UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CAROLINA SOSA,

Plaintiff,

OPINION AND ORDER

-against-

15 Civ. 3329 (JCM)

ROCKLAND COUNTY COMMUNITY COLLEGE,

Defendant.
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Plaintiff Carolina Sosa ("Plaintiff") commenced this action against Defendant Rockland County Community College ("Defendant" or "RCC") pursuant to Title VII of the Civil Rights Act ("Title VII"). Before the Court is Defendant's Motion for Summary Judgment (the "Motion"), which was filed on October 5, 2016.[1] (Docket Nos. 44, 49). Plaintiff opposed the Motion on October 27, 2016, (Docket No. 53), and Defendant replied on November 14, 2016, (Docket No. 62).[2] For the reasons that follow, the Motion is granted.

I. BACKGROUND

The following facts are gathered from Defendant's statement filed pursuant to Rule 56.1 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Rule 56.1"), (Docket No. 34), Defendant's supporting affidavits and exhibits, Plaintiff's Rule 56.1 counter-statement of facts, (Docket No. 50), Plaintiff's supporting affirmations and exhibits, and the pleadings submitted by the parties in support of their contentions.

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[1] This action is before the undersigned for all purposes on consent of the parties, pursuant to 28 U.S.C. § 636(c). (Docket No. 11).

[2] The parties' briefs are hereinafter cited as "Def. Br.," "Pl. Opp." and "Def. Reply." (Docket Nos. 49, 54, 62). All page number citations refer to the page number assigned upon electronic filing unless otherwise noted.

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A. Plaintiff's Employment at RCC and Prior Lawsuits

Plaintiff, a native born United States citizen of Mexican descent, is an assistant professor of Pluralism and Diversity in America at RCC. (Compl.[3] at 1). Plaintiff was hired by RCC in or about 1994 and, in 1998, was granted tenure as part of a confidential settlement of a federal lawsuit Plaintiff brought against Defendant.[4] (*Id.* at 1-2). Since 1998, Plaintiff has remained at the rank of tenured assistant professor. (*Id.*).

In 2003, Plaintiff submitted an application for promotion to the rank of associate professor, which was denied by Defendant's Faculty Senate College Reappointment, Tenure, and Promotion Committee (the "FSCRTP"). (Compl. at 2). Plaintiff reapplied in 2004, submitting substantially the same materials, and her application was again denied by the FSCRTP. (*Id.*). Thereafter, Plaintiff, along with a colleague of Haitian descent, commenced a second lawsuit against Defendant claiming that the denial of her promotion was the result of disparate treatment and intentional discrimination on the basis of her national origin. (*Id.*). Plaintiff also argued that Defendant had historically underemployed faculty of minority race and ethnicity. On May 1, 2007, the Court granted Defendant's motion for summary judgment in that action, finding, *inter alia*, that there was no disparate treatment and no evidence of institutional discrimination. *See Sosa v. Rockland Cty. Cmty. Coll.*, No. 04 Civ. 8722 (CLB), 2007 WL 1295723, at *4 (S.D.N.Y. May 1, 2007), *aff'd sub nom. Sosa v. Rockland Cmty. Coll.*, 302 F. App'x 56 (2d Cir. 2008).

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[3] Refers to the Complaint in this action filed on April 29, 2015. (Docket No. 1).

[4] In 1997, Plaintiff commenced a lawsuit against Defendant in this Court alleging racial and ethnic origin discrimination and disparate treatment following the denial of her application for tenure. (Compl. at 1-2). She sought equitable and monetary damages. Defendant denied the allegations in the complaint. That lawsuit was settled by way of a confidential agreement whereby Plaintiff was awarded tenure. (*Id.*).

B. Plaintiff's 2012 Promotion-by-Exception Application

In October 2012, Plaintiff submitted a Notice of Intent to Apply for Promotion by Exception, along with a statement explaining why she believed Defendant should promote her from the rank of assistant professor to full professor (the "Exception Application"). (Ex.[5] G). This application, the first Plaintiff made since her unsuccessful attempts for promotion in 2003 and 2004, (Tr. Sosa[6] at 162), sought to bypass entirely the rank of associate professor, (*see generally* Ex. F). According to Cliff Wood ("President Wood"), the president of RCC who has been employed there for approximately forty years, such an application was unprecedented, as no teaching faculty member in RCC's history had ever sought to skip a professorial rank. (Wood Aff.[7] at ¶ 10; *see also* Baker Aff.[8] at ¶ 16). Before submitting the Exception Application, Plaintiff asked Bruce Delfini ("Professor Delfini"), an RCC professor and then-president of the Faculty Senate Committee, whether she was eligible to apply for promotion from assistant professor to full professor. (Tr. Sosa at 99-100). According to Plaintiff, Professor Delfini told her that she "could apply." (*Id.*). Upon receipt of Plaintiff's Exception Application, the FSCRTP requested guidance from the acting vice president and secretary of the Faculty Senate, Josephine Coleman ("Professor Coleman"), who informed the FSCRTP that such exceptions would not be considered. (Ex. H).

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[5] Refers to the exhibits submitted with Defendant's brief. (Docket Nos. 34-1 to 34-35).

[6] Refers to the transcript of Plaintiff's deposition. (Docket Nos. 45-2, 51-21). All transcript citations herein refer to the original pagination.

[7] Refers to the Affidavit of President Wood in Support of Defendant's Motion for Summary Judgment. (Docket No. 46).

[8] Refers to the Affidavit of Professor Bill Baker in Support of Defendant's Motion for Summary Judgment. (Docket No. 47).

In accordance with Professor Coleman's directive, in April 2013, the FSCRTP advised Plaintiff that her application was denied. (Ex. I). Defendant notes that the FSCRTP did not review Plaintiff's materials submitted in support of her Exception Application once it determined that exceptions of this nature would not be considered in the promotion process. (Baker Tr.[9] at 53-54).

Plaintiff appealed the denial to the dean of instruction, Dr. Susan Deer, who supported the FSCRTP's decision. (Ex. J). Plaintiff then made her final appeal to President Wood, who also affirmed the FSCRTP's denial of the Exception Application and cited data conveying Plaintiff's unsatisfactory performance at RCC.[10] (Exs. K, L).

C. Requests for Accommodations

At various times throughout her employment with Defendant, Plaintiff requested: (i) office and classroom reassignment and reconfiguration due to, *inter alia*, arthritis in her foot; and (ii) that she be permitted to enter student grades in a non-electronic format due to migraine headaches caused by prolonged computer use.

1. Office and Classroom Reassignment and Reconfiguration

In 2003, Plaintiff requested that her office be relocated to a particular building on the RCC campus on the same floor as her classrooms of choice. (Ex. Q at 3-4). Defendant acceded to this request. (Ex. Q at 8). In 2005, Plaintiff noted that she had difficulty ambulating around various pieces of furniture in her office and requested that they be removed. (Ex. HH). Despite

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[9] Refers to the transcript of Professor Bill Baker. (Docket No. 51-26).

[10] President Wood testified that, in the course of his appellate review, he inspected Plaintiff's dossier and portfolio submitted with the Exception Application. (Tr. Wood at 223-224). However, as he always does when deciding an appeal, President Wood also requested and reviewed Plaintiff's retention rate, grade distributions and student satisfaction statistics as compared to other faculty teaching the same courses as Plaintiff over the same period of time. (Wood. Aff. at ¶ 11; Tr. Wood at 30-38; Ex. Z). President Wood conducted an identical inquiry for Plaintiff's 2004 promotion application, the subject of her previous lawsuit before this Court. (Wood Aff. at ¶ 52; Ex. Z).

Defendant's conclusion that the pathways in Plaintiff's office were sufficient for an individual of Plaintiff's mobility, and even for wheelchair passage, Defendant acceded to Plaintiff's request and removed the contested furniture. (*Id.*). Plaintiff complained, however, that this accommodation was not made in a timely fashion. (Tr. Sosa at 160). Finally, in 2010, Plaintiff requested that the new double-size desks placed in her classroom be replaced with the older single-size desks, as she had difficulty navigating around the new desks and placing them in her desired classroom configuration. (*Id.* at 25-26). Defendant ultimately granted this request, but Plaintiff again argued that this accommodation was not "immediate." (*Id.* at 25-26, 160).

2. Online Grading

Defendant requires that all teaching faculty enter student grades online. (Roy Aff.[11] at ¶ 13). In 2008, Plaintiff submitted a notice to Defendant stating that she was unable to sustain "prolonged" computer use due to photosensitivity migraines. (Ex. R). A neurologist hired by Defendant determined that computer use in excess of forty-five minutes may cause Plaintiff photosensitivity migraines. (Ex. S). Plaintiff later obtained a letter from a different doctor stating that five minutes of computer use would cause headaches and that she should be relieved of all online grade inputting requirements. (Exs. R, T). Despite these differing conclusions, Defendant authorized a staff member to perform all of Plaintiff's online grading duties on her behalf. (Ex. W).

II. SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, the moving party bears the burden of demonstrating that it is entitled to summary judgment. *See Huminski v. Corsones*, 396 F.3d 53, 69 (2d Cir. 2005). The Court must grant summary judgment "if the movant shows that

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[11] Refers to the Affidavit of Melissa L. Roy in Support of Defendant's Motion for Summary Judgment. (Docket No. 48).

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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine dispute as to a material fact "exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor." *Beyer v. Cty. of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008) (citation omitted); *see also Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48 (1986). "A fact is material if it might affect the outcome of the suit under the governing law." *Casalino v. N.Y. State Catholic Health Plan, Inc.*, No. 09 Civ. 2583 (LAP), 2012 WL 1079943, at *6 (S.D.N.Y. Mar. 30, 2012) (citation omitted).

In reviewing a motion for summary judgment, the Court "must draw all reasonable inferences in favor of the [non-moving] party" and "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000) (citations omitted). That said, the Court may not weigh the evidence or determine the truth of the matter, but rather conducts "the threshold inquiry of determining whether there is the need for a trial." *Anderson*, 477 U.S. at 250.

The moving party bears the initial burden of "demonstrating the absence of a genuine issue of material fact." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008) (citing *Celotex*, 477 U.S. at 323). If the moving party meets this initial burden, the burden then shifts to the non-moving party to "present evidence sufficient to satisfy every element of the claim." *Id.* "The non-moving party 'is required to go beyond the pleadings' and 'designate specific facts showing that there is a genuine issue for trial,'" *id.* (citing *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 249-50), and "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If the non-moving party fails to establish the existence of an essential element of the case on which

it bears the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

In an employment discrimination case such as this, where intent is an issue, the Second Circuit has urged caution in granting summary judgment, since direct evidence of intentional discrimination is available only in the rarest of instances. *See Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999) (noting that "the trial court must be especially cautious in deciding whether to grant [summary judgment] in a discrimination case, because the employer's intent is often at issue and careful scrutiny may reveal circumstantial evidence supporting an inference of discrimination"); *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1224 (2d Cir. 1994); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985). However, summary judgment is by no means precluded in employment discrimination cases. Indeed, the Second Circuit has noted that the "salutary purposes of summary judgment-avoiding protracted, expensive and harassing trials-apply no less to discrimination cases than to . . . other areas of litigation." *Meiri*, 759 F.2d at 998.

III. DISCUSSION

Plaintiff contends that Defendant's refusal to grant her application for a promotion violated Title VII because it was: (i) a discriminatory action on the basis of her national origin; and (ii) in retaliation for prior protected activities.[12] (Compl. at 4; Pl. Opp. at 1-4).

A. Discrimination on Basis of National Origin

Under Title VII, "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any

[12] In its brief, Defendant addresses, and argues that the Court should dismiss, what it believes to be Plaintiff's hostile-work-environment claims. (Def. Br. at 17-18). However, Plaintiff notes in her Opposition that she does not assert any hostile-work-environment claims against Defendant in this case. (Pl. Opp. at 20). Similarly, Plaintiff confirms that she does not raise any claims of disability discrimination in this litigation. (Docket No. 51 at 12). Accordingly, the Court will not opine or rule on these purported claims herein.

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1).

Courts analyzing discrimination claims under Title VII apply the three step burden-shifting approach established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). In the first stage, the plaintiff bears the burden of proving a prima facie case of discrimination by a preponderance of the evidence. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). To establish a prima facie case of race or national origin discrimination under Title VII, a plaintiff must show that: "(1) [s]he belonged to a protected class; (2) [s]he was qualified for the position [s]he held; (3) [s]he suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent." *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2012); *see also Mills v. S. Connecticut State Univ.*, 519 Fed. Appx. 73, 75 (2d Cir. 2013); *Ruiz v. County of Rockland*, 609 F.3d 486, 491-92 (2d Cir. 2010). A failure to promote may constitute an adverse employment action. *See Mills*, 519 Fed. Appx. at 75 ("failure to promote [plaintiff] constitutes an adverse employment action"); *Treglia v. Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002) (recognizing "discriminatory failure to promote falls within the core activities encompassed by the term 'adverse actions'").

In the second stage, if the plaintiff makes out a prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision of which plaintiff complains. *See Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). As noted by the Supreme Court in *Reeves v. Sanderson Plumbing Products*, "[t]his burden is one of production, not persuasion." 530 U.S. 133, 142 (2000). Finally, if the

defendant is able to provide a nondiscriminatory basis for the employment decision, it satisfies its burden, and the burden shifts back to plaintiff to demonstrate, by a preponderance of the evidence, that the defendant's reasons are merely pretext for discrimination. *See id.* at 143; *St. Mary's Honor Ctr.*, 509 U.S. at 510-11.

To prevail on a motion for summary judgment, the plaintiff must submit "evidence sufficient to allow a rational factfinder to infer that the employer was actually motivated in whole or in part by . . . discrimination." *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997). Evidence "contradicting the employer's given reason-without more-does not necessarily give logical support to an inference of discrimination," and is therefore insufficient to satisfy plaintiff's burden. *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000).

1. Prima Facie Case

Focusing on the fourth element of Plaintiff's prima facie case, Defendant contends that Plaintiff cannot satisfy her burden of demonstrating that an illegal discriminatory reason played a motivating role in the adverse employment decision. (Def. Br. at 24). Although Plaintiff's burden in establishing a prima facie case for discrimination is minimal, the Court agrees with Defendant that Plaintiff has fallen short.

Plaintiff's conclusory assertions that she was not promoted because she is of Mexican descent do not support an inference of discrimination. The only colorable evidence submitted by Plaintiff that speaks of discrimination is her own self-serving deposition testimony. Plaintiff does not, with competent evidence, identify a single administrator or decision maker at RCC who harbors a discriminatory animus against Americans of Mexican ancestry. Further, Plaintiff's allegation that the FSCRTP discriminated against her in denying the Exception Application is not supported by the evidence. (Pl. Opp. at 16). Indeed, a colleague with whom Plaintiff had an

adverse relationship, and who Plaintiff believed discriminated against her during her time at RCC, (Ex. GG), recused himself from participation in the review of Plaintiff's Exception Application to avoid any appearance of impropriety, (Baker Aff. at ¶ 9). Plaintiff's bald allegations that the FSCRTP discriminated against her on the basis of national origin -- and that those who recused themselves from the FSCRTP influenced the outcome -- are not supported by admissible evidence and, thus, are insufficient to state a claim of Title VII discrimination.

To further support her claim of discrimination, Plaintiff contends that "at the same time [Plaintiff] was being treated as she was, an African-American administrator, [Dr. Roger] Davis, was being subjected to a vicious campaign taunting his education and his speech . . ." by union president Dr. Cliff Garner ("Dr. Garner"). (Pl. Opp. at 14). It is difficult to see how this conclusory statement constitutes any proof of discrimination.[13] Plaintiff further argues that the paucity of Hispanic professors at RCC is suggestive of discrimination. (Pl. Opp. at 15). In support of this contention, Plaintiff cites to the Second Circuit's recent decision in *Walsh v. N.Y. City Hous. Auth.*, 828 F.3d 70 (2d Cir. 2016). In *Walsh*, the Second Circuit instructed that, in a Title VII discrimination case, "[t]he finder of fact *may* properly consider the dearth of female bricklayers as *one* component of its cumulative inquiry." *Walsh*, 828 F.3d at 77 (emphasis added). Even considering Plaintiff's assertion regarding the paucity of Hispanic professors in tandem with her myriad of other allegations concerning Defendant's purported discrimination, the Court finds that Plaintiff does not make out a colorable claim under Title VII. *See also Watson v. Arts & Entm't Television Network*, No. 04 Civ. 1932 (HBP), 2008 WL 793596, at *17 n.5 (S.D.N.Y. Mar. 26, 2008) (finding that "the mere fact that [plaintiff] may have been the only member of her protected class in her department does not give rise to an issue of fact");

[13] The Court also notes that Dr. Garner is no longer employed at RCC due to his termination stemming from his arrest on charges of misappropriating RCC and union funds. (Roy Aff. at ¶ 22).

Anderson v. Hertz Corp., 507 F. Supp. 2d 320, 328 (S.D.N.Y. 2007) (holding that the fact that plaintiff was the only African-American manager hired at defendant's facility in the past twelve years was insufficient to make out a prima facie case of race discrimination), *aff'd*, 303 F. App'x 946 (2d Cir. 2008); *Branch v. Sony Music Entm't Inc.*, No. 97 Civ. 9238 (TPG), 2001 WL 228108, at *6 (S.D.N.Y. Mar. 8, 2001) ("[A] racial imbalance in the makeup of a workplace is insufficient, by itself, to demonstrate discrimination.").

In sum, Plaintiff's claim rests on nothing more than her subjective belief that she was the victim of discrimination because she is of Hispanic descent. An employee cannot defeat summary judgment by restating the conclusory allegations contained in her complaint. *See Contemporary Mission, Inc. v. United States Postal Serv.*, 648 F.2d 97, 107 (2d Cir. 1981).

2. Nondiscriminatory Reasons

Even if Plaintiff were able to make out a prima facie case for failure to promote, this claim would be dismissed nonetheless as Defendant has offered legitimate, nondiscriminatory reasons for not promoting Plaintiff. *See McDonnell Douglas*, 411 U.S. at 802 (stating that once a plaintiff makes a prima facie case, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection"). Plaintiff's Exception Application was unprecedented, as no faculty member in RCC's history had ever made an application to bypass an entire faculty rank.[14] (Wood Aff. at ¶ 10). Defendant's refusal to grant

[14] RCC has received and granted exception applications in the past. (Baker Aff. at ¶ 14; Wood Aff. at ¶ 9). However, those applications, the last of which was in 2004, were in connection with exceptions regarding the amount of time a faculty member served in a particular rank before being elevated to the next successive rank, and not an exception authorizing a faculty member to bypass an entire rank. (*Id.*). Furthermore, though Professor Delfini informed Plaintiff that she "could apply" to bypass the rank of associate professor, the credible evidence does not demonstrate that this mere suggestion was binding upon the FSCRTP. *See, e.g., Simpri v. City of N.Y.*, No. 00 CIV. 6712 (SAS), 2003 WL 23095554, at *6 (S.D.N.Y. Dec. 30, 2003) (noting that even a "promise" of promotion from defendant's acting director was not binding upon defendant where plaintiff was not qualified for a promotion); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565-66 (2d Cir. 2000), *superseded on other grounds by Jones v. N.Y. State Metro D.D.S.O.*, 543 F. App'x 20 (2d Cir. 2013) (dismissing a failure-to-promote claim even though defendant "reneged on its promise to promote" where plaintiff was unqualified for the position).

an application that sought to circumvent its ranking system -- a request that had never been made or granted in RCC's history -- constitutes a legitimate, nondiscriminatory reason for not promoting Plaintiff.[15] Moreover, because Plaintiff's Exception Application was the first of its kind, Plaintiff cannot identify any similarly situated individuals not of Hispanic heritage who were treated more favorably than she was in this regard. *See, e.g.*, *Lee v. Healthfirst, Inc.*, No. 04 Civ. 8787 (THK), 2007 WL 634445, at *10 (S.D.N.Y. Mar. 1, 2007) ("One way to establish a *prima facie* case of discrimination is to demonstrate the disparate treatment of other similarly situated employees."). Furthermore, Defendant offers sufficient evidence demonstrating that Plaintiff's performance was unsatisfactory as compared to other professors teaching the same course in a similar period. (Exs. L, N, Z, AA, DD, JJ). Even though Plaintiff offers countervailing evidence "bespeak[ing] [] her effectiveness as a teacher," (Pl. Opp. at 11), Defendant's conclusion that Plaintiff's performance was unsatisfactory is overwhelmingly supported by the evidence and entitled to deference. *See Sarmiento v. Queens Coll. CUNY*, 386 F. Supp. 2d 93, 97-98 (E.D.N.Y.), *aff'd*, 153 F. App'x 21 (2d Cir. 2005) ("Defendant's decisions regarding the professional experience and characteristics sought in a candidate, as well as the search committee's evaluation of Plaintiff's qualifications, are entitled to deference.").

[15] Plaintiff argues that the Court should not countenance this legitimate, nondiscriminatory reason for denying the Exception Application because President Wood, in reviewing the FSCRTP's decision on appeal, discussed the merits of Plaintiff's application and not the fact that Plaintiff did not qualify for an exception because she was seeking to bypass an entire rank. (Pl. Opp. at 53). Preliminarily, this argument fails because President Wood does not aver that Plantiff's underperformance was the exclusive basis for his denial of the Exception Application. Furthermore, even if the Court were to disregard the unprecedented nature of the Exception Application as the basis for its denial, Plaintiff's unsatisfactory performance, as discussed *infra*, is also a sufficiently legitimate and nondiscriminatory reason for denying the Exception Application. *See, e.g.*, *Sarmiento*, 386 F. Supp. 2d at 97-98 (E.D.N.Y.), *aff'd*, 153 F. App'x 21 (2d Cir. 2005); *Tarshis v. Riese Org.*, 211 F.3d 30, 37 (2d Cir. 2000) (noting that the role of the Court is not to evaluate the wisdom of personnel decisions, but merely to determine whether the decisions were rational and nondiscriminatory).

Consequently, this also constitutes a legitimate, nondiscriminatory reason for Defendant's decision to deny Plaintiff's application.[16]

3. Evidence of Pretext

Plaintiff has failed to demonstrate that Defendants' explanations are pretextual. As noted above, Plaintiff has the ultimate burden "to point to evidence that reasonably supports a finding of prohibited discrimination . . . ." *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 127 (2d Cir. 2013). Plaintiff has propounded no colorable evidence, other than her own self-serving testimony, that would permit a reasonable fact-finder to conclude that the reasons offered by Defendant are pretextual. *See St. Mary's*, 509 U.S. at 511 n. 4 ("It is not enough . . . to disbelieve the employer;" the plaintiff also must come forward with direct or indirect evidence of unlawful retaliation); *Ford v. Consolidated Edison Co. of New York, Inc.*, No. 03 Civ. 9587 (PAC), 2006 WL 538116, at *12 (S.D.N.Y. Mar. 3, 2006) ("Although Plaintiff makes conclusory allegations of pretext, those allegations are completely undermined by the largely undisputed evidence that Plaintiff [failed to perform his job and was insubordinate]."). In sum, the Court concludes that "no reasonable jury could find that detailed and consistent concerns with [P]laintiff's [performance at work]," in addition to the unprecedented nature of the Exception Application, "were only a pretext for adverse employment actions that were really motivated by racial bias." *Wesley-Dickson v. Warwick Valley Cent. Sch. Dist.*, 586 F. App'x 739, 744 (2d Cir. 2014) (citation omitted).

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[16] To the extent Plaintiff seeks to prevent summary judgment "on the strength of a discrepancy in qualifications ignored by an employer, . . . the plaintiff's credentials . . . have to be so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Plahutnik v. Daikin Am., Inc.*, 912 F. Supp. 2d 96, 104 (S.D.N.Y. 2012) (quoting *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) (internal quotation marks omitted)). Here, Plaintiff has provided no evidence, other than her own unsupported allegations, that her credentials were clearly superior to anyone else's credentials.

Accordingly, Plaintiff's claim of discrimination on the basis of national origin under Title VII fails as a matter of law, and Defendant's Motion for Summary Judgment is granted.

B. Retaliation on Basis of Protected Activity

Title VII forbids discrimination against an employee "because [s]he has opposed any practice made an unlawful employment practice . . . or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the auspices of that statute." 42 U.S.C. § 2000e-3(a).

Retaliation claims under Title VII are analyzed under the same burden-shifting framework as discrimination claims. *See Sumner v. U.S. Postal Service*, 899 F.2d 203, 208 (2d Cir. 1990); *see also supra*, Section III.A. To make out a prima facie case of retaliation under Title VII, a plaintiff must show that "[s]he engaged in protected participation or opposition under Title VII, that the employer was aware of this activity, that the employer took adverse action against the plaintiff, and that a causal connection exists between the protected activity and the adverse action, *i.e.*, that a retaliatory motive played a part in the adverse employment action." *Sumner*, 899 F.2d at 208-09.

"[A] plaintiff can indirectly establish a causal connection . . . by showing that the protected activity was closely followed in time by the adverse employment action." *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) (quoting *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001)). As a general matter, "'district courts in this Circuit have consistently held that a passage of more than two months between the protected activity and the adverse employment action does not allow for an inference of causation.'" *Williams v. Woodhull Med. & Mental Health Ctr.*, No. 10 Civ. 1429 (NGG)(LB), 2012 WL 555313, at *2 (E.D.N.Y. Jan. 31, 2012), *report and recommendation*

adopted sub nom., *Williams v. Woohdull Med. & Mental Health Ctr.*, 2012 WL 567028 (E.D.N.Y. Feb. 21, 2012) (quoting *Garrett v. Garden City Hotel Inc.*, No. 05 Civ. 0962 (JFB)(AKT), 2007 WL 1174891, at *21 (E.D.N.Y. Apr. 19, 2007)); *see also Gentile v. Potter*, 509 F. Supp. 2d 221, 239 & n.9 (E.D.N.Y. 2007) (dismissing retaliation claim premised on act that occurred four months after protected activity where there was no direct evidence of retaliation); *Nicastro v. Runyon*, 60 F. Supp. 2d 181, 185 (S.D.N.Y. 1999) ("Claims of retaliation are routinely dismissed when as few as three months elapse between the protected . . . activity and the alleged act of retaliation."). Once a defendant has articulated legitimate nondiscriminatory reasons for the alleged retaliation, the burden shifts back to the plaintiff to show that the proffered reasons are a pretext for discrimination. *Sumner*, 899 F.2d at 209 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). "The ultimate burden of persuasion, of course, remains with the plaintiff." *Id.*

1. Prima Facie Case

The Court finds that Plaintiff fails to make out a prima facie case of retaliation because she cannot establish a causal connection between the protected activity and Defendant's alleged retaliation. Plaintiff argues that the denial of her Exception Application in 2014 was in retaliation for her 2003, 2005 and 2010 requests to reassign and reconfigure her classroom and office, her 2008 request to be excused from Defendant's online grading requirement, and the two lawsuits she previously brought against Defendant in 1997 and 2004.[17] (Pl. Opp. at 17-17). However, these protected activities all predate Defendant's denial of Plaintiff's Exception Application by several years. Given that "[t]hree months is on the outer edge of what courts in

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[17] Plaintiff's submissions fail to clearly articulate the protected activities upon which she believes Defendant is basing its alleged retaliation. In deference to Plaintiff as the non-moving party, the Court broadly construes Plaintiff's case to include each of these protected activities.

this circuit recognize as sufficiently proximate to admit of an inference of causation," *Yarde v. Good Samaritan Hosp.*, 360 F. Supp. 2d 552, 562 (S.D.N.Y. 2005), Plaintiff cannot overcome her burden of demonstrating the causal connection between her protected activities and the alleged retaliation years later in 2014. *See also Ruhling v. Tribune Co.*, No. 04 Civ. 2430, 2007 WL 28283, at *23 (E.D.N.Y. Jan. 3, 2007) ("district courts in this Circuit have consistently held that a passage of two months between the protected activity and the adverse employment action seems to be the dividing line") (citing cases); *Cunningham v. Consol. Edison Inc.*, No. 03 Civ. 3522, 2006 WL 842914, at *19-20 (E.D.N.Y. Mar. 28, 2006) (a "lag of three, four, and fourteen months is too long for a causal inference to be appropriate"; the "passage of two months between the protected activity and the adverse employment action seems to be the dividing line").

2. Nondiscriminatory Reasons

Assuming that Plaintiff could make out her prima facie case, the Court finds that Defendant has nonetheless articulated a number of legitimate, nondiscriminatory reasons for denying Plaintiff's Exception Application for promotion from assistant professor to full professor. These reasons, discussed *supra*, Section III.A.2, include dissatisfaction with Plaintiff's performance -- specifically her retention rates, grade distributions and student satisfaction rates as compared to other professors teaching the same course in a similar period (Exs. L, N, Z, AA, DD, JJ; Tr. Wood[18] at 30-37) -- and the fact that an application to skip a full faculty rank was unprecedented in RCC's history.

3. Evidence of Pretext

Plaintiff suggests that these proffered reasons are pretextual. However, Plaintiff has propounded no colorable evidence, other than her own self-serving testimony, that would permit

[18] Refers to the transcript of President Wood's deposition. (Docket No. 51-24).

a reasonable fact-finder to conclude that the reasons offered by Defendant are pretext for an adverse employment action truly motivated by unlawful retaliation. *See St. Mary's*, 509 U.S. at 511 n.4; *see also Ghirardelli v. McAvey Sales & Serv., Inc.*, 287 F. Supp. 2d 379, 391 (S.D.N.Y. 2003), *aff'd sub nom., Ghirardelli v. McAvey Sales & Servs., Inc.*, 98 F. App'x 909 (2d Cir. 2004) ("[E]xamining the record as a whole in light of the legitimate reasons [defendant] proffered for dismissing [plaintiff], and even assuming [plaintiff] could establish the elements of a prima facie case of retaliation, a rational jury could not conclude that the grounds [defendant] articulated are false and merely a pretext for retaliation for protected activity."); *Gonzalez v. Beth Israel Medical Center*, 262 F. Supp. 2d 342, 357-58 (S.D.N.Y. 2003).

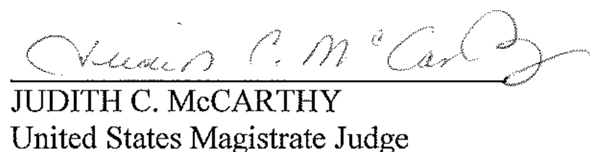
Accordingly, Plaintiff's claim of retaliation under Title VII is denied as a matter of law.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted. The Clerk is respectfully requested to terminate the pending motion, (Docket No. 44), and close the case.

Dated: July 20, 2017
White Plains, New York

SO ORDERED:



JUDITH C. McCARTHY
United States Magistrate Judge