For Opinion See 2007 WL 6847408 , 2007 WL 1438763 , 2007 WL 841019 , 2006 WL 891163 , 338 F.Supp.2d 97

United States District Court, District of Columbia.
Sharon BLACKMON-MALLOY, et al., Plaintiffs,
v.
UNITED STATES CAPITOL POLICE BOARD, Defendant.
No. 101CV02221.
March 26, 2008.

Memorandum in Support of Defendant's Motion for Summary Judgment

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In the Third Amended Complaint, seven current or former Capitol Police officers allege that the United States Capitol Police (“USCP” or “Board”) discriminated against them because of their race, in violation of the Congressional Accountability Act (“CAA”), 2 U.S.C. § 1301.

Each plaintiff asserts factually distinct claims. All of the claims, however, suffer from at least one of the following legal infirmities: (1) the plaintiffs did not timely exhaust administrative remedies; (2) the plaintiffs were not subjected to an adverse action; or (3) the plaintiffs did not endure disparate treatment or a hostile work environment. Accordingly, as the Board demonstrates below, the Court should dismiss this action with prejudice and enter judgment in favor of the USCP under Rule 56.

BACKGROUND

A. Sharon Blackmon-Malloy

Sharon Blackmon-Malloy is an African-American who worked as an officer for the USCP from October 12, 1982 until October 31, 2007. On November 4, 2000, she took a written examination as part of the 2000-2002 promotion process for becoming a Lieutenant. (Compl. ¶ 10.) Fields Consulting Group (“FCG”), an outside contractor that specializes in promotional exams, developed and administered the test. (Ex. 1.) Blackmon-Malloy initially received a score of 75 on the exam, but FCG later determined that her correct score was 69. (Ex. 2.) FCG took responsibility for the initial scoring error and apologized to her. (Id.)

Based on her correct score, Blackmon-Malloy finished 28th out of 42 officers on the promotions list. (Ex. 3.) If she had received the (incorrect) score of 75, she would still have only been ranked 24th. (Ex. 4, Fields Decl. ¶ 10.) The Board promoted ten officers, including three African-Americans, to the rank of Lieutenant from the list of 42 candidates. (Ex. 5, Madigan Decl. ¶ 5.) Regardless of whether she received a score of 69 or 75 on the written exam, Blackmon-Malloy would not have been promoted to the rank of Lieutenant at that time. (*Id.*)

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The Board promoted Blackmon-Malloy to Lieutenant on November 4, 2004, after she successfully participated in the 2002-2004 promotions process. (Compl. ¶¶ 21-28.) The Pittman McLenagan Group, L.C. ("PMG"), another outside contractor, developed and administered the test. (Ex. 6.) The test consisted of a written examination, which was administered on February 22, 2003, and a simulation exercise, which was administered on May 11, 2003. (*Id.*, Pittman Decl. ¶ 2.) The simulation exercise was graded on a scale of zero to five by three independent graders from outside the USCP. (*Id.* ¶¶ 5-11.) The graders listened to an audio tape of each candidate's response to the exercise and then gave each candidate a score. (*Id.*, ¶.) The graders did not know the candidate's race or even their names when grading the test. (*Id.* at ¶ 8.) The candidates were only identified by a randomly assigned candidate identification number. (Id.) Blackmon-Malloy received a score of 0.5 on this portion of the test. (*Id.*)

After the examination process had begun, the Chief of Police learned that eligible Board personnel who were serving in the military may not have been notified of the process. (Ex. 7.) He also learned that one officer, Kathryn Stillman, had expressed an interest in taking the exam but never received confirmation that she was eligible to do so. (*Id.)* The Chief of Police decided to administer a second, comparable examination. The group that took the second exam included four African-American officers. (Ex. 5, Madigan Decl. ¶ 7.)

In determining which officers to promote, the Chief of Police decided to pair candidates from the two examinations side-by-side (i.e., 5 and 5A), and then over-promote by one candidate to ensure that the second examination did not result in an officer who otherwise would have been promoted being denied the promotion. (Ex. 7.)

Blackmon-Malloy ranked 17th out of the 25 Sergeants who took the examination. (Compl. ¶ 27.) The Board promoted nineteen Sergeants to Lieutenant from the 2002-2004 list. (Ex. 5, Madigan Decl. ¶ 8.) The USCP made the first ten promotions on February 15, 2004. (*Id.* ¶ 9.) The Board made the next eight promotions -including that of Blackmon-Malloy - on November 8, 2004. (*Id.* ¶ 9.) The USCP made the last promotion on December 12, 2004. (*Id.* ¶ 10.) Even if Stillman, who is Caucasian, did not take the exam, Blackmon-Malloy would still not have been promoted until November 8, 2004.

Blackmon-Malloy did not have any disciplinary entries in her personnel file that delayed (or even affected) her promotion on November 8, 2004. In 2001, however, the Board did temporarily insert two "CP-550" notes into her personnel file. A CP-550 form is a Capitol Police document that includes positive, corrective, and informational entries on officers. (Ex. 8.) CP-550's are temporary documents that are only maintained as part of an officer's file for one year. (*Id.*) Information entries, like the ones Blackmon-Malloy received, do not affect an officer's pay or benefits. (*Id.*)

The Board issued Blackmon-Malloy a CP-550 note on February 23, 2001. (Ex. 9.) The note documented that her Lieutenant had discussed with her "the proper procedures to request the withdrawal or cancellation of a" Notice of Infraction for traffic violations. (*Id.*) The USCP issued Blackmon-Malloy another CP-550 note on March 14, 2001. (*Id.*) This note reflected that she failed to arrest immediately a man who had entered the Longworth House Building with a pistol and who falsely claimed to be a law enforcement officer. (*Id.*) The note advised Blackmon-Malloy that, "as the supervisor overseeing this incident," she "should have ordered the immediate arrest of the individual once it was determined that he had no legal authority to be in possession of a firearm." (*Id.*) These notes did not adversely affect plaintiff.

The USCP assigned Blackmon-Malloy to its Operations Command Center between September 16, 2001 and November 5, 2001. (Compl. ¶ 13.) However, once there, she became upset because some officers smoked cigar-

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ettes and, as a non-smoker, she was concerned about being exposed to the smoke. (Compl. ¶¶ 13-19.) The Board's General Order 1230 authorizes the use of tobacco products in break rooms and private offices, but not in the Operations Command Center. According to Blackmon-Malloy, "officers on the seventh floor [of the Command Center] smoke heavily in their offices... and pollute the atmosphere of the atrium so badly that non-smoking officers, such as herself, reek of tobacco when they leave the office. (Compl. ¶ 14.)

The Board took corrective action after plaintiff brought the issue to Lieutenant Timothy Connors. (Ex. 10, Connors Decl. ¶¶ 2-3.) Lieutenant Connors mitigated the amount of smoke in the area by opening windows and using a large electrostatic air cleaner. (Id., ¶5.) He worked to dissuade persons from congregating in the private office to smoke, and he also kept the door to the outer hallway closed. (Id.)

B. Regina Bolden-Whitaker

On May 16, 2001, the Board counseled officer Regina Bolden-Whitaker for not wearing her protective body armor. (Ex. 11.) At the time, she had not provided the Board with the necessary information regarding her medical condition. (*Id.*) On June 18, 2001, Deputy Chief James P. Rohan informed plaintiff that "when an employee is unable to wear the protective body armor, he/she must conform to the medical certification guidelines established in General Order 2030." (*Id.*) Bolden-Whitaker provided the appropriate medical documentation on June 25, 2001. (*Id.*)

In April 2003, the District of Columbia's Metropolitan Police Department requested assistance from the USCP in preparation for the IMF World Bank spring meetings. (Ex. 12.) Because the USCP officers would be assigned outside of their jurisdiction, they needed to sign special deputation forms. (*Id.*) On April 10, 2003, Bolden-Whitaker's supervisor directed her to complete the deputation form. (*Id.*) Plaintiff refused to sign the form, however, even though she had signed the same form in 2002. (*Id.*)

On April 11, 2003, Deputy Chief McGaffin conducted a duty status hearing for Bolden-Whitaker. (*Id.*) She stated that she did not understand the form; Deputy Chief McGaffin explained it to her; and she signed it. (*Id.*) Following General Order 2221, the Board issued a CP-535 form[FN1] to Bolden-Whitaker based on her failure to obey the order given on April 10, 2003. (*Id.*) The penalty for disobeying an order is a one-day suspension from duty; however, Acting Assistant Chief Larry Thompson waived the penalty for Bolden-Whitaker. There was no other penalty issued to her. (*Id.*)

> FN1. A CP-535 may address repetitious or serious infractions. It becomes a permanent part of an officer's central personnel file, but does not necessarily result in discipline. (Ex. 12.)

C. Arnold Fields

On August 29, 2001, the Board provided Fields with his 2001 performance evaluation. (Compl. ¶38.) The evaluation and ratings were compiled by Sergeant Kyle Miller. (*Id.*) Fields received an overall rating of "effective and competent." (Ex. 13.) More specifically, the Board rated him effective and competent in six categories and "marginal" in the area of Human Relations. (*Id.*)

On October 24, 2002, the Board asked Fields to report to Headquarters. (Compl. ¶ 41.) When he arrived, a Sergeant informed him that the USCP had initiated an investigation regarding his whereabouts on October 12, 2002. (Id.) Plaintiff informed the Sergeant that he had called Officer Alyce Diggs, the office clerk, on October 11, 2002, and requested Family Friendly Leave for October 12, 2002. (Compl. ¶ 42.) After confirming that Fields had spoken with Officer Diggs, the Sergeant "stated that there was no need for further investigation." (*Id.*)

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On January 9, 2003, the USCP provided Fields with his 2002 performance evaluation. (Compl. ¶ 47.) As in 2001, plaintiff's overall rating was "effective and competent." (Ex. 14.) He was rated effective and competent in six of the seven categories, with a rating of "below average" in "Acceptance of Responsibility." (Compl. ¶ 47.)

On March 25, 2003, there were two emergency evacuation alarms in the Hart and Dirksen Senate Office Buildings. (Compl. ¶ 49.) Plaintiff was on duty during the first alarm and reported to the intersection of First Street and Massachusetts Avenue. (Id.) When the second alarm sounded, Fields was in the lunch break room inside the Dirksen Building. (*Id.*) Fields did not evacuate the building until Sergeant Dana Sunberg entered the break room and told him to respond to the alarm. (*Id.*)

After interviewing Fields, the investigating officers recommended that the Board charge him with unsatisfactory performance for failing to evacuate the break room during an audible alarm and failing to comply with a directive to provide a written statement during the investigation. (*Id.*) However, Chief Gainer ultimately decided simply to issue Fields a CP-534 "with warning" for the failure to evacuate. (Ex.15.) He dismissed the other charge. (*Id.*) The Board did not take any other action against Fields.

D. Duvall Phelps

In early 2000, the Board charged Phelps with violating its Rules of Conduct based on a domestic dispute involving his issued firearm. (Compl. 156-57.) Prior to convening a hearing on this charge, however, Phelps, along with his counsel, John Berry, signed a settlement agreement on June 20, 2000. (Ex. 16) (under seal). The agreement explicitly provided that Phelps "will retire effective" October 31, 2000. (*Id.* ¶ 10.) The settlement agreement further provided that "this Agreement is binding for all purposes; failure to abide by any of its terms shall establish a predicate for retroactive enforcement, including reopening and prosecution of the IAD case and recoupment of monies paid pursuant to leave use that would not otherwise have been allowable absent a settlement." (*Id.*, ¶ 14.)

Plaintiff retired on October 31, 2000. (*Id.*) He alleges that the USCP generally permits retired officers to have "free access to the Capital complex." (Compl. ¶ 60.) But on January 18, 2002, Phelps alleges he "was interrupted" by a white officer "while he was trying to meet with another African-American officer." (*Id.* ¶ 61.) On January 21, 2002, a white officer "threatened to deny" him access to the Capitol. And, on January 24 and 25, 2003, he was denied access to the Capitol. (*Id.* ¶¶ 63-65.)

In support of a retaliation claim, Phelps alleges that on July 21, 2003 his retired police identification and badge were stolen from his automobile, which was parked outside his house. (Ex. 17.) He reported that Prince George's County Police responded and were investigating the theft. (*Id.*) It appears that this is an unsolved crime. Phelps has not alleged that the USCP was behind the theft. (*see* Compl., *passim.*)

E. Vernier Riggs

On April 13, 2001, during roll call, Inspector Michael Jarboe "stated that all officers should be wearing blue long-sleeve shirts[.]" (Compl. ¶ 70.) However, Riggs "had [already] dressed in [a] white short-sleeve shirt," believing that she could do so. (*Id.*) Lieutenant James Proctor nevertheless "harshly admonished" Riggs and told her that she "looked bad." (*Id.*) The Board did not discipline Riggs for wearing a white shirt instead of a blue one. (*Id.*)

Riggs alleges that she was denied the use of leave in October 2000. (3/19/07 Order, App. D, item 36.) She did

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not, however, request to use leave during the week of October 1, 2000. During the week of October 8, 2000, she requested and was granted 16 hours of sick leave and 3 hours of annual leave. (Ex. 18.) Riggs did not request to use leave during the week of October 15. She requested and was granted 2.5 hours of annual leave during the week of October 22, 2000. (*Id.*) On October 20, Lieutenant James Proctor granted Riggs' request to use 24 hours of annual leave for October 25-27, 2000. (*Id.*) There is no record of the Board denying a request to use leave by Riggs in October 2000. (*Id.*)

F. Shafton Adams

S. Adams received one CP-550 note on June 2, 1997 and two CP-550 notes on June 3, 1997. (Ex.19.) The June 2, 1997 note reflected that he was not present for roll call. (*Id.*) The first note on June 3, 1997 reflected that S. Adams became extremely upset and raised his voice challenging the tardiness charge received the day before. (*Id.*) The second note on June 3, 1997 reflected that S. Adams' supervisor overheard him saying "[I] can't work for someone like her, I can't take orders from someone I might slap the s--t out of or cuss out." (*Id.*) The entry reflected that a CP-534 was to be generated. (*Id.*) However, the Board has no record that discipline was ever given. (Ex. 19, Mahr Decl. ¶2.)

S. Adams also received a CP-550 note dated February 2, 2000, regarding a visit he received from his daughter. (*Id.*) The entry reflects that he was counseled regarding his child being present in his place of employment for an extended period of time and the questionable judgment he used in allowing her to wait at the House Door. (*Id.*) No other discipline was imposed.

On April 16, 2001, S. Adams applied for a Criminal Investigator position. (Ex. 20, Robinson Decl. ¶ 2.) He participated in a practical exercise and an oral assessment for the position. (*Id.* ¶3.) At the conclusion of the process, the USCP selected an African-American officer named Mark Crawford for the position. (*Id.* ¶ 4.) S. Adams was the second most qualified applicant. (*Id.*)

S. Adams alleges that he applied for an Intelligence Investigator position in October or November 2000. (Compl. ¶ 75.) However, there were no vacancy announcements posted for a Special Agent, Intelligence Section position between October and November 2000. (Ex. 21, Demas Decl. ¶ 4.) On May 4, 2000, the Board posted a vacancy announcement for the position of Special Agent in the Protection Intelligence Division, Information Security Unit. (*Id.* I 2.) Plaintiff did not apply for the position. (*Id.* ¶ 3.)

G. Frank Adams

F. Adams participated in the 2000-2002 promotions process to the rank of Lieutenant. (Ex.4.) He performed well, and finished fifth out of 42 candidates. *Id.* F. Adams believes that he should have received a higher score on one component of the exam. (Compl. ¶ 85.) Fredinal Rogers, an African American male, finished first and was promoted on May 20, 2001. (Ex. 5, Madigan Decl. ¶ 3.) The officers that finished 2-5, including F. Adams, were all promoted on December 2, 2001. (Id. ¶4.)

F. Adams alleges that the Board subjected him to several "baseless" investigations. (Compl. ¶¶ 76-77.) He claims, however, that in all but one instance he was "exonerated." (*Id.* ¶ 77.) The sole exception involved a complaint that was filed against F. Adams on November 11, 2000 for discourtesy. (Ex. 22.) As a result of this charge, the Board recommended that F. Adams "be counseled regarding his actions and advised to consider more discreet locations for counseling subordinates should a similar situation arise." (*Id.* at 14.)

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F. Adams alleges that the Board named a black canine "Huk," which he believes is a racially discriminatory name. (Compl. ¶ 78.) The USCP obtained the dog -a black labrador -from the Animal Control Center of Queen Anne's County on November 17, 2000. (Ex. 23.) The dog's name at the time of the adoption was "*Huck*" not "Huk." (Ex. 23, ¶ 2.) The Board renamed the dog "Thunder" on or around December 1, 2000. (Ex. 23, I 3.)

F. Adams also alleges (for the first time) in the Joint Third Amended Complaint that officers used a racially derogatory term, "gangster," to describe African-American officers, and the term "friends of gangsters" or "FOGs" to describe white officers who were friends with African-American officers. (Compl. ¶ 78.) F. Adams never raised this issue with the Board. However, based on the allegations of another officer, the Board investigated a Technician who allegedly used the phrase "friends of gangsters." (Ex. 24.) The investigation concluded that the Technician used the phrase "friends of gangsters" to describe his Sergeant because he felt that his Sergeant was more supportive of criminals than he was of officers. (Id.) Although the record did not show that the Technician used the term in a racially derogatory manner, the Board issued him a CP-534 and a CP-550. (Ex. 24.)

LEGAL STANDARD

A. Subject Matter Jurisdiction

"[T]he plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence." *Thompson v. Capitol Police Bd.*, 120 F. Supp. 2d 78, 81 (D.D.C. 2000). Bare allegations of exhaustion are not enough to establish subject matter jurisdiction in the face of a challenge. *Blackmon-Malloy v. United States Capitol Police Bd.*, 338 F. Supp. 2d 97, 107 (D.D.C. 2004). To commence a proceeding under the CAA, a covered employee "shall request counseling by the Office [of Compliance] not later than 180 days after the date of the alleged violation." 2 U.S.C. § 1402(a). Completion of counseling and mediation are jurisdictional prerequisites to filing suit under the CAA. *Blackmon-Malloy*, 338 F. Supp. 2d at 107.

B. Summary Judgment

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment, as a matter of law." Fed. R. Civ. P. 56(c). The plaintiff must establish more than the "mere existence of a scintilla of evidence" in response to the motion. *Anderson*, 477 U.S. 242, 249-50 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.*

ARGUMENT

I. Counts I and II Should Be Dismissed Because Sharon Blackmon-Malloy's Claims of Discrimination And Retaliation Fail As A Matter Of Law

Blackmon-Malloy alleges in Count I that the USCP discriminated against her because of her race by failing to promote her to Lieutenant in 2000 and 2003, and by subjecting her "to a hostile work environment when she was incorrectly written up" in February and March 2001. (Compl. ¶ 88.) In Count II, Blackmon-Malloy alleges that the USCP retaliated against her "by intentionally exposing her to second-hand smoke" and by denying "her a promotion in 2003." (Compl. ¶ 89.) As Defendant demonstrates below, each of these claims fails.

A. 2000-2002 Promotion List for Lieutenant (Count I)

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On November 4, 2000, plaintiff took a written examination as part of the promotion process for becoming a Lieutenant. (Compl. ¶ 10.) She alleges that the USCP discriminated against her by changing her "on-site score of 75, which would have advanced her to the next phase of the Lieutenant's examination," to "a 69, resulting in her not being promoted."[FN2] (*Id.*)

> FN2. In order to establish a *prima facie* case of discriminatory failure to promote, Blackmon-Malloy must show that: 1) she is member of a protected class; 2) she applied for and was qualified for an available position; 3) despite her qualifications she was rejected; and 4) either someone outside her protected class filled the position or the position remained vacant. *Kilby-Robb v. Spellings*, 522 F. Supp.2d 148, 156 (D.D.C. 2007).

Plaintiff's claim fails because she cannot show that she was qualified for the position of Lieutenant and because the USCP had a legitimate, non-discriminatory reason for not promoting her. *Waters v. Gonzales*, 374 F. Supp. 2d 187, 194-95 (D.D.C. 2005). Blackmon-Malloy ranked 28th out of 42 officers on the promotions list. (Ex. 5.) The USCP promoted ten officers to Lieutenant off of the 2000-2002 promotions list, including three African-American officers. (*Id.*, ¶¶ 2-5.) However, even if Blackmon-Malloy received the (incorrect) score of 75 on the written portion of the test, she would still have only been ranked 24th. (Ex. 4, Fields Decl. I¶ 10.) Thus, even with the score that Blackmon-Malloy believes is correct, she would not have been promoted. (Id.; Ex. 5, Madigan Decl. ¶¶ 2-5.)

Moreover, Blackmon-Malloy's claim fails because the undisputed evidence reflects that the USCP did not improperly reduce her written test score. An outside contractor, FGC, administered and graded the test on which plaintiff bases her claim, without involvement by the USCP. (Ex. 4, Fields Decl. ¶¶ 2-9.) The outside contractor determined that Blackmon-Malloy's preliminary score of 75 was incorrect, and that her actual score was 69. (Id.) In these circumstances, no reasonable jury could conclude that the USCP failed to promote plaintiff because of her race. Waters, 374 F. Supp. 2d at 194-95; Kilby-Robb, 522 F. Supp.2d at 157-60.

B. 2002-2004 Promotion List For Lieutenant (Counts I & II)

On November 8, 2004, the USCP promoted Blackmon-Malloy to the rank of Lieutenant. (Ex. 5, Madigan Decl. ¶ 9.) This promotion was based on her performance on the 2003 Lieutenant's examination. (Id.) Blackmon-Malloy contends, however, that she should have been promoted earlier in 2004. (Compl. ¶¶ 20-28.) Specifically, she contends that the USCP discriminated and retaliated against her by (1) giving her "an inaccurate, unfair score on the Simulation Exercises in the 2003 Lieutenant's exam," and (2) by granting a white candidate "several more months to prepare for the exam[.]" (*Id.*) These claims are not supported by the record and the USCP had legitimate, non-discriminatory reasons for doing what it did.

The simulation exercise - formerly called the "Video Scenario Exercise" - was developed and administered by an outside contractor called the Pittman McLenagan Group, L.C. ("PMG"). (Ex. 6, Pittman Decl. ¶2.) This test assessed certain knowledge, skills, and abilities deemed important to the rank of Lieutenant. (*Id.*, ¶¶ 3-5.) The examination was graded on a scale of zero to five by three independent assessors from outside the USCP. (*Id.* ¶¶ 5-11.) Specifically, the graders listened to an audio tape of each candidate's response to the exercise and then gave each candidate a score. (*Id.*, ¶ 7.) The graders did not know the candidate's race (or even their names) when administering the score. (Id. at ¶ 8.) Indeed, the candidates were only identified by a randomly assigned candidate identification number. (*Id.*) In these circumstances, no reasonable jury could conclude that Blackmon-Malloy's score on the simulation exercise was lowered because of her race or in retaliation for her engaging in pro-

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tected activity.

Moreover, the USCP did not discriminate against Blackmon-Malloy by permitting additional candidates to take the promotion exam several months later. (Compl. ¶ 26.) After the examination process had begun, the Chief of Police learned that eligible Board personnel who were serving in the military may not have been notified of the opportunity to participate. (Ex. 7.) Therefore, the Chief of Police determined that a second examination, which was comparable in nature, would be administered. As a result, four African-American officers took this examination, in addition to the white officer identified by plaintiff. (Ex. 5, Madigan Decl. ¶ 7.) There is no evidence that this decision was based on Blackmon-Malloy's race.

In addition, the decision to administer a second examination did not change the date on which plaintiff was promoted. Blackmon-Malloy ranked 17th out of the 25 Sergeants who took the examination. (Compl. ¶ 27.) The first ten promotions were made on February 15, 2004. (Ex. 5, Madigan Decl. ¶ 5-8.) The next eight promotions - including that of Blackmon-Malloy -were made on November 8, 2004. (*Id.* I¶ 9.) Thus, even if the white candidate identified by plaintiff had not been permitted to take the exam, Blackmon-Malloy would still have been promoted on November 8, 2004. No reasonable jury could conclude that the Board failed to promote Blackmon-Malloy or retaliated against her based on her race. Cf. Kilby-Robb, 522 F. Supp.2d at 156 (noting that a plaintiff must show she was denied a promotion).

C. Personnel Performance Notes - CP-550s (Count I)

Blackmon-Malloy contends that she was "subjected to discriminatory discipline and a hostile work environment" when the USCP issued her two personnel performance notes (CP-550s) in February and March 2001. (Compl. ¶12.) However, these performance notes do not constitute an adverse employment action. *Brown v. Brody*, 199 F.3d 446, 458 n.11 (D.C. Cir. 1999) (rejecting argument that "formal criticism or poor performance evaluations" alone are adverse actions); *Runkle v. Gonzales*, 391 F. Supp.2d 210, 225-226 (D.D.C. 2005) (holding that "[f]ormal letters of admonishment and disciplinary notices that have no effect on an employee's grade, salary level, job title, duties, benefits, or work hours,... do not constitute adverse actions"); *Ware v. Billington*, 344 F. Supp. 2d 63, 76-77 (D.D.C. 2004) (same).

In this case, the performance notes given to Blackmon-Malloy did not result in any diminution in benefits, pay, or duties. (Exs. 8-9.) Nor did they result in discipline being imposed on Blackmon-Malloy or affect her ability to be promoted to Lieutenant. (Id.) Indeed, the CP-550s are merely temporary notes that are removed from an officer's file after just one year. (Id.) Accordingly, like the plaintiffs in *Brown*, *Runkle*, and Ware, Blackmon-Malloy has failed to show that she suffered an adverse employment action based on the issuance of performance notes that, by her own admission, did not affect the terms or conditions of her employment. (Compl. ¶12.)

Moreover, the issuance of two personnel notes hardly constitutes the type of severe and pervasive treatment necessary to support a claim of hostile work environment. Stewart v. Evans, 275 F.3d 1126, 1133-34 (D.C. Cir. 2002) (noting that "a workplace environment becomes hostile ... only when offensive conduct permeates the workplace with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment."); *Holbrook v. Reno*, 196 F.3d 255, 262 (D.C. Cir. 1999) (same). The fact that the performance notes temporarily went into Blackmon-Malloy's otherwise "spotless personnel jacket" (Compl. ¶ 12) does not mean that the Board subjected her to a hostile work environment. Kilby-Robb, 522 F. Supp.2d at 163.

D. Second Hand Smoke (Count II)

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Blackmon-Malloy accepted an assignment to work in the Board's Operations Command Center between September 16 and November 5, 2001. (Compl. ¶ 13.) The USCP's General Order 1230 authorizes the use of tobacco products in break rooms and private offices, but not in the Operations Command Center. Plaintiff alleges that the USCP retaliated against her because some officers smoked in the area surrounding the Operations Command Center, and thereby subjected her to second hand smoke. (Compl. ¶¶13-19.) This claim fails for several reasons.

First, Blackmon-Malloy has failed to even allege that the officers in the offices surrounding the Command Center did not smoke prior to her arrival in September 2001. Nor could she. By her own admission, "officers on the seventh floor [of the Command Center] smoke heavily in their offices... and pollute the atmosphere of the atrium so badly that non-smoking officers, such as plaintiff Blackmon-Malloy, reek of tobacco when they leave the office. (*Id.*, ¶ 14) (emphasis added). In order to state a claim for retaliation, a plaintiff must show that the adverse action happened because she engaged in protected activity. *Burlington Northern v. White*, 548 U.S. 53___, 126 S. Ct. 2405, 2410-11 (2006); *Rochon v. Gonzales*, 438 F.3d 1211, 1220 (D.C. Cir. 2006). Blackmon-Malloy has failed to make this showing here.

Second, Blackmon-Malloy has not alleged that the officers who temporarily assigned her to the Command Center or the officers who worked in the Command Center knew that she had engaged in protected activity at the time. (Compl. I¶ 13.) Without this knowledge, the officers' decision to smoke indoors could not be retaliatory. Rochon, 438 F.3d at 1220-21.

Third, Blackmon-Malloy has not alleged that she was the only officer subjected to second hand smoke or that all of the officers who were subjected to second hand smoke participated in this lawsuit. (Compl. ¶13.) Thus, these allegations fall far short of showing that the officers around the Command Center were smoking because of plaintiff's prior protected activity. *Burlington Northern*, 126 S. Ct. at 2410-11.

Finally, being near fellow officers who smoke indoors -albeit in violation of a Board policy -does not rise to the level an adverse action against Blackmon-Malloy that would dissuade her from engaging in protected activity. [FN3] *Id.*

> FN3. In any event, the Board did take corrective action after plaintiff brought the issue to Lieutenant Timothy Connors. (Ex. 10, ¶¶ 2-3.) Lieutenant Connors mitigated any smoke in the area by opening windows and using a large electrostatic air cleaner stationed outside of one of the private offices. (Id., I 5.) He worked with one of the smokers to dissuade persons from congregating in the private office to smoke so as to limit the amount of smoke. (Id.) He was also instructed to keep the door to the outer hallway closed.

II. Count III Should Be Dismissed Because Regina Bolden-Whitaker Cannot Establish a Claim of Retaliation.

Bolden-Whitaker alleges that the USCP retaliated against her by (1) "counsel [ing] her for not wearing body armor" on May 16, 2001, and (2) issuing her a CP-535 for failing to sign a deputation form on April 10, 2003. (Compl. ¶¶ 29-34.) Neither of these alleged acts constitute retaliation.

A. Counseling For Failing To Wear Body Armor (Count III)

Bolden-Whitaker contends that she was counseled on one occasion in 2001 for not wearing body armor. (Compl. ¶ 31.) Bolden-Whitaker alleges that this counseling constitutes retaliation because it happened after she had participated in mediation. (Id.) But even assuming a causal link between her protected activity and the counseling,

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her retaliation claim fails because counseling plainly is not an adverse action that would deter a person from engaging in protected activity. Walker v. Johnson, 501 F. Supp.2d 156, 172 (D.D.C. 2007) (rejecting argument that reprimand was sufficient to constitute adverse action in support of retaliation claim); Brodetski v. Duffey, 199 F.R.D. 14, 21 (D.D.C. 2001) (rejecting retaliation claim because "a reprimand that amounts to a mere scolding, without any disciplinary action which follows, does not rise to the level of adverse action.").

The counseling Bolden-Whitaker received is considered an "informational entry," and is not discipline. (Ex. 11.) The counseling did not affect Bolden-Whitaker's pay, benefits, leave or any other condition of her employment. Nor did it become a permanent part of her record. Bolden-Whitaker's receiving counseling, without more, is insufficient to substantiate a claim of retaliation. *Walker*, 501 F. Supp.2d at 172; Brodetski, 199 F.R.D. at 21. No reasonable person would be deterred from filing a claim of discrimination because she received a counseling note regarding the wearing of protective body armor. *Id.*

B. CP-535 For Failing To Sign Deputation Form (Count III)

Bolden-Whitaker alleges that nearly two years later the USCP retaliated again by issuing her a CP-535 for failing to obey an order to sign a deputation form.[FN4] (Compl. ¶ 32.) This claim fails, as a matter of law, for two reasons. First, the lapse of nearly two years between the protected activity and the alleged retaliatory action defeats any causal connection between the two events. *See, e.g.*, *Mayers v. Laborers'* Health & Safety Fund, 478 F.3d 364, 369-70 (D.C. Cir. 2007) (holding that an eight or nine month gap is "far too long."); Brodetski, 199 F.R.D. at 19-20 (noting that generally only "a few months" between the protected activity and the adverse action will support a retaliation claim.)

> FN4. Even though she previously signed the same deputation form on March 4, 2002, plaintiff claims that she did not "recognize" the form and did not "fully understand" the effect of the document in April 2003. (Compl. ¶ 32.)

Second, although a CP-535 is part of an officers permanent file, it does not rise to the level of an adverse action that would dissuade a reasonable employee from making a charge of discrimination. The note did not have any effect on the conditions of Bolden-Whitaker's employment. Her pay and benefits remained the same, as did her job responsibilities. Notably, a CP-535 can result in a suspension without pay for one day, but the Acting Assistant Chief specifically decided to waive such discipline for Bolden-Whitaker. (Ex. 12.) The Acting Assistant Chief further stated that "no further action will be taken in this matter." (*Id.*) (emphasis added). This simply does not rise to the level of an adverse action necessary to support a retaliation claim. *Burlington Northern*, 126 S. Ct. at 2410-11. Moreover, the Board had a legitimate, non-discriminatory reason for issuing the CP-535; namely, plaintiffs refusal to sign the same form that she had signed the year earlier.

III. Counts IV, V, and VI Should Be Dismissed Because Arnold Fields Fails To Establish A Claim of Discrimination, Retaliation, or Hostile Work Environment.

Arnold Fields alleges that the USCP discriminated and retaliated against him by lowering his performance appraisals in 2001 and 2002; inquiring into his whereabouts on two occasions in 2002 when he took sick and Family Friendly Leave; and issuing him a CP-534 discipline with warning for not leaving the building during a fire alarm on May 25, 2003. Fields's claims fail because none of these actions rise to the level of an adverse action and the Board had legitimate, non-discriminatory reasons for the challenged decisions. These actions also did not create a racially hostile work environment.

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A. Performance Evaluations (Counts IV, V, VI)

Fields contends that the USCP gave him "inaccurate, lowered" performance appraisals on or about August 29, 2001 and January 9, 2003. (Compl. ¶¶ 38-40, 47.) Plaintiff alleges that the 2001 performance appraisal states that he "did not possess the requisite interpersonal skills needed for his position." (Compl. ¶ 38.) He further alleges that the 2003 performance evaluation rated him "below average' in 'Acceptance of Responsibility."' (Compl. ¶ 47.) Fields asserts that these evaluations were "lowered" because of his race and in retaliation for engaging in protected activity.

However, Fields's overall rating in both evaluations was "Effective and Competent." (Exs. 13-14.) The fact that the USCP rated Fields "below average" in one out of seven categories did not change his overall rating, let alone affect the terms and conditions of his employment. (*Id.*) The comment in his 2001 performance evaluation that his interpersonal skills were deficient also did not affect the terms and conditions of his employment.

In these circumstances, Fields has failed to establish that the USCP subjected him to an adverse action. *Brown,* 199 F.3d at 458. In *Brown,* the plaintiff argued that her performance evaluation of "fully satisfactory" constituted an adverse action because it was lower than it should have been. The Court disagreed, opining that the evaluation was not an adverse action because it did not affect the plaintiffs grade and salary. *Id.* As in *Brown,* Fields's dissatisfaction with isolated comments in his evaluations that found him to be "Effective and Competent" are insufficient to support a discrimination or retaliation claim. *Id.; see also Lester,* 290 F. Supp.2d at 27 (holding that, standing alone, allegations of "inaccurate, unfair, and delayed performance appraisals" are insufficient to support a discrimination claim.)

These evaluations also fall far short of amounting to a racially hostile work environment. *National R.R. Passenger Corp. v. Morgan,* 531 U.S. 101, 111-13 (2002) (holding that acts of disparate treatment are different than acts which give rise to hostile work environment claim); Lester, 290 F. Supp.2d at 32 (concluding that alleged acts of disparate treatment may not be "transformed, without more, into a hostile work environment claim."); *see also Stewart,* 275 F.3d at 1133-34 (noting that discriminatory acts must "permeate" the workplace with "intimidation, insult, and ridicule" to give rise to actionable hostile work environment).

B. Requests For Information Regarding Fields's Use Of Sick And Family Friendly Leave (Counts IV, V, VI)

Fields alleges that on August 6, 2002, a white Sergeant who is not his supervisor "requested documentation" to substantiate sick leave that he had taken. (Compl. ¶ 37.) Fields told the white Sergeant "that the information he sought was contained in [his] personnel folder and that he should consult directly with [Fields's] supervisor... for that information." (*Id.*) He also alleges that a different white Sergeant asked him to verify his whereabouts on October 12, 2002, a day in which Fields took Family Friendly Leave. (*Id.,* I 41.) Fields informed the Sergeant that he had properly requested and taken the leave (which another officer confirmed), and the Sergeant concluded "that there was no need for further investigation." (*Id.* ¶ 42.)

These discriminatory treatment and retaliation claims fail because neither incident resulted in an adverse action against Fields. The mere investigation of an employee does not constitute an adverse action because the investigation has no adverse effects on a plaintiff's employment. *See, e.g., Ginger v. District of Columbia,* 477 F. Supp.2d 41, 52-53 (D.D.C. 2007); *Ware v. Billington,* 344 F. Supp. 2d 63, 76 (D.D.C. 2004). By Fields's own admission, the inquiries allegedly made by these officers did not result in any change in the terms and conditions of his employment. (Compl. ¶¶37-42.) Nor would such an inquiry dissuade a reasonable employee from com-

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plaining about discriminatory treatment.

Moreover, being asked on two occasions to substantiate the use of sick and Family Friendly Leave is plainly not sufficiently pervasive or severe to rise to the level of a hostile work environment. *Stewart* 275 F.3d at 1133-34.

C. Failure To Evacuate When Emergency Alarm Sounded (Counts IV, V, VI)

On March 25, 2003, there were two emergency evacuation alarms in the Hart and Dirksen Senate Office Buildings. (Comp. ¶ 49.) Plaintiff did not leave the Dirksen break room during the second evacuation alarm because he alleges that he did not hear the alarm. (Id.) At the completion of its investigation, the Board issued Fields a CP-534 with warning. Pursuant to Board policy, a CP-534 with warning only remains in an officer's personnel file for one year. (Ex. 15.) However, because more than one year had lapsed between the time of the incident and the time of the issuance of the CP-534 with warning, the document was removed from his personnel file before formally becoming a part of it. (*Id.*) Fields nevertheless contends that the USCP "inequitably and discriminatorily disciplin[ed] him for not leaving [a] break room for an alarm while he was on [a] break[.]" (Compl. ¶ 91.)

This claim fails for two reasons. First, Fields cannot demonstrate that the temporary CP-534 was an adverse action. The CP-534 did not result in a change in grade, salary, or other benefits. (Ex.15.) Nor did it remain part of his personnel record. In these circumstances, Fields has failed to allege, much less show, an essential element of a discrimination and retaliation claim. *Brodetski*, 199 F.R.D. at 21.

Second, Fields cannot show that he was treated different than the other officers in the break room at the time. *All* of the officers in the break room received the same CP-534. (Ex. 56.) This included one officer who was not African-American and officers who had not engaged in protected activity. (*Id.*) Thus, Fields cannot establish that he was treated differently because of his race or because he engaged in protected activity. *Brown*, 199 F.3d at 458.

IV. Counts VII and VIII Should Be Dismissed Because Duvall Phelps Did Not Exhaust His Administrative Remedies And He Cannot Establish A Claim Of Discrimination Or Retaliation.

Duvall Phelps alleges that the USCP constructively discharged him on October 31, 2000 based on his race. (Compl. ¶ 56.) He further contends that -more than one year after his termination -the Board retaliated against him by denying him unfettered access to the Capitol and also when his credentials and badge were "stolen out of his vehicle in July 2003." (*Id.* ¶¶ 59-67.) As the Board demonstrates below, none of these claims has merit.

A. Constructive Discharge (Count VII)

Phelps's constructive discharge claim fails for the simple reason that he was not discharged; rather, he voluntarily retired on October 31, 2000 pursuant to a settlement agreement that he signed on June 16, 2000. (Ex. 16) (under seal). This settlement agreement resolved a pending disciplinary matter against him. (Id.) The agreement explicitly provided that Phelps "will retire effective" October 31, 2000. (Id. ¶ 10.) Phelps may not voluntarily agree to retire pursuant to a settlement agreement, receive all of the benefits under the agreement, and then subsequently file a discrimination claim alleging that he was constructively discharged. *Brees v. Hampton*, 877 F.2d 111, 117-118 (D.C. Cir. 1989) (noting that settlement agreement barred raising claims).

Phelps's constructive discharge claim also lacks merit because he failed to exhaust the appropriate administrative

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remedies. Section 402 of the CAA requires an employee to seek counseling within 180 days after the alleged violation. *See* 2 U.S.C. § 1402(a). The period begins to run from the date the employee knows that the action is being taken. *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980) (time period began to run when plaintiff was notified of date of decision and not on expiration of employment). Here, Phelps signed the settlement agreement on June 16, 2000. Thus, at the absolute latest, Phelps knew on that date that he was going to retire in October 2000. But Phelps has failed to even allege, much less demonstrate, that he sought counseling within 180 days of June 16, 2000. Therefore, his constructive discharge claim should be dismissed.

B. Unfettered Access To The Capitol (Count VIII)

Phelps's contention that the USCP retaliated against him by denying him access to the Capitol more than one year after he had already retired has no merit. (Compl. ¶¶ 59-67.) As a matter of law, even assuming his allegations are true, the alleged conduct by the USCP plainly did not materially affect the terms, conditions or privileges of his employment or his future employment opportunities. Brown, 199 F.3d at 457. Indeed, at most, the USCP did not provide Phelps with a courtesy to enter the building. But "the failure to receive a courtesy" is not an adverse action. Raymond v. U.S. Capitol Police Bd., 157 F. Supp. 2d 50, 56 (D.D.C. 2001); Bailey v. Henderson, 94 F. Supp. 2d 68, 73 (D.D.C. 2000).

C. Stolen Credentials (Count VIII)

Phelps's retaliation claim stemming from the unsolved theft of his credentials from his automobile requires little discussion. He does not allege that the USCP was responsible for the theft, which took place nearly two years *after* he retired and happened outside of his house. Nor does he specifically allege - much less present any evidence -that the theft took place because he engaged in protected activity. In these circumstances, Phelps has failed to show that the USCP engaged in conduct that would materially deter a reasonable person from bringing a claim of discrimination. *Cf. Reed v. Shepard*, 939, F.2d 484, 492-93 (7th Cir. 1991) (noting that not all bad things that happen to a plaintiff are actionable as retaliation).

V. Counts IX and X Should Be Dismissed Because Vernier Riggs Cannot Establish A Claim of Discrimination, Retaliation, or Hostile Work Environment.

Vernier Riggs alleges that the USCP "subjected her to a hostile work environment based on her race (African-American) by denying her leave [.]" (Compl. ¶ 96.) She further alleges that the Board retaliated against her "by publicly rebuking her for wearing a white shirt" instead of a blue shirt. (*Id.*, ¶ 97.) Even if the underlying factual assertions are true, Riggs's hostile work environment and retaliation claims fail.

A. Denial Of Leave (Count IX)

Riggs contends that the USCP subjected her to a hostile work environment by denying her requests to use leave. (Compl. ¶ 96.) But even if the USCP wrongfully denied her leave, it would not support a hostile work environment claim. Cf. Ware, 344 F. Supp. 2d at 76 (noting that the "withholding of annual leave approval [is not] an adverse action."); *Lester*, 290 F. Supp.2d at 32-33 (noting that "[d]iscrete acts are constituting discrimination or retaliation... are different in kind from a hostile work environment claim that must be based on severe and pervasive discriminatory intimidation or insult.") The denial of leave is simply not the type of pervasive and severe conduct necessary to support a claim of hostile work environment. Id. This is especially true here because, even after six years of litigation, Riggs has failed to allege with any specificity instances in which she was denied leave or even the type of leave she was attempting to use but could not. (Compl. ¶ 68.) The complaint is simply

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bereft of any allegation that would support a finding that the USCP subjected Riggs to a hostile work environment.

Moreover, the record shows that Riggs was granted permission to use considerable amounts of leave. The most recent month in which Riggs alleges the USCP denied her leave is October 2000.[FN5] (*Id.*) But in October 2000 alone Riggs received over 40 hours of approved leave. (Ex. 18.) In these circumstances, no reasonable trier of fact could conclude that the USCP subjected Riggs to a hostile work environment claim by denying her the ability to use accrued leave. *Lester*, 290 F. Supp.2d at 33.

FN5. Plaintiffs are limited to claims identified in this Court's March 19, 2007 Order.

B. White Shirt Incident (Count X)

Riggs's retaliation claim rests on a single instance where a senior officer told her that she "looked bad" when she wore a "white short-sleeve shirt" instead of a "blue long-sleeve shirt." (Compl. ¶ 70.) Even assuming that this is true, it clearly falls short of the adverse action necessary to support a retaliation claim. *Forkkio v. Powell*, 306 F.3d 1127,1130-31 (holding that "purely subjective injuries, such as ... public humiliation or loss of reputation" are insufficient).

VI. Count XI Should Be Dismissed Because Shafton Adams Did Not Exhaust His Administrative Remedies And He Cannot Establish A Hostile Work Environment Claim.

Shafton Adams alleges that the USCP subjected him to a hostile work environment when it issued him "CP-550" performance notes in 1997 and in "early 2000." (Compl. ¶¶ 73-74.) S. Adams further alleges that the Board subjected him to a hostile work environment when it did not select him for two investigator positions. (Comp. ¶ 75.) Neither of these claims has merit.

A. Performance Notes (Count XI)

S. Adams's claim regarding the issuance of performance notes fails because he did not exhaust his administrative remedies. The only date identified by S. Adams in Appendix D, item 18, was a hostile work environment claim that occurred in October through November 2000. The CP-550 notes identified in the Complaint are dated June 2, 1997, June 3, 1997, and February 2, 2000. (Ex. 19.) But S. Adams did not seek counseling regarding these claims until April 12, 2001. (Order dated March 19, 2007, Appx. D, item 18.) Accordingly, he failed to timely exhaust his administrative remedies. To be sure, none of these dates fall within the identification of viable claims for S. Adams that this Court identified in Appendix D of its March 19, 2007 Order.

This hostile work environment claim also fails because the issuance of these CP-550 performance notes fall far short of the type of severe and pervasive conduct necessary to support a hostile work environment claim. *Lester*, 290 F. Supp.2d at 32-33.

B. Position Transfers (Count XI)

S. Adams contends that, between October and November 2000, the Board subjected him to a hostile work environment when it did not select him to be a Criminal Investigator or a Intelligence Investigator. (Compl. ¶ 75.) S. Adams did not apply for a Criminal Investigator position during that time period. Rather, he applied for a Criminal investigator position that was posted on April 16, 2001. (Ex. 20, Robinson Decl.¶ 2.) He participated in a practical exercise and an oral assessment for the position on July 20, 2001. *(Id.)* At the conclusion of the selec-

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tion process, another African-American male officer, Mark Crawford, was selected for the position. *(Id.)* In these circumstances, no reasonable trier of fact could conclude that the USCP subjected S. Adams to a racially hostile work environment by selecting another African-American officer for the position. *Lester*, 290 F. Supp.2d at 33-34.

There were no vacancy announcements posted for a Special Agent, Intelligence Section position between October and November 2000. (Ex. 21, Demas Decl. ¶ 4.) On May 4, 2000, the Board posted a vacancy announcement for the position of Special Agent in the Protective Intelligence Division, Information Security Unit. (Id.) But S. Adams did not apply for that position. (Id.) His contention that the USCP subjected him to a racially hostile work environment by not transferring him to a position for which he did not apply is devoid of merit.

Moreover, even if S. Adams could show that he was improperly denied these transfers, they would not support a hostile work environment claim. The court's decision in *Kilby-Robb* is instructive. There, the plaintiff alleged a hostile work environment where she was not promoted to a GS-14 level and when she received a fully successful evaluation in her 2003 performance evaluation. *Kilby-Robb*, 522 F. Supp. 2d at 148. The Court found that plaintiff's reliance on these two discrete events falls "far short of the showing she must make for a discriminatory hostile work environment claim." Id. at 164 (emphasis in original). Moreover, the Court found that discrete acts of alleged *disparate treatment* cannot be transformed, without more, into a hostile work environment claim. *See, e.g., Lester*, 290 F. Supp. 2d at 33. Thus, S. Adams cannot rely on two alleged acts of disparate treatment, which are neither pervasive and severe nor discriminatory, to establish a viable hostile work environment claim. This is especially true here, because there was no disparate treatment.

VII. Counts XII, XIII, and XIV Should Be Dismissed Because Frank Adams Cannot Establish a Claim of Discrimination, Retaliation, or Hostile Work Environment.

F. Adams alleges that the Board discriminated against him by subjecting him to "frivolous" investigations because of his race. (See, e.g., Compl. ¶¶ 76-77, 81.) He further contends that the Board "retaliated against him by lowering his Performance Rating Score ("PRS") in an attempt to negatively impact his promotional opportunities." (Id., ¶ 85.) Finally, he contends that the USCP subjected him to a racially hostile work environment by using racially insensitive terms to describe African-American officers. (Compl. ¶ 78.) As the Board demonstrates below, the record does not support any of these claims.

A. Internal Investigations (Count XII)

F. Adams's allegations regarding internal investigations fail because the mere investigation of an employee, without more, does not constitute an adverse employment action. Indeed, this court has held that "[t]he mere initiation of an investigation into plaintiffs conduct is not an adverse employment action when it has no effect on the plaintiffs employment." Ginger, 477 F. Supp. 2d at 52-53; see also Ware, 344 F. Supp.2d at 76 (mere initiation of the investigation on a plaintiff does not have an adverse effect on a plaintiff's employment). In this case, F. Adams concedes that in all but one instance he was "exonerated." (Compl. ¶ 77.)

The sole exception involved a complaint filed on November 11, 2000 for discourtesy. (Ex. 22.) But the result of this charge was a recommendation that F. Adams "be counseled regarding his actions and advised to consider more discreet locations for counseling subordinates should a similar situation arise." (Id. at 14.) Being "counseled" does not rise to the level of an adverse action either. Stewart, 275 F.3d at 1136.

B. PRS Score (Count XIII)

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F. Adams also cannot establish an adverse action based on the alleged reduction of his PRS score. (Compl. ¶ 105, 108.) F. Adams participated in the 2000-2002 promotions process to the rank of Lieutenant. (Ex. 4.) He performed well during this process, and finished fifth out of 42 candidates. *(Id.)* The top candidate was another African-American officer named Fredinal Rogers. The USCP promoted Rogers on May 20, 2001. (Ex. 5, I¶ 3.) The Board promoted the officers who finished 2-5, which included Adams, on December 2, 2001. (*Id.* ¶f 4.) F. Adams has failed to allege that he would have been the top candidate if his PRS score had been higher. (Compl. ¶ 85.) Nor can he show that Rogers, who himself is African-American, was promoted instead of F. Adams because of his race. In these circumstances, F. Adams cannot establish an adverse action that would deter a person from complaining about discrimination. Burlington Northern, 126 S. Ct. at 2410-11.

C. Racially Insensitive Remarks

F. Adams contends that he was subjected to a racially hostile work environment because "a black canine was officially named by Defendant as 'Huk,' a derogatory term used by white officers on Patrol Division to refer to black officers and citizens." (Compl. ¶ 78.) He also "avers that white officers often referred to black officers and officials as 'Gangsters' and whites who maintained good working relationships with black officials as a 'FOG' - Friend of Gangsters." (*Id.*) Finally, F. Adams alleges that "white officers often referenced the Metropolitan Police Department as the 'Ghetto Police.' (*Id.*) The record does not support these allegations.

Contrary to F. Adams's allegation, the Board did not name a black canine "Huk." (Compl. ¶78.) The USCP obtained a black labrador from the Animal Control Center of Queen Anne's County on November 17, 2000. (Ex. 23.) The dog's name at the time of the adoption was "Huck" not "Huk." (*Id.*) The Board renamed the dog "Thunder" on or around December 1, 2000. (*Id.*, ¶ 3.) No reasonable trier of fact could conclude that the dog's name created a racially hostile work environment for F. Adams. Notably, this is the only allegation regarding his hostile work environment claim that F. Adams raised with the Board.

The other allegations are plainly more serious. (Compl. ¶ 78.) But F. Adams never complained about these alleged statements. Nor has he claimed that any such statements were made in his presence. Indeed, he has not made any allegations regarding when, where, or who made the derogatory statements. (Id.) F. Adams's failure to make such allegations defeat his hostile work environment claim. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). See also Lester, 290 F. Supp.2d at 32 (noting that plaintiff's decision "not to report" incident "is a further reason [it] does not provide a basis for finding a hostile work environment.").

Moreover, the Board did investigate a claim that an officer used the phrase "friends of gangsters." The USCP determined that a Technician used the phrase in referring to his Sergeant, whom he believed to be overly sympathetic to criminal defendants. The USCP counseled the Technician not to use the term ever again. (Ex. 24.) Even if this term was racially motivated, it would not rise to the level of a hostile work environment against F. Adams. *Lester*, 290 F. Supp.2d at 32 (noting that single letter referencing the Ku Klux Klan was not sufficient to support hostile work environment claim). Furthermore, the Board's prompt investigation and counseling of the Technician who made the remark defeats F. Adams's hostile work environment claim. *Id.*

CONCLUSION

For the foregoing reasons, the USCP requests that the Court dismiss Plaintiffs' Joint Third Amended Complaint with prejudice and enter judgment in favor of Defendant.

Sharon BLACKMON-MALLOY, et al., Plaintiffs, v. UNITED STATES CAPITOL POLICE BOARD, Defend-

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ant.
2008 WL 6968322 (D.D.C.) (Trial Motion, Memorandum and Affidavit)

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