2013 based on Kemp's participation in the 2008 case), finding that Kemp did not prove a causal connection between his participation in the 2008 case and the AOC's delayed payment of overtime in 2012 and 2013. The Hearing Officer also dismissed counts 23-27 (retaliation – nonpayment of overtime in pay periods 18-22 based on Kemp's participation in *Kemp I*). The Hearing Officer reasoned that Kemp could not show a causal connection between the delay in paying overtime and his participation in *Kemp I* during pay periods that ended before the AOC had notice in November 2012 that *Kemp I* was pending.¹⁰

III. Hearing Officer's Order in *Kemp III*

On August 22, 2014, the Hearing Officer issued a Final Order in *Kemp III*, which found in favor of Kemp on counts 29-33 (retaliation for non-payment of overtime after the AOC received notice that Kemp sought mediation for his request for counseling in *Kemp I*). The Hearing Officer further ordered that for each successful retaliation claim and based on Kemp's testimony about his emotional distress, the AOC shall pay \$500 to Kemp as compensatory damages, totaling \$2,500. Finally, the Hearing Officer found for the AOC on all remaining counts (retaliation, non-promotion, retaliatory hostile work environment). On September 22, 2014, Kemp filed a Petition for Review in *Kemp III*.¹¹

IV. 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. *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), at *4 (Jan. 21, 2011).

V. Analysis

Kemp I

1) Retaliation for Participation in the 2008 Case (Count 19)

The Board reverses and remands the dismissal of count 19 in *Kemp I*. 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

¹⁰ The Hearing Officer also dismissed counts 37 and 38 after they were consolidated into count 39.

¹¹ Kemp's Petitions for Review seek reversal for all claims he lost in *Kemp I* and *Kemp III*.

between the two. See *Britton v. Office of the Architect of the Capitol*, Case No. 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).

The Board agrees with the Hearing Officer that Kemp engaged in protected activity when he participated in his 2008 case, and that the delayed overtime payment could reasonably deter an employee from engaging in protected activity. The Board, however, disagrees with the Hearing Officer that “there was literally no evidence presented that the delay in Plaintiff’s overtime payment had any connection or causal link” to Kemp’s protected activity of participation in the 2008 case. The Hearing Officer found that in approximately April 2012, Willard reported to the entire UDS team (absent Kemp) that the only reason Kemp held his current position was because he had received a promotion as part of settlement of a discrimination case he had filed against the AOC and that Kemp did not really know how to do his job. Willard made these comments just a few months before he disapproved and protractedly delayed Kemp’s overtime payment. Given these factual findings, the Board reverses and remands count 19 to the Hearing Officer to determine whether Willard’s actions in delaying the payment of Kemp’s overtime were caused by retaliatory animus. Because the Hearing Officer already awarded damages for successful retaliation counts 29-33 in *Kemp III* (that were not appealed by Kemp)¹² for the period of November 18, 2012 to January 26, 2013, the remand of Count 19 is for a determination on liability and damages for the period from on or about August 26, 2012 to November 17, 2012.

2) Retaliation Based On Breaching Confidentiality (Count 27)

The Hearing Officer’s dismissal of Count 27 of the complaint is reversed and remanded. In granting the AOC’s Motion to Dismiss in *Kemp I*, the Hearing Officer treated as a breach of confidentiality claim under section 1.07 of the Procedural Rules, Kemp’s Section 207 retaliation claim that Willard told Kemp’s co-workers about Kemp’s settlement of a discrimination case against the AOC. The Hearing Officer dismissed this claim on grounds that, in failing to inform the Executive Director within 30 days that confidentiality had been breached, Kemp had not complied with the OOC’s Procedural Rules.

However, count 27 was pled, at least in part, as a Section 207 retaliation claim and not a breach of confidentiality claim. In count 27 of his *Kemp I* Complaint, Kemp alleges: “[u]nlawful retaliation in violation of Section 207(a) of the CAA based on complainant’s prior participation in federally protected activities pursuant to his prosecution of Case No. 08-AC-26 (CV, RP): Respondent’s revealing confidential information respecting the settlement agreement in Case No. 08-AC-26 (CV, RP) to employees of the Capitol Police Power Plant in violation of Section 416

¹² The Board takes no position on the counts 29-33 retaliation findings because they were not appealed.

of the CAA and said settlement agreement entered into by the parties hereto.” While this language may be confusing, it is reasonable to interpret count 27 as, at least in part, an allegation of retaliation in violation of Section 207 of the CAA. Because this claim was dismissed in full on a motion to dismiss before discovery or hearing, we remand count 27. Because the Hearing Officer already awarded damages for successful retaliation counts 29-33 in *Kemp III* (that were not appealed by Kemp) for the period of November 18, 2012 to January 26, 2013, the remand of Count 27 is for a determination on liability and damages for the period from on or about Spring 2012 to November 17, 2012.

3) Additional FLSA Claims for Non-Payment (Counts 1, 4-9)

Kemp is not entitled to additional monetary relief for his remaining FLSA claims beyond the award of liquidated damages for counts 2-3.¹³ Section 216(b) of the FLSA, as incorporated by section 203(b) of the CAA, provides that “[a]ny employer who violates ... section 207 of this title shall be liable to the employee ... in the amount of their ... unpaid overtime compensation, ... and in an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b). When wage and overtime disputes recur over numerous pay periods, liquidated damages are still capped at an amount equal to the unpaid wages. *See, e.g., Mafa v. Clean House, Inc.*, No. 12-0040, 2012 WL 1450181, at *1 (D.D.C. Apr. 26, 2012) (awarding liquidated damages in an equal amount to unpaid overtime wages that accrued during one year of employment). Thus, Kemp is not entitled to additional damages for his remaining FLSA claims beyond the liquidated damages in the amount of 17 hours. The dismissal of counts 1, and 4-9 is affirmed.

4) Retaliation for Opposition to Unlawful Conduct under the CAA (Count 10)

The Hearing Officer properly found against Kemp’s count 10 retaliation claim because the record did not establish retaliatory animus. First, we disagree with the Hearing Officer’s finding that Kemp did not establish protected activity in his opposition to the AOC’s nonpayment of overtime because Kemp failed to mention the FLSA statute in his oral complaints and he did not consider the delay in payment to be a FLSA violation when he complained to Willard and the Plant Manager. In FLSA cases, the Supreme Court has found oral complaints to be protected activity so long as the complaint is “sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.” *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011). Thus, the Hearing Officer erred in concluding that Kemp was required to cite the FLSA or show that he thought the delay was a FLSA violation in order to show protected activity.

¹³ The Board takes no position on the Hearing Officer’s FLSA findings in favor of Kemp because they were not appealed.

Even so, the Board need not determine whether Kemp actually engaged in protected activity when he opposed the delayed overtime payment. Kemp cannot show any retaliatory animus on the part of the AOC related to the alleged opposition of the delayed payment. Willard disapproved Kemp's overtime request before Kemp ever complained to him or his superiors. The facts do not show that the delayed overtime payment was motivated by retaliation. *See Britton v. Office of the Architect of the Capitol*, Case No. 02-AC-20 (CV, RP) (May 23, 2005).

5) Retaliation for Opposition (Counts 11-17) and Retaliation for Participation in the 2008 Case (Counts 18, 20-26)

Counts 11-17, 18, and 20-26 are dismissed as duplicative. The allegations in counts 11-17 are essentially the same as those in count 10: AOC's alleged failure to pay overtime for time worked in PP 18 in retaliation for Kemp's protected oppositional activity. Further, the allegations in counts 18, and 20-26 mirror those in count 19: AOC's alleged failure to pay overtime in PP 18 in retaliation for Kemp's protected participation in his 2008 case. In short, these retaliation counts all stem from the AOC's protracted delay in paying 17 hours of overtime worked in a single pay period. There is no legal support for pleading separate causes of action for each subsequent pay period during which the overtime payment remained outstanding. The interests of judicial economy and clarity are ill-served by such redundant pleading. Counts 11-17, 18, and 20-26 are therefore dismissed. *See Ahuja v. Detica, Inc.*, 873 F.Supp.2d 221, 225 (D.D.C. 2012) (for purposes of clarity and avoidance of duplication, the court dismissed a count, which sought the same relief in an earlier plead count).

6) Hostile Work Environment (Count 28)

We affirm the Hearing Officer's conclusion in *Kemp I* that Kemp failed to prove a hostile work environment. To prevail on a hostile work environment claim, a plaintiff 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 (D.C. 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." *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).

The record evidence does not prove discriminatory conduct against Kemp (i.e. inadequate office space, damaged tools, hostile conversations, etc.) that an objectively reasonable person would perceive as sufficiently severe or pervasive to establish a hostile work environment. For

example, moving Kemp from his desired office is the type of business decision that the AOC is permitted to make. *See Stephens v. Erickson*, 569 F.3d 779, 788 (7th Cir. 2009) (recognizing that the role of the court is not to second-guess employers' business judgments). Also, Kemp's evidence of mistreatment by Willard or his co-workers was not sufficiently severe or pervasive to prove hostile work environment. *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). The Board affirms the Hearing Officer's dismissal of the hostile work environment claim.

Kemp III

7) Retaliation for Non-Promotion to GS-13 Classification (Counts 34-36)

The dismissal of Kemp's non-promotion claims is affirmed. There is nothing in the record to show that the desk audit was orchestrated to retaliate against Kemp because he complained about his delayed overtime payment, participated in his 2008 case, or participated in *Kemp I*. The audit was conducted to determine if the UDS team members could be moved to GS-13 classifications to help offset their loss of hazardous pay. No UDS team members received a GS-13 classification, which weakens Kemp's position that he was denied GS-13 classification because of his protected activities. *See Lockridge v. The Univ. of Maine Sys.*, 597 F.3d 464, 473 (1st Cir. 2010) (no retaliation regarding the denial of the plaintiff faculty member's request for better office space because the denial left the plaintiff faculty member in no worse a position than that held by similarly-situated faculty members, who held the same office space as the plaintiff faculty member after the denial).

Also, Kemp testified that he had no evidence that the desk audit results were a product of retaliation or that he believed that Lewis retaliated against him. Indeed, Lewis testified that even if he had credited Kemp with all the duties he had claimed, including those challenged by his supervisors, there still would not have been sufficient responsibilities to justify moving Kemp to the GS-13 classification.¹⁴ Moreover, the AOC continued to provide Kemp with pay increases, "Fully Successful" performance ratings, and merit awards after Kemp's earliest protected activity in 2008. On these facts, Kemp has failed to prove that his reclassification denial was based on retaliatory animus.

¹⁴ Likewise, Lewis testified that Kemp was awarded additional points that he should not have been entitled to, but even with those additional points Kemp's job would still not have been classified as a GS-13.

8) Retaliatory Hostile Work Environment (Counts 37-39)

The finding of no retaliatory hostile work environment is affirmed. In *Kemp III*, Kemp essentially makes the same hostile work environment arguments that he made in *Kemp I*. Kemp also asserts that the continued delayed overtime and the classification denial contribute to his hostile work environment claim.

Nonetheless, Kemp's hostile work environment allegations in *Kemp III* fail for the same reasons as in *Kemp I*. For example, the AOC decided to put all the UDS team members in the same office space and not give any of the UDS team members a GS-13 classification. Such decisions are within the purview of an employer. *See Stephens*, 569 F.3d at 788 (recognizing that the role of the court is not to second-guess employers' business judgments). The Board finds no retaliatory hostile work environment.

9) Retaliation for Opposition and Participation (Counts 1-28)

The remaining retaliation counts in *Kemp III* are dismissed because they are duplicative. In *Kemp III*, the Hearing Officer found that the AOC retaliated against Kemp with respect to counts 29-33, which covered the AOC's continued delay in overtime payment throughout PPs 24-27 in 2012 and PP 1 in 2013 (November 18, 2012 – January 26, 2013). The Hearing Officer awarded Kemp \$2,500 in compensatory damages based on Kemp's testimony of his emotional distress throughout this time period (\$500 for each successful count).¹⁵ As a result, Kemp is not entitled to additional relief for his duplicative retaliation claims involving the very same employer conduct during the very same time period. Thus, because counts 7-11 (retaliation for opposition), and counts 18-22 (retaliation for participation in 2008 case) involve the same employer conduct for which Kemp was already awarded compensatory damages, those claims are dismissed as duplicative.

Also, in counts 1-6 (retaliation for opposition), 12-17 (retaliation for participation in 2008 case), and 23-28 (retaliation for participation in *Kemp I* case), Kemp is seeking the same scope of relief as sought in the reversed and remanded count 19 in *Kemp I* (PPs 18-23 in 2012). Therefore, counts 1-6, 12-17, and 23-28 in *Kemp III* are dismissed as duplicative of count 19 in *Kemp I*, which has been remanded to the Hearing Officer.

¹⁵ The Board takes no position on the counts 29-33 retaliation findings because they were not appealed.

ORDER

For the foregoing reasons, the Board reverses and remands counts 19 and 27 in *Kemp I*. Further, the Board dismisses all the remaining counts in *Kemp I and Kemp III*.

It is so ORDERED.

Issued, Washington, DC on, July 22, 2015.