PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2275

KRISTIN COSBY,

Plaintiff – Appellant,

v.

SOUTH CAROLINA PROBATION, PAROLE & PARDON SERVICES,

Defendant – Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., Senior District Judge. (6:20-cv-00655-HMH)

Argued: September 19, 2023 Decided: February 27, 2024

Before AGEE, WYNN, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge Agee wrote the opinion in which Judge Wynn joined. Judge Thacker wrote a dissenting opinion.

ARGUED: Courtney C. Atkinson, METCALFE & ATKINSON, LLC, Greenville, South Carolina, for Appellant. Richard James Morgan, BURR & FORMAN LLP, Columbia, South Carolina, for Appellee. **ON BRIEF:** G. Wade Leach, III, BURR & FORMAN LLP, Columbia, South Carolina, for Appellee.

AGEE, Circuit Judge:

Kristin Cosby appeals the district court's order granting summary judgment to South Carolina Probation, Parole & Pardon Services ("SCPPP") on Cosby's gender discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–17. After a careful review of the record, we affirm.

I.

In 2006, Cosby started working for SCPPP—a state agency that supervises criminal offenders on probation and parole. Cosby left the agency four years later but sought reemployment with SCPPP in 2012. Cosby was denied the position she sought, however, and "was advised by [SCPPP] that they wanted to hire a male [for] the position." J.A. 267. In response, Cosby filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC sided with Cosby and entered a finding of discrimination against SCPPP, which agreed to rehire Cosby in October 2012.

Upon her rehiring, Cosby was supervised by Chadwick Gambrell, the Agent-in-Charge ("AIC") of Cosby's office, though only for a short time.[1] Gambrell became Cosby's supervisor again in December 2017.

In March 2018, Gambrell sought input from Cosby on filling a position on Cosby's team. Cosby recommended Christina Worthy. Gambrell questioned Cosby's choice as "he

[1] There is no evidence in the record—none—that Gambrell was involved in SCPPP's initial decision not to rehire Cosby, that he knew of Cosby's EEOC charge of discrimination, or that he "handled [Cosby's] forced rehiring." Opening Br. 23; *cf. post* at 34, 36.

suspected that Cosby and Worthy had more than a professional relationship." *Cosby v. S.C. Prob., Parole & Pardon Servs.*, C.A. No. 6:20-00655-HMH-JDA, 2021 WL 4772094, at *2 (D.S.C. Oct. 13, 2021) (cleaned up). Although at the time there was no SCPPP policy that specifically prohibited romantic or sexual relationships between supervisors and subordinates, Gambrell believed that such relationships violated SCPPP's general professionalism policy. Gambrell raised this concern with Cosby, stressing the importance of strictly professional relationships between supervisors and their subordinates. Cosby assured him that her relationship with Worthy, however, was purely professional.

In September 2018, Cosby applied for a promotion. Shortly thereafter, Gambrell again became concerned that Cosby was having inappropriate relationships with subordinates. "[A]fter some issues came up with another agent," Gambrell came to believe that Cosby had "moved on from Worthy" and "was concentrating on somebody else." *Id.* (cleaned up). As a result, he and the Assistant Agent in Charge ("AAIC") Robert Honeycutt counseled Cosby on this issue.

Not long after, on October 19, 2018, Cosby filed an internal complaint against Gambrell and Honeycutt. In its entirety, the complaint read:

> AAIC Honeycutt and AIC Gambrell have created a hostile working environment for me and some members of my team, to the point where I have been afraid to come to work, not for physical reasons but psychological reasons. I feel as though I am being harassed and repeatedly counseled for things that I am not explained how to fix, or some things that I have not been trained. This harassment has extended to members of my team, to where one of them perceived a threat by AAIC Honeycutt on one occasion based off a statement that was made. My agents have been made to feel as though they are not trusted and do not know how to proceed with me, making my job extremely difficult to do. I have felt attacked how AAIC Honeycutt approached me with issues, working off of wrong information or a

> misunderstanding of the information without gathering the facts before addressing the situation with me. This is consistent behavior by AAIC Honeycutt and his approach with dealing with me. He berates and attacks me, and does not provide any coaching or development, making it difficult to interact with him as my immediate supervisor. AAIC Honeycutt and AIC Gambrell have created an environment to [sic] which I cannot succeed. I have consistently done certain things since AAIC Honeycutt became my supervisor and now for no reason has become an issue and repeated counseling sessions. I have made attempts to make changes, but I am still being told repeatedly to communicate, communicate, communicate, you're not communicating. I am confused as to why he keeps saying that I do not communicate, inferring a failure or noncompliance on my part. Despite my efforts to better the situation, he has failed to provide guidance as to how I can achieve this. Some of my agents have felt as though AAIC Honeycutt and AIC Gambrell have created an environment for which they cannot thrive. All of this seems to come our to [sic] nowhere for no reason, to which I have to question their motivation. After being told I am the hardest working one in the office, my work is being questioned.

J.A. 434.

Given that Cosby complained of a "hostile working environment," SCPPP Director Jerry Adger referred the matter to the SCPPP Office of Professional Responsibility ("OPR"), which is responsible for investigating potential Title VII issues. OPR Director Jeffrey Harmon then interviewed Cosby. According to Harmon's written notes, Cosby expressed frustration that Gambrell and Honeycutt "were constantly meeting with her concerning her poor communication with management" and "was concerned that her managers asked her about an [unsubstantiated] allegation of misconduct." J.A. 481. There's no evidence that Cosby ever told Harmon, or anyone else at SCPPP, that her internal complaint related to perceived mistreatment based on her sex.

After speaking with Cosby, Harmon determined that the complaint involved a communication issue rather than a hostile work environment claim based on a protected

ground (i.e., Cosby's gender). After reviewing Harmon's findings, Adger "decided [Cosby's complaint] was not a matter for OPR to investigate" and "remanded" the complaint to the appropriate SCPPP division. J.A. 553–54.

On November 7, 2018, Gambrell first learned of Cosby's complaint against him. The next day, Gambrell met with Nicole Albany, one of Cosby's past subordinates, to discuss her interactions with Cosby.[2] During this meeting, Albany told Gambrell that she and Cosby had a consensual sexual encounter in 2015, when she was Cosby's subordinate; that their relationship later turned hostile; and that Cosby removed Albany from her team, affecting Albany's pay and job performance.[3]

Gambrell reported Albany's allegations to Adger, who referred the matter to Harmon for an investigation into whether Cosby had created a hostile working environment for Albany. Harmon interviewed Albany, who repeated her allegations concerning Cosby. Harmon also met with Gambrell and Honeycutt, who provided documentation dating back

[2] Gambrell later testified that when he interviewed Albany, his investigation into Cosby concerning inappropriate relationships with subordinates was "open and ongoing." J.A. 629; *see also Cosby*, 2021 WL 4772094, at *3.

[3] At a state administrative hearing regarding her law enforcement certification, Cosby testified that, in 2015, she told her then-AIC Greg Stewart that Albany was "making advances towards [her]" and "was becoming angry and a little bit hostile because [Cosby] was not accepting her advances." J.A. 292. For that reason, Cosby testified, she asked Stewart to move Albany off her team. Cosby's testimony did not indicate that she ever told Stewart, or anyone else, that she and Albany had a romantic "relationship" or "interaction," as the dissent contends. *Post* at 35 & n.1; *cf. post* at 36.

to January 2017 reflecting that Cosby needed improvement in communication and professionalism with her supervisors.[4]

Harmon then met with Cosby (now for the second time). After encouraging Cosby to be truthful and warning that she could be subjected to disciplinary action if it was later determined that she had been untruthful, Harmon asked her about Albany's allegations. Cosby denied any sexual relationship with Albany. Harmon then told Cosby that a polygraph examination would be scheduled and that refusal to participate could subject her to termination. Harmon also told Cosby that she could amend her statement any time before the polygraph.

In the following days, Cosby told Harmon that she would consent to the polygraph but that she wanted to amend her statement to now say that Albany *attempted* to have a sexual encounter with her but that it never came to fruition because Albany was "interrupted." J.A. 485.

Cosby's polygraph took place on December 17, 2018. Immediately before and during the polygraph, Cosby again denied ever having a sexual relationship with Albany.

After the examination, the administrator informed Cosby that she was being deceptive and had failed the polygraph. At that point, Cosby admitted the truth of Albany's allegations and provided a voluntary handwritten statement confirming the same. Based on this admission, Harmon determined that Cosby had made false statements during the course

[4] The same documentation "also included praise for work that was done by Team Leader Cosby and plans for improvement in areas of weakness including communication." J.A. 481.

of an internal OPR investigation, in violation of SCPPP's policies. Accordingly, he recommended that Cosby's employment be terminated.[5]

Before SCPPP acted on that recommendation, on December 19, 2018, Cosby tendered a letter of resignation. Two weeks later, Adger notified the South Carolina Criminal Justice Academy that Cosby's employment had been terminated due to statutorily defined misconduct.[6] As a result, Cosby's law enforcement certification was permanently revoked.

Cosby then filed another charge with the EEOC, alleging gender discrimination and retaliation based on the OPR investigation and her resulting separation from SCPPP. The EEOC dismissed Cosby's charge and issued her a right-to-sue letter. Cosby in turn sued SCPPP in South Carolina state court, alleging gender discrimination and retaliation in violation of Title VII, among other claims not at issue here. SCPPP removed the case to federal court and sought summary judgment on Cosby's Title VII claims. The matter was referred to a magistrate judge for a report and recommendation, who recommended granting SCPPP's motion in full. Over Cosby's objections, the district court adopted the report and recommendation and granted summary judgment to SCPPP.

Cosby now appeals, and we have jurisdiction under 28 U.S.C. § 1291.

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[5] Eventually, OPR also closed its separate investigation into Cosby's 2018 internal complaint, determining that its allegations were unfounded.

[6] There's some dispute between the parties as to whether Cosby's resignation letter was properly accepted or communicated and thus as to whether Cosby officially resigned or was terminated. This dispute is immaterial for purposes of this appeal.

II.

We review the district court's summary judgment award de novo. *Ballengee v. CBS Broad., Inc.*, 968 F.3d 344, 349 (4th Cir. 2020). In doing so, we "view[] all facts and reasonable inferences in the light most favorable to the nonmoving party." *Id.* Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III.

Cosby argues that the district court erred in granting summary judgment to SCPPP on her Title VII gender discrimination and retaliation claims. As explained below, we disagree.

A.

We begin with Cosby's gender discrimination claim.

Under Title VII, an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

Here, Cosby's gender discrimination claim proceeds under two distinct theories of liability: disparate treatment and hostile work environment. We consider each theory in turn.

1.

To establish a prima facie case of disparate treatment, a plaintiff must prove four elements: "(1) membership in a protected class; (2) satisfactory job performance; (3)

adverse employment action; and (4) different treatment from similarly situated employees outside the protected class." *Coleman v. Md. Ct. of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010).

Consistent with the magistrate judge's recommendation, the district court concluded that Cosby failed to identify a valid comparator for purposes of the fourth element.[7] Cosby challenges that determination on appeal.

The similarly situated element requires a plaintiff to "provide evidence that the proposed comparators are not just similar in *some* respects, but 'similarly-situated *in all respects*.'" *Spencer v. Va. State Univ.*, 919 F.3d 199, 207–08 (4th Cir. 2019) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)). To that end, the plaintiff must prove that she and the comparator "dealt with the same supervisor, were subject to the same standards[,] and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Haynes v. Waste Connections, Inc.*, 922 F.3d 219, 223–24 (4th Cir. 2019) (cleaned up). To be sure, "a comparison between similar employees will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances." *Id.* at 223 (cleaned up). Nonetheless, "[t]he similarity between comparators and the seriousness of their respective offenses must be clearly established in order to be meaningful." *Lightner v. City of Wilmington*, 545 F.3d 260, 265 (4th Cir. 2008).

[7] SCPPP concedes that Cosby has satisfied the other elements.

Here, Cosby proffers four male comparators, none of whom qualifies as similarly situated for purposes of her disparate treatment claim.[8]

Three of the four identified comparators are agents who worked in Cosby's office and applied for the same promotion that Cosby sought in September 2018. Unlike Cosby, these three individuals received interviews for the promotion,[9] "were not subjected to similar and repeated investigations for conduct that did not violate [SCPPP's] policies, and were not forced to resign." Opening Br. 11.

But Cosby provided no evidence that any of these agents were also accused or suspected of having a sexual relationship with a subordinate that adversely affected the subordinate's employment, or of engaging in any similar conduct. *Cf.* J.A. 621 (Harmon testifying that Albany's allegations that her employment was negatively affected by the ending of her relationship with Cosby prompted an investigation into whether Cosby created a hostile work environment for Albany). Absent evidence that these three male agents "engaged in the same conduct" as Cosby, they cannot serve as valid comparators.

[8] Cosby also points to an unnamed female candidate that received an interview and was not subjected to any investigations. But that does nothing to further her claim of disparate treatment based on gender: the comparator must be "*outside* the protected class." *Coleman*, 626 F.3d at 190 (emphasis added).

[9] Cosby was not interviewed for the promotion because she was no longer employed with SCPPP when the interviews occurred in February 2019.

Haynes, 922 F.3d at 223–24 (citation omitted). Consequently, the district court properly found that these three male agents were not similarly situated to Cosby.[10]

[10] In the dissent's view, our analysis as to these three comparators is flawed because it applies a "disparate discipline" theory instead of a "failure to promote" theory. *Post* at 41 (emphases omitted). Under the latter theory, the dissent represents, Cosby establishes a prima facie case of discrimination because even though she "had communication issues at work," "she received positive reviews." *Post* at 42 (reciting the failure to promote elements under *Walton v. Harker*, 33 F.4th 165, 176 (4th Cir. 2022), which require proof that the plaintiff applied for a position for which she was qualified but was rejected under circumstances giving rise to an inference of discrimination).

But Cosby has never raised a failure to promote claim, a distinct theory of liability under Title VII with a distinct set of elements. *See Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1129 (4th Cir. 1995). In the gender discrimination count of her complaint, Cosby alleged that SCPPP "treat[ed] her differently than her similarly situated male colleagues" by "harassing" her and "creating a hostile work environment"; "constantly investigating her for various matters that were not a violation of any rule or policy"; and "*disciplining her more harshly*." J.A. 19–20 (emphasis added). Although the dissent cites two cursory allegations in the *background* section of the complaint that SCPPP investigated Cosby to "disqualify" and "prevent" her from being promoted, J.A. 15–16, Cosby's counseled complaint never alleged a gender discrimination claim in the form of failure to promote. Nor did she advance such a claim in opposing summary judgment before the district court below.

The same goes for Cosby's argument on appeal, which is that she "was subjected to *harsher discipline*, including the ultimate termination of her employment, than similarly situated male employees." Opening Br. 2 (emphasis added). Although Cosby again stated (once) in passing that SCPPP sought to "prevent" her promotion, Opening Br. 4, she never developed that argument before this Court. Indeed, Cosby's briefs *never* mentioned the failure to promote elements, let alone argued that they were at issue—and satisfied—in this case. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue." (cleaned up)). In fact, Cosby's reply brief relies on the very "disparate discipline" language that the dissent disclaims. *Compare post* at 41, *with* Reply Br. 9–10. In short, therefore, only the dissent raises failure to promote in this case.

Moreover, it is difficult to see how the failure to promote theory would fit here given that SCPPP did not even *interview* candidates for the position until nearly two months after Cosby's employment ended.

In any event, we have applied the correct analytical framework with respect to these three comparators.

Cosby's fourth proffered comparator is Greg Stewart. According to Cosby, Stewart held a supervisory role in Cosby's office and "was rumored to have been involved in a romantic relationship with a subordinate." Opening Br. 12. Yet unlike Cosby, Stewart was not formally investigated or required to take a polygraph.

There are at least two material differences between Cosby's situation and Stewart's that preclude Stewart from serving as a valid comparator as to the decision to formally investigate Cosby but not Stewart.

First, while Harmon testified that he was generally aware of rumors that Stewart had a romantic relationship with a subordinate, Cosby hasn't presented any evidence that Stewart was accused of *altering a subordinate's job conditions*, or otherwise subjecting a subordinate to a hostile work environment, after having a sexual relationship with that subordinate, as was Cosby. Furthermore, the allegations involving Cosby and Albany came from Albany herself, whereas Cosby has not pointed to any evidence showing that the subordinate with whom Stewart was rumored to have had a sexual relationship (or anyone else) made a similar allegation against him as part of any informal or formal SCPPP investigation. In light of these critical distinctions, no reasonable jury could conclude that Cosby's and Stewart's respective alleged misconduct was sufficiently similar as to be "comparable in seriousness." *Haynes*, 922 F.3d at 223.

Second, and independently fatal to her claim, Cosby has not shown that the supervisor or supervisors that made the decision to investigate her also made the decision not to investigate Stewart. The record reveals that Gambrell initiated an investigation into Cosby regarding potential misconduct for having romantic relationships with her

subordinates. After speaking to Albany, Gambrell reported Albany's allegations to Adger. As a result, Adger—the SCPPP Director and ultimate decisionmaker—instructed Harmon to open a formal OPR investigation into Cosby. But Cosby offers no evidence that either Gambrell or Adger was involved in the decision not to investigate Stewart based on rumors of a romantic relationship with a subordinate, or indeed that Gambrell or Adger even knew of such rumors.[11]

Instead, Cosby and the dissent take the view that Harmon was the common denominator: he conducted the investigation into Cosby but declined to investigate Stewart. But even were we to accept that Harmon, who was Stewart's supervisor at the relevant time, had the authority to open an investigation into Stewart based on the rumors, his decision not to exercise that authority would not help Cosby here. As just explained, although Harmon was responsible for *conducting* the OPR investigation into Cosby, the undisputed evidence is that the decision to *initiate* that investigation was made by Adger, not Harmon—an important distinction the dissent glosses over. That Harmon followed his boss's instructions does not render him "the same supervisor" for purposes of the similarly situated inquiry. *Haynes*, 922 F.3d at 223.

Absent any record evidence that would allow a factfinder to conclude that the decision to investigate Cosby and the decision not to investigate Stewart were made by the

[11] Even assuming Gambrell knew of the rumors concerning Stewart, when those rumors surfaced, Gambrell was not the AIC of the office—Stewart was. *See* J.A. 648–50. And Cosby has offered no evidence that Gambrell had any authority to undertake an investigation into Stewart at that time.

same supervisor or supervisors, Cosby's disparate treatment claim fails. The district court therefore did not err in granting summary judgment to SCPPP on Cosby's gender discrimination claim based on a disparate treatment theory.

2.

To demonstrate a prima facie case of a hostile work environment based on gender, "a plaintiff must show that the offending conduct (1) was unwelcome, (2) was because of her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment, and (4) was imputable to her employer." *Bonds v. Leavitt*, 629 F.3d 369, 385 (4th Cir. 2011) (citation omitted).

The district court agreed with the magistrate judge that Cosby failed to produce sufficient evidence to meet the second element—that any mistreatment she experienced was "because of her sex."[12] Unsurprisingly, Cosby says otherwise.

Our case law illustrates that a plaintiff may satisfy the "because of sex" element in one of several ways. She may, for example, provide evidence that she was "subjected to sexual advances or propositions." *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331 (4th Cir. 2003). Alternatively, she may point to evidence that she was "the individual target of open hostility because of her sex" or was "harassed in such sex-specific and derogatory terms as to make it clear that the harasser [was] motivated by general hostility to the presence of women in the workplace." *Id.* at 331–32 (cleaned up). Whatever the chosen method of proof, the evidence must be such that it would allow a reasonable jury to

[12] The remaining elements are not in dispute.

conclude that, "but for the employee's gender," "she would not have been the victim of the discrimination." *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 242 (4th Cir. 2000) (cleaned up).

In challenging the district court's conclusion, Cosby relies primarily on her own affidavit that she submitted in opposing SCPPP's motion for summary judgment as well as the October 2018 internal complaint she lodged against Gambrell and Honeycutt. Cosby's affidavit asserts that, shortly after she applied for the promotion, Gambrell began investigating and harassing her, while the other applicants (both male and female) were not subjected to the same treatment. The affidavit then goes on to reference Cosby's 2018 internal complaint, characterizing it as "alleging that [Cosby] was being subjected to a 'hostile work environment' by [her] two male supervisors." J.A. 268. And "[i]n making that complaint and using the language [she] did," the affidavit continues, "it was [her] intention of reporting [her] belief that [she] was being treated differently and subjected to harassing conduct on the basis of [her] gender." J.A. 268. According to Cosby, this evidence is sufficient at the summary judgment stage to demonstrate that her mistreatment was "because of" her gender.

We agree with the district court that Cosby has not raised a triable issue of fact on this claim. Aside from her now-stated belief, Cosby has provided no evidence indicating that her gender was the reason that she was subjected to an investigation after applying for the promotion. To the contrary, her affidavit *undercuts* her claim of gender-based mistreatment as it specifically notes that "one other female . . . applied for the same promotion" and "was not subjected to the same treatment and ongoing investigations." J.A.

268. As for Cosby's internal complaint, it too fails to demonstrate any mistreatment motivated by an impermissible discriminatory animus. While it used the phrase "hostile working environment" and proceeded to recount allegedly harassing conduct by Gambrell and Honeycutt, the complaint makes no reference, explicit or implicit, to Cosby's gender as a basis for that hostility and harassment. Cosby admitted as much in her deposition. *See* J.A. 519 (Cosby responding "No" when asked whether the complaint included any language "that states that the harassment -- the hostile working environment was based on sex or gender"). Moreover, the internal complaint specifically stated that members of her team—which included males—were subjected to the same mistreatment. *See* J.A. 434 (stating that the "harassment has extended to members of my team"); *see* J.A. 518 (Cosby testifying that her team included both male and female members). So again, Cosby's cited evidence undermines her claim rather than supports it.

In the end, we are left only with Cosby's subjective "belief," as expressed in her self-serving affidavit prepared in the course of this litigation, that she was singled out because of her gender. And our cases make clear that such an expressed belief, standing alone, is insufficient to defeat summary judgment. *See Webster v. Chesterfield Cnty. Sch. Bd.*, 38 F.4th 404, 413–14 (4th Cir. 2022) (observing that a plaintiff "cannot primarily rely upon her own statements" to create a triable issue of fact on the "because of sex" element of a hostile work environment claim); *Nat'l Enters., Inc. v. Barnes*, 201 F.3d 331, 335 (4th Cir. 2000) (concluding that a "self-serving affidavit" was insufficient to overcome summary judgment where the plaintiffs provided no other supporting evidence); *see also Alfano v. Costello*, 294 F.3d 365, 378 (2d Cir. 2002) (holding that a plaintiff asserting

a hostile work environment claim must provide "some circumstantial or other basis for inferring that incidents sex-neutral on their face were in fact discriminatory").

We therefore find no error in the district court's summary judgment award to SCPPP on Cosby's gender discrimination claim premised on a hostile work environment theory.

B.

We next turn to Cosby's retaliation claim.

Title VII bars retaliation against an employee that has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a).

To establish a prima facie case of retaliation, a plaintiff "must show (1) that she engaged in protected activity; (2) that her employer took an adverse action against her; and (3) that a causal connection existed between the adverse activity and the protected action." *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 578 (4th Cir. 2015) (cleaned up).

Here, Cosby identifies two instances of purportedly protected activity for which she claims SCPPP retaliated against her: (1) her filing of the 2018 internal complaint; and (2) her filing of the 2012 EEOC charge of discrimination.

In granting summary judgment to SCPPP on this claim, the district court agreed with the magistrate judge's findings that Cosby's filing of the 2018 internal complaint did not constitute protected activity and that there was no causal connection between the 2012 EEOC charge and any of the alleged adverse employment actions.[13]

[13] SCPPP does not dispute that Cosby suffered an adverse employment action.

1.

We first consider the district court's finding that Cosby's filing of the 2018 internal complaint did not constitute protected activity under Title VII's retaliation provision.

As indicated above, § 2000e-3(a) protects two categories of activity: (1) opposing a practice forbidden by Title VII; and (2) participating in a Title VII investigation or proceeding. Cosby contends that her filing of the 2018 internal complaint falls under the first category—opposition activity.

Although opposition activity can take the form of an internal complaint like Cosby's, *see DeMasters v. Carilion Clinic*, 796 F.3d 409, 417 (4th Cir. 2015) (noting that "utilizing informal grievance procedures" falls within this Court's "expansive view of what constitutes oppositional conduct" (citation omitted)), such a complaint constitutes protected activity only if it was directed at "an unlawful employment practice" under Title VII. § 2000e-3(a); *see also McIver v. Bridgestone Ams., Inc.*, 42 F.4th 398, 411 (4th Cir. 2022) ("Not all employee complaints are protected by Title VII's retaliation provision[.]"); *Bonds*, 629 F.3d at 384 ("Title VII is not a general bad acts statute . . . , and it does not prohibit private employers from retaliating against an employee based on her opposition to discriminatory practices that are outside the scope of Title VII.").

We have previously said that the term "unlawful employment practice" should be interpreted broadly such that it encompasses "not only employment actions actually unlawful under Title VII but also employment actions [the employee] reasonably believes to be unlawful." *DeMasters*, 796 F.3d at 417 (cleaned up).

But that broad interpretation is not without limits. Whether an employee reasonably believed that the employment action she opposed violated Title VII is an objective inquiry that turns on the particular facts of the case. *See McIver*, 42 F.4th at 411 ("[O]nly when an employee has an objectively reasonable belief in light of all the circumstances that a Title VII violation has happened or is in progress is the employee's [opposition] conduct protected." (cleaned up)). Accordingly, the plaintiff must point to specific evidence in the record from which a jury could infer that a reasonable person in the plaintiff's shoes would have "belie[ved] that her complaints related to an ongoing Title VII violation." *Id.* at 412.

We agree with the district court that Cosby falls short of the required showing to put this issue before a jury.

As explained above, Cosby's internal complaint is undisputedly facially neutral as to sex: it did not allege that she was singled out for mistreatment because of her gender, and in fact it charged that members of her team (both male and female) were being subjected to the same hostility and harassment. Thus, the substance of the complaint itself provides no basis to infer that Cosby believed she was opposing unlawful discrimination. *See Skiba v. Ill. Cent. R.R. Co.*, 884 F.3d 708, 718 (7th Cir. 2018) ("Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient" to constitute protected activity under Title VII. (citation omitted)).[14] The mere fact that the

[14] According to the dissent, our conclusion in this respect stems from Cosby's failure to use "the four magic words" in her internal complaint: "because of her sex." *Post* at 29. Respectfully, that is inaccurate. Our conclusion is premised on the lack of *any* indication (Continued)

individuals accused in the complaint of the harassing conduct—Gambrell and Honeycutt—are male does not alter this conclusion. For "the law does not blindly ascribe to [sex] all personal conflicts between individuals of different [sexes]." *McIver*, 42 F.4th at 411 (cleaned up).

Nonetheless, Cosby and the dissent maintain that two pieces of evidence in the record provide a sufficient evidentiary basis to preclude summary judgment. The first is Cosby's affidavit's assertion that "[i]n making that complaint and using the language I did, it was my intention of reporting my belief that I was being treated differently and subjected to harassing conduct on the basis of my gender." J.A. 268. The second is that SCPPP "initially considered the internal complaint to be one made pursuant to Title VII based on the face of the internal complaint." Opening Br. 21.

Neither piece of evidence can bear the weight that Cosby and the dissent put on it.

Beginning with Cosby's litigation affidavit, we have already explained that the employee's belief that she was engaging in protected activity must be evaluated by reference to *objective* criteria. And Cosby's self-serving affidavit containing an after-the-fact and otherwise unsubstantiated statement concerning her *subjective* intent and belief does not fit the bill. *Cf. Webster*, 38 F.4th at 413–14; *Barnes*, 201 F.3d at 335.

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that her internal complaint sounded in sexual discrimination. And as just stated, Cosby's internal complaint actually indicates that the complained-of mistreatment was *not* due to Cosby's sex as it expressly stated that members of her team, *including males*, were similarly mistreated. Moreover, Harmon specifically followed-up with Cosby about the internal complaint, and even then Cosby did not claim that her alleged mistreatment was due to her sex. She only makes that claim now in a self-serving litigation affidavit. The dissent overlooks these critical details.

As for Cosby's second contention, it is true that Harmon testified that Cosby's complaint was initially assigned to OPR, which, as previously noted, is responsible for investigating potential Title VII complaints. Harmon indicated that the reason for this staffing decision was the complaint's references to a "hostile working environment" and "harassment." *See* J.A. 554 (Q. "Was [Cosby's internal complaint] initially reviewed as if it could possibly have been an EEOC complaint?" A. "All complaints based on just face value, they say I'm harassed based on whatever criteria, we take that and staff it."). He also testified that, in those situations, OPR generally follows-up by interviewing the complainant, if possible, to gather more information "because some people don't use correct terminology." J.A. 554. Harmon followed this same process in connection with Cosby's complaint.

Importantly, however, after meeting with Cosby "and collect[ing] her information as she gave [it]," J.A. 554, Harmon determined that Cosby's complaint did *not* implicate Title VII but rather stemmed from "poor communication" and "poor relationships" with her supervisors. J.A. 481, 554. Adger concurred and so "decided it was not a matter for OPR to investigate." J.A. 553.[15]

Critically, Cosby does not contest any of this. She does not dispute that Harmon met with her to gather more information about her complaint, nor does she dispute Harmon's characterizations of what she told him or otherwise contend that Harmon's investigation

[15] Consequently, it is simply not accurate to say as the dissent does that "SCPPP recognized [that Cosby's] Internal Complaint was rooted in Title VII." *Post* at 31–32. As just explained, SCPPP reached the opposite conclusion.

was a sham. Further still, she makes no claim that she ever told Harmon during the interview that the alleged harassment was, in her judgment, based on her gender. Indeed, the record is devoid of any evidence that Cosby told anyone at SCPPP that her internal complaint was aimed at opposing gender discrimination.

Faced with these circumstances, which the dissent doesn't confront, we fail to see how SCPPP's decision to initially staff Cosby's complaint with OPR for further investigation is sufficient to create a jury issue as to whether Cosby reasonably believed at the time that she was engaging in protected activity. To do so would ignore—as the dissent does—part of the record properly submitted on summary judgment. And it's a crucial part as it shows that even after SCPPP's initial staffing decision, Cosby was given an opportunity to expand on her complaint. Yet she failed to convey any belief that she was the target of *gender*-based discrimination. Instead, the uncontroverted evidence is that Cosby's comments to Harmon during the interview dispelled any notion that the complaint sounded in unlawful discrimination.

Given the stark absence of other supporting evidence for her claim, we cannot conceive of any jury that could find that Cosby *reasonably* believed that she was engaging

in protected activity by submitting her internal complaint.[16] The district court did not err in reaching the same conclusion and granting summary judgment to SCPPP in that respect.[17]

2.

Finally, we turn to the district court's finding that Cosby failed to demonstrate a causal relationship between her filing of the 2012 EEOC charge of discrimination and any of the alleged adverse employment actions in 2018.

Where, as here, "temporal proximity between protected activity and allegedly retaliatory conduct is missing, courts may look to the intervening period for other evidence

[16] In light of our holding that Cosby's filing of the internal complaint did not constitute protected activity, that Gambrell interviewed Albany the day after he learned of the internal complaint is irrelevant. For even if Gambrell interviewed Albany solely as a means of getting back at Cosby for filing the internal complaint—and there is no direct evidence that he did—"Title VII . . . does not prohibit private employers from retaliating against an employee based on her opposition to discriminatory practices that are outside the scope of Title VII." *Bonds*, 629 F.3d at 384.

[17] Although unnecessary to our holding, we note that this claim fails for the additional reason that Cosby never put SCPPP on proper notice that she was complaining of unlawful discrimination, thereby precluding a causal connection between the purported protected activity and any adverse employment action. *See Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 124 (4th Cir. 2021) ("[W]e have consistently required proof of a decisionmaker's knowledge of protected activity to support a Title VII retaliation claim."). This is so for many of the same reasons already discussed. As explained, Cosby's internal complaint makes no mention of gender-based discrimination, and even after having the opportunity to discuss her complaint with Harmon, Cosby still failed to communicate a belief that she was being targeted because of her gender. Indeed, it was precisely for these reasons that SCPPP positively concluded that Cosby was *not* lodging a Title VII hostile work environment complaint. Given Cosby's "fail[ure] to tie [her] complaint[] about workplace conduct to her protected status," SCPPP "could not have retaliated [against her] for engaging in a protected activity." *McIver*, 42 F.4th at 412.

of retaliatory animus." *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007) (citation omitted).

In this case, Cosby asserts that she has shown a causal relationship given that (1) Gambrell was her AIC for a short time in 2012 after SCPPP was required to rehire her as a result of the 2012 EEOC charge, which Cosby "believe[s]" Gambrell "had full knowledge of," J.A. 268; and (2) shortly after Gambrell became her AIC again in 2017, he began investigating Cosby for conduct that "was not a violation of any policy" and about which SCPPP "had been on notice . . . for three years" without taking any action. Opening Br. 23. In other words, Cosby's theory is that when Gambrell ceased being her supervisor in 2012, he bided his time and retaliated against her for the 2012 EEOC charge at the first available opportunity: when he became her AIC again in 2017. The dissent subscribes to this postulation, musing that a jury could "connect the dots and find that AIC Gambrell retaliated against Cosby because he harbored resentment from the 2012 Charge of Discrimination." *Post* at 37.

We readily reject this unsubstantiated theory. Guesswork aside, neither Cosby nor the dissent points to *any* evidence that Gambrell was in some way involved in the events giving rise to Cosby's 2012 EEOC charge; that he even knew about the charge or the subsequent investigation; or that he "handled [Cosby's] forced rehiring" following the investigation. Opening Br. 23. Nor has Cosby or the dissent identified *any* evidence

demonstrating that Gambrell otherwise "harbored resentment" toward Cosby because of the 2012 EEOC charge. *Post* at 37.[18]

At bottom, Cosby and the dissent's asserted causal connection between events six years apart relies on pure conjecture. And it goes without saying that such conjecture cannot defeat summary judgment. *See Graves v. Lioi*, 930 F.3d 307, 324 (4th Cir. 2019) ("[S]urviving summary judgment . . . requires evidence, not unsupported conjecture."). The district court therefore appropriately entered summary judgment in SCPPP's favor on Cosby's claim of retaliation in connection with her 2012 EEOC charge.[19]

[18] What's more, the notion that Gambrell investigated Cosby for conduct that did not violate SCPPP policy and about which SCPPP knew for three years beforehand does not comport with the record. Gambrell testified that although there was not a policy that expressly prohibited relationships between supervisors and subordinates, he believed that such relationships violated SCPPP's professionalism policy—testimony that Cosby did not rebut in the district court and has not rebutted here. Additionally, the record shows only that Cosby reported to Stewart in 2015 that Albany was "making advances towards [her]," which Cosby purportedly "*was not accepting*." J.A. 292 (emphasis added). There has been *no* evidence presented to this Court that Cosby alerted SCPPP in 2015 to a romantic relationship, or even some romantic "interaction," *post* at 35 n.1, between herself and Albany. To the contrary, the evidence shows that Cosby expressly disavowed such a relationship.

[19] Cosby separately argues that the district court committed reversible error by finding no causal connection based only on a lack of temporal proximity between the filing of the 2012 EEOC charge and the alleged adverse employment actions in 2018. But we may affirm on any basis apparent from the record, *Lawson v. Union Cnty. Clerk of Ct.*, 828 F.3d 239, 247 (4th Cir. 2016), and as just explained, the record here fails to establish a causal connection separate and apart from a lack of temporal proximity.

IV.

For these reasons, we affirm the district court's award of summary judgment to SCPPP.

AFFIRMED

THACKER, Circuit Judge, dissenting:

The majority affirms the district court's holding that Cosby failed to present sufficient evidence to survive summary judgment on either her Title VII retaliation claim or her Title VII discrimination claim. Respectfully, I disagree. I would hold that Cosby has presented triable issues as to both claims, which should be resolved by a finder of fact.

Therefore, I dissent.

I.

Retaliation

A.

2018 Internal Complaint

On October 11, 2018, Cosby filed a Citizen/Personnel Formal Complaint Form ("Internal Complaint") alleging that her male supervisors -- Agent in Charge ("AIC") Chadwick Gambrell and Assistant Agent in Charge ("AAIC") Robert Honeycutt -- were subjecting her to "a hostile work environment" and "harassment." J.A. 104. Despite the fact that the SCPPP "initially assessed" the Internal Complaint as a Title VII complaint and investigated it as such, J.A. 654–55, the SCPPP ultimately decided, after some consideration, to treat the Internal Complaint as having to do with "a communication issue." *Ante* at 4. At summary judgment, Cosby submitted an affidavit in which she confirmed just what the SCPPP understood when it saw the Internal Complaint in the first place: she intended to lodge a Title VII complaint regarding gender discrimination.

Upon learning that Cosby had filed a complaint against him, **the very next day** AIC Gambrell opened an investigation into a personal relationship Cosby was *rumored* to have

had with someone in the office *three years prior* -- a relationship that Appellees concede did not violate any office policy. *See* J.A. 628 (admitting the SCPPP's professionalism policy did not "say that a relationship between a supervisor and a subordinate is morally improper"); *id.* at 766 ("Gambrell was aware that Defendant did not have a policy specifically prohibiting sexual relationships with subordinates . . . ."); *ante* at 3 (noting "at the time there was no SCPPP policy that specifically prohibited romantic or sexual relationships between supervisors and subordinates"). That investigation precipitated the adverse actions against Cosby that followed. Coincidence? I think not.

Yet, the majority has nixed Cosby's retaliation claim because, according to the majority, Cosby never engaged in "protected activity." In my view, Cosby clearly engaged in protected activity when she filed a complaint form alleging a "hostile work environment" and "harassment," which was assessed by her employer as a Title VII complaint, and in which, as Cosby confirms by sworn affidavit, she intended to claim gender discrimination.

Our precedent makes room for Title VII complainants to assert their rights with less-than-lawyerly precision. Employees are protected under Title VII when they "complain to their superiors about suspected violations of Title VII." *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 543–44 (4th Cir. 2003). This can mean "a formal proceeding," *Strothers v. City of Laurel*, 895 F.3d 317, 328 n.4 (4th Cir. 2018), but it can also mean "informal grievance procedures" or even "informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities." *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). And the majority does not deny that Cosby submitted her Title VII complaint by appropriate vehicle. *Ante* at 18

(acknowledging that "opposition activity can take the form of an internal complaint like Cosby's").

Where the majority knocks Cosby is the substance of the Internal Complaint, which, per the majority, "provide[d] no basis to infer that Cosby believed she was opposing unlawful discrimination." *Ante* at 19 (citing *Skiba v. Ill. Cent. R.R. Co.*, 884 F.3d 708, 718 (7th Cir. 2018)). But the Internal Complaint expressly stated Cosby was enduring a "hostile work environment" and "harassment" -- language apparently sufficient to prompt the SCPPP to view the complaint as a Title VII complaint. Clearly, the SCPP had a "basis to infer . . . unlawful discrimination." *Id.* Nonetheless, the majority rationalizes that Cosby missed the four magic words that might have floated her over the summary judgment barrier: "because of her sex." *Id.* at 14.

However, under our precedent, Cosby did not *need* the magic words. The purpose of the Title VII anti-retaliation provision is to encourage victims to speak up to report violations. *See DeMasters v. Carilion Clinic*, 796 F.3d 409, 418 (4th Cir. 2015) (describing the "remedial purpose of Title VII"). In *Boyer-Liberto*, we emphasized, "The reporting obligation [of Title VII] is essential to accomplishing Title VII's 'primary objective,' which is 'not to provide redress but to avoid harm.'" *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 282–83 (4th Cir. 2015) (en banc) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)). It is for this reason that Title VII's anti-retaliation provisions "provide broader protection for victims of retaliation than for [even] victims of race-based, ethnic-based, religion-based, or gender-based discrimination." *Id.* at 283 (citing

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006)) (alteration in original); *DeMasters*, 796 F.3d at 418.

Thus, employees complaining of Title VII violations are protected from retaliation "even when they complain of actions that are not actually unlawful under Title VII" if an employee's perception of a violation is "'objectively reasonable' under the circumstances known to her." *Strothers*, 895 F.3d at 327–28 (quoting *Boyer-Liberto*, 786 F.3d at 282). Protecting Title VII complainants who raise their concerns, even when they are reasonably mistaken, serves the purpose of the statute. *See Boyer-Liberto*, 786 F.3d at 283 ("[E]ffective enforcement could . . . only be expected if employees felt free to approach officials with their grievances.") (citing *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 66–67) (internal quotation marks omitted).

Cosby reasonably believed a Title VII violation was occurring. She said so in a sworn affidavit: "it was my intention of reporting my belief that I was being treated differently and subjected to harassing conduct on the basis of my gender." J.A. 268. She reiterated this during her deposition. J.A. 666 (testifying she "believe[d] that any of that different treatment was due to [her] gender"). And it bears remembering that Cosby was *rejected* from employment *with this very office* in 2012 because the SCPPP wanted to "hire a male." J.A. 762; *see also ante* at 2 (describing the circumstances of Cosby's 2012 charge of discrimination). Thus, Cosby *actually* believed that she was subject to different treatment because of "[her] gender" and she had *reason* to believe it. J.A. 268. And yet the majority declares that her belief was not objectively reasonable.

In reaching its conclusion, the majority dissects Cosby's evidence piece by piece, failing to consider whether, taken together and considered in the light most favorable to *her*, the evidence creates a triable issue. *See Cook v. CSX Transp. Corp.*, 988 F.2d 507, 512 (4th Cir. 1993) ("The question confronting a judge faced with determining whether a prima facie case under Title VII has been made is whether the record as a whole gives rise to a reasonable inference of . . . discriminatory conduct by the employer."); *id.* at 512 ("[T]o focus on one piece of the record without considering the whole would distort the permissible inferences to be drawn.").

First, the majority finds no evidence of gender discrimination on the face of the Internal Complaint. Failing that, the majority turns to Cosby's affidavit, which it deems self-serving. Then, citing cases in which the *only* evidence was a self-serving affidavit, determines this "otherwise unsubstantiated statement" cannot create a triable issue. *Ante* at 20 (citing *Webster v. Chesterfield Cty. Sch. Bd.*, 38 F.4th 404, 413–14 (4th Cir. 2022) (affirming summary judgment when a plaintiff's only evidence that the defendant targeted her based on her sex was "her own statements"); *Nat'l Enters., Inc. v. Barnes*, 201 F.3d 331, 335 (4th Cir. 2000) (affirming summary judgment when "appellants [we]re unable to produce any evidence" regarding obligations created by a repurchase agreement apart from a "self-serving affidavit describing the content of the repurchase agreements")). Not yet having found any single piece of evidence sufficient, the majority last turns to the fact that the SCPPP itself treated Cosby's Internal Complaint as a Title VII complaint. *See* J.A. 654–55 (Director Harmon admitting the Internal Complaint was "initially assessed" as a "Title VII complaint"). In my view, the fact that even the SCPPP recognized Appellant's

Internal Complaint was rooted in Title VII supports Cosby's claim of protected activity, but the majority disagrees. *See ante* at 21–22 (noting that "after meeting with Cosby . . . Harmon determined that Cosby's complaint did *not* implicate Title VII but rather stemmed from 'poor communication' and 'poor relationships' with her supervisors") (emphasis in original).

The majority emphasizes the lack of evidence that Cosby told Director Harmon or anyone at SCPPP that her Internal Complaint was about sex discrimination. *Ante* at 5. To be sure, that fact weighs against Cosby. But, I emphasize that it is not our role to weigh facts when resolving an appeal from summary judgment. In doing so, the majority usurps the role of the jury by picking the version of the story it most prefers at the expense of contrary facts. In my view, those facts create a triable issue.

Summary judgment is not a tool to jettison imperfect cases. *Webster*, 38 F.4th at 412 ("[T]he aim of summary judgment is not to determine the exact strength of a case and dispose of so-called weak cases, but instead to determine whether a rational jury *could* find in the plaintiff's favor . . . .") (emphasis in original). Our role at summary judgment is not to break Cosby's case into pieces and see if one of those pieces can lift Cosby over the summary judgment barrier. *See DeMasters*, 796 F.3d at 418 ("[W]e must examine the course of a plaintiff's conduct through a panoramic lens, viewing the individual scenes in their broader context and judging the picture as a whole."). Our job is to consider whether all of the material evidence Cosby has adduced is enough that a reasonable jury could find for her. Here, it could. Although Cosby did not expressly claim in her Internal Complaint, as a lawyer might have, that she was discriminated against "on the basis of sex," there is

material evidence that she complained of a Title VII violation -- and that she was promptly punished for it.

The majority also posits that "a causal connection between the purported protected activity and any adverse employment action" is "precluded." *Ante* at 23 n.17. This is ostensibly because Appellant's Internal Complaint never put the SCPPP "on notice" of protected activity. *Id.* But the SCPPP plainly had notice. We know it had notice because it opened a Title VII investigation regarding Cosby's Internal Complaint. Further, AIC Gambrell opened an investigation into Appellant's personal relationships *the day after* he learned about the purportedly *un*-protected activity. *See* J.A. 260 (admitting he "went to Nicole Albany on . . . the day after [he was] advised that Kristin Cosby had filed a complaint against [him]"). That is clear evidence that Cosby's Internal Complaint caused the investigation into her out of office relationship, and clear evidence the SCPPP had notice.

The majority attempts to diminish this evidence by collapsing the elements of protected activity and causation. The majority reasons that because the Internal Complaint was not protected activity, the SCPPP lacked notice of protected activity, and thus the SCPPP's retaliatory actions could not be caused by protected activity. In this way, the majority stretches its conclusion regarding lack of protected activity to undermine causation, avoiding the glaring fact that AIC Gambrell retaliated against Cosby as soon as he learned of the Internal Complaint. Thus, the majority's holding doubly undermines the remedial purpose of Title VII's antiretaliation provision, *Boyer-Liberto*, 786 F.3d at 283; *DeMasters*, 796 F.3d at 418, because it discounts Cosby's reasonable belief that she

complained about gender discrimination and endorses the SCPPP's actions taken against her because of her complaint. The majority's holding impairs employees' "'broad protection from retaliation,'" *Boyer-Liberto*, 786 F.3d at 283 (quoting *Burlington N. & Santa Fe. Ry. Co.*, 548 U.S. at 67), and discourages "the early reporting vital to achieving Title VII's goal of avoiding harm," *id.*

I disagree with the majority regarding both protected activity and causation. Cosby's facts create a triable issue at summary judgment, where a plaintiff need only present a genuine dispute, and we must read those facts in the light most favorable to the non-movant.

B.

2012 Charge of Discrimination

Cosby applied to work for the SCPPP in 2012. But she was not hired because the SCPPP wanted to "hire a male." *Ante* at 2 (quoting J.A. 267). As a result, Cosby filed a Charge of Discrimination with the EEOC. When the EEOC sustained her charge, the SCPPP hired her. When Cosby started work in Fall 2012, she was assigned to AIC Gambrell, whom Cosby testifies had full knowledge of the EEOC charge.

Cosby was transferred to a different AIC shortly after she was hired, but she was eventually transferred back to AIC Gambrell. That occurred in December 2017. In March 2018, a position opened on the sex offender team that Cosby led, and AIC Gambrell sought Cosby's recommendation to fill the position. Cosby recommended Christina Worthy. AIC Gambrell had heard Cosby and Worthy "had more than a professional relationship." J.A. 763. Eight months later, in November 2018, AIC Gambrell opened an investigation into

another of Cosby's rumored relationships, this one with Nicole Albany -- a relationship Cosby purportedly had three years before, in 2015. SCPPP had known about this relationship for three years. *See ante* at 5 n.3 (noting testimony that Cosby reported the Albany relationship in 2015).[1] It was concededly not a violation of any office policy for Cosby to have these relationships. J.A. at 628; *id.* at 766; *ante* at 3.

The majority notes that AIC Gambrell believed Cosby's conduct violated the SCPPP's catch-all professionalism policy. *Ante* at 25 n.19. But AIC Gambrell himself admitted that "nothing in that policy specifically defines a relationship of that type of being unethical and immoral." J.A. 259; *id.* (admitting there was not "any policy in the Agency that prohibited that"). Whatever the majority might think, in the light most favorable to Cosby, AIC Gambrell's personal "opinion" on what is "morally and ethically improper" was hardly a legitimate ground to investigate Cosby (the day after discovering she filed a complaint). *Id.* at 260 ("HEARING OFFICER SMITH: So that's your opinion? WITNESS GAMBRELL: Right.").

It stands to reason, then, that these relationships were not an issue from the time Cosby was hired in 2012 until 2018, shortly after AIC Gambrell became Cosby's boss

[1] The majority quibbles with the term "relationship" because the evidence reflects that in 2015 Cosby reported Albany for making unrequited sexual advances. Setting aside that Cosby's description of the interaction was inconsistent, *see* J.A. 475 (describing "consensual sexual relations" and "a brief interaction"); Opening Br. at 12 (noting that Greg Stewart, "like Cosby, was rumored to have been involved in a romantic relationship with a subordinate"), it is beside the point. SCPPP was aware of the interaction in 2015, yet it only became an issue again in 2018 after Cosby filed a harassment complaint against AIC Gambrell, who then decided the 2015 unrequited sexual advances would be worth investigating **three years** after Cosby reported them.

again. This sequence of events invites the following question: was AIC Gambrell harboring resentment from 2012, when the EEOC forced his office to hire Cosby after she successfully claimed sex discrimination?

The district court determined there could be no causal connection in this series of events because it concluded the time lapse of six years was too long. However, we have held that a plaintiff can show causation on a retaliation claim with "other relevant evidence" beyond temporal proximity. *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). Here, Cosby's other relevant evidence can provide a sufficient basis from which to infer she was retaliated against by AIC Gambrell for filing the 2012 Charge of Discrimination.

AIC Gambrell became Cosby's boss when the EEOC forced SCPPP to rehire her in 2012. He was Cosby's AIC for only a short time before Cosby was transferred to another AIC. AIC Gambrell became Cosby's AIC again in December 2017. He began investigating her relationship with Christina Worthy by March 2018, and began investigating her relationship with Nicole Albany in November 2018. Neither of Cosby's relationships directly violated office policy, and the SCPPP had been aware of the Albany relationship for three years before AIC Gambrell began investigating it. These facts provide a sufficient causal nexus between the 2012 Charge of Discrimination and the adverse actions Cosby endured.

Rather than grapple with the district court's decision to resolve the question of causation here on temporal proximity, the majority relies instead on reasoning that there was nothing in the record proving AIC Gambrell *knew* about the 2012 Charge of Discrimination. This defies logic. AIC Gambrell was the Agent in Charge of the office

when the SCPPP was forced to hire Cosby *because* she filed a successful Charge of Discrimination with the EEOC. J.A. 268. Cosby was transferred from under AIC Gambrell's charge shortly after she was hired. Then, shortly after he became her boss again in 2017, he started investigating two of her personal relationships, which did not violate office policy, one of which had taken place three years before without consequence in the interim.

A factfinder drawing reasonable inferences in Cosby's favor could connect the dots and find that AIC Gambrell retaliated against Cosby because he harbored resentment from the 2012 Charge of Discrimination. By disregarding that theory, the majority prefers the SCPPP's story to Cosby's. That we cannot do. *Guthrie*, 79 F.4th at 342 ("[A] court cannot base a grant of summary judgment merely on the belief that the movant will prevail if the action is tried on the merits.") (internal quotation marks omitted).

In sum, there is sufficient evidence from which a finder of fact could determine the SCPPP retaliated against Cosby because of her protected activity.

II.

Discrimination

The majority rejects Cosby's disparate treatment theory for the same reason as the district court: Cosby's proposed comparators were differently situated. To make a prima facie case of discrimination under the theory of disparate treatment, a plaintiff must establish four elements: "(1) membership in a protected class; (2) satisfactory work performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class." *Perkins v. Int'l Paper Co.*, 936 F.3d 196,

207 (4th Cir. 2019) (citing *Coleman v. Maryland Ct. of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010)). A plaintiff can prove similarly situated employees were treated differently through use of "comparators" -- employees in similar positions to the plaintiff, but who lacked her protected classification, and who did not suffer the same ill treatment the plaintiff suffered. *See Haynes v. Waste Connections, Inc.*, 922 F.3d 219, 223 (4th Cir. 2019); *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511 (4th Cir. 1993).

Cosby points to four comparators whom she says were similarly situated to her but disparately treated. The parties and the majority split these comparators among, on one hand, a group of three agents, Brian Fahnle, Allan Norfus, and Michael Richards; and, on another hand, a single agent, Greg Stewart. The first three men applied for an open unit coordinator position that Cosby also applied for in September 2018. The three men got an interview. Cosby did not. As for Stewart, like Cosby, he was rumored to have had a relationship with a subordinate in the office, but he faced none of the adverse consequences Cosby faced.

As the majority does, I take these two camps in turn.

A.

Fahnle, Norfus, and Richards

Fahnle, Norfus, and Richards were similar to Cosby in the following respects: (1) they worked in the same office (Greenville); (2) they held the same position (agent); (3) they had the same supervisor (AIC Gambrell); (4) they applied for the same promotion (unit coordinator). But none of the three men was investigated for anything; none was pushed out of their position, and each was given an interview. In my view, that satisfies

Cosby's prima facie burden. *See Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."); *Cowgill v. First Data Techs., Inc.*, 41 F.4th 370, 380 (4th Cir. 2022) ("[A] plaintiff need not 'show that [s]he was a perfect or model employee. Rather, a plaintiff must show only that [s]he was qualified for the job and that [s]he was meeting [her] employer's legitimate expectations.'") (quoting *Haynes*, 922 F.3d at 225).

In the "disparate discipline" context, this court has emphasized that the comparison between a plaintiff and a comparator "will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances." *Cook*, 988 F.2d at 511. Courts must instead consider whether "the plaintiff and the comparator 'dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" *Haynes*, 922 F.3d at 223–24 (quoting *Haywood v. Locke*, 387 F. App'x 355, 359 (4th Cir. 2019) (per curiam)) (alteration in *Haynes*).

Yet, the majority opines that Fahnle, Norfus, and Richards were differently situated from Cosby because none of these men was "accused or suspected of having a sexual relationship with a subordinate that adversely affected the subordinate's employment, or of engaging in any similar conduct." *Ante* at 10. In other words, the SCPPP had reason to

treat Cosby differently than it treated the three men because there were accusations about Cosby. Of course, the conduct underlying those accusations was concededly *not* a violation of office policy. J.A. at 628; *id.* at 766; *ante* at 3. Instead, it simply appears to be a reason that AIC Gambrell dug up the day after he found out about Cosby's Internal Complaint in order to ostensibly support the disparate treatment.

But even setting this quite suspect series of events aside, the majority's reasoning misapplies our precedents regarding disparate treatment. The rumors about Cosby should, at most, qualify as a "legitimate, nondiscriminatory reason" for differential treatment under the second step of the *McDonnell Douglas* framework. *Cowgill*, 41 F.4th at 381 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Why the lower courts did not treat it as that, and instead treated it as "differentiating or mitigating circumstances that would distinguish [Cosby's] conduct," J.A. 712 (R&R) (quoting *Haywood*, 387 F. App'x at 359), is not clear. But there is a critical distinction between a "legitimate, non-discriminatory reason" and "differentiating or mitigating circumstances." The former would permit Cosby's case to proceed at this stage while, with the later, she loses that opportunity as a matter of law.

For many employees in Title VII cases, comparators will be difficult to find. That is why courts have emphasized comparators need not be carbon copies of a plaintiff (apart from shared protected status). They need only be similar enough that courts can make a true apples-to-apples comparison between the plaintiff and the comparators; that is, similar in "all *relevant* respects." *Cowgill*, 41 F.4th at 382 (emphasis supplied); *Haynes*, 922 F.3d at 225.

Ironing over this subtlety, the district court relied upon an element from *disparate discipline* cases and applied it to *failure to promote* comparators. The majority now adopts that error as binding precedent. The language relied on by the majority -- "engaged in the same conduct without such differentiating or mitigating circumstances," *ante* at 10 -- comes from disparate *discipline* cases, where it makes sense to consider, as a comparator factor, a plaintiff's conduct compared to other disciplined employees. *See Haynes*, 922 F.3d at 223–24 (holding white employee who received lighter discipline for infraction *was* a valid comparator in race discrimination case because the white employee "engaged in similar conduct") (citing *Cook*, 988 F.2d at 511 (same)). If a plaintiff is claiming she suffered harsher discipline than some comparator, it is natural to ask whether those comparators deserved lighter discipline because of their conduct. *Balderson v. Lincare Inc.*, 62 F.4th 156, 166 (4th Cir. 2023) (analyzing whether the parties' "conduct was so similar that fairness required them to receive the same discipline"); *Cook*, 988 F.2d at 511 (requiring a plaintiff to prove "that the prohibited conduct in which he engaged was comparable in seriousness to the misconduct of employees outside the protected class"); *Matias v. Elon Univ.*, 780 F. App'x 28, 31 (4th Cir. 2019) (per curiam) ("[N]ot only was HR unable to confirm the complaints lodged against the comparator, but also the comparator, unlike Matias, was never accused of forcing himself on a coworker."); *Kelley v. United Parcel Serv., Inc.*, 528 F. App'x 285, 286 (4th Cir. 2013) (per curiam) ("We conclude that Kelley and McDonald were not valid comparators because they were not engaged in the same conduct and because they were not subject to the same standards.").

But asking whether misconduct justifies disparate treatment makes less sense as a comparator factor in a case involving failure to promote.[2] In this context, courts considering comparator distinctions look to job performance or candidate qualifications. *See, e.g.*, *Walton v. Harker*, 33 F.4th 165, 176 (4th Cir. 2022) ("To bring a failure-to-promote claim, a plaintiff must establish: (1) she is a member of a protected group, (2) there was a specific position for which she applied, (3) she was qualified for that position, and (4) [her employer] rejected her application under circumstances that give rise to an inference of liability.") (internal quotation marks omitted) (alteration in original). If one person did not get the interview, and the comparator did, maybe their resume was better -- maybe they performed better in the same position. That makes sense. In this case, for example, there is some evidence in the record that Cosby had communication issues at work. But there is also evidence she received positive reviews. These are more like the

[2] The majority asserts that "Cosby has never raised a failure to promote claim" "[i]n her complaint" and that "[t]he same goes for Cosby's argument on appeal." *Ante* at 11 n.10. In fact, the majority confidently asserts that "only the dissent raises failure to promote." *Id.*

This assertion is belied by the record. Cosby specifically alleged that SCPPP "began investigating [her] for supposedly engaging in an inappropriate relationship . . . . ***to disqualify [her] from being considered for the promotion she was seeking***." J.A. 15 ¶ 10 (emphasis supplied); *id.* 16 ¶ 11 ("[T]his new investigation was undertaken . . . ***to further prevent [Cosby] from seeking a promotion*** . . . .") (emphasis supplied). Cosby reiterated this contention at numerous points in her brief. *See* Opening Br. at 4 ("Cosby contends they [began investigating her for allegedly engaging in personal relationships] in order to prevent her from receiving the promotion."); *id.* at 11 (contending Cosby's "comparator evidence should have been sufficient to overcome [summary judgment]" because "[a]ll three male agents . . . applied for the same promotion Cosby was seeking" and "[a]ll three agents . . . were subsequently interviewed for the promotion Cosby had sought without being granted an interview"); *id.* at 11–12 ("Gambrell . . . did not interview Cosby for the promotion she was seeking, and did interview the three male comparators.").

kinds of things that would justify distinguishing a comparator as "differently situated" from a plaintiff applying for the same job.

But if, in a failure to promote case like this one, employers' reasons for differential treatment go outside qualifications and performance, it starts to look *less* like the comparators were situated differently and *more* like the employer is offering a justification as to why an otherwise qualified candidate was not interviewed. At that point, we are moving to the second prong of the *McDonnell Douglas* framework: the legitimate, non-discriminatory reason.

Employers can always manufacture some reason to discriminate against an employee otherwise shielded by Title VII, treat that employee disparately, and then argue their spurious reason to discriminate *was* a "differentiating or mitigating circumstance." That is why in the *McDonnell Douglas* framework the burden shifts back to a plaintiff to demonstrate the defendant's purportedly legitimate reason was pretext. And perhaps in this case Cosby can show exactly that: she was denied an interview, endured an investigation into her out-of-work sexual relationships, was made to sit for a polygraph test, and ultimately was forced out of her position not because the sexual relationship was an especially dire infraction -- indeed, it was concededly not a policy violation -- but because of a Title VII violation.[3] *Cowgill*, 41 F.4th at 383 ("[W]hen 'facts, if believed, would allow a trier of fact to think [the employer] was simply looking for a reason to get

[3] As noted below, faced with similar rumors involving a male agent's sexual relationships withs subordinates, Director Harmon simply asked the agent if the rumors were true, was assured they were not, and left it at that.

rid of [the employee],' the employer's proffered explanation may not be worthy of credence.") (quoting *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 296 (4th Cir. 2010)) (second and third alterations in *Cowgill*). Could it be that AIC Gambrell, who was compelled to take Cosby on following her successful charge of discrimination in 2012, *wanted* a reason to deny Cosby's application for the open position? Yes. And Cosby should be given the opportunity to prove it.

In sum, the problem with treating a "legitimate, non-discriminatory reason" as a "differentiating or mitigating" comparator characteristic is that it legally deprives a plaintiff of the chance to demonstrate pretext. Perhaps Cosby cannot demonstrate pretext. But the *McDonnell Douglas* framework gives her the opportunity to try to do so.

B.

Greg Stewart

The majority also rejects a fourth comparator, Greg Stewart. Stewart held a supervisory role in the SCPPP's Greenville office. Stewart was also rumored to have been involved in a romantic relationship with a subordinate, but he was not subjected to any of the adverse actions to which Cosby was subjected. Cosby emphasizes that Director Harmon -- the same agent who conducted the final investigation of Cosby in 2018 -- was aware of the rumors about Stewart, yet Director Harmon only spoke to Stewart informally, never subjected him to a polygraph test, never attempted to corroborate the rumors, and never required a formal statement of him. Instead, Director Harmon simply asked Stewart if the rumors were true, got assurances they were not, and considered that the end of the matter -- hardly the inquisition Cosby endured.

But in the majority's view, this did not amount to disparate treatment. The majority posits Stewart was differently situated for two reasons: First, in the majority's view, the supervisors who decided to investigate Cosby's relationship were not the same as those who investigated the Stewart relationship. *Ante* at 12 ("Cosby has not shown that the supervisor or supervisors that made the decision to investigate her also made the decision not to investigate Stewart."). And second, the majority finds it a "critical distinction" that, although there were rumors Stewart had a relationship with a subordinate in the office, there were no rumors he had a relationship with a subordinate and then altered the job conditions of that subordinate. *Id.* at 12. Neither of these purported distinctions should doom Cosby's claim at summary judgment.

First, the supervisors. The evidence is undisputed that Director Harmon, who had heard rumors about Stewart's activity, was responsible for investigating rumors of Cosby's activity too. The majority seeks to distinguish Director Harmon's position with respect to Stewart from Director Harmon's position with respect to Cosby, as if there were two Director Harmons who were different people. The majority undertakes this effort without precedential support because this court has not parsed the same supervisor requirement as finely as the majority does here. In fact, our court originally borrowed the same supervisor requirement from a Sixth Circuit case, *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992), which many courts, including ours, have cabined or set aside in appropriate cases. *See Cowgill*, 41 F.4th at 382 ("As *Mitchell*'s progeny have long noted, plaintiffs do not need to share the same supervisor in every case, and that comparison point is not a bar to relief in a case like this one, where the comparators are otherwise similar in all relevant

respects.") (internal quotation marks omitted). The majority's opinion here proves why. Creating an arbitrary firewall within an entity (or, here, within a single person) prevents the left hand from knowing what the right hand is doing.

Regardless, it is clear that Director Harmon investigated rumors about both Greg Stewart and Cosby. While it is true that AIC Gambrell, not Director Harmon, *initiated* the investigation into Cosby's relationship with Nicole Albany (the *day after* he discovered Cosby had filed the Internal Complaint against him), Albany's report about Cosby reached Director Harmon roughly three weeks later. And Director Harmon carried the investigation forward thereafter. He did so in a way categorically different from his investigation into the rumors concerning Greg Stewart. Director Harmon interviewed Nicole Albany, *then* AIC Gambrell and AAIC Honeycutt, *and then* Cosby.

That takes us to the majority's second reason for distinguishing Stewart from Cosby: the gravity of the rumors. The majority says Cosby was investigated, and Stewart was not, because the allegations about Cosby were worse: Cosby "hasn't presented any evidence that Stewart was accused of *altering a subordinate's job conditions*, or otherwise subjecting a subordinate to a hostile work environment, after having a sexual relationship with that subordinate." *Ante* at 12 (emphasis in original). But the accusation about Cosby altering an employee's job conditions came from Nicole Albany, whose statement AIC Gambrell procured based upon rumors. What the majority views as the *cause* of differential treatment could just as easily be viewed as the *consequence* of differential treatment. The SCPPP investigated the rumors about Cosby to develop evidence, but with Stewart, Director Harmon simply took him at his word.

Director Harmon testified that when he heard the rumors about Stewart, he asked Stewart directly *first* whether the rumors were true. *See* J.A. at 648 ("Since Greg [Stewart] was the agent in charge, he was a person that's over subordinates, I had to address that issue with him."). Director Harmon took Stewart's denial at face value. *Id.* ("This is the rumor, is it happening? No."); *id.* at 647 ("[M]y comments were if this is the case you need to stop it immediately. This is your warning about it. If evidence comes up after this warning they'll [sic] be an investigation."). Director Harmon did not even interview the subordinate with whom Stewart purportedly had a relationship, because "our professional policy say[s] start with the supervisor." *Id.* at 648; *id.* ("[Supervisors are] going to be the ones that are going to be held accountable first, not the subordinate."). That policy was not only undermined, but inverted, when Director Harmon investigated the rumors about Cosby. And it is because of this inversion that the difference between the quality of the rumors exists.

What is more, like Stewart, Cosby initially denied the allegations against her. Unlike Stewart, Cosby was then instructed by Director Harmon to sit for a polygraph on pain of termination. Cosby, but not Stewart, was required to give a formal statement. Cosby, but not Stewart, was ultimately forced to resign.

Given this context, Stewart is a valid comparator. He held a supervisory role like Cosby, in the same office as Cosby. Like Cosby, he had been accused of having inappropriate relationships with subordinates. Like Cosby, he was investigated based upon these rumors by Director Harmon. But *unlike* he did with Cosby, Director Harmon credited Stewart's attestation that the rumors about him were false. And *unlike* Cosby, nobody ever

asked around the office to find out if the rumors could be corroborated. It certainly looks like a similarly situated employee was treated differently -- and that may well have been, as Cosby contends, for reasons within the compass of Title VII. *See Haynes*, 922 F.3d at 224 ("Considering this evidence, a reasonable fact finder could conclude that Hicks and Haynes were appropriate comparators, because they dealt with the same supervisor, were subject to the same standards, and engaged in similar conduct."). As with the three other comparators, the gravity of the rumors is at best a "legitimate, nondiscriminatory reason" as to why Cosby was treated differently than Greg Stewart. *Cowgill*, 41 F.4th at 379–81; *see also Haynes*, 922 F.3d at 225 ("Although WCI contends that its own investigation suggested that Haynes left work because he was frustrated that his truck was not ready while Hicks quit for a 'seemingly honest' reason, this contention simply results in another dispute of fact, which must be read in the light most favorable to the non-moving party at this stage."). It may well be that Cosby can show this reason was pretextual.

Viewing the facts in the light most favorable to Cosby at this stage, I would hold that Cosby has identified suitable comparators and remand with instructions that the district court consider whether Cosby can carry her burden at summary judgment to identify a pretext behind the SCPPP's proffered reasons for disparate treatment.

III.

For these reasons, I dissent. Cosby should have her day in court.