STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-24-394

SHARON ANDERSEN

Plaintiff-Appellant

v.

STATE OF MAINE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendant-Appellee

ON APPEAL FROM THE CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF APPELLEE

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INTRODUCTION

Plaintiff-Appellant Sharon Andersen ("Andersen") appeals the decision of the Superior Court (*Cashman, J.*) granting summary judgment in favor of the Defendant-Appellee, State of Maine, Department of Health and Human Services ("DHHS") on her claim of disability discrimination under the Maine Human Rights Act, 5 M.R.S.A. §§ 4571-4577 (2013) (Supp. 2A, Part II (2024)) ("MHRA"). Andersen claims that she was the victim of a hostile work environment based on her physical or mental disability, and that she was constructively discharged when she resigned her employment from DHHS.

As demonstrated below, the Superior Court properly ruled that (A) any alleged discriminatory conduct occurring before August 18, 2019, was barred by the two-year statute of limitations in the MHRA, and (B) based on the undisputed material facts in the summary judgment record, the two pertinent actions that occurred within the limitations period were not, as a matter of law, sufficient on their own to maintain a disability discrimination claim. The Court should affirm the Superior Court judgment in favor of DHHS.

STATEMENT OF UNDISPUTED FACTS

Factual Background

The summary judgment record shows that there is no genuine issue as to the following facts.

Andersen began her employment with Maine DHHS in approximately 2005. (Defendant's Statement of Material Fact Not in Genuine Issue ("DSMF"), ¶ 1; Appendix ("A.") 0078). From 2005 until August 30, 2019, Andersen was employed by DHHS in the Office of Child and Family Services ("OCFS"), occupying various positions. (DSMF ¶ 1; A. 0078). For the period relevant to this litigation, namely 2018 to August 30, 2019, she was employed by OCFS as a Case Aide, in the Portland, Maine office. (DSMF ¶¶ 1-2; A. 0078). During this relevant period, Andersen was directly supervised by Cynthia Sargent ("Sargent"), an OCFS Adoption Supervisor. (DSMF ¶ 4; A. 0078). She was also in the supervisory chain of command of Assistant Program Administrator Denise Merrill ("Merrill") and Program Administrator Julienne McShane ("McShane"). (DSMF ¶ 5; A. 0079).

Throughout the latter part of 2018 and into early 2019, Andersen received a series of disciplines related to her work performance. (DSMF ¶¶ 6-27; A. 0079-0082). Andersen received a Written Warning in December 2018 for failing to follow supervisors' instructions and misrepresenting facts to a supervisor. (DSMF ¶¶ 22-23; A. 0081). Andersen received a Written Reprimand in January of 2019, for further failing to follow supervisors' directives and failing to complete other job tasks. (DSMF ¶¶ 25-26; A. 0082). Andersen received a proposed two-day suspension in January of 2019, relating to an incident in which Andersen

mistakenly sent confidential and personal information about children in DHHS's custody and foster parents to a large external email list that included hundreds of unauthorized recipients. (DSMF ¶¶ 6-18; a. 0079-0081). Andersen never served the two-day suspension, as she went out on medical leave on January 19, 2019, never to return to work before resigning on August 30, 2019. (DSMF ¶¶ 19-21; A. 0081).

While out on medical leave, Andersen worked with DHHS Human Resources to request a reasonable accommodation under the Americans with Disabilities Act ("ADA") and the MHRA in anticipation of her potential return to work. (DSMF ¶¶ 30-45; A. 0082-0085). In both April and June of 2019, Andersen and her doctor submitted paperwork to DHHS Human Resources explaining Andersen had been diagnosed with Major Depressive Disorder and anxiety attacks and requesting accommodations. (DSMF ¶¶ 30-45; A. 0082-0085).

In April of 2019, both Andersen and her doctor requested that she be allowed to continue her medical leave. (DSMF ¶¶ 31-36; A. 0083-0084). She was permitted to do so by DHHS. (DSMF ¶¶ 36; A. 0084).

In June of 2019, both Andersen and her doctor requested that Andersen, in order to return to work, be reassigned to a different building or department, so her mental health problems were not exacerbated by Sargent or other supervisors at OCFS. (DSMF ¶¶ 37-45; A. 0084-0085). Neither Andersen nor her doctor asked

for any accommodation other than reassignment, nor did either specify which of the essential functions of her job Andersen was incapable of performing due to her disability. (DSMF ¶¶ 37-46; A. 0084-0085).

In response to this request, on July 24, 2019, DHHS's Equal Employment Opportunity Coordinator Kate Wentworth ("Wentworth") explained to Andersen that reassignment was available as an accommodation only when an individual is unable to perform the essential functions of their job due to disability. (DSMF ¶¶ 47-48; A. 0085-0086). Andersen did not make such a claim. (DSMF ¶ 49; A. 0086). Andersen never proposed a different reasonable accommodation. (DSMF ¶¶ 49-51; A. 0089).

Present Litigation

Andersen filed a complaint with the Maine Human Rights Commission ("MHRC") on January 31, 2020, and received a right-to-sue letter on August 19, 2020, without a finding by the MHRC. (DSMF ¶ 68; A. 0028). Andersen filed the complaint in the pending action in Cumberland County Superior Court ("Superior Court") on August 18, 2021. Andersen filed an amended complaint on February 1, 2022. The amended complaint contained three counts. (A. 0045-0055). Count I was for disability discrimination; Count II was for failure to accommodate; and Count III was for retaliation under the MHRA. (A. 0045-0055).

DHHS moved to dismiss the amended complaint. (A. 0181-0192). On August 24, 2022, the Superior Court granted DHHS's motion in part, dismissing her MHRA retaliation claim (Count III) and, with Andersen's consent, dismissing her failure to accommodate claim (Count II). (A. 0199). The trial court declined to dismiss Count I, a claim for disability discrimination based on hostile work environment. (A. 0199). DHHS filed its Answer to the amended complaint on September 15, 2022. (A. 0007).

After the close of discovery, DHHS filed a motion for summary judgment on December 14, 2023. (A. 0057-0077). The Superior Court granted DHHS's motion and entered summary judgment on Count I in favor of DHHS on August 6, 2024. (A. 0014-0033). The Superior Court ruled that any alleged discriminatory conduct occurring before August 18, 2019, was barred by the two-year statute of limitations in the MHRA because the alleged conduct outside the limitations period was not sufficiently similar to the alleged conduct within the limitations period. (A. 0027-0031). The Superior Court then identified two pertinent actions that occurred within the limitations period: DHHS's continued unwillingness to reassign Andersen to a different supervisor as a reasonable accommodation and Andersen's resignation from DHHS. The Superior Court ruled, as a matter of law, that neither of these two actions, on their own or together, were sufficient to maintain a disability discrimination claim. (A. 0032-0033). This appeal followed.

STATEMENT OF ISSUES

I. Whether the Superior Court correctly ruled that the alleged actions taken by DHHS prior to August 18, 2019, were not sufficiently related or similar to those actions taken by DHHS after August 18, 2019, and did not constitute a continuing violation for purposes of a hostile work environment claim and were thus barred from consideration under the statute of limitations.

II. Whether the Superior Court correctly ruled that the actions taken by DHHS after August 18, 2019, were not, on their own, actionable violations of the MHRA that created a hostile work environment sufficient to establish liability for disability discrimination.

III. Whether Andersen failed to generate a genuine issue that DHHS knew about or had notice of her disabilities prior to January 19, 2019, sufficient to attribute any alleged adverse employment actions or hostile work environment to disability discrimination.

IV. Whether Andersen has established that the alleged adverse actions she faced prior to January 19, 2019, were sufficiently severe or pervasive and objectively offensive to constitute a hostile work environment based on disability.

SUMMARY OF ARGUMENT

The Superior Court properly ruled that the discriminatory actions that Andersen alleged occurred before August 18, 2019 (two-years prior to the filing of her complaint), were not sufficiently similar to the ones that she alleged occurred after August 18, 2019, to constitute a continuing violation. The Superior Court was correct in this analysis because the two sets of alleged actions were different in kind, different in frequency, and committed by different actors. Andersen did not carry her burden to show that the two sets of actions emanated from the same discriminatory animus, and thus she cannot rely on the pre-August 18, 2019,

actions to establish a continuing violation for the purposes of her hostile work environment claim. The Superior Court's judgement should be affirmed.

The Superior Court then properly ruled that the actions that occurred after August 18, 2019, namely, DHHS's continued unwillingness to reassign Andersen to a different supervisor or building as a form of reasonable accommodation and Andersen's resignation from DHHS on August 30, 2019, were not violations of the MHRA, nor did they contribute to or were they the product of a hostile work environment. This analysis was correct because employers are not legally required to reassign employees to different supervisors as a reasonable accommodation, and if the refusal was not unlawful or discriminatory, it does not violate the MHRA. Further, Andersen's resignation was not a constructive discharge, which is not an independent cause of action, because it was not in response to present intolerable working conditions or unlawful activity.

Even if the Court disagreed with the Superior Court's reasons for entering judgment for DHHS, the Court should affirm on other grounds. Andersen failed to generate a genuine issue of fact that (1) DHHS's alleged discriminatory conduct occurred because of her disability; (2) the alleged conduct was sufficiently severe or pervasive; and (3) the alleged conduct was objectively offensive to a reasonable person.

First, to prove that DHHS engaged in unlawful discrimination based on a protected category, Andersen must establish that DHHS knew about her protected category status at the time that it engaged in the allegedly discriminatory conduct, and that the conduct was because of that protected category status. Andersen failed to generate a genuine issue of fact that DHHS knew about her disability or was put on sufficient notice of it during the time she allegedly faced a hostile work environment; she thus cannot show that DHHS's allegedly discriminatory conduct occurred because of her disability.

Second, Andersen failed to generate a genuine issue that the alleged adverse actions that she faced prior to January 19, 2019, were sufficiently severe or pervasive to constitute a hostile work environment based on her disability. To carry the burden to show a hostile work environment, Andersen must demonstrate more than just disagreements with her supervisors, unhappiness at work, or occasional unpleasantness from supervisors. The mistreatment Andersen alleges she experienced, even in the light most favorable to her, does not rise to the legal level of severe or pervasive mistreatment as recognized by this Court.

Third, Andersen failed to generate a genuine issue that most of the alleged adverse actions that she faced prior to January 19, 2019, were objectively offensive to a reasonable person. Most of the conduct she cites that allegedly took place at the hands of her supervisors to support her hostile work environment claim are

things like disagreements over office policy, workload assignment, or legitimate disciplines issued to her for misconduct. These are common occurrences in the workplace, and Andersen cannot make a showing that they would be objectively offensive to a reasonable person.

ARGUMENT

Standard of appellate review

The Court reviews a grant of summary judgment *de novo,* viewing the evidence in the light most favorable to the party against whom judgment has been granted to decide whether the parties' statements of material facts and the referenced record materials reveal a genuine issue of material fact. *Doyle v. Dep't of Hum. Servs.,* 2003 ME 61, ¶ 8, 824 A.2d 48. Summary judgment is appropriate when a party establishes that no genuine issue exists as to any material fact and the party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); *Kelly v. Univ. of Me.*, 623 A.2d 169, 171 (Me. 1993). "To survive a defendant's motion for summary judgment, a plaintiff must produce evidence that, if produced at trial, would be sufficient to resist a motion for a judgment as a matter of law." *Prescott v. State Tax Assessor*, 1998 ME 250, ¶ 4, 721 A.2d 169 (quoting *Rodrigue v. Rodrigue*, 1997 ME 99, ¶ 8, 694 A.2d 924).

In opposing a properly supported motion for summary judgment, the non-moving party may not rest "merely upon conclusory allegations, improbable

inferences, and unsupported speculation" to defeat the motion. *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821 (quoting *Vives v. Fajardo*, 472 F.3d 19, 21 (1st Cir. 2007)); *see also Biette v. Scott Dugas Trucking & Excavating, Inc.*, 676 A.2d 490, 494 (Me. 1996) (if the evidence put forth by the non-moving party is merely colorable, or is not significantly probative, summary judgment may be granted in favor of the moving party). Once the moving party has pointed to the absence of adequate evidence supporting the non-moving party's case, the onus is on the non-moving party to present facts that show a genuine issue for trial. M.R. Civ. P. 56(e).

I. THE SUPERIOR COURT CORRECTLY HELD THAT ANDERSEN'S CLAIM OF DISABILITY DISCRIMINATION BASED ON AN ALLEGED HOSTILE WORK ENVIRONMENT MUST BE BASED SOLELY ON UNLAWFUL DISCRIMINATION THAT OCCURRED ON OR AFTER AUGUST 18, 2019, AND THAT ALLEGED CONDUCT OCCURRING PRIOR TO THAT DATE IS TIME BARRED.

In order to establish a hostile work environment claim, Andersen must prove that: (1) she is a member of a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based upon protected class status; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive work environment; (5) the objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and Andersen in fact did perceive it to be

so; and (6) some basis for employer liability has been established. *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 22, 969 A.2d 897; *see also Forrest v. Brinker Int'l Payroll Co., LP*, 511 F.3d 225, 228 (1st Cir. 2007).

DHHS argued below that any alleged discriminatory conduct occurring before August 18, 2019, was barred by the two-year statute of limitations in the MHRA. The Superior Court agreed.

When a defendant raises the affirmative defense of expiration of a statutory limitations period in a motion for summary judgment, "the defendant bears the burden of assembling a record of undisputed facts demonstrating that the plaintiff's action is time-barred by the applicable statute." *Drilling & Blasting Rock Specialists, Inc. v. Rheaume*, 2016 ME 131, ¶ 15, 147 A.3d 824 (citing *Baker v. Farrand*, 2011 ME 91, ¶ 31, 26 A.3d 806). "To survive a limitations defense raised at summary judgment and proceed to adjudication of the facts, a plaintiff, either with or without statements of additional material fact…, bears the burden of demonstrating that the summary judgment record creates a factual dispute about the running of the limitations period." *Id.* (citing *Brawn v. Oral Surgery Assocs., P.A.*, 2006 ME 32, ¶ 10, 893 A.2d 1011 ("When the plaintiff fails to set forth facts showing that there is a genuine issue for trial on a statute of limitations defense, summary judgment may be granted on the ground that the applicable statute of limitations has run.")).

Andersen commenced her suit in Superior Court on August 18, 2021. (A. 0027 & 0044).[1] She received a right-to-sue letter from the MHRC on August 19, 2020. (A. 0027).

Under the MHRA, an "action must be commenced not more than either 2 years after the act of unlawful discrimination complained of or 90 days after any of the occurrences listed under section 4622, subsection 1, paragraphs A to D, whichever is later." 5 M.R.S. § 4613(2)(C). One of the occurrences listed in this statute is that the MHRC "[i]ssued a right-to-sue letter…" 5 M.R.S. § 4622(1)(C). Thus, under the MHRA, a complaint would be timely if it was filed within 90 days after the plaintiff received a right-to-sue letter from the MHRC.

For Andersen, the later of the two options is the two-year limitation. Therefore, unless some exception applied, her claim of disability discrimination based on a hostile work environment must be based on unlawful discrimination that occurred on or after August 18, 2019 – two years prior to the date on which this action was commenced. *See Lakshman v. Univ. of Me. Sys.*, 328 F. Supp. 2d 92, 102 (D. Me. 2004) (eliminating claims under MHRA based on discrete acts of

[1] The complaint contained in the Appendix, is dated August 16, 2021. (A. 0044). However, in the Order on DHHS's Motion for Summary Judgment (A. 0014-0033), the Superior Court found that the action was commenced on August 18, 2021. Whether this action was commenced August 16th or 18th does not affect DHHS's statute of limitations arguments. But for clarity, in this brief, DHHS will use August 18, 2019, as the date this action was commenced as that is the date the Superior Court used in its analysis of the statute of limitations.

discrimination that occurred more than two years before the filing of the complaint in state court).

The Superior Court correctly determined that only two relevant actions in the record occurred after August 18, 2019: 1) DHHS's continuing unwillingness to reassign Andersen to a new supervisor as a reasonable accommodation under the ADA or the MHRA, and 2) Andersen's resignation from her position on August 30, 2019. (A. 0028).

Therefore, in order for Andersen's disability discrimination claim to survive the statute of limitations, either (A) the actions that took place within the limitations period had to be a continuing violation of the actions outside the limitations period, emanating from the same discriminatory animus or (B) the actions within the limitations period had to be, on their own, actionable wrongs sufficient to constitute unlawful disability discrimination. (A. 0027-0033). The Superior Court correctly held that neither of these scenarios applied to Andersen's claims and thus properly granted summary judgment for DHHS on Count I. This Court should affirm.

A. The Superior Court properly held that DHHS's actions within the limitations period were not part of a continuing violation, as they were not substantially similar to the actions alleged to have occurred outside the limitations period.

A hostile work environment claim is different from a claim involving discrete acts. The very nature of this claim involves "an aggregation of a series of

acts in which the 'unlawful employment practice'" took place, and it "cannot be said to occur on any particular day." *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 12, 909 A.2d 629 (quoting *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002)). The continuing violation doctrine allows a claim to be spared from a statute of limitations if "all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Morgan*, 536 at 122. The act within the limitations period serves as the anchor that ties the whole pattern of behavior together to form a timely claim. "A court's task is to determine whether an act about which an employee complains is part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory period." *Id.* at 120.

To determine whether a given alleged action is part of a continuing violation for the purposes of the statute of limitations in a hostile work environment claim, courts consider three factors: (1) whether the conduct within and outside the statute of limitations involves "the same type of employment actions"; (2) whether the conduct occurred "relatively frequently"; and (3) whether the actions were "perpetrated by the same managers." *Id.*; *see also Randall v. Potter*, 366 F. Supp. 2d 104, 115 (D. Me. 2005). These so-called *Morgan* factors help courts and juries assess whether two or more actions or sets of actions "emanat[e] from the same discriminatory animus." *Tourangeau v. Nappi Distribs.*, 648 F. Supp. 3d 133, 212

(D. Me. 2022) (citing *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 53 (1st Cir. 1999)).

The Superior Court correctly considered these *Morgan* factors in comparing the alleged actions taken by DHHS within the limitations period and the alleged actions taken outside the limitations period, and ruled that, "[e]ven in the light most favorable to Andersen, these employment actions do not appear to emanate from the same discriminatory animus." (A. 0031). The Superior Court ruled that Andersen did not marshal the evidence to satisfy these *Morgan* factors, and she could therefore not demonstrate that a dispute of material fact existed as to whether there was a continuing violation. "All the factors show that the employment actions taken by the Department outside and inside the limitations period differ in kind." *Id*. The Superior Court noted specific differences, including, among others: the alleged actions outside the limitations period were mainly committed by Sargent, while the alleged actions outside the limitations period were exclusively committed by Wentworth; Andersen had relatively infrequent contact with Human Resources while she was out on medical leave and was only contacted once by OCFS management while out on medical leave; and no actions involving harassment or mistreatment are even alleged to have taken place within the limitations period, only outside it while Andersen was still working full-time. (A. 0030-0031). As the Superior Court concluded, "Andersen has not carried her

burden to show a dispute of material fact on the issue of a continuing violation." (A. 0031).

Additional evidence from the record shows that the Superior Court's analysis of the *Morgan* factors was correct.[2] First, the decision not to reassign Andersen is not "the same type of employment action[]" that Andersen allegedly experienced outside the limitations period. *Morgan*, 536 U.S. at 120. Prior to going out on medical leave on January 19, 2019, during the time she was still working full-time at OCFS, she claimed that she was, among other things, unfairly criticized, yelled at, disciplined without reason or justification, accused of lying, and insulted on the basis of her intelligence or ability. (DSMF ¶¶ 62-63; A. 0088-0089). She makes no such allegations related to her interactions with DHHS's Human Resources personnel at any point, including within the limitations period. She worked with Wentworth, exclusively, though infrequently, for several months, discussing reasonable accommodations and reassignment. She does not claim to have been harassed or mistreated by Wentworth or anyone in Human Resources the way she alleges she was abused and mistreated by her OCFS supervisors. Andersen even thanked Wentworth for her assistance when Andersen informed

[2] This discussion must necessarily focus only on DHHS's unwillingness to reassign Andersen to a different supervisor or building as a reasonable accommodation, as this was the only *action* taken by DHHS within the limitations period, and the *Morgan* factors require an analysis of *actions*. Andersen's resignation – or alleged constructive discharge – was not an action taken by DHHS. The reasons why her resignation was not a constructive discharge, could not be a standalone claim even if it was, and cannot be used to anchor Andersen's hostile work environment claim are all discussed *infra* at Section I.B.2.

Wentworth of her resignation. (DSMF ¶ 50; A. 0086). A polite, though persistent, denial of a reassignment request is hardly "the same type of employment action[]," *Morgan*, 536 U.S. at 120, that Andersen claims she experienced while at OCFS – which, she claims, was pervasive targeting and abuse.

Second, the denial of Andersen's reassignment request was not something that happened "relatively frequently." *Id.* The decision was made once and communicated to Andersen thereafter whenever she inquired. And the decision was made only after Human Resources reviewed Andersen's situation, considered her medical paperwork, and assessed her ability to perform the essential functions of her job. (DSMF ¶ 48; A. 0086). Importantly though, these considerations and decisions all took place after Andersen went out on medical leave on January 19, 2019, and are wholly unrelated to any of the decisions that might have been made while she was still working full-time at OCFS – which is when she claims that she was frequently abused.

Third, the actions were not "perpetrated by the same managers." *Id.* All of Andersen's allegations outside the limitations period involved her supervisors at OCFS, namely Sargent, but also Merrill and McShane. (DSMF ¶ 61; A. 0088). But within the limitations period, there is no dispute that it was only Wentworth who made the relevant decision – namely on Andersen's request for reassignment. (DSMF ¶¶ 46-50; A. 0085-0086). There is also no dispute that Wentworth had

nothing to do with what allegedly occurred at OCFS during the time outside the limitations period, and Sargent, Merrill, and McShane had nothing to do with Human Resources' decision occurring within the limitations period. (DSMF ¶¶ 46-50; A. 0085-0086). This distinction is important, because if several different managers were all involved, at different times, in making decisions about Andersen, it makes it far less likely that there was a singular "discriminatory animus" animating the decisions of all these different, and in this case, unrelated managers. *Tourangeau*, 648 F. Supp. 3d at 212. The type of connection that is required to link acts outside the limitations period to acts within the limitations period in order to establish a continuing violation is not present here.

The Superior Court correctly ruled, and the record demonstrates, that the actions by DHHS allegedly occurring outside the limitations period cannot be sufficiently anchored to those alleged actions taking place within the limitations period according to the *Morgan* factors. The Superior Court's ruling that DHHS actions taken prior to August 18, 2019, are thus barred by the statute of limitations from consideration in Andersen's disability discrimination claim was proper.

B. The Superior Court properly held that DHHS's alleged actions within the limitations period were not, on their own, actionable wrongs sufficient to maintain a disability discrimination claim.

If all actions taken by DHHS prior to August 18, 2019, are time barred from consideration, that leaves only those actions identified by the Superior Court as

having taken place after August 18, 2019, for consideration in Andersen's suit. Those actions were: 1) DHHS's continuing refusal to reassign Andersen as a reasonable accommodation, and 2) Andersen's resignation (or alleged constructive discharge). (A. 0028).

1. DHHS's refusal to reassign Andersen as a reasonable accommodation.

The Superior Court held that, "[t]he undisputed facts establish that the Department's refusal to accommodate Andersen by reassigning her to a new office or department did not violate the MHRA by creating a hostile work environment based on her disability or otherwise violate her rights under the MHRA." (A. 0032). This holding is supported by overwhelming persuasive authority making clear that DHHS was not under any legal obligation to reassign Andersen as a reasonable accommodation in this situation.

First, under Equal Employment Opportunity Commission ("EEOC") Enforcement Guidance, DHHS is *only* required to consider reassignment as an accommodation as a last resort:

> Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, No. 915.002 (10/17/2002) at "Reassignment."[3] This same analysis also applies to requests for reasonable accommodation under the MHRA.[4]

Second, the EEOC has repeatedly held that employee requests to change supervisors, or to be reassigned to another department to avoid particular supervisors or coworkers, is *not* a reasonable accommodation for a disability under the ADA or the Rehabilitation Act, even where the employee claims that a specific individual exacerbates the conditions of the disability. *E.g.*, *Belton v. Dep't of Veterans Affairs*, 2013 EEOPUB 893 (EEOC 2013).

Third, the federal courts have overwhelmingly adopted this EEOC interpretation, recognizing that the ADA "cannot interfere with an employer's choice of supervisors over a given employee," because "any sort of accommodation that could be construed as essentially insulating" the employee from interacting with a supervisor would be "unreasonable under the ADA." *D'Onofrio v. Costco Wholesale Corp.*, 964 F.3d 1014, 1029, 1031 (11th Cir. 2020). The ADA does not entitle "an employee to a supervisor ideally suited to

[3] Available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#reassignment.

[4] "Because the MHRA generally tracks federal anti-discrimination statutes, it is appropriate to look to federal precedent for guidance in interpreting the MHRA." *See Carnicella v. Mercy Hosp.*, 2017 ME 161, ¶ 20 n.3, 168 A.3d 768.

her needs." *Sessions v. Univ. of Penn.*, 739 F. App'x 84, 88 (3rd Cir. 2018). Employees, even ones with covered disabilities, are not entitled to be "restricted from visual or verbal contact with [their] direct supervisor," as that "is effectively a request for a new supervisor" which is "per se unreasonable." *Roberts v. Permanente Med. Grp. Inc.*, 690 F. App'x 535, 536 (9th Cir. 2017). Even in situations where reassignment "is within the realm of possible reasonable (and therefore required) accommodation," an employer is not legally obligated to transfer or reassign an employee for the purpose of allowing that employee to avoid contact with certain other employees. *Coulson v. Goodyear Tire & Rubber Co.*, 31 F. App'x 851, 858 (6th Cir. 2002).[5]

In this case, Andersen sought reassignment in June of 2019, for the sole purpose of avoiding her supervisors, especially Sargent. (DSMF ¶ 50; A. 00086). This situation does not mandate reassignment as a reasonable accommodation. Wentworth informed Andersen that DHHS was obligated to first assess whether there were accommodations available to allow Andersen to remain in her current position. (DSMF ¶ 47-48; A. 0085-0086). This obligation was not just based on a

[5] *See also Bradford v. City of Chicago*, 121 F. App'x 137 (7th Cir. 2005) (holding that an employee with a mental health condition that was allegedly aggravated by certain co-workers was not entitled to reassignment away from those co-workers); *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576 (3rd Cir. 1998) (an employee who had depression and anxiety was not entitled to be transferred away from the people allegedly causing him stress); *Deister v. Auto Club Ins. Ass'n.*, 647 F. App'x 652, 658 n.2 (6th Cir. 2016) ("[A]n employer is not obligated to honor, as a 'reasonable accommodation,' an employee's request for assignment to a different supervisor.")

personal policy or a predilection of Wentworth's – it was also consistent with EEOC guidance and case law.

In the ADA paperwork that Andersen submitted to DHHS Human Resources in June of 2019, there is no dispute that neither Andersen nor her doctor ever specified which of the essential functions of her job, if any, she could not perform – a necessity if reassignment is to be considered. (DSMF ¶¶ 37-45; A. 0084-0085). Wentworth was on sound legal and factual footing when she said, "[a]t first glance I am not seeing where you might qualify for a reassignment as you *can perform* the essential functions of your job." (DSMF ¶ 47; A. 0085-0086).[6] Andersen never contested Wentworth's assertion. (DSMF ¶ 49; A. 0086).

The decision not to grant Andersen a reassignment was not "an unlawful" or "actionable employment practice." *See Morgan*, 536 U.S. at 120-21. The law does not require that employers surrender personnel and supervisory decisions to their employees. Therefore, as the Superior Court noted, that decision cannot be viewed as contributing to a hostile work environment. (A. 0032). If the decision to not reassign Andersen was lawful, it cannot create a hostile work environment. It would be illogical if the law, on the one hand, permitted an employer to deny

[6] This was not a complete denial of *any* reasonable accommodation, of course. Andersen was never told that she did not qualify for *some* reasonable accommodation, that she did not have a covered disability, or that Wentworth or DHHS Human Resources would not work with her any further. (DSMF ¶ 54; A. 0087). She was simply told that unless Wentworth got more information, Andersen likely did not qualify for reassignment. (DSMF ¶¶ 48, 54; A. 0086-0087).

reassignment as an accommodation, but then, on the other hand, allowed for that same lawful denial to serve as the basis for a hostile work environment claim.

Andersen initially brought a discrete claim for failure to accommodate a disability under the MHRA, but subsequently consented to that claim's dismissal at the motion to dismiss stage. The Superior Court, at that point, ordered that voluntary dismissal and allowed only the hostile work environment claim to proceed. (A. 0199). Andersen should not be allowed to now use a claim that she voluntarily dismissed (failure to accommodate) as the basis to resurrect a different claim on appeal, either by claiming the failure to accommodate was a continuing violation or a discrete, actionable wrong.

2. Andersen's voluntary resignation/alleged constructive discharge

The Superior Court also examined Andersen's contention that her August 30, 2019, resignation from DHHS was a constructive discharge for purposes of her MHRA discrimination claim. The Superior Court explained that:

> [C]onstructive discharge is not a standalone claim. It is simply a way of satisfying the adverse employment action element of an otherwise complete claim for unlawful employment discrimination. Here, where all other factors argued to constitute an intolerable work environment are either outside the statute of limitations period or are not unlawful, Andersen's resignation cannot be the basis for the Department's liability for disability discrimination.

(A. 0033) (internal citations and quotations omitted).

The doctrine of constructive discharge may be used by a plaintiff in state or federal court to "satisfy the elements of 'discharge' or 'adverse employment action' in an otherwise actionable claim,"[7] but "treating constructive discharge as an independent cause of action would be fundamentally inconsistent with existing employment law." *Levesque*, 2012 ME 114, ¶ 8, 56 A.3d 1227. If constructive discharge does not "exist as an independent cause of action," *Id.*, ¶¶ 8-9, then, by the correct reasoning of the Superior Court, Andersen cannot save her disability discrimination claim by relying solely on it once all other allegedly unlawful or hostile practices supposedly causing the constructive discharge have been ruled time barred or lawful. (A. 0033).

In any event, as shown below, Andersen cannot satisfy the elements of a constructive discharge on this summary judgment record.[8]

"To prove constructive discharge, a plaintiff must usually 'show that working conditions were so difficult or unpleasant that a reasonable person in [her]

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[7] "Both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1) (2012), and the Maine Human Rights Act, 5 M.R.S. § 4572(1)(A) (2011), prohibit the unlawful discriminatory discharge of an employee." *Levesque v. Androscoggin Cty.*, 2012 ME 114, ¶ 8 n.2, 56 A.3d 1227.

[8] A constructive discharge claim automatically fails on the merits if there is not a hostile work environment claim that can be sustained. *See Pa. State Police v. Suders*, 542 U.S. 129, 149 (2004) ("Creation of a hostile work environment is a necessary predicate to a hostile-environment constructive discharge."); *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 28 (1st Cir. 2002) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment."); *Teague v. Brennan*, 2015 WL 3910192, at *9 (D. Mass. 2015) ("[W]here [plaintiff's] hostile work environment claim is insufficient, her constructive discharge claims also fail[].")

shoes would have felt compelled to resign.'" *Lee-Crespo v. Schering-Plough Del Caribe, Inc.*, 354 F.3d 34, 45 (1st Cir. 2003) (quoting *Marrero*, 304 F.3d at 28). The standard by which unpleasantness or difficulty are measured is an objective one, and "an employee's subjective perceptions do not govern." *Id.* "It is not enough that a plaintiff suffered 'the ordinary slings and arrows that workers routinely encounter in a hard cold world.'" *Id.* (quoting *Suarez v. Pueblo Inter., Inc.*, 229 F.3d 49, 54 (1st Cir. 2000)). "'Constructive discharge' usually refers to 'harassment so severe and oppressive that staying on the job while seeking redress—the rule save in exceptional cases—is 'intolerable.'" *Id.* (quoting *Keeler v. Putnam Fiduciary Trust Co.*, 238 F.3d 5, 9-10 (1st Cir. 2001)).

Here, Andersen did not generate a genuine issue of fact that she experienced conditions sufficient to meet the steep burden to demonstrate that she was "compelled to resign." For one thing, at the time of her resignation on August 30, 2019, Andersen had been out on medical leave since January 19, 2019. (DSMF ¶ 20-21; A. 0081). She was not in the office during those seven months and was not interacting with Sargent or any other supervisor or co-worker. (DSMF ¶ 20-21, 61; A. 0081, 0088). She was not told on or around August 30, 2019, that if she did not make some decision immediately, she would be forced to resign or be terminated. (DSMF ¶ 53-54; A. 0087).

Andersen's alternative to resignation on August 30, 2019, was to continue to stay out on medical leave and to continue to work with Wentworth and DHHS Human Resources on trying to find another accommodation that might suit her needs. (DSMF ¶ 54; A. 0087). Being home and occasionally communicating via phone or email with DHHS Human Resources personnel, even if the conversations were disappointing, could hardly be described as "intolerable" or even harassment.

The court in *Lee-Crespo* confronted a similar situation to the one at issue here. There, an employee went out on extended medical leave, and while out on leave, the company asked for the return of her company car and other equipment, and it insisted that the employee schedule an appointment with the company physician. 354 F.3d at 46. The First Circuit held that these actions by plaintiff's employer did not constitute "conditions that were so difficult or unpleasant as to force a reasonable person to resign." *Id.* What Andersen experienced while on medical leave is far less difficult or unpleasant than what the plaintiff in *Lee-Crespo* experienced. Andersen was left alone by her OCFS supervisors while on leave, except for one phone call from McShane to check in on her status. (DSMF ¶ 61; A. 0088). If the conditions of having a car taken away and being forced to see a doctor not of her choosing were not enough to create "intolerable" conditions for the plaintiff in *Lee-Crespo*, then Andersen's conditions (being left almost entirely

alone while out on medical leave) are not, when seen objectively, so "intolerable" that she had no choice but to resign.

If, as a matter of law, Andersen's resignation is not a "constructive discharge" by an objective standard, then her resignation was voluntary.[9] If her resignation was voluntary, then it was not an adverse employment action because she was not "subject" to an "action that materially change[d] the conditions of [her] employment." *Sullivan v. St. Joseph's Rehabilitation & Residence*, 2016 ME 107, ¶ 14, 143 A.3d 1283. Andersen chose to resign, and that action cannot be lawfully attributed to DHHS, either as a standalone claim or as part of a continuing violation.

C. Andersen has waived any argument regarding the statute of limitations and continuing violation issues.

As shown above, the Superior Court based its ruling on the statute of limitations and the continuing violation issues. As a result, all but two actions of DHHS were ruled to be outside the limitations period. Andersen has little chance of resurrecting her claim without arguing that that ruling by the Superior Court, barring consideration of all actions other than the two occurring post-August 18, 2019, was wrong. She does not make that argument on appeal.

At no place in Andersen's Brief will the Court find a discussion of the statute of limitations, the continuing violation theory, or the *Morgan* factors that

[9] Andersen admits as much anyway. (DSMF ¶ 53; A. 0087).

compare actions to test if they emanate from the same or a shared "discriminatory animus." *Tourangeau*, 648 F. Supp. 3d at 212. Therefore, Andersen has waived these arguments on appeal. *See Thurston v. Galvin*, 2014 ME 76, ¶ 5 n.1, 94 A.3d 16 (an issue not briefed on appeal is deemed waived); *Halliday v. Henry*, 2015 ME 61, ¶ 10 n.4, 116 A.3d 1270 (listing examples of situations when an argument is waived for lack of briefing).

II. THE SUMMARY JUDGMENT RECORD DOES NOT CONTAIN EVIDENCE SUPPORTING ANDERSEN'S CLAIM THAT SHE WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT DURING HER EMPLOYMENT.

Even if the Court disagrees with DHHS's and the Superior Court's analysis of the statute of limitations and the continuing violation issues, and their nearly dispositive effect on Andersen's claims, her hostile work environment claim also fails even if the Court were to consider the whole record, including the alleged actions occurring before August 18, 2019. This Court may affirm the Superior Court judgment on different grounds in its *de novo* review of the decision. *See Sears, Roebuck & Co. v. State Tax Assessor*, 2012 ME 110, ¶ 13, 52 A.3d 941 (affirming judgment on alternative grounds); *Schlear v. James Newspapers, Inc.*, 1998 ME 215, ¶ 6, 717 A.2d 917 ("a court order, even if entered for an erroneous reason, will be affirmed if there is a valid basis for the order"); *Bakal v. Weare*, 583 A.2d 1028 (Me. 1990) (affirming an erroneously-reasoned order granting summary judgment on other grounds).

In order to establish a hostile work environment claim, Andersen must prove that: (1) she is a member of a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based upon protected class status; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) the objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) some basis for employer liability has been established. *Watt*, 2009 ME 47, ¶ 22, 969 A.2d 897 (citing *Forrest*, 511 F.3d at 228). Andersen failed to generate a genuine issue of fact that (1) DHHS's alleged conduct occurred because of her disability; (2) the alleged conduct was sufficiently severe or pervasive; and (3) the alleged conduct was objectively offensive to a reasonable person.

A. Andersen failed to generate a genuine issue of fact that the alleged conduct occurred based on her disability.

To succeed on a hostile work environment claim, Andersen must show that the hostile environment she faced was based upon her membership in a protected class. *See O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-787 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993). Andersen failed to generate a genuine issue of fact that the alleged conduct occurred because of her disability.

First, the record reflects that Andersen's OCFS supervisors were not aware that she had a disability. "In order to find that an employer discriminated against an employee 'because of' the employee's disability under the A.D.A. the employer must be properly charged with knowledge or notice of the employee's disability." *Clapp v. Northern Cumberland Memorial Hosp.*, 964 F. Supp. 503, 505 (D. Me. 1997). "[V]ague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the ADA." *Morisky v. Broward Cnty.*, 80 F.3d 445, 448 (11th Cir. 1996).

There is no genuine dispute in the record that no supervisor within DHHS knew that Andersen had a disability prior to her departure on medical leave on January 19, 2019. Neither Sargent nor McShane knew anything about her disability at any point while she was working for them. (DSMF ¶ 55; A. 0087). Neither Sargent nor McShane considered, discussed, or raised any health or disability related concerns about Andersen when they participated in drafting disciplines for her. (DSMF ¶¶ 56-57; A. 0087-0088). Further, Andersen herself does not recall ever speaking to anyone at OCFS about her diagnosis prior to January 19, 2019, when she went out on medical leave, let alone to any of her supervisors specifically. (DSMF ¶¶ 58-60; A. 0088). Andersen does not even recall when she was specifically diagnosed with any mental health disabilities. (DSMF ¶ 58; A. 0088). She did not recall whether those diagnoses occurred

before or after she went out on medical leave. (DSMF ¶ 59; A. 0088). If Andersen does not know when these things happened, then she cannot establish – and did not establish on this record – when or if her supervisors knew about them.

Further, the record establishes that Andersen does not believe that any of DHHS's alleged conduct occurred "because of her disability." Andersen testified at her deposition that she thought Sargent's behavior toward her was a response to the mistake that she made in 2018, wherein she disclosed confidential information to several unauthorized individuals via email. (DSMF ¶¶ 65-67; A. 0089). And Andersen could not think of "any other reason" why Sargent would treat her badly. (DSMF ¶ 66; A. 0089). Nor could she think of any other instances in which she was treated poorly by anyone because of her disability. (DSMF ¶ 67; A. 0089). Without that connection, her hostile work environment claim fails as a matter of law.

B. Andersen failed to generate a genuine issue of fact that the alleged conduct was severe or pervasive.

"Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment." *Doyle*, 2003 ME 61, ¶ 23, 824 A.2d 48. The standard is in place to screen out those hostile work environment claims that, if presented to a jury, would effectively turn federal and state anti-harassment legislation into general workplace civility codes. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Andersen

failed to generate a genuine issue of fact that the alleged conduct she faced was severe or pervasive.

In determining whether the conduct is severe or pervasive, this Court and other courts look at all the relevant circumstances including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Doyle*, 2003 ME 61, ¶ 23, 824 A.2d 48 (internal quotations omitted); *see also Landrau-Romero v. Banco Popular De P.R.*, 212 F.3d 607, 613 (1st Cir. 2000). To establish a hostile environment claim, "conduct must be extreme and not merely rude or unpleasant to affect the terms and conditions of employment." *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 993 (8th Cir. 2003) (quotations omitted). Such cases require proof of "severe or pervasive," "extreme," and "offensive" conduct. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). "[T]he workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins." *Flood v. Bank of America Corp.*, 780 F.3d 1, 12 (1st Cir. 2015).

Andersen does not allege conduct that rises to the level of severe or pervasive harassment. Andersen largely describes three categories of conduct from DHHS that she alleges were discriminatory and created a hostile work environment. The first category contains allegations that are largely vague and

conclusory.[10] Andersen alleges that her supervisors were "constantly criticizing [her] job performance," "reprimanding [her] for no reason," "yelling at [her]," "treating her poorly," and making rude comments. (DSMF ¶ 63; A. 0089). Not one of these alleged statements is supported by the factual record outside of Andersen's own testimony, and even there, she did not provide any details to support these assertions. (DSMF ¶ 66; A. 0089). The only instance that Andersen alleges with any detail is that Sargent apparently told her at one point that "there was something wrong with her brain" and that Sargent called her a "sneaky liar." (DSMF ¶ 64; A. 0089).

Sargent denies these accusations. (DSMF ¶ 64; A. 0089). But even if they were true, these statements, although rude and insensitive, do not constitute severe or pervasive harassment. "Toiling under a boss who is tough, insensitive, unfair, or unreasonable can be burdensome, but Title VII does not protect employees from the ordinary slings and arrows that suffuse the workplace every day." *Ahern v. Shinseki*, 629 F.3d 49, 59 (1st Cir. 2010) (quotations omitted); *see also Paul v. Johnson*, 2013 WL 5299399, at **7-8 (D. Mass. Sept. 17, 2013) (being subjected to greater supervision, given a temporary warning letter, losing telework privileges, and work being criticized by supervisor not objectively severe or overtly offensive).

[10] *See infra* at Section II.C for discussion of the other two categories.

In *Doyle*, this Court considered a situation where a supervisor made an unprofessional comment to an employee about a recent bowel surgery that the employee had undergone. The supervisor suggested that the employee should go to the bathroom, because the supervisor did not want to have to "clean up" any mess that the employee might make due to the surgery. The comment "may have been offensive and in poor taste," but the Court held that it was not "conduct sufficiently severe or pervasive to constitute a hostile work environment." *Doyle*, 2003 ME 61, ¶ 25, 824 A.2d 48. If that comment in *Doyle* was not considered severe or pervasive, when the supervisor knew about the employee's disability and was intentionally making a derogatory comment to the employee about it, then Sargent's alleged comments, even considered in the aggregate with the other conduct that Andersen alleges, do not constitute severe or pervasive harassment under *Doyle*.[11]

C. Andersen failed to generate a genuine issue of fact that the alleged conduct was objectively offensive to a reasonable person.

The other two categories of conduct that Andersen alleged contributed to a hostile work environment are not severe or pervasive either (see *supra* at Section II.B), but these categories are also not objectively offensive to a reasonable person,

[11] *See also Murray v. Warren Pumps, LLC*, 821 F.3d 77, 87 (1st Cir. 2016) ("snide comments" at issue fell "into the category of isolated, stray remarks whose substance and frequency cannot provide adequate foundation for a hostile work environment claim); *Faragher*, 524 U.S. at 788 ("[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.") (internal quotation marks and citation omitted).

an independent and separate element of a hostile work environment claim. *Watt*, 2009 ME 47, ¶ 22, 969 A.2d 897. The second category of allegations Andersen makes against DHHS include her disagreements with how policies were enforced, or how management decisions were made by her supervisors. Her allegations include several mundane instances including being asked legitimate questions about her performance.[12] The question is not just whether Andersen subjectively found this conduct offensive or upsetting, but also whether a reasonable person would objectively find it offensive. The standard by which unpleasantness or difficulty are measured is also an objective one, and "an employee's subjective perceptions do not [alone] govern." *Lee-Crespo*, 354 F.3d at 45. "It is not enough that a plaintiff suffered 'the ordinary slings and arrows that workers routinely encounter in a hard cold world.'" *Id.*

The final category of allegations relates to disciplines that Andersen received. During the latter half of 2018 and into early 2019, Andersen received one written warning, one written reprimand, and a proposed two-day suspension that she never served. (DSMF ¶¶ 15-27; A. 0080-0082). Andersen disputes the basis of the two written disciplines, but she admits to the mistake that she made

[12] These actions additionally include: Andersen's workspace being moved on the office floor; Andersen having to be "constantly" on the road fulfilling the duties of her job; being yelled at for not conducting due diligence searches properly; a color printer being moved from Andersen's desk to a new location; Sargent's refusal to approve Andersen's inaccurate timecard; and Andersen being told she needed to rent a car if hers was in the shop so that she could provide transportation for children in DHHS custody. (DSMF ¶ 62; A. 0088).

that resulted in the proposed two-day suspension. (DSMF ¶¶ 15-27; A. 0080-0082). Whether Andersen agrees that she did anything wrong sufficient to warrant the disciplines, the disciplines lay out specific, non-discriminatory reasons for their issuance. (DSMF ¶¶ 15-27; A. 0080-0082). The disciplines relate to Andersen's performance issues and nothing else. (DSMF ¶¶ 15-27; A. 0080-0082).

On their face, the disciplines issued to Andersen are measured, non-insulting, and provide steps for Andersen to take to avoid future problems. They are hardly what one could accurately describe as "extreme," and certainly not "objectively offensive." *Watt*, 2009 ME 47, ¶ 22, 969 A.2d 897

Andersen failed to generate an issue of fact that her supervisors at OCFS were on notice about her disability and that it was the basis of any discriminatory conduct, that she experienced severe or pervasive mistreatment and harassment because of her disability, or that the treatment she experienced was objectively offensive. Because she cannot establish these three elements based on the summary judgment record, her hostile work environment claim fails. The Superior Court's judgment in favor of DHHS should be, alternatively, affirmed on those grounds.

CONCLUSION

For all of the foregoing reasons, the decision of the Superior Court granting summary judgment in favor of DHHS should be affirmed.

Dated: January 21, 2025

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CERTIFICATE OF SERVICE

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