

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO

3 DIANA PADILLA-IBAÑEZ,

4 Plaintiff,

5 v.

6 LEXMARK INTERNATIONAL, INC.,  
7 et al.,

8 Defendants.

Civil No. 08-1821 (JAF)

9 **OPINION AND ORDER**

10 Plaintiff, Diana Padilla-Ibañez, brings this case against  
11 Defendants Lexmark International, Inc. ("Lexmark"); Jairo Fernández,  
12 Fernández' wife and their conjugal partnership; William D. Martin,  
13 Martin's wife and their conjugal partnership; Luis Viloría, Viloría's  
14 wife and their conjugal partnership; Antonio Díaz, Díaz' wife and  
15 their conjugal partnership; and ten unknown insurance companies.  
16 (Docket No. 1.) Plaintiff accuses Defendants of sex discrimination,  
17 harassment, and retaliation, and national origin discrimination, in  
18 violation of Title VII of the Civil Rights Act of 1964 ("Title VII"),  
19 42 U.S.C. §§ 2000e to e-17; age discrimination, harassment, and  
20 retaliation in violation of the Age Discrimination in Employment Act  
21 ("ADEA"), 29 U.S.C. §§ 621-34; violation of the Equal Pay Act, 29  
22 U.S.C. § 206(d)(1); and violation of Puerto Rico laws. (*Id.*)  
23 Defendants move for summary judgment under Federal Rule of Civil

1 Procedure 56(c). (Docket No. 41.) Plaintiff opposes (Docket No. 54),  
2 and Defendants reply (Docket No. 59).

3 **I.**

4 **Factual and Procedural History**

5 We derive the following facts from the parties' motions,  
6 statements of uncontested material facts, and exhibits.<sup>1</sup> (Docket  
7 Nos. 41, 42, 53, 54, 55, 58, 59, 60, 66.)

8 Plaintiff was born on May 28, 1962. (Docket No. 53-2.) She began  
9 working for Lexmark as a sales representative on August 16, 2000.  
10 (Id.) Lexmark is a business that manufactures and sells office  
11 printers. (Docket No. 42-2.) Plaintiff's primary duties were to sell  
12 Lexmark products and services and to maintain business relations with  
13 Lexmark's clients. (Docket No. 42-11 at 6-7.) Her peers at Lexmark  
14 were Luis Cruz, Sonia López, and Karelys Correa. (Docket No. 42-10 at  
15 18.)

16 Díaz became the manager of Plaintiff's division in April 2006.  
17 (Docket No. 42-13.) Díaz was responsible for monitoring the  
18 compliance of sales representatives with sales quotas. (Id.) To carry

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<sup>1</sup> We note that Plaintiff's submissions have generally failed to support her opposition to Defendants' proffered facts with relevant evidence. (See Docket Nos. 53, 66.) Her blanket denials for immateriality are particularly egregious, as it captures pertinent facts such as the date of her termination. (See id.) Nevertheless, as Plaintiff's submissions proffer facts which relate to her opposition (see Docket No. 53), we decline to strike her submissions (Docket No. 58). At the same time, we wish to remind Plaintiff's counsel of the proper procedures relating to summary judgment and his duty of diligence. See L.Cv.R. 56(c), 83.5(a); ABA Model Rules of Prof'l Conduct R. 1.3.

1 out his duties, Díaz routinely reviewed an electronic database of  
2 information gathered by Lexmark's sales representatives on market  
3 demand for its hardware. (Id.) The accuracy of this database depends  
4 on regular entry of reports on new sales opportunities by sales  
5 representatives. (Docket No. 42-12 at 1-4.)

6 Fernández began working for Lexmark as its general manager for  
7 Puerto Rico in October 2007. (Docket No. 42-2.) His duties included  
8 increasing sales to meet sales quotas. (Id.) Fernández determined  
9 that the company operations failed to achieve sales targets. (Id.)  
10 He then convened a company-wide meeting to motivate employees to  
11 attain better results. (Id.) During this meeting, Fernández recounted  
12 an episode from his previous position in human resources for IBM.  
13 (Id.) He recalled that a younger candidate for a position volunteered  
14 to yield his earlier time-slot for an interview when an older  
15 candidate complained about the wait. (Id.) This younger candidate's  
16 positive attitude so impressed Fernández that he chose this candidate  
17 over the others. (Id.) Following this anecdote, Fernández proceeded  
18 to cite three Lexmark employees with a similarly-positive attitude.  
19 (Id.) These employees were ages forty-nine, twenty-five, and thirty-  
20 two years. (Id.) Plaintiff, who attended the meeting, asserts that  
21 Fernández' statements implied a preference for "young" and "dynamic"  
22 employees. (Docket No. 53-2.)

23 Fernández proceeded to work with Díaz to revamp operations by  
24 requiring employees to meet individual targets for finding new "sales

1 opportunities," i.e., potential purchase orders, for each of the five  
2 final weeks of 2007. (Docket No. 42-13.) The cumulative targets that  
3 Fernández and Díaz set for Plaintiff were \$46,000 by November 30,  
4 2007; \$92,000 by December 7, 2007; \$138,000 by December 14, 2007;  
5 \$184,000 by December 21, 2007; and \$230,000 by December 28, 2007.  
6 (Id.; Docket No. 42-14 at 17.) Plaintiff's entries into the database  
7 showed only \$9,000 in new potential sales as of November 26, 2007.  
8 (Id.) By December 7, 2007, Plaintiff projected \$14,530 in new sales  
9 opportunities for the first quarter of 2008. (Docket Nos. 42-13, 42-  
10 14 at 20-21.)

11 Fernández and Díaz began to consider major restructuring to  
12 Lexmark's sales operations in late 2007. (Docket No. 42-2.) On  
13 December 7, 2007, Fernández wrote Martin to inform him that of the  
14 four sales representatives, Plaintiff and Cruz had the worst  
15 performance, as each generated only \$1,000 in sales in the fourth  
16 quarter of 2007. (Docket No. 42-3 at 3-4.) Fernández noted that  
17 although Plaintiff showed an unwillingness to cooperate with his new  
18 initiatives, he expected her to improve her performance and he  
19 intended to assess her work again in the future. (Id.)

20 Fernández and Díaz met weekly with underperforming salespersons  
21 in "Red Flag Coaching Sessions." (Docket No. 42-2.) Sales  
22 representatives who achieved their allotted quotas were not required  
23 to attend these remedial meetings. (Id.) Fernández and Díaz met with  
24 Plaintiff on the afternoon of Friday, December 7, 2007, to discuss

1 her failure to meet her cumulative targets and recommend ways to  
2 improve. (Id.) During the session, Plaintiff did not mention any  
3 pending new potential sales that she had identified but not yet  
4 entered into the database. (Id.) In the course of their meeting,  
5 Fernández reemphasized his preference for "dynamic" approaches by  
6 employees. (Docket No. 53-2.) That same weekend, Plaintiff entered  
7 over \$400,000 in potential sales which she attributed to the Puerto  
8 Rico Department of Education. (Docket Nos. 42-13, 42-14 at 26-28.)  
9 Fernández doubted the veracity of these entries as the public agency  
10 does not operate over the weekend. (Docket No. 42-2.) On December 10,  
11 2007, Fernández sent Plaintiff an e-mail to convey his concern about  
12 her performance and recommend ways for her to improve. (Docket  
13 No. 42-3 at 5-6.) However, as Plaintiff had met her individual target  
14 for the following week, Díaz declined to conduct another Red Flag  
15 session with her. (Docket Nos. 53-6, 53-10, 55-2.)

16 On December 11, 2007, Plaintiff directed a formal complaint by  
17 e-mail to Martin, Lexmark's human resources manager for Puerto Rico.  
18 (Docket Nos. 42-4, 42-7 at 4.) The message took general issue with  
19 the negative attitude that Plaintiff perceived from her superiors but  
20 did not accuse Lexmark of engaging in prohibited conduct. (See Docket  
21 No. 42-7 at 4.) On December 20, 2007, Martin called Plaintiff by  
22 telephone to address her complaint. (Docket No. 42-7 at 10-11.)  
23 During the conversation, Plaintiff expressed deep anxiety arising in  
24 part from the company-wide meeting, in which she maintained that

1       Fernández stated a preference for “young” professionals. (Id.)  
2       Plaintiff also felt threatened by competition from coworkers and  
3       believed that Díaz gave undue recognition to another employee for  
4       Plaintiff’s efforts. (Id.) Lastly, Martin noted that Plaintiff  
5       alleged age and sex discrimination. (Id.)

6       During her employment with Lexmark, Plaintiff received annual  
7       evaluations. For fiscal-year 2004, Plaintiff received a good review  
8       for having achieved 153% of her quota for sales of supplies,  
9       solicited potential purchases from Universidad Politécnica and Burger  
10      King, and received a letter of appreciation from a Lexmark client.  
11      (Docket No. 53-7.) For fiscal-year 2005, Lexmark gave Plaintiff a  
12      high mark for employee attitude and considered her successful in her  
13      commitment to customers, communication skills, teamwork, and  
14      knowledge of her work. (Docket No. 53-8.) The same report noted,  
15      however, that Plaintiff routinely failed to submit her reports to the  
16      database in a timely fashion. (Id.) For fiscal-year 2006, Lexmark  
17      ranked Plaintiff as high in communication skills and successful in  
18      employee attitude and work-related knowledge. (Docket No. 53-9.)  
19      However, the same report noted that Plaintiff only partially met her  
20      quota for hardware sales and her target for monthly revenue. (Id.)  
21      In addition, the report noted that Plaintiff failed to meet her  
22      quotas for sales of supplies and sales of supplies in combination  
23      with hardware. (Id.) Lexmark rated her overall employee contribution  
24      as “basic.” (Id.)

1           Besides the evaluations, Díaz noted in March 2007 that Plaintiff  
2 had filed an outdated report on the database; the corrected monthly  
3 progress report indicated only one new sales opportunity. (Docket  
4 Nos. 42-13, 42-14 at 13-15.) Plaintiff reported no new potential  
5 sales in April 2007, and a total of \$54,061 for the months of April  
6 through June 2007. (Docket No. 42-14 at 16.) By comparison, her  
7 coworkers, Correa and López, reported \$292,378 and \$172,757,  
8 respectively, for the same three-month period. (Id.) Plaintiff's  
9 quota for hardware sales in 2007 was \$775,000, of which she attained  
10 only \$67,000. (Docket Nos. 42-13, 42-14 at 6.)

11           In 2007, Plaintiff received the second-lowest salary increase  
12 among employees in her office due to her performance relative to her  
13 peers. (Docket No. 42-4.) However, among Plaintiff's peers, only Cruz  
14 received a higher base salary than Plaintiff due to better  
15 evaluations from 2004 to 2006 and significantly-longer employment  
16 with Lexmark. (Docket Nos. 42-5, 42-10 at 14-18.)

17           On December 28, 2007, Fernández addressed an e-mail to Viloría,  
18 Lexmark's regional general manager, in which he proposed a  
19 reorganization that contemplated the possible termination of  
20 Plaintiff. (Docket No. 42-3 at 9-10.) After reviewing Plaintiff's  
21 personnel records, Díaz recommended her for dismissal based on her  
22 sub-par performance. (Docket No. 42-13.) Lexmark terminated Plaintiff  
23 following a meeting on January 8, 2008, which Díaz and Martin  
24 attended. (Id.) At the time of her dismissal, Plaintiff was forty-

1 five years old. Her three peers at Lexmark, Cruz, López, and Correa,  
2 were aged thirty-eight, forty-two, and twenty-seven, respectively.  
3 (Docket No. 42-10 at 18.)

4 Lexmark replaced Plaintiff with Antonio Jardón, a fourth-level  
5 account manager; Plaintiff had been a level-three employee. (Docket  
6 Nos. 42-5, 42-10 at 2.) Lexmark later terminated Cruz on April 18,  
7 2008, for performance-related reasons. (Docket Nos. 42-2, 42-13, 42-  
8 5, 42-10 at 20.) On April 24, 2008, Plaintiff filed a charge with the  
9 Equal Employment Opportunity Commission ("EEOC"), alleging sex and  
10 age discrimination and retaliation, but omitting reference to any  
11 alleged misconduct due to her national origin or disability. (Docket  
12 No. 42-19.)

13 On July 29, 2008, Plaintiff filed the present complaint in  
14 federal district court. (Docket No. 1.) On May 1, 2009, Defendants  
15 moved for summary judgment. (Docket No. 41.) Plaintiff opposed on  
16 June 1, 2009 (Docket No. 54), and Defendants replied on June 15, 2009  
17 (Docket No. 59).

## 18 II.

### 19 Summary Judgment under Rule 56(c)

20 We grant a motion for summary judgment "if the pleadings, the  
21 discovery and disclosure materials on file, and any affidavits show  
22 that there is no genuine issue as to any material fact and the movant  
23 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).  
24 A factual dispute is "genuine" if it could be resolved in favor of



1 either party, and "material" if it potentially affects the outcome of  
2 the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st  
3 Cir. 2004).

4 The movant carries the burden of establishing that there is no  
5 genuine issue as to any material fact; however, the burden "may be  
6 discharged by showing that there is an absence of evidence to support  
7 the non-movant's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325,  
8 331 (1986). The burden has two components: (1) an initial burden of  
9 production, which shifts to the non-movant if satisfied by the  
10 movant; and (2) an ultimate burden of persuasion, which always  
11 remains on the movant. Id. at 331.

12 In evaluating a motion for summary judgment, we view the record  
13 in the light most favorable to the non-movant. Adickes v. S.H. Kress  
14 & Co., 398 U.S. 144, 157 (1970). However, the non-movant "may not  
15 rely merely on allegations or denials in its own pleading; rather,  
16 its response must . . . set out specific facts showing a genuine  
17 issue for trial." Fed. R. Civ. P. 56(e)(2).

### 18 III.

#### 19 Analysis

20 Defendants argue that Plaintiff cannot establish her claims as  
21 a matter of law as to age and sex discrimination, hostile work  
22 environment and retaliation under Title VII and the ADEA, and the  
23 Equal Pay Act. (Docket No. 41.) Defendants also argue that Plaintiff

1 has failed to exhaust her claim for national origin discrimination.  
2 (Id.) We address each contention in turn.

3 **A. Sex Discrimination**

4 Defendants argue that Plaintiff cannot establish sex  
5 discrimination as a matter of law because they terminated her for  
6 poor work performance. (Docket No. 41.) Plaintiff cites Díaz'  
7 decision against holding a "Red Flag" session with her on  
8 December 17, 2007, as evidence that Plaintiff had met Lexmark's  
9 expectations. (Docket No. 54.)

10 Absent direct proof of sex discrimination, a plaintiff must meet  
11 her burden under a burden-shifting framework. Smith v. Stratus  
12 Computer, Inc., 40 F.3d 11, 15 (1st Cir. 1994).

13 [T]he plaintiff bears the initial burden of  
14 establishing a prima facie case . . . [by]  
15 show[ing] that (1) she is a member of a  
16 protected class; (2) she was performing her job  
17 at a level that rules out the possibility that  
18 she was fired for inadequate job performance;  
19 (3) she suffered an adverse job action by her  
20 employer; and (4) her employer sought a  
21 replacement for her with roughly equivalent  
22 qualifications.

23 Id. (citing Mesnick v. Gen. Elec. Co., 950 F.2d 816, 823 (1st Cir.  
24 1991)); see also Fontanez-Núñez v. Janssen Ortho LLC, 447 F.3d 50, 55  
25 (1st Cir. 2006) (citing Stratus Computer, 40 F.3d at 15). If the  
26 plaintiff satisfies this first step, the employer must then  
27 "articulate[] a legitimate, non-discriminatory reason for its  
28 decision." Id. at 16. "The plaintiff must then introduce sufficient

1 evidence to . . . [show] (1) that the employer's articulated reason  
2 for the job action is a pretext, and (2) that the true reason is  
3 discriminatory." Id. (citing Woods v. Friction Materials, Inc., 30  
4 F.3d 255, 260 (1st Cir. 1994)).

5 In 2006, Plaintiff only partially met her targets for hardware  
6 sales and monthly revenue. (Docket No. 53-9.) In 2007, Plaintiff  
7 achieved only 8.6% of her quota for hardware sales. (Docket Nos. 42-  
8 13, 42-14 at 6.) Plaintiff's sales figures from April through June  
9 2007 were substantially lower than those of her colleagues. (Docket  
10 No. 42-14 at 16.) Therefore, the record demonstrates Plaintiff's  
11 disappointing performance, at least from Lexmark's perspective, in  
12 2006 and 2007, as she fell far short of her sales targets. Moreover,  
13 Lexmark maintains that it terminated Plaintiff on account of her poor  
14 sales record. (Docket No. 42-13.)

15 Lastly, Díaz' note dated December 17, 2007, suggested that  
16 Plaintiff had found sufficient sales prospects to meet targets for  
17 the next quarter. (Docket Nos. 53-11, 55-2.) However, a single note  
18 does not vitiate substantial evidence of Plaintiff's failure to meet  
19 sales targets.<sup>2</sup> As Plaintiff cannot show that her performance met  
20 Lexmark's expectations, she cannot establish a claim for sex  
21 discrimination. See Fontanez-Nuñez, 447 F.3d at 55.

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<sup>2</sup> We note that Fernández suspected that Plaintiff's reported figures after December 7, 2007, were false. (Docket No. 42-2.)

1       **B. Age Discrimination**

2           Defendants contend that Plaintiff cannot establish age  
3       discrimination because they terminated her for poor work performance.  
4       (Docket No. 41.) To prove a prima-facie case for age discrimination  
5       without direct proof, a plaintiff "must adduce evidence that (1) she  
6       was at least forty years of age; (2) her job performance met the  
7       employer's legitimate expectations; (3) the employer subjected her to  
8       an adverse employment action . . .; and (4) the employer had a  
9       continuing need for the . . . position from which the claimant was  
10      discharged." González v. El Día, Inc., 304 F.3d 63, 68 n.5 (1st Cir.  
11      2002). If the plaintiff satisfies this initial burden, the defendant  
12      must posit "a legitimate, non-discriminatory basis for its adverse  
13      employment action." Id. at 69. The plaintiff must then show that age  
14      was, nonetheless, a motivating factor, such as by attacking the  
15      proffered reason as pretextual. Id.

16           The foregoing discussion on sex discrimination applies here,  
17      mutatis mutandis, with equal force, as Plaintiff cannot show that she  
18      satisfied Lexmark's legitimate expectations. See supra part III-A.  
19      The facts are the same, and the necessary prima-facie showings for  
20      sex and age discrimination are virtually identical. Compare Stratus  
21      Computer, 40 F.3d at 15 with El Día, 304 F.3d at 68 n.5.

22       **C. Hostile Work Environment**

23           Defendants argue that Plaintiff cannot establish her claims for  
24      hostile work environment under Title VII and the ADEA because she

1 cannot demonstrate that the abuse against her was sufficiently  
2 severe. (Docket No. 41.) To establish a claim for hostile work  
3 environment sexual harassment under Title VII, a plaintiff must show:

4 (1) that she . . . is a member of a protected  
5 class; (2) that she was subjected to unwelcome  
6 sexual harassment; (3) that the harassment was  
7 based upon sex; (4) that the harassment was  
8 sufficiently severe or pervasive so as to alter  
9 the conditions of plaintiff's employment and  
10 create an abusive work environment; (5) that  
11 sexually objectionable conduct was both  
12 objectively and subjectively offensive, such  
13 that a reasonable person would find it hostile  
14 or abusive and the victim in fact did perceive  
15 it to be so; and (6) that some basis for  
16 employer liability has been established.

17 Crowley v. L.L. Bean, Inc., 303 F.3d 387, 394-95 (1st Cir. 2002).

18 The standard for severity and pervasiveness of workplace hostility  
19 must be sufficiently demanding so as not to transform Title VII into  
20 a general code of civility; thus, "sporadic use of abusive language,  
21 gender-related jokes, and occasional teasing" do not suffice to  
22 establish a prima facie case. Faragher v. City of Boca Raton, 524  
23 U.S. 775, 788 (1998).

24 To establish a hostile work environment under the ADEA, a  
25 plaintiff must show that the severity and pervasiveness of the  
26 harassment were sufficient to be objectively abusive, and that she  
27 subjectively perceived the environment to be hostile. Rivera-  
28 Rodríguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 24 (1st Cir.  
29 2001) (citing Landrau-Romero v. Banco Popular de P.R., 212 F.3d 607,  
30 613 (1st Cir. 2000)). "When assessing whether a workplace is a

1 hostile environment, courts look to the totality of the  
2 circumstances, including the frequency of the discriminatory conduct;  
3 its severity; whether it is threatening or humiliating, or merely an  
4 offensive utterance; and whether it unreasonably interferes with the  
5 employee's work performance." Id. (citing Landrau-Romero, 212 F.3d at  
6 613). Verbal abuse directed at a plaintiff's poor work performance,  
7 rather than her age, does not violate the ADEA. Young v. Will County  
8 Dep't of Pub. Aid, 882 F.2d 290, 294 (7th Cir. 1989).

9 The record in this case is devoid of any demeaning remarks by  
10 Defendants targeting Plaintiff on account of her sex. Therefore,  
11 Plaintiff cannot establish a claim for sexual harassment as a matter  
12 of law. See Crowley, 303 F.3d at 394-95.

13 The record also fails to show Defendants' persistent animosity  
14 towards Plaintiff on account of her age. At best, Plaintiff could  
15 point to Fernández' presentation in October 2007 where he described  
16 his preference for a younger employee with dynamism, or Plaintiff's  
17 "Red Flag" session where Fernández reemphasized his preference for  
18 dynamism. (Docket No. 53-2.) However, this court has previously held  
19 that "[t]he word 'dynamic' is simply not a synonym for 'young.'" Rodríguez-Áviles v. Banco Santander de P.R., 467 F. Supp. 2d 148, 155  
20 (D.P.R. 2006). The other negative exchanges with Lexmark officers  
21 were primarily directed at her lackluster performance relative to her  
22 coworkers. (Docket Nos. 42-2, 53-2.) Therefore, Plaintiff cannot  
23

1 establish a claim for age-based harassment as a matter of law. See  
2 Rivera-Rodríguez, 265 F.3d at 24; Young, 882 F.2d at 294.

3 **D. Retaliation**

4 Defendants argue that Plaintiff cannot establish her claims for  
5 retaliatory termination under Title VII or the ADEA as Lexmark  
6 discharged Plaintiff due to her poor performance. (Docket No. 41.)  
7 In response, Plaintiff insists that Lexmark's proffered motive for  
8 termination is pretextual. (Docket No. 54.)

9 To establish a claim for retaliation, a plaintiff must satisfy  
10 her burden in accordance with a burden-shifting framework. See  
11 Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 25-26 (1st Cir.  
12 2004). For a prima-facie case of retaliation under Title VII, a  
13 plaintiff must "prove that (1) she engaged in protected conduct under  
14 Title VII; (2) she suffered an adverse employment action; and (3) the  
15 adverse action was causally connected to the protected activity."  
16 Marrero v. Goya of P.R., Inc., 304 F.3d 7, 22 (1st Cir. 2002) (citing  
17 Hernández-Torres v. Intercont'l Trading, Inc., 158 F.3d 43, 47 (1st  
18 Cir. 1998)). Similarly, to establish retaliation under the ADEA, a  
19 plaintiff must show that (1) she opposed age discrimination at work;  
20 (2) she suffered an adverse employment action; and (3) there is a  
21 causal connection between the protest and the adverse action.  
22 Ramírez Rodríguez v. Boehringer Ingelheim Pharms., Inc., 425 F.3d 67,  
23 84 (1st Cir. 2005).

1            "An employee has engaged in activity protected by Title VII if  
2 she has either (1) opposed any practice made an unlawful employment  
3 practice by Title VII or (2) made a charge, testified, assisted, or  
4 participated in any manner in an investigation, proceeding, or  
5 hearing under Title VII." Fantini v. Salem State Coll., 557 F.3d 22,  
6 32 (1st Cir. 2009) (quoting Long v. Eastfield Coll., 88 F.3d 300, 304  
7 (5th Cir. 1996)) (internal quotation marks omitted). In showing her  
8 opposition to an unlawful practice, she need not prove its actual  
9 illegality, but rather that she had a good faith, reasonable belief  
10 as to its unlawfulness. Id. (citing Wimmer v. Suffolk County Police  
11 Dep't, 176 F. 3d 125, 134 (2nd Cir. 1999)). To show causation purely  
12 on the basis of "mere temporal proximity between an employer's  
13 knowledge of protected activity and an adverse employment action,"  
14 "the temporal proximity must be very close." Calero-Cerezo, 355 F.3d  
15 at 25 (quoting Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-  
16 74 (2001)) (internal quotation omitted).

17            If the plaintiff establishes a prima-facie case, the "defendant  
18 must articulate a legitimate, non-retaliatory reason for its  
19 employment decision." Id. at 26. The plaintiff must then rebut this  
20 excuse by showing that it "is in fact a pretext and that the job  
21 action was the result of the defendant's retaliatory animus." Id.  
22 However, on summary judgment, "'a court may often dispense with  
23 strict attention to the burden-shifting framework, focusing instead  
24 on whether the evidence as a whole is sufficient to make out a



1 question for the factfinder as to pretext and discriminatory  
2 animus.'" Id. (quoting Fennell v. First Step Designs, Ltd., 83 F.3d  
3 526, 535-36 (1st Cir. 1996)).

4 "[P]retext can be demonstrated through a showing that an  
5 employer has deviated inexplicably from one of its standard business  
6 practices." Kouvchinov v. Parametric Tech. Corp., 537 F.3d 62, 68  
7 (1st Cir. 2008). Without a specific policy, however, a company's  
8 "flexible or discretionary" approach to personnel matters does not  
9 imply the existence of a standard practice. Id. at 69 (finding no  
10 standard practice where defendant frequently reviewed employee  
11 records on case-by-case basis before termination).

12 In her sole complaint to Martin on December 20, 2007, Plaintiff  
13 accused Lexmark's management of sex and age discrimination. (Docket  
14 No. 42-7 at 10.) By opposing perceived discrimination, Plaintiff's  
15 communication satisfied the first element for retaliatory discharge.  
16 See Marrero, 304 F.3d at 22; Ramírez Rodríguez, 425 F.3d at 84.  
17 Defendants terminated Plaintiff soon thereafter, on January 8, 2008  
18 (Docket No. 42-13), thereby satisfying the second element of adverse  
19 employment action. See Marrero, 304 F.3d at 22; Ramírez Rodríguez,  
20 425 F.3d at 84. The temporal proximity, about three weeks, between  
21 Plaintiff's complaint to Martin and her termination could satisfy the  
22 causal element. See Calero-Cerezo, 355 F.3d at 26 (holding that one-  
23 month span between complaint and adverse employment action  
24 demonstrated causation for prima-facie case). But see Freadman v.

1 Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 100-01 (1st Cir. 2007)  
2 (citing plaintiff's insubordination to vitiate inference of causation  
3 from temporal proximity).

4 Therefore, the burden shifts to Defendants to state a legitimate  
5 reason for Plaintiff's discharge. See Calero-Cerezo, 355 F.3d at 26.  
6 Defendants had noticed Plaintiff's mediocre performance as part of  
7 their discussions on restructuring as early as December 7, 2007.  
8 (Docket No. 42-3 at 3-4.) There is ample evidence that Defendants  
9 accounted for Plaintiff's performance in making the final decision.  
10 (Docket No. 42-13; see Docket Nos. 42-13, 42-14, 53-9.) Therefore,  
11 Defendants can point to Plaintiff's poor performance as a legitimate  
12 excuse to fire her. See Calero-Cerezo, 355 F.3d at 26.

13 In response, Plaintiff accuses Defendants of departing from  
14 their usual practice of filing a report on an employee's under-  
15 performance before terminating her. (Docket No. 54.) In the excerpt  
16 from Díaz' deposition testimony cited by Plaintiff, Díaz stated, "It  
17 was common for us to prepare the report and notify the sales person:  
18 'This is where you're at now.'" (Docket No. 53-10.) This testimony  
19 simply suggests that Lexmark frequently, but not necessarily always,  
20 filed reports on employee performance and notified them about under-  
21 performance. (See id.) Thus, the excerpt cannot demonstrate the  
22 existence of a standard policy. See Kouvcchinov, 537 F.3d at 68.

23 Furthermore, the transcript merely shows that Díaz could not  
24 recall whether he had filed a report during a particular week when a

1 full month elapsed between Plaintiff's "Red Flag" session and her  
2 subsequent discharge. (See Docket No. 53-10.) The testimony does not  
3 prove that Defendants failed to follow their usual practice even if  
4 it constituted standard policy. Indeed, the record suggests that  
5 Defendants substantially followed routine by voicing their concerns  
6 to Plaintiff personally on December 7, 2007 (Docket No. 42-2) and by  
7 e-mail on December 10, 2007 (Docket No. 42-3 at 5-6). In view of the  
8 substantial evidence suggesting Plaintiff's under-performance, and  
9 without conclusive proof of Defendants' deviation from standard  
10 practice, we cannot surmise that Defendants' proffered motive is  
11 pretextual. See Calero-Cerezo, 355 F.3d at 26 (rejecting plaintiff's  
12 rebuttal as she "failed to point to specific facts that would  
13 demonstrate any sham or pretext intended to cover up defendants'  
14 retaliatory motive," and defendants had stated a legitimate excuse).

15 As an alternate basis for finding pretext, Plaintiff notes that  
16 Díaz had informed her on December 17, 2007, that she had achieved her  
17 sales targets. (Id.) We have previously dismissed the import of Díaz'  
18 communication dated December 17, 2007, in view of substantial  
19 evidence supporting Plaintiff's poor performance. See supra part III-  
20 A. Without greater proof of a discriminatory motive on the part of  
21 Defendants, we decline to second-guess Lexmark's business decision in  
22 dismissing Plaintiff for her failure to meet sales targets. See  
23 Calero-Cerezo, 355 F.3d at 26. Accordingly, Plaintiff cannot

1 establish a case for retaliation either under Title VII or the ADEA.  
2 See Marrero, 304 F.3d at 22; Ramírez Rodríguez, 425 F.3d at 84.

3 **E. Equal Pay Act**

4 Defendants argue that Plaintiff cannot establish a case for  
5 disparate pay due to her gender as she fails to name specific  
6 employees for comparison. (Docket No. 41.) Under the Equal Pay Act,  
7 employers may not discriminate "between employees on the basis of sex  
8 by paying wages . . . at a rate less than the rate at which he pays  
9 wages to employees of the opposite sex . . . for equal work on jobs  
10 the performance of which requires equal skill, effort, and  
11 responsibility, and which are performed under similar working  
12 conditions, except where such payment is made pursuant to (i) a  
13 seniority system; (ii) a merit system; (iii) a system which measures  
14 earnings by quantity or quality of production; or (iv) a differential  
15 based on any other factor other than sex." 29 U.S.C. § 206(d)(1). To  
16 establish a claim, a plaintiff must show "that the employer paid  
17 different wages to specific employees of different sexes for jobs  
18 performed under similar working conditions and requiring equal skill,  
19 effort and responsibility." Ingram v. Brink's, Inc., 414 F.3d 232,  
20 232 (1st Cir. 2005).

21 Plaintiff has failed to cite specific male coworkers with equal  
22 qualifications who have been paid greater compensation. (See Docket  
23 Nos. 1, 54.) As Defendants note, the only plausible candidate would  
24 have been Cruz, but he had achieved greater seniority and performance

1 than Plaintiff. (Docket Nos. 42-5, 42-10 at 14-18.) Accordingly,  
2 Plaintiff cannot establish a claim under the Equal Pay Act as a  
3 matter of law. See Ingram, 414 F.3d at 232.

4 **F. National Origin Discrimination**

5 Defendants contend that Plaintiff has not exhausted her claim  
6 for national origin discrimination by including the allegation in her  
7 charge before the EEOC. (Docket No. 41.) Before commencing an action  
8 under Title VII in federal district court, a plaintiff must file a  
9 charge before the EEOC alleging the same violation. Franceschi v.  
10 U.S. Dep't of Veterans Affairs, 514 F.3d 81, 85 (1st Cir. 2008). In  
11 Puerto Rico, a plaintiff must have filed the charge within 300 days  
12 of an allegedly illegal employment action. 42 U.S.C. § 2000e-5(e)(1);  
13 29 C.F.R. § 1601.74.

14 On April 24, 2008, Plaintiff filed a charge with the EEOC,  
15 alleging sex and age discrimination and retaliation, but did not  
16 accuse Defendants of misconduct due to her national origin. (Docket  
17 No. 42-19.) Therefore, Plaintiff's claim under Title VII for national  
18 origin discrimination is barred for her failure to exhaust her  
19 remedies before the EEOC. See Franceschi, 514 F.3d at 85.

20 **G. Claims under Puerto Rico Law**

21 As we order summary judgment in favor of Defendants on all  
22 federal claims, we decline to exercise supplemental jurisdiction over  
23 Plaintiff's associated claims under Puerto Rico law. See 28 U.S.C.  
24 § 1367(c)(3); Rivera v. Murphy, 979 F.2d 259, 264 (1st Cir. 1992).

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**IV.**

**Conclusion**

Accordingly, we hereby **DENY** Defendants' motion to strike (Docket No. 58). We hereby **GRANT** Defendants' motion for summary judgment (Docket No. 41). We **DISMISS** all federal claims **WITH PREJUDICE**, and **DISMISS** all claims under Puerto Rico law **WITHOUT PREJUDICE** (Docket No. 1).

**IT IS SO ORDERED.**

San Juan, Puerto Rico, this 5<sup>th</sup> day of August, 2009.

s/José Antonio Fusté  
JOSE ANTONIO FUSTE  
Chief U.S. District Judge