Bekkem v. McDonald Doc. 148

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

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| ANUPAMA BEKKEM, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | NO. CIV-14-996-HE |
| | ) | |
| ROBERT A MCDONALD, SECRETARY, U.S. DEPARTMENT OF VETERANS AFFAIRS, | ) | |
| | ) | |
| Defendant. | ) | |

**ORDER**

Plaintiff Anupama Bekkem, M.D., sued Robert A. McDonald, Secretary of the United States Department of Veterans Affairs, asserting employment discrimination claims under Title VII of the Civil Rights Act of 1964 and a claim under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d). The court previously dismissed several of plaintiff's claims, including her EPA claim.[1] Defendant now seeks summary judgment on plaintiff's remaining claims for pay discrimination based on gender and retaliation.[2]

Summary judgment is appropriate only "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). "A genuine dispute as to a material fact 'exists when the evidence, construed in the light most favorable to the non-moving party, is such that a reasonable jury could return a verdict for the non-moving party.'" Carter v. Pathfinder Energy Servs.,

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[1] *The parties agreed that the court lacks subject matter jurisdiction over plaintiff's EPA claim. See Doc. #138.*

[2] *Plaintiff asserts both a retaliation claim based on discrete acts and a retaliatory hostile work environment claim.*

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Inc., 662 F.3d 1134, 1141 (10th Cir. 2011) (quoting Zwygart v. Bd. of Cnty. Comm'rs, 483 F.3d 1086, 1090 (10th Cir.2007)). Having considered the submissions of the parties in light of this standard, the court concludes defendant's motion should be granted.

## Background[3]

The background and circumstances pertinent to plaintiff's claims are largely undisputed. Since 2006, plaintiff, an Asian-Indian, Hindu female, has worked as a primary care physician in ambulatory care at VAMC-OKC, the Veterans Health Administration health network for veterans, which has several facilities in Oklahoma City and elsewhere in the region. Dr. Malatinszky, as the Medical Director of Primary Care, was plaintiff's immediate supervisor from 2008-2012. He then became the Chief of Ambulatory Care and plaintiff's second-line supervisor, and Dr. Ramirez, the Deputy Chief of Ambulatory Care, became plaintiff's immediate supervisor. During this time period, Dr. Huycke was the Chief of Staff.

Plaintiff was in charge of a four person team, referred to as a PACT team or teamlet. The physician led the team, which include a registered nurse ("RN"), a licensed practical

[3] *The background will be divided into two sections, one which pertains to plaintiff's pay claim and the other which pertains to her retaliation claims. Plaintiff repeatedly objects to defendant's factual statements on the ground they are supported by "the hearsay testimony of an interested party" or the "self-serving testimony of an interested party." Her objection is baseless. Federal Rule of Civil Procedure 56(c) permits the use of "affidavits or declarations." Fed.R.Civ.P. 56(c)(1)(A)& (c)(4); see Sanchez v. Vilsack, 695 F.3d 1174, 1180 n.4 (10th Cir. 2012) ("So long as an affidavit is based upon personal knowledge and set[s] forth facts that would be admissible in evidence, it is legally competent to oppose summary judgment, irrespective of its self-serving nature.") (internal citation and quotation marks omitted).*

nurse ("LPN") and a clerk. Plaintiff, although the leader of the team, did not supervise the team members and lacked the authority to transfer or discipline them.

Pay

A VAMC-OKC's primary care physician's total pay has multiple components: (1) base pay, determined by length of service with the Veteran's Administration, (2) market pay, which reflects recruitment/retention needs for the specialty or assignment of a particular physician and includes factors such as level of experience, need for the specialty, board certifications, and accomplishments, (3) performance pay, which recognizes the achievement of specific goals and may not exceed the lower of $15,000 or 7.5% of annual pay, and (4) retention, relocation and recruitment pay.

A compensation panel, comprised of a diverse group of men and women from different medical services, determines the physicians' pay. Because the panel meets weekly, its composition varies. The panel makes a pay recommendation and the VAMC-OKC Medical Director then makes a final compensation decision. The director can accept, reject or alter the panel's recommendation. Because the physicians' hiring dates differ, their pay determinations are similarly staggered.

From January 1, 2011, to December 31, 2013, a federal pay freeze was in effect. Although the freeze did not prohibit increases in market pay, regional leadership communicated to VAMC-OKC that it should not be raised, absent extraordinary circumstances. VAMC-OKC increased a physician's market pay during the freeze if the doctor's duties or responsibilities increased. The agency also increased the market pay of some male and female physicians during the freeze as the result of converting prior

retention pay to market pay due to a policy change regarding retention pay. The change did not result in an increase in total pay, "only the source of the various components of pay." Doc. #121-2, p. 6, ¶¶ 31-32.[4]

The Secretary is required both by statute and the VA Handbook to review the market pay of VA physicians at least once every 24 months. 38 U.S.C. §7431(c)(5);[5] *see* Doc. #139-4. However, Ann Davidson, the Chief of Human Resources for VMAC-OKC, testified that VMAC-OKC did not always conduct pay panel reviews "within the obligatory two-year period, because management felt there was no reason if there could effectively be no change to market salaries." Doc. #121-2, p. 5, ¶27. Ms. Davidson stated that "[b]oth males and females, in many different services (i.e., more than Ambulatory Care), did not receive timely bi-annual compensation panel review." *Id.*

Following a compensation panel review before the freeze was imposed, plaintiff received a market pay increase on May 8, 2009, resulting in a salary of $160,664. Neither Dr. Malatinszky nor Dr. Huycke participated in that decision. Her next compensation panel review was in July 2012. At that time she received an increase in her base pay because of her longevity with the VA. While Dr. Malatinszky proposed the 2012 panel review, neither he nor Dr. Huycke participated in the panel's deliberation or its decision. When the pay freeze expired, plaintiff was the subject of two compensation panel reviews in March and

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[4] *Page references to briefs and exhibits are to the CM/ECF document and page number.*

[5] *Although the statute was revised in 2016, the pertinent language was unchanged. The court will refer to the revised statute, which has a slightly different numbering system.*

April 2014, which Dr. Malatinszky proposed and which the Medical Director approved. Plaintiff's market pay was increased more than $20,000 from $60,907 to $82,013.

A review of the salaries of all non-supervisory primary care physicians working at VAMC-OKC from 2009 through May 2016 did not reveal any "statistically significant gender disparity in pay" either in the aggregate or in an individual year. Doc. #121, p. 12, ¶27. Each year, while there were male primary care physicians who made more market and total pay than plaintiff, there were some who made less.

Retaliation

Plaintiff received an overall evaluation score of HIGH SATISFACTORY on her 2013 proficiency report, which was the same score she had received in 2009, 2010, 2011 and 2012. While she was eligible for a performance award of $12,652 in 2013, if she met certain identified goals, defendant awarded plaintiff only $6,500, asserting that she had not met the required goals.

In September 2012, plaintiff transferred to the North May Avenue satellite clinic from the main clinic in downtown Oklahoma City where she had worked since 2006. In early 2013, Cathy Nale was assigned as the RN to plaintiff's PACT team. Ms. Nale made disparaging comments to plaintiff, to other staff and to patients about the fact that plaintiff is Indian and has a dot on her forehead which reflects that she is a married Hindu female. Plaintiff testified that she was offended by Ms. Nale's comments, because she is a female of the Hindu religion from India. She stated that, despite her complaints to Drs. Ramirez and Huycke, nothing was done to stop Ms. Nale's harassment.

The LPN on plaintiff's PACT team left in June 2013 and was not replaced for several months.[6] Plaintiff said she was told that LPNs from different teams would assist as needed "when they had time." She stated the help she received from other LPNs was minimal and the team vacancy created a burden for her, making it much more difficult for her to care for her patients. It is undisputed that staffing shortages are common and that it can take several months and sometimes up to a year to replace an RN or LPN.

New patients generally are assigned by non-clinical coordinators and staff. Dr. Malatinszky testified that periodically he reviewed the panel sizes and, with Dr. Ramirez and coworkers, made "decisions on who receives new patients on the panel, who gets new patient[s] assigned to the panel." Doc. #139-7, pp. 28-29. Plaintiff testified that, after she initiated her EEO complaint, she was assigned an increased number of "unassigned patients." She assumed that her colleagues did not experience a similar increase because they "never told [her] about it." Doc. #121-5, p. 17. She also alleges that, because Dr. Ramirez "cherry picked" patients when plaintiff moved to the North May location in September 2012 and took over his panel, she was assigned "sicker" patients.

Around May 24, 2013, plaintiff initiated contact with an EEO counselor, alleging numerous acts of gender, race/national origin and religious discrimination committed by several management officials, including Drs. Malatinszky and Huycke. Plaintiff testified that Dr. Malatinszky was "very upset" because she had filed an EEO complaint. Doc.

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[6] *Plaintiff's states in her affidavit that, after her LPN left her team, "[d]espite my requests, the VA did not replace my LPN." Doc. #139-13, p. 2, ¶8. The statement is misleading as it appears another LPN was assigned to her team within a few months. See Doc. #121, p. 15, ¶47 ((Plaintiff did not dispute defendant's fact statement: "Although Plaintiff complains of insufficient LPN support for a few months in 2013 . . . .").*

#139-17, pp. 14-15. She testified during her deposition that he told her, after she had initiated contact with an EEO counselor but before she had filed a complaint, that he did not want her to continue with it. *See id.* at pp. 14-16. She later clarified her earlier testimony, stating that she had inferred that that was what Dr. Malatinszky meant. Doc. #143-5, pp. 3-5. Plaintiff also stated that Dr. Malatinszky was "micromanaging [her] actions and keeping [her] uncomfortable" and not allowing her to do her job properly. Doc. Doc. #139-17, p. 15. In mid-June, Dr. Ramirez denied plaintiff's request to earn extra pay to perform C & P examinations on patients.

In August 2013 plaintiff sent three emails to Dr. Malatinszky and others. On August 19 plaintiff responded to an earlier email from Dr. Malatinszky regarding the need for provider coverage at the Ardmore VA facility due to the loss of two staff physicians. On August 27 plaintiff responded to another email from Dr. Malatinszky. In his email, Dr. Malatinszky confirms that he met earlier that day with plaintiff and informed her that, because of a "dysfunctional environment in [her] teamlet," apparently due to plaintiff's relationship with the RN (Cathy Nale) assigned to her teamlet, she was being assigned to the main facility of the OKC VAMC. Doc. #121-12, p. 2. Plaintiff's third email was also sent on August 27. In it she complained of pay discrimination.

In August 2013, as just mentioned, defendant moved plaintiff back to the main downtown VA clinic. Plaintiff's transfer was a lateral move which did not involve a change in work conditions or duties. She returned to the same team and room where she had previously worked a year earlier. Plaintiff asserts that, contrary to defendant's normal procedure, she was not given administrative leave to make the transition as she had been

when she transferred in 2012. She testified that the transfer caused a hardship because there was less accessible parking and it was not a desirable location for her. Doc. #139-17, p. 6.

On September 5, 2013, plaintiff filed her formal complaint of discrimination with the EEOC. The next day plaintiff received a proposed reprimand from Dr. Malatinszky, which he issued after consulting with human resources to confirm that the behavior alleged in the reprimand violated VA codes of conduct. The proposed reprimand was based on the three August emails plaintiff had sent. It stated:

> The specific reasons for your proposed reprimand are as follows:
>
> **Inappropriate Conduct**
>
> **Specification 1:** On or about August 27, 2013 you exhibited inappropriate conduct in an email that you sent to me and multiple other employees. In the email you stated to me, among other things, "I was already a US citizen the day I started at this job, unlike you who used the VA to get your visa paperwork done. . . . Ms. Nale is lazy and vindictive. . . The physician management has no backbone, and all you are interested in is dumping work on the rank and file, and padding your paychecks. . . ."
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> **Specification 2:** On or about August 19, 2013 you exhibited inappropriate conduct in an email that you sent to me and multiple other employees. In the email you stated to me, among other things, "So we have to cover at Ardmore CBOC because you in the physician management couldn't do your jobs right . . . . So how come you need us to help you now, with something you and the rest or [sic] leadership team messed up? You all can fix your mess-ups by going to Ardmore yourself and taking care of the patients there..."
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> **Specification 3**: On or about August 27, 2013 you sent an inappropriate email to several employees who you labeled "Colleagues." In the email you alleged various complaints regarding the pay of physicians at this facility. In your email you made an allegation by stating, "Maybe some money changed hands to make this happen?"

Doc. #121-10, p. 1. Plaintiff was given the opportunity to respond before Dr. Huycke issued the reprimand on September 30, 2013.[7]

Plaintiff asserts that the following January, while she was in India on Family Medical Leave Act leave, Drs. Malatinszky and Huycke refused to notify her that she was required to renew her VA clinical privileges. Because they were copied on the email sent by the VA Credentialing Office, she contends Drs. Malatinszky and Huycke were aware plaintiff had been sent the email and also were aware that, because she was out of the country, she would not have received it. Plaintiff states that if she had failed to renew her privileges, she would have been terminated.

Two physicians -- plaintiff and Dr. Legg-Jack -- applied for the medical director position for the North May VAMC-OKC location. In January 2015, both applicants participated in a Performance Based Interview ("PBI"). Each panel member scored Dr. Legg-Jack higher than plaintiff. After the interview plaintiff complained to Dr. Malatinszky that the panel members had asked about her EEO activity. She testified that they spent 30 minutes out of a 45 minute interview quizzing her about her EEO complaints. Dr. Malatinszky requested that a second PBI panel be constituted. Plaintiff asserts that he agreed to form a second panel only after she refused his demand to withdraw her name from consideration for the position. She testified he said:

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[7] *Plaintiff asserts that Dr. Huycke testified that "the face of the Reprimand he issued indicates Plaintiff was being reprimanded for her gender complaint." Doc. #139, p. 12, ¶54. What Dr. Huycke stated was: "Again, I can tell you today with absolute clarity that this reprimand had nothing to do with any allegation she made concerning district pay or discrimination. That is not what the intent of this was, and if the wording appears unclear to other readers, then perhaps it should have been clarified." Doc. #139-20, p. 6.*

> you better -- because of the history with Cathy Nale at the North May clinic, you better withdraw your consideration for North May director and if you don't, I'm going to do in my power to -- to, you know, sabotage that. I will never make you to be the director. And even if you become one, we're going to make your life miserable, so you better, you know, take the consideration off.

Doc. #139-17, p. 19.

The new panel consisted of four individuals believed to have no knowledge of plaintiff's EEO complaints and an H.R. employee witness. The panel members did not discuss plaintiff's EEO activity during her interview. Each member again scored Dr. Legg-Jack higher than plaintiff. After interviewing both candidates, Dr. Malatinszky selected Dr. Legg-Jack for the position. He stated in his affidavit submitted in support of defendant's motion that he based his decision on the candidates' interviews, "their respective expressions of a vision for the role," the unanimous PBI scoring of the candidates[8] and Dr. Legg-Jack's previous two-year experience as the liaison/lead physician at the North May location. Doc. #121-1, p. 6, ¶35.

Plaintiff asserts that, in August 2016, Dr. Malatinszky grabbed her hand and "crushed it so hard that she suffered injuries and required medical attention." Doc. #139, p. 16. The following month she filed this lawsuit alleging discrimination based on gender, race, national origin and religion.

Analysis

[8] *Plaintiff states in her brief that Dr. Malatinszky testified that "PBI scores were only a minor factor." Doc. #139, p. 13. Dr. Malatinszky does not make a statement to that effect on the pages plaintiff cites from his deposition, Doc. #139-7 p. 26 (depo. pp. 151-152).*

As plaintiff has not offered direct evidence of discrimination or retaliation, her claims are analyzed under the burden-shifting framework of McDonnell Douglas.[9] Riser v. QEP Energy, 776 F.3d 1191, 1199-1200 (10th Cir. 2015) (pay discrimination claim); Hiatt v. Colorado Seminary, 858 F.3d 1307, 1315 (10th Cir. 2017 (retaliation claim). A plaintiff bears the initial burden of establishing a prima facie case of discrimination or retaliation. *Id.* at 1316. If she succeeds, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory or nonretaliatory reason for its actions. *Id.* If the defendant sustains its burden, plaintiff "bears the ultimate burden of demonstrating that [defendants'] proffered reason is pretextual." Vaughn v. Epworth Villa, 537 F.3d 1147, 1150 (10th Cir. 2008) (internal quotations omitted). She must prove "her employer intentionally discriminated against her." Riser, 776 F.3d at 1199.

Gender Pay Discrimination

Plaintiff asserts that because of her gender she was paid less than male physicians. Her pay claim is based on conduct occurring during a discrete time period – between September 2011 and March 2014, which essentially is during the federal pay freeze.[10] Defendant argues plaintiff cannot establish a prima facie case of pay discrimination, much less demonstrate pretext.

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[9] *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).*

[10] *Plaintiff did not claim pay discrimination from March 2014 forward. See Doc. #75, p. 12. Because "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission," 42 U.S.C.A. § 2000e-5(g)(1), plaintiff's claim is limited to the period from September 2011 to September 2013.*

To establish a prima facie case of pay discrimination, plaintiff "must show she 'occupies a job similar to that of higher paid males.'" Riser, 776 F.3d at 1200 (quoting Sprague v. Thorn Ams., Inc., 129 F.3d 1355, 1363 (10th Cir.1997). Defendant contends that because federal law requires that VHA physicians' pay be based on "individualized assessment[s],"[11] plaintiff must identify males within primary care with "similar medical experience, similar experience within VHA, with similar board certifications, at the same locations, without additional or distinct duties, and that are responsible for a similar number and severity of patient." Doc. #121, pp. 19-20. Defendant asserts plaintiff has failed to satisfy her prima facie case because, instead of identifying relevant male comparators, she responded in discovery that all 75 primary care physicians are comparable. *See* Doc. #121-15. Plaintiff contends that she has met her initial burden because Dr. Malatinszky testified that all primary care physicians have similar responsibilities and duties with respect to patient care.

While, as plaintiff notes, she does not have to show under Title TII that she performed "equal work" as her comparators, Riser, 776 F.3d at 1200 (job similarity requirements under Title VII are less stringent than under the EPA), that does not translate into a conclusion that she can properly compare her salary to every other primary care physician VAMC-OKC employed. However, in her response brief, plaintiff narrows her list of comparators to seven male physicians who, she asserts, received increases in market or retention pay when she did not. The court therefore concludes for purposes of

[11] *See 38 U.S.C. § 7431(c)(4).*

defendant's motion that plaintiff has established a prima facie case of pay discrimination under Title VII.

Defendant has articulated a legitimate, non-discriminatory reasons for the pay disparities between plaintiff and her co-workers. The gap in wages, defendant states, was due to the pay freeze, the conversion of retention pay to market pay and differences in experience and responsibilities.

The burden of production then shifts back to plaintiff to show that the Secretary's reasons are pretextual or that gender was a "determinative" factor in his pay decisions. Riser, 776 F.3d at 1200. "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Id.* (quoting Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir.1997)).

Plaintiff's evidence of pretext principally consists of Dr. Malatinszky's allegedly "shifting" explanations for the pay increases during the pay freeze, defendant's deviation from its mandatory pay review policy and failure to give plaintiff a pay review and Dr. Malatinszky's allegedly biased remarks. None of plaintiff's arguments render defendant's explanations for the pay differential to be implausible or unworthy of belief.

Plaintiff claims Dr. Malatinszky neglected to tell the EEO investigator that the market pay of some physicians was increased during the pay freeze when prior retention pay was converted to market pay. She asserts that when he later explained that some physicians only appeared to receive market pay increases due to the conversion, he was

"shifting" the reason given for increases in market pay, contradicting his earlier statement to the EEO (in 2015) that "the ***only*** reason Market Pay could be increased was if physicians took on additional job duties." Doc. #139, p. 8, ¶¶ 14-15. Plaintiff ignores the fact that the conversion did not result in a pay increase. While it may have appeared on paper that certain physicians received raises because of increases in their market pay, their total salaries did not actually change. Their retention pay was simply redesignated as market pay. The change reflected an accounting maneuver done so that the physicians' pay would not have to be reduced due to a change in policy. A reasonable juror could not conclude that Dr. Malatinszky's failure to mention the conversion somehow demonstrated that defendant's proffered reasons for the pay differences are unworthy of belief.

Plaintiff also relies on defendant's failure to follow the VA's mandatory pay review policy and give her a pay review as evidence of pretext. She contends that "[a] jury could find Malatinszky intentionally precluded Plaintiff from having her pay reviewed [before the freeze] by a pay panel and, as a consequence, kept her wages low because of her gender."[12] Doc. #139, p. 30. However, Dr. Malatinszky was not responsible for setting compensation panel reviews until he became Chief of Ambulatory Care in 2012. Plaintiff has not shown that he had anything to do with the salary decisions which she claims were discriminatory. And plaintiff admitted, but ignores the fact that, the VAMC-OKC Medical Director was the final decision-maker with respect to all pay decisions. She has offered no

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*[12] Plaintiff is contending that, because she was hired in 2006, her pay should have been reviewed in 2008 and 2010, rather than in 2009, which "would have resulted in two Market Pay increase, rather than just one." Doc. # 139, p. 9. Not only does plaintiff fail to demonstrate how this shows defendant's explanation for the pay differences to be pretextual, but, as defendant notes, the pertinent time frame for plaintiff's pay claim is later, beginning in September 2011.*

evidence that any Medical Director who approved her pay during the critical period acted with discriminatory intent.

She next asserts that Dr. Malatinszky's biased remarks constitute evidence of pretext. However she failed to explain how what he said could demonstrate pretext with respect to her pay claim, when he had no involvement with the pay decisions themselves. Further, as will be discussed subsequently, plaintiff is unable to show that Dr. Malatinszky's remarks reflect discriminatory or retaliatory bias.

Plaintiff's remaining evidence of pretext falls short of what is required to create a fact question for a jury. She claims defendant failed to cite to any documents showing that the physicians she identified in PF28 (Plaintiff's Additional Fact #28) performed additional job duties justifying more pay. See Doc. #139, p. 32. However, defendant did so in his reply brief. *See* Doc. #143, pp. 5-6, citing to documents attached to his initial brief. An earlier disclosure was prevented by plaintiff's failure to identify which of the 75 primary care doctors she considered to be her comparators. As for the seven male physicians plaintiff identified as her comparators, defendant has offered evidence that all but one had more experience and responsibilities than plaintiff. *See* Doc. #121-1, pp.8-9, ¶49; 121-9. The sole exception received more pay for one year because of a recruitment bonus. Plaintiff's nonspecific attempt to rebut defendant's evidence with the general reference to her PF28 is inadequate. *See* Doc. #139, pp. 32-33.

Other arguments plaintiff makes regarding pretext are nothing more than conjecture. For example, she states that a "jury could believe that Defendant gave male physicians Retention Pay during the pay freeze to get around the prohibition on increasing Market Pay

for physicians who did not take on additional job duties." Doc. #139, p. 30. She must, though, offer some evidence demonstrating that that is in fact what defendant did in order to raise a genuine issue of material fact that defendant's explanations for the pay differences are pretextual.

Plaintiff has shown that she was paid less than some of the other male primary care providers employed by VAMC-OKC, but that is not enough for her to prevail under Title VII. She has not produced any, much less sufficient, evidence to create a fact question as to whether the pay disparity was due to her gender. "Title VII does *not* make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal. It prohibits only intentional discrimination *based upon* an employee's protected class characteristics." E.E.O.C. v. Flasher Co., Inc., 986 F.2d 1312, 1319 (10th Cir.1992). Defendant's motion for summary judgment on plaintiff's pay discrimination claim will therefore be granted.

Retaliation[13]

[13] *The court assumes for present purposes that a retaliation claim is potentially available to plaintiff. The Supreme Court stated in Green v. Brennan, 136 S.Ct. 1769, 1774 n.1 (2016) that it "assume[d] without deciding that it is unlawful for a federal agency to retaliate against a civil servant for complaining of discrimination." As explained by the dissent in Green, the question arises because "Title VII's federal-sector provision incorporates certain private-sector provisions related to discrimination but does not incorporate the provision prohibiting retaliation in the private sector. See 42 U.S.C. § 2000e–16(d) (incorporating §§ 2000e–5(f) to (k) but not § 2000e–3(a), which forbids private-sector retaliation.")). Id. at 1792 n. 2 (Thomas, J., dissenting). A federal employee asserted a retaliation claim in a subsequent unpublished Tenth Circuit decision, Glapion v. Jewell, 673 Fed.Appx.803 (10th Cir. Dec. 14, 2016), but the question of whether a federal employee can assert a retaliation claim was not raised. Because defendant did not properly raise the issue here, either, discussing it only in a footnote, the court will not otherwise address it here.*

Plaintiff alleges numerous discrete acts of retaliation in her second amended complaint. She also asserts that defendant, in retaliation for her EEO activity, engaged in a campaign of harassment against her. Plaintiff relies on many of the same asserted discrete acts of retaliation to support her retaliatory hostile work environment claim. While defendant's arguments vary, the Secretary contends with respect to most of the asserted adverse employment actions that plaintiff cannot establish the causal connection of her prima facie case or pretext.

To establish a prima facie case of retaliation, plaintiff must show that "(1) [s]he engaged in protected opposition to discrimination, (2) [s]he suffered an adverse employment action, and (3) a causal connection existed between the protected activity and the adverse employment action." Ward v. Jewell, 772 F.3d 1199, 1202 (10th Cir. 2014). To establish "actionable retaliation," plaintiff "'must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[14] Hiatt, 858 F.3d at 1316 (quoting Burlington Northern & Santa Fe Ry.

[14] *Relying on the applicable statutory language, 42 U.S.C. § 2000e-16(a), defendant also argues that "with regard to the public section provision of Title VII, the action must also be a personnel action." Doc. #121, p. 27. Defendant does not, though, cite any cases supporting his position and case law does not appear to recognize the distinction defendant makes. See e.g., Steele v. Schafer, 535 F.3d 689, 695 (D.C. Cir. 2008)("'Title VII's substantive [discrimination] provision and its anti-retaliation provision are not coterminous" because the "'scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.'") (quoting Burlington Northern, 548 U.S. at 67); see Ward, 772 F.3d at 1202 (government employee must show he "suffered an adverse employment action," not a "personnel action" in his prima facie case) (emphasis added). Plaintiff does not address the issue. The distinction is not determinative here, though, because the only potentially actionable conduct by*

Co. v. White, 548 U.S. 53, 68 (2006). "The action must be materially adverse 'to separate significant from trivial harms,' such as 'petty slights, minor annoyances, and simple lack of good manners . . . .'" *Id.* (quoting Burlington Northern, 548 U.S. at 68). To establish a causal connection plaintiff "must present 'evidence of circumstances that justify an inference of retaliatory motive.'" Ward, 772 F.3d at 1203 (quoting Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1091 (10th Cir. 2007)). Courts often infer a causal connection if the adverse action closely follows the protected activity. *Id.*

The amended complaint sets out a number of alleged discrete acts of retaliation. Defendant has challenged plaintiff's reliance on those acts on a variety of grounds and, as to many of those challenges, plaintiff's brief simply ignores them. These ignored arguments include those directed to plaintiff's allegations that defendant retaliated against her (1) by instructing her to "be professional; (2) by reporting her to the National Practitioners Data Bank; (3) with respect to her 2013 performance evaluation and pay; (4) by denying her an assigned LPN for several months in 2013; (5) by assigning her more "unassigned" patients; (6) by assigning her sicker patients; and (7) by transferring her back to the main downtown clinic from the North May location.[15] The court concludes plaintiff has abandoned all the grounds for her retaliation claim, other than the 2013 reprimand, defendant's failure to promote her to the position of Medical Direction of the North May

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*defendant that was retaliatory was a "personnel action" – defendant's reprimand and failure to promote plaintiff.*

[15] *Plaintiff included multiple "additional facts precluding summary judgment" in her brief to substantiate her claims. See Doc. #139, pp. 13-22. However, as noted, she failed to respond to defendant's arguments as to why most of the discrete claims based on those facts fail as a matter of law.*

Avenue clinic location and the retaliatory hostile work environment claim. *See generally* Maestas v. Segura, 416 F.3d 1182, 1190 n.9 (10th Cir. 2005) (plaintiffs "appear to have abandoned [these] claims as evidenced by their failure to seriously address them in their briefs"); Dixon v. City of Lawton, 898 F.2d 1443, 1449 n.7 (10th Cir. 1990) ("Although plaintiff's docketing statement indicates a general intention to appeal jury instructions, any issue concerning this particular instruction was not briefed, *see* Fed.R.App.P. 28(a), and we deem it abandoned."); LCcR7.1 (g). The three remaining grounds are insufficient to support a retaliation claim.

Reprimand

Defendant contends that plaintiff cannot rely on the September 2013 reprimand because it did not constitute a material adverse personnel action, the "but-for" causation element is lacking and there is no evidence that the agency's explanation for the reprimand was pretextual. Plaintiff's only response is that the reprimand "demonstrates direct evidence of retaliatory intent." Doc. #139, p. 28.

Though neither party discusses the first element of plaintiff's prima facie case, the court concludes that plaintiff engaged in protected activity when she sent the August 27, 2013, email complaining of pay discrimination. That activity allows her to rely on temporal proximity to establish the third element -- causation. A Title VII "retaliation plaintiff may rely solely on temporal proximity to show causation during the prima facie stage of the *McDonnell Douglas* framework where [her] protected activity is closely followed by an adverse employment action." Foster v. Mountain Coal Co., LLC, 830 F.3d

1178, 1191 (10th Cir. 2016). Here, plaintiff sent her email on the same date Dr. Malatinszky drafted the proposed reprimand.

That leaves the second element, adverse action. A reprimand can "constitute an adverse employment action if it adversely affects the terms and conditions of the plaintiff's employment-for example, if it affects the likelihood that the plaintiff will be terminated, undermines the plaintiff's current position, or affects the plaintiff's future employment opportunities." Medina v. Income Support Div., New Mexico, 413 F.3d 1131, 1137 (10th Cir. 2005). The September 2013 reprimand cautioned plaintiff that "any future offenses or violations of rules for which disciplinary action would be appropriate could result in a more severe penalty, up to and including removal." Doc. #121-14. The court concludes the letter, which was placed in plaintiff's "Official Personnel Folder," can be considered an adverse employment action.[16] As plaintiff has established a prima facie case, defendant must come forth with a legitimate, nonretaliatory reason for the adverse employment action plaintiff suffered.

It has done so. Defendant asserts that the reprimand was issued because of plaintiff's inappropriate attacks in her three emails on VA personnel, not because of her EEO activity. Specifically, defendants contends plaintiff

> attacked Mr. Malatinszky by claiming he only worked at the VA "to get his visa paperwork done," called a VA nurse "lazy and vindictive," assailed management for only being "interested in dumping work on the rank and file, and padding [their] paychecks," and insubordinately refused to assist with patient coverage at the Ardmore location (that was suffering a physician

[16] *The reprimand did provide that it might be withdrawn "in three (3) years or it [might] be withdrawn and destroyed after six (6) months, depending entirely on [plaintiff's] future behavior and attitude." Doc. #121-14. The court does not view the potential withdrawn or destruction of the reprimand as necessarily affecting its adverse nature.*

> shortage) because management "couldn't do [their] jobs right." Further, one email even alleged bribery ("Maybe some money changed hands to make this happen").

Doc. #121, pp. 31-32 (quoting Exhibits 121-1, p. 5 ¶29; 121-11; 121-12;121-13). Plaintiff responds that the reprimand "demonstrates direct evidence of retaliatory intent." Doc. #139, p. 28. She is referring to the third paragraph of the proposed reprimand, which discusses one of her two August 27, 2013 emails. There the reprimand states that plaintiff "alleged various complaints regarding the pay of physicians at this facility" and "made an allegation by stating, 'Maybe some money changed hands to make this happen?'" Doc. #121-10, p. 1. Plaintiff argues that Drs. Malatinszky and Huycke admitted during their depositions that the reprimand shows on its face that it was given to plaintiff because she complained of gender and other forms of discrimination. Neither Dr. Malatinszky nor Dr. Huycke made such an admission.[17] It is evident, when the sentence regarding pay is read in context, that it is provided to describe and identify the email.[18] The sentence does not amount to direct evidence of discrimination and plaintiff offers nothing else to rebut defendant's valid, nonretaliatory reason for issuing the reprimand – plaintiff sent emails to her supervisors and coworkers which contained indisputably inappropriate remarks.

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[17] *In support of her argument, plaintiff cites her response to defendant's statement of fact Nos. 52 and 53 (RDF52-53) and her statement of fact No. 9 (PDF 9). In his deposition testimony Dr. Huycke was adamant that, as he read and signed the reprimand, "that that is clarifying in Specification 3 that it was that e-mail, and that within that e-mail, the sentence for which the reprimand was being applied was the sentence that said, "Maybe some money changed hand to make this happen." Doc. #139-20, p. 6. A reasonable juror, reading the sentence in context, could not conclude otherwise. Plaintiff was being disciplined for alleging bribery.*

[18] *Identification was required in part because plaintiff sent two emails on the same day.*

Defendant is therefore entitled to summary judgment on plaintiff's retaliation claim based on her reprimand.

Failure to Promote

Plaintiff alleges that defendant retaliated against her by failing to promote her to the position of medical director for the North May clinic location. Defendant does not challenge plaintiff's ability to demonstrate a prima facie case of retaliation, but instead asserts that her claim fails because she lacks evidence that the reasons for selecting Dr. Legg-Jack for the position were pretextual.

Defendant argues that Dr. Malatinszky selected Dr. Legg-Jack based on (1) the scores the candidates received from the Performance Based Interview panel (every member scored Dr. Legg-Jack higher); (2) the visions for the role of the North May Director each candidate expressed when Dr. Malatinszky personally interviewed them; and (3) Dr. Legg-Jack's prior two year experience as the liaison/lead physician at the North May location. Plaintiff contends that "comments from Malatinszky warning Plaintiff not to file an EEO claim, [his] expressing anger when Plaintiff did file, [his] demands that Plaintiff withdraw her application for Director after she filed an EEO lawsuit, and [his] threats to sabotage Plaintiff's chances of being promoted to Director (a position to which Malatinszky was the decisionmaker)," demonstrate that these reasons for her nonselection are pretextual. Doc. #139, p. 27. She also cites defendant's asserted "shifting reasons" for the promotion denial and his "history of pre-selecting males for leadership (Lead/Liaison) experience, then using

that experience to show the male is more qualified than the female," as evidence of pretext. *Id.* at p. 32.[19]

The statements plaintiff relies on to establish pretext were allegedly made by Dr. Malatinszky at the time she initiated her EEO activity and at the time she applied to be medical director at the North May location. In considering their probative value, the Tenth Circuit's decision in Ward, 772 F.3d at 1203 is instructive. There the plaintiff was attempting to satisfy the causation element of his prima facie case of retaliation, relying in part on a statement that it would be "'essentially impossible'" to put him "in a supervisory position because of 'things that had happened in the past.'" *Id.* The court stated that "the statement is probative of retaliation only if we speculate on his meaning," *id.*, and that even the plaintiff was not sure if the speaker was referring to the EEOC proceedings. The statement was insufficient, the court concluded, to provide the required link between the plaintiff's protected activity and the claimed retaliatory action by his employer.

Here, plaintiff attempts the same sort of speculation. In her first deposition, plaintiff was asked whether Dr. Malatinszky had expressed anger towards her for filing an EEO complaint. She said he had. But the specific statements she attributed to him made no reference to the EEO complaint. According to plaintiff, "He was angry at me complaining about Nurse Nale and he was angry about revealing all the stuff what is going

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[19] *Plaintiff also asserted that Dr. Legg-Jack was not "minimally qualified for the position," because he indicated on his application that he had not registered for the selective service. Doc. #139, p. 16, ¶ 17 (citing Doc. #139-7, pp. 24-25). As explained by Ms. Davidson, her understanding was that Dr. Legg-Jack was older than 26 when he immigrated or was naturalized. Doc. #121-2, p. 6, ¶34. The Selective Service will not accept registrations after a man has reached age 26. See 50 U.S.C. § 3802(a).*

on in the primary care to the chief of staff and the medical director." Doc. #139-17, pp. 14-15. She also stated that "when he dropped by one time, he said this is not right, you are not supposed to do these things and -- but I cannot reassign Cathy Nale, but you have to suck it up and just do it. You don't have a choice, if you want to, we can send you back to the main VA." *Id.* at p. 15. These statements were directed to the controversy with Nurse Nale and other matters going on in primary care, not the EEO filing. Plaintiff's apparent surmise that they showed anger at the EEO filing is simply speculation on her part. That conclusion was made explicitly clear at plaintiff's continued deposition when, in response to further questioning, she essentially acknowledged Dr. Malatinszky had not referenced the EEO filing in his comments, but she inferred that was what he really meant. Such a stretch involves the sort of speculation that Ward cautions against and is insufficient to show pretext.[20] *See* Doan v. Seagate Tech., Inc., 82 F.3d 974, 977 (10th Cir. 1996) ("Mr. Doan claimed that the RIF was merely a pretext for pruning away unwanted employees. Speculation, however, will not suffice for evidence.").

As another basis for establishing pretext, plaintiff asserts that defendant's justifications for its decision were not legitimate because they were "shifting." Dr.

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[20] *To the extent plaintiff is arguing, based on temporal proximity, that a "triable issue of pretext" is created because Dr. Malatinszky demanded that she withdraw her application after she filed her lawsuit, her argument fails. Plaintiff filed her lawsuit approximately three months before she applied for the promotion. The Tenth Circuit noted in Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999), that it had previously had that a three-month period, standing alone, was too long for a fact-finder to infer causation.*

Malatinszky gave different/overlapping reasons for her nonselection at his depositions[21] and in the affidavit he prepared in support of defendant's summary judgment motion. The reasons offered were not, though, inconsistent or contradictory. And while plaintiff did discredit one of the explanations – both she and Dr. Legg-Jack have the same board certification[22] – she did not "proffer evidence that shows each of the employer's justifications are pretextual." Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1309 (10th Cir.2005) (per curiam) (emphasis added). Plaintiff acknowledges that the second BPI panel unanimously ranked Dr. Legg-John higher than her and she does not dispute that he had more leadership experience.

"Debunking one of the employer's explanations defeats the case for summary judgment 'only if the company has offered no other reason that, if that reason stood alone (more precisely if it did not have support from the tainted reason), would have caused the company to take the action of which the plaintiff is complaining.'" *Id.* at 1310 (quoting (Russell v. Acme–Evans Co., 51 F.3d 64, 69 (7th Cir. 1995)). From the beginning, defendant stated that a reason for Dr. Legg-Jack's selection was his higher PBI score. Plaintiff has not shown that his higher score, alone, was not a valid reason for selecting

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[21] *While plaintiff asserts that Dr. Malatinszky testified in 2015 that the "sole" reason for not selecting plaintiff was because of her lower PBI score, she has not offered evidence demonstrating that he made such a statement.*

[22] *Plaintiff also asserts that, during his second deposition, while Dr. Malatinszky testified that Dr. Legg-Jack was selected because of his length of experience, he "claimed to not recall how much more experience Legg-Jack had than the Plaintiff and could not quantify how Legg-Jack's experience was greater." Doc. #139, pp. 17,¶22. More than this is required to demonstrate pretext, such as evidence demonstrating that Dr. Legg-Jack actually had less experience than plaintiff.*

him for the position of medical director for the North May facility. And she has not demonstrated that defendant's provision of additional, noncontradictory reasons for why she was not promoted is sufficient to create a genuine issue of fact as to pretext.[23] *See* Foster, 830 F.3d at 1194-95.

Finally, plaintiff claims that "[p]retext can also be found by Malatinszky' s history of pre-selecting males for leadership (Lead/Liaison) experience, then using that experience to show the male is more qualified than the female." Doc. #139, p. 32. Such evidence, if it exists, might be pertinent to a gender discrimination claim, but it is not probative of retaliatory bias or pretext.

In a situation such as this, "when considering the relative merits of individual employees," the court "must proceed with caution." Jaramillo, 427 F.3d at 1308. It "may not 'act as a super personnel department that second guesses employers' business judgment.'" *Id. (*quoting Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Servs., 165 F.3d 1321, 1328 (10th Cir. 1999)). Plaintiff has not satisfied her burden of showing that defendant's reasons for failing to promote her to the position of medical director for the North May clinic location were merely pretext for retaliation. Defendant is therefore entitled to summary judgment on plaintiff's retaliation claim based on her failure to promote claim.

Retaliatory Hostile Work Environment

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[23] *Although in certain circumstances outlined in Jaramillo, "a successful attack on part of the employer's legitimate, non-discriminatory explanation is enough to survive summary judgment even if one or more of the proffered reasons has not been discredited," none of them is present here. See Jaramillo, 427 F.3d at 1310.*

Plaintiff asserts that she was subjected to a retaliatory hostile work environment after she filed her 2013 EEO complaint. It is not altogether clear that such a claim exists. In Kline v. Utah Anti-Discrimination & Labor Div., 418 Fed. Appx. 774, 780 n.2 (10th Cir. April 7, 2011), an unpublished opinion, the Tenth Circuit noted that "causes of action for retaliatory hostile work environment have not been formally recognized by the Tenth Circuit." The court had, though, discussed such a claim in earlier cases. E.g., Somoza v. Univ. of Denver, 513 F.3d 1206, 1217-18 (10th Cir. 2008). However, for present purposes, the court assumes the claim is available.

Here, plaintiff asserts that defendant "engaged in a steady stream of retaliatory conduct, including transferring the Plaintiff, denying raises and equal pay, yelling at her, refusing to allow her to perform other job duties for more pay, refusing to advise her when she needed to renew her credentials risking Plaintiff's termination, telling her she should not proceed with EEO, reprimanding Plaintiff for complaining of discrimination and Malatinszky's physically assaulting the Plaintiff." Doc. #139, pp. 33-34. Defendant argues that because plaintiff has failed to establish the discrete incidents of alleged retaliation on which she appears to base her claim of a retaliatory hostile work environment, it too must fail.

While the parties do not specifically address plaintiff's retaliatory harassment claim using the McDonnell-Douglas framework, the issue raised by defendant's motion is whether plaintiff can satisfy the second element of her prima facie – adverse action. Plaintiff and defendant appear to agree that the traditional severe or pervasive "hostile work environment" standard applies. However, it may be, as the court concluded in Adcox v.

Brennan, 2017 WL 2405326, at *7 (D. Kan. June 2, 2017), that the relaxed adverse-action standard set forth by the Supreme Court in Burlington Northern. applies. *See* Burlington Northern, 548 U.S. at 57. In other words, the conduct "need only be sufficiently severe or pervasive to constitute a 'materially adverse' action; that is, the conduct must be sufficiently severe or pervasive that it could well dissuade a reasonable worker from engaging in protected activity." Adcox, 2017 WL 2405326, at *7. Regardless of which standard is applicable, plaintiff's claim fails.

Plaintiff abandoned most of the discrete acts of discrimination which she seeks to aggregate to establish her retaliatory hostile work environment claim. And the court has rejected for lack of evidence of pretext two other allegedly retaliatory acts -- the reprimand and failure to promote – which plaintiff also relies upon to establish her claim.[24] As for the remaining asserted retaliatory conduct, the court concludes a jury could not find that it, when considered in the aggregate, was sufficiently materially adverse to dissuade a reasonable worker from pursuing a charge of discrimination. Such conduct includes defendant's claimed refusal to allow plaintiff to earn additional pay by performing C & P examinations[25] and failure to advise plaintiff that she needed to renew her credentials.[26] It does not, though, include the asserted physical assault based on the prolonged handshake

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[24] *Plaintiff asserts that she has "alleged years' worth of hostile comments and conduct" including "yelling [and] denial of medical accommodations," Doc. #139, p. 33, yet she offers no evidence of either.*

[25] *Plaintiff does not state how much extra money she could have made, though it appears from her discovery response that the additional earning opportunity was limited, as its purpose was to clear a backlog. See Doc. #139-24, p. 3.*

[26] *While plaintiff states that she did not have access to her VA email account, she provides no evidence that Drs. Malatinszky and Huycke were aware of that or that they had any responsibility for plaintiff's professional credentialing.*

that occurred in 2016. As defendant notes, because the handshaking incident was separated by more than two years from the events of the complaint, evidence of a causal connection is lacking. *See* Ward, 772 F.3d at 1203.

Based on the evidence before it, the court concludes no reasonable factfinder could conclude plaintiff was subjected to a retaliatory hostile work environment. Defendant is therefore entitled to summary judgment on plaintiff's retaliatory hostile work environment claim.

## Conclusion

For the reasons stated, the court concludes defendant is entitled to summary judgment on plaintiff's claims for gender pay discrimination, retaliation and retaliatory hostile work environment. Accordingly, defendant's motion for summary judgment [Doc. #121] is granted.

**IT IS SO ORDERED.**

Dated this 21st day of July, 2017.

JOE HEATON
CHIEF U. S. DISTRICT JUDGE