18-2415-cv
Flowers v. Connecticut Light and Power Company

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of May, two thousand nineteen. **Present**: DEBRA ANN LIVINGSTON, GERARD E. LYNCH, RICHARD J. SULLIVAN, Circuit Judges.

PATRICIA A. FLOWERS,

Plaintiff-Appellant,

v. **18-2415-cv**

CONNECTICUT LIGHT AND POWER COMPANY, AKA NORTHEAST UTILITIES, AKA EVERSOURCE ENERGY,

Defendant-Appellee

For Plaintiff-Appellant: Patricia Flowers, *pro se*, West Hartford, CT

For Defendant Appellee: Honor Southard Heath, Senior Counsel, Eversource Energy Service Company, Berlin CT

Appeal from a judgment of the United States District Court for the District of Connecticut (Bryant, *J.*). **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Patricia Flowers ("Flowers"), proceeding *pro se*, appeals from the September 29, 2017 decision and order of the United States District Court

for the District of Connecticut (Bryant, *J.*) granting summary judgment in favor of her former employer, the Connecticut Light and Power Company ("Eversource"), with respect to her employment discrimination and retaliation claims brought pursuant to 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964.

We review de novo a district court's order granting a motion for summary judgment Sotomayor v. City of New York, 713 F.3d 163, 164 (2d Cir. 2013).

Summary judgment is appropriate when "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). Although we draw all inferences in favor of the non-moving party, that non-moving party may not rely upon "conclusory statements or mere allegations," but must instead "go beyond the pleadings, and by his or her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Davis v. New York*, 316 F.3d 93, 100 (2d Cir. 2002) (internal quotation marks and alterations omitted). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

As an initial matter, Flowers argues that the district court granted only partial summary judgment because it did not mention Flowers's claims brought under 42 U.S.C. § 1981 in its order. After reviewing the decision below, we disagree. "[T]he order clearly stated that the [complaint] was dismissed in its entirety, and the court clearly intended exactly that result[.]" *Cox v. United States*, 783 F.3d 145, 148 (2d Cir. 2015). In other words, though the district court did not discuss

Flowers's § 1981 claims, it clearly intended to dismiss them, and we may affirm on any grounds supported by the record, whether or not explicitly relied upon by the district court. *See Mitchell v. City of New York*, 841 F.3d 72, 77 (2d Cir. 2016). As discussed below, the district court properly granted summary judgment on all of Flowers's claims.

First, we affirm the district court's dismissal of Flowers's discrimination claims. Flowers, an African-American woman, asserts that Eversource discriminated against her in failing to promote her from the position of Associate Analyst to that of Analyst in 2013. Failure-to-promote claims brought under Title VII and § 1981 proceed under the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Patterson v. McLean Credit Union,* 491 U.S. 164, 186–87 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; *Howley v. Town of Stratford*, 217 F.3d 141, 150 (2d Cir. 2000).

Pursuant to this framework, a plaintiff must first establish a *prima facie* case of discrimination, showing among other things, that she was qualified for the denied position. *Id.* at 150. If the plaintiff meets this burden, and the employer comes forward with evidence of a legitimate, nondiscriminatory reason for its decision, the plaintiff must present sufficient evidence for a rational finder of fact to infer that the employer's proffered reason is pretext for discrimination in order to withstand summary judgment. Id. In conducting this analysis, we "must respect an employer's

unfettered discretion to choose among qualified candidates." *Sassaman v. Gamache,* 566 F.3d 307, 314 (2d Cir. 2009) (internal quotation marks and alterations omitted).

Even assuming that Flowers has established a prima facie case of race-based discrimination, we agree with the district court that she has failed to produce sufficient evidence that the failure to promote her was motivated by discriminatory animus rather than by Eversource's stated motivations. Eversource has offered "legitimate, non-discriminatory reason[s]," *McDonnell Douglas,* 411 U.S. at 802, for its failure to promote Flowers, including evidence that Flowers's work performance as an Associate Analyst was substandard and erratic. Indeed, only a few months prior to Eversource's failure to promote her, Flowers received a performance review indicating that she at best met expectations as an Associate Analyst, a position beneath that to which she sought to ascend. Flowers, for her part, has failed to offer sufficient evidence of pretext. See *Schwapp v. Town of Avon,* 118 F.3d 106, 110 (2d Cir. 1997).

("[E]ven in the discrimination context, a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment."). The district court therefore did not err in dismissing Flowers's discrimination claims and granting Eversource's motion for summary judgment on those claims.

Next, we affirm the district court's decision to grant summary judgment in favor of Eversource on Flowers's retaliation claims predicated on her filing of an internal discrimination complaint in 2013. Retaliation claims under Title VII and §

1981 are also subject to the *McDonnell Douglas* framework. See *Littlejohn v. City of New York*, 795 F.3d 297, 315 (2d Cir. 2015). Again, even assuming that Flowers has established prima facie showing of retaliation, Eversource has offered ample evidence of legitimate, non-retaliatory reasons for the allegedly adverse actions taken toward Flowers following her filing of the complaint. Yet Flowers has failed to provide sufficient evidence that these actions were instead motivated by discriminatory animus. For example, Flowers highlights an exchange where an Eversource employee conveyed to her that the company's Information Technology Department was ending its investigation into an alleged "spoofing" (i.e., hacking) of her email. Eversource, however, presented a non-retaliatory justification for this interaction: The company had twice investigated Flowers's "spoofing" allegation and found it meritless. Flowers has failed to provide support for her claim that this exchange in fact constituted a retaliatory threat, issued in response to her internal complaint.

Finally, Flowers argues that the district court erred in declining to consider her two additional allegations of retaliation:

Eversource's alleged inadequate investigation of her internal discrimination complaint and its refusal to promote her for a second time in 2016. Flowers, however, asserted these claims for the first time in her opposition to summary judgment, and the district court therefore properly declined to consider them. See *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (recognizing that a party may not use an opposition to a dispositive motion as a means to amend the

complaint). In any event, Flowers has not provided evidence that Eversource acted with a retaliatory motivation either when it determined the scope of its investigation or when it refused to promote Flowers in 2016. We have considered all of Flowers's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.[1]

FOR THE COURT

"s/" Catherine O'Hagan Wolfe,

United States Court of Appeals Second Circuit

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[1] Flowers asserts that her supervisor subjected her to disparate treatment based on her race beginning in 2010. She also claims that Eversource engaged in an illegal cover-up of its wrongdoing by omitting information from affidavits submitted to the Equal Employment Opportunity Commission. Because Flowers raised both of these claims for the first time on appeal, we decline to consider them here. See Askins v. Doe No. 1, 727 F.3d 248, 252 (2d Cir. 2013). We also decline to [1] consider Flowers's argument, raised for the first time in her reply brief, that she should have been granted leave to amend her complaint a second time. See JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").

UNITED STATES DISTRICT OF CONNECTICUT

PATRICIA FLOWERS,

Plaintiff,

v.

3:15-cv-534 (VLB)
September 29, 2017

CONNECTICUT LIGHT & POWER CO.,/aka NORTHEAST UTILITIES, a/k/a EVERSOURCE ENERGY

Defendants.

MEMORANDUM OF DECISION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DKT. 24]

I. Introduction

Plaintiff Patricia Flowers ("Plaintiff" or "Flowers") brings this employment discrimination action against Defendant Eversource Energy ("Defendant" or "Eversource") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The Defendant moved for summary judgment and Plaintiff filed an opposition. [Dkt. 24 ("Motion"); Dkt. 52 ("Opposition").] For the reasons that follow, Defendant's Motion is GRANTED.

I. Factual Background

The following facts, unless otherwise noted, are drawn from the parties' D. Conn. L. R. 56(a) statements of undisputed facts.

Plaintiff Patricia A. Flowers ("Flowers" or "Plaintiff") is an African American woman. [Dkt. 26-6 at 106.] On September 21, 2009, she was hired by the Defendant, The Connecticut Light and Power Company, now doing business as Eversource Energy ("Defendant"), as an Associate Analyst in the Transmission Reliability Compliance Department. [Dkt. 26 (Def. 56(a)(1) Stmt.) at ¶ 1, Dkt. 52-1 (Pl. 56(a)(2) Stmt.) at ¶ 1.]

Plaintiff's department works with "numerous Eversource subject matter experts to ensure all compliance requirements are met and documented appropriately. [Dkt. 26 at ¶ 7.] This supports reliable electric service to Eversource customers. *Id.* Eversource is part of the "electric grid" that transmits electricity in and out of Connecticut and New England. *Id.* As such, Eversource is obligated under the Federal Power Act to provide accurate reporting on reliability issues." *Id.* "Failure to provide accurate reporting may result in fines and other sanctions including penalties up to one million dollars per day per violation." [Dkt. 52-1 at ¶ 8.]

Plaintiff was evaluated twice as a new employee by her direct supervisor Karl Tammar. [Dkt. 52-19.] On or about October of 2010, Karl Tammar left the Defendant's company and William Temple became Plaintiff's supervisor. [Dkt. 26 at ¶ 5, Dkt. 52-1 at ¶ 5.] In early 2011, Temple completed Plaintiff's 2010 Job Performance review. [Dkt. 26-6 at 59-60.] He rated her job performance as a 2 out of 5 and did not recommend her for a raise. [*Id.*; Dkt. 26-5 at 2.]

On January 15, 2011, after midnight early on a Saturday morning, Plaintiff used the Eversource email system to send Temple and his supervisor,

Dwayne Basler, an email, which Plaintiff admitted to sending while under the influence of alcohol. [Dkt. 26 ¶ at 11, Dkt. 52-1 at ¶ 11.] The parties have not produced the email for the Court's review, but Plaintiff discussed the email at her deposition and referenced that the email mentioned Plaintiff describing herself as an "imperfect perfectionist." [Dkt. 26-6 at 62-63.] Plaintiff also quoted the email as stating "I can see a lot more clearly now," and "I'll try to get my performance review report in to you before Monday." *Id.* Plaintiff could not recall to what those statements referred. *Id.*

Plaintiff would later report a conversation she had with her Supervisor William Temple, shortly after he took over the position, where he talked to her about his Japanese heritage and how as a child he was ashamed of his bi-racial identity and that he had been told by his mother that he should marry Caucasian people. [Dkt. 52-15 at 2.] Plaintiff testified that she did not remember whether the conversation happened before or after she sent Temple her midnight email. [Dkt. 26-6 at 63-64.] Temple asserts the conversation occurred after the midnight email. [Dkt. 52-15 at 2.]

In March of 2011 Plaintiff wrote a letter to Deborah Feringo, a former Human Resources Partner, to object to her job performance rating. [Dkt. 52-17.]

In May 2011, an Analyst who was training

Flowers filed a harassment complaint against her. [Dkt. 26 at ¶ 12, Dkt. 52-1 at ¶ 12.] Neither party submits exhibits detailing the incident, but as a result Dwayne Basler, then a Director of the Transmission Operations and Reliability

Compliance Department, "counseled [Plaintiff] on respect for co-workers and about the importance of teamwork at the Company." [Dkt. 26-8 at ¶ 8.] In 2012, Plaintiff complained that an engineer spoke with Temple about an issue with her work product instead of speaking with her directly. [Dkt. 27-6 at 209:23 – 211:5, Dkt 26-7 at 53:3-20.] She made her statements directly to the offending engineer and in front of Temple. *Id.*

In Plaintiff's annual review in 2012, her supervisor stated she did "not follow through on assignments and had to be reminded," "wait[ed] to the last minute to get things done rather than planning her work ahead of time," that she is so willing to please that she "promise[d] more than she can deliver," and that she needed to "improve in the overall quality and consistency in her work." [Dkt. 26-5 at 16, 17, 18.]

In April 2013 Flowers informed Temple that she was going to apply for the Analyst position in the Transmission Reliability Compliance Department. [Dkt. 26-2 at 67.] Plaintiff stated Temple informed her she was not eligible for the position. *See id.* at 155-57. Temple also mentioned that managers had informed him that they did not want to work with Plaintiff. *Id.* at 157. Temple does not believe he told Plaintiff she was unqualified for the position.

The position was ultimately given to Suzanne Black, who had previously worked as an Analyst in a different department. [Dkt. 26 at ¶ 18; Dkt. 52-1 at ¶ 18.] Plaintiff testified that Black was "as qualified" as she was for the Analyst position, and described Black as "very, very good" at her job. [Dkt. 26-6 at 105- 06.]

Between May and August of 2013, Plaintiff transmitted at least one report to the Independent System Operator for New England ("ISO") without obtaining reviews and signatures from the appropriate Eversource personnel. [Dkt. 26 at ¶ 25, Dkt. 52-1 at ¶ 25.] This error resulted in a North American Electric Reliability Corporation ("NERC") violation. [Dkt. 26 at ¶ 25, Dkt. 52-1 at ¶ 25.] Plaintiff admits she made errors like submitting reports without signatures and submitting reports late but asserts the errors were a small percentage of her work. [Dkt. 26 at ¶ 25, Dkt. 52-1 at ¶ 25; Dkt. 27-6 at 183:25 -187:13.]

On May 23, 2013, an email containing a self-report matrix was sent to Duong Le, a compliance engineer from Northeast Power Coordinating Council, Inc., from Plaintiff's email. [Dkt. 52-58.] Plaintiff alleges someone else sent the email under her name. [Dkt. 52 at 26-27.] The parties have not provided the Court with further information about the contents of this email.

In July of 2013, Plaintiff was placed on a "Success Plan" because peers and management expressed frustration about Plaintiff's inability to retain and follow instructions. [Dkt. 26-5 at 22.] The Plan was designed to "help improve both the quality and timeliness of her work." *Id.* Plaintiff "successfully completed the actions noted in the Success Plan in late October" and began working with a mentor. *Id.*

On August 15, 2013, Plaintiff filed a race discrimination complaint through the "Beacon Line," Defendant's internal discrimination and harassment reporting system. [Dkt. 52-14.] She accused Temple of racial discrimination dating back to

2010. [Dkt. 52-14.] In her Beacon Line complaint, Flowers asserts discrimination based on her conversation with Temple about his Japanese heritage, Temple's negative annual performance review of her in 2010, Temple's statement that she was not eligible for the analyst position, the email sent to Duong Le, which she asserts was sent by someone else accessing her account in an attempt to sabotage her, and her placement on a Success Plan, which she believes was punitive. *Id.* at 3, 4, 5, 6.

Denise Nadeau, Program Manager for Labor Relations for Eversource Energy ("nadeau") was tasked with investigating Flower's complaints. Nadeau described her Beacon Line investigation in an affidavit to the EEOC. [Dkt. 52-51.] In her affidavit, Nadeau stated she compiled a list of critical issues from Plaintiff's internal complaint and allowed Plaintiff to review that list and make any comments or changes. [Dkt. 52-51 at 3.] Nadeau interviewed several individuals from Plaintiff's department including Plaintiff's direct supervisor, the department director, and a manager and staff engineer who worked with Plaintiff. *Id.* She reached out to IT about the email allegations. *Id.* In addition, Nadeau investigated Flowers' unsuccessful application for promotion to an Analyst position. *Id.* After approximately 20 hours spent on the investigation, Nadeau found no evidence of discrimination or sabotage. *Id.* at 4.

On September 11, 2013, Plaintiff met with Nadeau, Program Manager for to discuss the August 2013 Beacon Line complaint. [Dkt. 52-49.] At this meeting, Nadeau informed Plaintiff that there was insufficient evidence to support her

complaint. *Id.* During that conversation, Plaintiff asked Ms. Nadeau if her investigation had revealed information about the May 23, 2013 email to Duong Le. *Id.* Ms. Nadeau told Plaintiff her investigation had focused on the May 23, 2013 email, but that Plaintiff could contact IT Security Manager Bob Ciurylo if she wanted additional information about the email. [Dkt. 52-51.]

On October 29, 2013, Nadeau and Mariana Emanuelson met with Plaintiff and told her that IT had "found no evidence that anyone other than Ms. Flowers had anything to do with sending the email to Mr. Le" and that they would like to close out the investigation. [Dkt. 52-51, Dkt. 26-9 at 4.] Plaintiff alleges that at this meeting Nadeau accused her of harassing IT manager Ciurylo, and states the harassment accusation made her afraid to continue investigating the email. [Dkt. 52-2 at 32-36]. Flowers does not specify exactly what was said or done to cause her to conclude that her conduct was perceived as harassment. Defendant denies that Nadeau characterized Flowers' communications with Ciurylo as harassment or otherwise threatened her. [Dkt. 52-52 at ¶ 9.]

In addition, Plaintiff does not give specific dates but alleges that Temple instructed Plaintiff's co-workers to report to him any errors Plaintiff made in the Compliance Web-based Corrective Action Tracking System (CATsWeb). [Dkt. 52-2 at 13.] She alleges this supervision was a retaliatory measure taken by Defendant because of her Beacon Line complaint. [Dkt. 14 at ¶¶ 49, 178.] Defendant denies placing Flowers under increased scrutiny and states Plaintiff's allegation is

unfounded. [Dkt. 25 at 16.] Flowers does not offer testimony, affidavits or other evidence to support this claim.

In Plaintiff's 2013 Performance Review, Temple stated Plaintiff still exhibited inconsistency in the quality and timeliness of her work. [Dkt. 26-5 at 22, 24.] Plaintiff alleges that negative statements about her work performance in her 2013 performance review were made in retaliation for Plaintiff's complaint about race discrimination. [Dkt. 27-6 at 260:8-10.]

On May 22, 2014, Plaintiff filed a discrimination claim with the EEOC. [Dkt. 52-9.]. Plaintiff alleged she had been a "victim of unlawful employment discrimination on the basis of [her] race." *Id.* at 2. The EEOC charge focused on two issues, 1) retaliation by Denise Nadeau in the handling of Plaintiff's internal racial discrimination complaint and 2) alleged "unfavorable and unjustified" statements made by Plaintiff's supervisor William Temple in her 2013 performance review in an effort to retaliate against her for her internal racial discrimination complaint. *Id.* at 3-4, 5.

On February 5, 2015, the EEOC issued a right to sue letter and" [Dkt. 52-67.] Plaintiff filed the Complaint in this action on April 10, 2015. [Dkt. 1.] Plaintiff submits a cause of action for failure to promote and a cause of action for retaliation based on "[t]he conduct of Nadeau in reprimanding the plaintiff for following up with Ciurylo, as originally suggested by Nadeau, the unfavorable annual job rating of the plaintiff's work performance prepared by Temple and continued unfair scrutiny of the plaintiff's job activities. [Dkt. 14.]

In March of 2016, Plaintiff applied for a Senior NERC Specialist position in the Transmission Reliability Compliance Department. [Dkt. 52-76 at 3.]

Plaintiff alleges in August of 2016 she was informed by her current manager, Mark Kenny that Human Resources had refused to consider Plaintiff for the position because of her 2013 Job Performance Review. [Dkt. 52-2 at 44.] Plaintiff resigned from the position of Associate Analyst on September 26, 2016. *Id.*

II. Standard of Review: Motion for Summary Judgment

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment 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. The court should state on the record the reasons for granting or denying the motion." Fed. R. Civ. P. 56(a).In order to prevail, the moving party must sustain the burden of proving that no factual issues exist. *Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010). "In determining whether that burden has been met, the court is required to resolve all ambiguities and credit all factual inferences that could be drawn in favor of the party against whom summary judgment is sought. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If there is any evidence in the record that could reasonably support a jury's verdict for the nonmoving party, summary judgment must be denied." *Am.*

Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH, 446 F.3d 313, 315-16 (2d Cir. 2006) (quotation omitted). In addition, "the court should not weigh evidence or assess the credibility of witnesses" on a motion for summary judgment, as "these determinations are within the sole province of the jury." *Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996).

"A party opposing summary judgment 'cannot defeat the motion by relying on the allegations in [her] pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible.' At the summary judgment stage of the proceeding, [p]laintiffs are required to present admissible evidence in support of their allegations; allegations alone, without evidence to back them up, are not sufficient." *Welch-Rubin v. Sandals Corp.*, No. 3:03-cv-481, 2004 WL 2472280, at *1 (D. Conn. Oct. 20, 2004) (quoting *Gottlieb v. County of Orange,* 84 F.3d 511, 518 (2d Cir. 1996)). "Summary judgment cannot be defeated by the presentation . . . of but a 'scintilla of evidence' supporting [a] claim." *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 726 (2d Cir. 2010) (quoting *Anderson*, 477 U.S. at 251).

A court must make the threshold determination of whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson*, 477 U.S. at 250. Judges are not required "to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless

the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Anderson*, 477 U.S. at 251 (citing *Pennsylvania R. Co. v. Chamberlain,* 288 U.S. 333, 343 (1933); *Coughran v. Bigelow,* 164 U.S. 301, 307 (1896)). Indeed, summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944).

"A party asserting that a fact is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1). A party may also support their assertion by "showing that the materials cited do not establish the absence of a genuine dispute." *Id.*

Cited documents must consist of either "(1) the affidavit of a witness competent to testify as to the facts at trial and/or (2) evidence that would be admissible at trial." Local R. Civ. P. 56(a)3; *see also* Fed. R. Civ. P. 56(c)(4). The

Court need not consider any materials that the parties have failed to cite, but may in its discretion consider other materials in the record. Fed. R. Civ.P. 56(c)(3). If a party fails to properly support an assertion of fact, or fails to properly address another party's assertion of fact, the Court may grant summary judgment on the basis of the undisputed facts. D. Conn. L. Rule 56(a)(3) (stating that "failure to provide specific citations to evidence in the record as required by this Local Rule may result in the Court deeming certain facts that are supported by the evidence admitted in accordance with [Local] Rule 56(a)(1) or in the Court imposing sanctions, including . . . an order granting the motion if the undisputed facts show that the movant is entitled to judgment as a matter of law").

Finally, while Plaintiff was initially represented by counsel, she chose to proceed without counsel after Defendant filed its motion for summary judgment, and has filed her own opposition pro se. "[I]t is well established that the submissions of a pro se litigant must be construed liberally and interpreted to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006). When a party exercises his or her "right of self- representation," the Court is obliged to "make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Id.* at 475 (citing *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983).

III. Discussion

Plaintiff alleges that Defendant discriminated against her by (1) failing to promote her and (2) retaliating against her for complaining about discrimination in the promotion decision. Defendant challenges Plaintiff's claims on three grounds: (1) Plaintiff's promotion claim is barred by the statute of limitations; (2) Plaintiff fails to raise a question of fact whether Defendant's failure to promote her was discriminatory; and (3) Plaintiff fails to raise a question of fact whether Defendant retaliated against her for filing her Beacon Line complaint. The Court evaluates each argument in turn.

IV. Timeliness of Promotion Claim

Defendant argues that Plaintiff only asserted an EEOC claim for retaliation and failed to timely submit an EEOC claim regarding the promotion. As Defendant asserts, the EEOC claim states: "This charge is a claim of *retaliation* stemming from a racial discrimination complaint I filed with my employer . . . on 8/15/2013." [Dkt. 26-3 at 4 (emphasis in original).]

A Title VII claimant may bring suit in federal court only if she has filed a timely complaint with the EEOC and obtained a right-to-sue letter. 42 U.S.C. §2000e-16(c). However, "claims that were not asserted before the EEOC may be pursued in a subsequent federal court action if they are reasonably related to those that were filed with the agency." *Deravin v. Kerik*, 335 F.3d 195, 200(2d Cir. 2003); *Mathirampuzha v. Potter*, 548 F.3d 70, 76 (2d Cir. 2008). A claim is "reasonably related" if "the conduct complained of would fall within the scope of

the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.* at 76. An "adverse employment action taken in retaliation ordinarily is deemed reasonably related to the original[2] complaint." *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1209 (2d Cir. 1993); *Soares v. Univ. of New Haven*, 175 F. Supp. 2d 326, at 331 (D. Conn. 2001).

Here, the EEOC complaint references the failure to promote Plaintiff to an analyst position on May 6, 2013. [Dkt. 26-3 at 4.] In the EEOC complaint, Plaintiff specifically provides information about the 2013 failure to promote "should the EEOC consider investigating this claim as background to [her] retaliation claim." *Id.* at 5. In fact, Nadeau confirmed in an affidavit that she "did look into that issue." [Dkt. 52-51 at ¶ 8.] The Court finds Plaintiff's failure to promote claim is reasonably related to the exhausted, timely retaliation claim. Defendant's motion for summary judgment based on untimeliness of Plaintiff's failure to promote

[2] This wording, and the wording of other cases, suggests that the order of events matters. For example, the District of Connecticut has stated the relevant question is "whether a discrete act of discrimination . . . occurring after the timely filing of an administrative complaint alleging discriminatory treatment is reasonably related to the administrative complaint such that it need not be separately exhausted administratively." *O'Hazo v. Bristol-Burlington Health Dist.*, 599 F. Supp. 2d 242, 254 (D. Conn. 2009) (emphasis added). However, the District of Connecticut has also allowed unexhausted claims regarding employment actions which preceded an administrative complaint when those actions were referenced in the administrative complaint. Cloutier v. England, 302-cv-616, 2003 WL 32648094, *2 (D. Conn. July 15, 2003) (allowing claims where the EEOC complaint stated the claimant had been passed over for promotions since 1988).

claim is accordingly DENIED.

a. Merits of the Promotion Claim

Defendant asserts Plaintiff cannot establish a prima facie case of employment discrimination for failure to promote and cannot establish that Defendant's legitimate, nondiscriminatory basis for its employment decisions is a mere pretext for discrimination.

To state a claim for race-based employment discrimination for failure to promote, a complainant must establish a prima facie case by showing:

1 that [s]he belongs to [a protected group];
2 that [s]he applied and was qualified for a job for which the employer was seeking applicants;
3 that, despite h[er] qualifications, [s]he was rejected; and
4 that, after h[er] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Byrne v. Cromwell, Bd. of Educ.*, 243 F.3d 93, 101 (2d Cir. 2001) (superseded on other grounds) (stating the *McDonnell* framework applies to race discrimination claims under Title VII as well as age discrimination claims under ADEA). Even at the summary judgment phase, where a plaintiff must put forth evidence in support of each of these elements, the "plaintiff's *prima facie* burden [i]s minimal and *de minimis.*" *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 76 (2d Cir. 2005) (internal quotation marks omitted). If the complainant makes out a prima facie case, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection. *Id.* at 802-03. If employer does so, the burden shifts back

to the complainant to show the employee's legitimate, nondiscriminatory reason is a pretext for prohibited discrimination. *Id.* at 804. To establish pretext, the complainant may raise "facts as to the [employer's] treatment of [complainant] during his prior term of employment; [the employer's] reaction, if any, to [complainant's] legitimate civil rights activities; and [the employer's] general policy and practice with respect to minority employment." *Id.* at 804-05.

Where a complainant shows a prima facie case and the employer raises a legitimate, non-discriminatory purpose for the hiring decision, but the complainant "cannot offer direct evidence of an improper discriminatory bias," the complainant must rely on the "strength of his prima facie case combined with circumstantial evidence that [the employer's] stated reason for failing to hire [the complainant] is pretext" in order to defeat summary judgment. *Byrne*, 243 F.3d at 102. The Court "must respect the employer's unfettered discretion to choose among qualified candidates," and "does not sit as a super-personnel department to reexamine a firm's business decisions about how to evaluate the relative merits of education and experience in filling job positions." *Id.* at 103; *Newsom-Lang v. Warren Int'l, Inc.*, 80 F. App'x 124, 126 (2d Cir. 2003). However, "an employer's disregard or misjudgment of a plaintiff's job qualifications may undermine the credibility of an employer's stated justification for an employment decision." *Id.* Where the "credentials of the person selected for the job" are such that "no reasonable person . . . could have chosen the candidate selected over the plaintiff," the employer's hiring decision may not stand. *Barry v. New Britain Bd. of Educ.*, 300 F. App'x

113, 114 (2d Cir. 2008) (citing *Byrne*, 243 F.3d at 103). The record includes evidence establishing a prima facie case of discrimination based on the failure to promote.

Flowers: (1) Flowers is a member of a protected classes in that she is African American (Dkt. 26-6 at 106); (2) She applied for the April 2013 analyst position and was, for the purposes of the prima facie analysis, qualified[3] (Dkt. 26 at ¶18; Dkt. 52-1 at ¶18); (3) Flowers was not selected for the position (*Id.*); and (4) Instead of Flowers, Black was formally appointed to the analyst position. *Id.*

In turn, Defendant asserts it has raised a legitimate, nondiscriminatory reason for its failure to promote Flowers: Plaintiff's performance was "substandard and erratic," rendering her unqualified to serve as an analyst. [Dkt. 25 at 12.] Flowers' annual review for 2012, which was completed three months before she applied for the analyst position, supports Defendant's assertion that her work product "could . . . be improved." [Dkt. 26-5 at 15 (2012 review).] For example, Flowers occasionally failed to "follow[] through on assignments and had to be reminded," "wait[ed] to the last minute to get things done," and produced work which included "a number of errors." *Id.* at 16-18. Flowers' supervisor concluded

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[3] Flowers asserts that she was in fact qualified for the position, and her performance reviews consistently rate her as a "Successful Contributor" in most categories of review.... A "successful contributor" is defined as one who "routinely meets expectations and may occasionally exceed expectations." Id. at 3. Given the Plaintiff's "minimal" burden to establish a prima facie case, the Court finds Plaintiff's evidence of qualification sufficient to continue the analysis. *Woodman,* 411 F.3d at 76.

that as of January 2013, Flowers "need[ed] to improve in the overall quality and consistency in her work." *Id.* at 18. Flowers' reviews for prior years also "encourage [Plaintiff] to continue to pay attention to details," (*Id.* at 13 (2011 review), and document a consistent need to "go back and correct mistakes." *Id.* at 6 (2011 review).

The rating system for annual reviews also supports Defendant's position that Plaintiff's performance was not sufficient to warrant a promotion. Defendant's annual reviews rate employees out of the following five categories:

(5) Top Achiever: Routinely exceeds expectations; is self-directed, expertly skilled, and a role model.
(4) High Contributor: Frequently exceeds expectations; demonstrates high level skills, initiative, and productivity.
(3) Successful Contributor or Developing: Routinely meets expectations and may occasionally exceed expectations - OR – is developing (performance satisfactory based on time in position.)
(2) Improvement Needed to Be a Successful Contributor: Results approach requirements but do not fully meet expectations; some improvement is needed.
(1) Did Not Meet Performance Expectations: Results do not approach requirements and are below expectations; sustained improvement is required.

In the years preceding her application for the analyst position, Plaintiff consistently rated as a "Successful Contributor" in most categories of review. Specifically, in 2010, Plaintiff rated "Successful Contributor" in all but two categories, in which she rated "Improvement Needed." [Ex. 26-2 at 5.] In 2011, she rated "Successful Contributor or Developing" in all categories but one, ("Contributing to Team Success"), in which she was a "High Contributor." *Id.* at 5-6. In 2012, she rated "Successful Contributor" in all categories but one, in which

she rated "Improvement Needed." *Id.* at 6-7.

Given Plaintiff's consistently average evaluations, it is reasonable to infer that Plaintiff's performance in a higher position would have been unacceptable. Flowers' evaluations support Defendant's assertion that her performance was insufficient to warrant a promotion.

In further support of Defendant's assertion that its promotional decision was legitimate, Plaintiff does not dispute that Black was qualified for the position. [Dkt. 26-6 at 105-06.]

The burden accordingly shifts back to Plaintiff to show that Defendant's legitimate, nondiscriminatory reason for not promoting her is a mere pretext for race-based discrimination. However, Flowers has raised no evidence to support this contention. Plaintiff raises other events that allegedly establish Temple was motivated by racial animus when he told her she was not eligible for the analyst position but supports those examples with only her own deposition testimony and/or EEOC complaint. However, a Plaintiff's own "self-serving testimony," which is "speculative, and subjective" and does not "square . . . with the hard evidence adduced during discovery," is "insufficient to defeat summary judgment." *Deebs v. Alstom Transp. Inc.*, 346 F. App'x 654, 657 (2d Cir. 2009) (citing *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985) (explaining that allowing "a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial" in all employment discrimination actions).

For example, Plaintiff argues her 2010 discussion with Temple in which he discussed his own Asian heritage is evidence that Temple was motivated by racial animus when he told her she was unqualified for the promotion. However, Plaintiff offers only her own allegation to support her claim. [*See, e.g.*, Dkt. 52 at 4 (citing Plaintiff's transcript and Plaintiff's Beacon Line complaint to support her characterization of the 2010 conversation)]. Plaintiff has offered no other evidence suggesting this conversation was in any way tied to her failure to secure a promotion three years later. Nor has she offered any evidence supporting her contention that the conversation with Temple was discriminatory against her. [Dkt. 52 at 4 (citing Plaintiff's transcript and Plaintiff's Beacon Line complaint to support her characterization of the 2010 conversation); *Id.* at 5 (citing Temple's Beacon Line investigation response which states Temple attempted to "bond" with Plaintiff "about his heritage" and "how others treated him because he was bi-racial").] At best, Temple's statement could be characterized as reflecting a bias against Asians, not African Americans. Even if the statement was made it would not support Flowers' discrimination claim on the basis of her African American heritage or ethnicity. Plaintiff's "conclusory" allegations, "without evidence to back them up, are not sufficient." *Welch-Rubin*, 2004 WL 2472280 at *1.

Similarly, Plaintiff alleges that other employees also made errors and were promoted to other positions or not supervised to the same degree as Plaintiff. [Dkt. 52 at 17.] However, Plaintiff offers no evidence of the particulars of this claim. She has not shown that she is similarly situated to the individuals to which she compares herself. Accordingly, because plaintiff has failed to offer any evidence

that defendants "treated him less favorably than a similarly situated employee *outside* his protected group," *Graham,* 230 F.3d at 39 (emphasis supplied), the Court finds that plaintiff cannot, as a matter of law, establish an inference of gender discrimination sufficient to satisfy the *prima facie* standard. *See, e.g., Goldman v. Admin. for Children's Servs.,* No. 04 Civ. 7890 (GEL), 2007 U.S. Dist. LEXIS 39102, 2007 WL 1552397, at *6 (S.D.N.Y. May 29, 2007) ("[P]laintiff's claim of discrimination . . . must fail, as she has not identified any individuals 'outside' of the 'protected group' to whom she may compare herself."); *Chan v. NYU Downtown Hosp.,* No. 03 Civ. 3003 (RMB), 2005 U.S. Dist. LEXIS 40243, 2006 WL 345853, at *5 (S.D.N.Y. Feb. 14, 2006) [**29] (granting summary judgment where the plaintiff "fail[ed] to identify any similarly situated individuals outside her protected class who were treated preferentially by the [defendant] . She cites only her own deposition testimony to support that contention. *Id.* at 18. "Plaintiff's evidence in this regard is solely based on her speculative belief" that other employees were treated differently. *Weichman v. Chubb & Son,* 552 F. Supp. 2d 271, 283-84 (D. Conn. 2008). Plaintiff cannot testify as to other employees' conduct that she did not personally observe, and has submitted no other evidence[4] which supports her assertions. *Id.* Plaintiff offers no evidence which raises a question of fact as to whether Defendant's reason for not promoting her was mere pretext for

[4] Plaintiff also submits what appear to be records of other employees' work product to establish those other employees made mistakes... However, those logs are incomprehensible to the Court, and Plaintiff does not provide any evidence which would allow the Court to decipher them.

discrimination. Defendant's motion for summary judgment as to her promotion-based discrimination claim is GRANTED.

b. The Retaliation Claim

Defendant also challenges Plaintiff's ability to establish a prima facie case of retaliation and asserts that Plaintiff cannot show that Defendant's legitimate, nondiscriminatory reason for its conduct was a mere pretext for retaliation.

It is unlawful for an employer to discriminate against an employee because he "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e–3(a). The burden-shifting framework laid out in *McDonnell Douglas Corp.*, 411 U.S. 792, governs retaliation claims. *Summa v. Hofstra Univ.*, 708 F.3d 115, 125 (2d Cir. 2013); *Preston v. Bristol Hosp.*, 645 F. App'x at 19 (2d Cir. 2017). To establish a prima facie case of retaliation, a plaintiff must put forth evidence that:

1. [s]he engaged in protected activity (such as complaining about discrimination);
2. h[er] employer knew about it;
3. h[er] employer took adverse action against h[er]; and
4. there is a causal connection between h[er] protected activity and the adverse employment action.

Summa v. Hofstra Univ., 708 F.3d at 25.

For the purposes of a retaliation claim, an adverse employment action must be "materially adverse," that is, it must be "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of

discrimination." *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)).

Once a plaintiff establishes a *prima facia* case of retaliation, the employer then bears the burden of production "to demonstrate that a legitimate, nondiscriminatory reason existed for its action." *Summa*, 708 F.3d at 125. Poor performance undoubtedly constitutes a legitimate, non-discriminatory reason. *See Varno v. Canfield*, 664 F. App'x 63, 66 (2d Cir. 2016) (where plaintiff orally complained of discrimination to HR employee prior to termination, the Second Circuit found "[t]he defendants demonstrated a legitimate, non-discriminatory reason for terminating Varno: substandard performance"); *Lawless v. TWC Media Sols., Inc.*, 487 F. App'x 613, 616 (2d Cir. 2012) (stating that poor work performance is a legitimate, non-retaliatory reason for termination in a Title VII retaliation case); *see generally Lawson v. City of New York*, 595 F. App'x 89, 90 (2d Cir. 2015) (upholding a district court's determination that poor performance evaluations provided a legitimate reason for reduction of hours and transfer to a different unit); *Oliver v. Waterbury Bd. of Educ.*, No. 3:12-CV-1285, 2014 WL 1246711, at *18 (D. Conn. Mar. 24, 2014), *appeal docketed*, No. 14-1779 (2d Cir. May 22, 2014) (in a Title VII retaliation case, the court stated, "Poor job performance is a legitimate, non-retaliatory explanation for the adverse employment actions taken.").

Where the employer presents a legitimate, non-discriminatory reason, then the burden shifts back to the plaintiff to provide direct or circumstantial evidence

that the employer's action was a mere pretext. *See Summa*, 708 F.3d at 125; *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 845 (2d Cir. 2013).

"[A] plaintiff alleging retaliation in violation of Title VII must show the retaliation was a 'but-for' cause of the adverse action, and not simply a 'substantial' or 'motivating' factor in the employer's decision." *Zann Kwan*, 737 F.3d at 845-46 (citing *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2526, 2533 (2013)); *Ya-Chen Chen v. City Univ. of New York*, 805 F.3d 59, 70 (2d Cir. 2015) ("If the defendant provides such an explanation, the presumption of retaliation dissipates, and the plaintiff must prove that the desire to retaliate was the but-for cause of the challenged employment action.") (internal quotation marks and citations omitted). The Second Circuit has clarified that this "does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive." *Id.* Evidence of any "weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its actions" can constitute sufficient proof that retaliation is the "but-for cause" of the adverse employment action. *Id.* However, "temporal proximity alone is insufficient to defeat summary judgment at the pretext stage." *Id.* at 847; *see Lawless*, 487 F. App'x at 617.

Flowers' Amended Complaint asserts three instances of retaliation: (1) Nadeau's statement to Plaintiff that Plaintiff was borderline harassing someone in the IT department about investigating whether Temple "spoofed" her email account, (2) Temple's 2013 annual review which included "false accusations and

belittling comments," and (3) Temple's unduly high level of supervision of Plaintiff. [5] [Dkt. 14 (Amended Complaint) at ¶ 178.] The Court discusses each allegation in turn.

i. Plaintiff's Claim of Threatening

Plaintiff has not established a prima facie case that Defendant retaliated against her when Nadeau notified Plaintiff she was borderline harassing someone in the IT department over her email account. At step one, the parties do not contest that Plaintiff participated in a protected activity when she filed her Beacon Line complaint. [Dkt. 25 at 8.] At step two, Defendant knew about the protected action, as Defendant conducted the Beacon Line investigation. [Dkt.52-51 at ¶ 6.] However, at step three, even given that "plaintiff's *prima facie* burden [i]s minimal and *de minimis,"* Plaintiff has not made a showing that Defendant's statement was an adverse action. *Woodman,* 411 F.3d at 76. First, although Flowers offers no ~~evidence that she was accused~~ of harassment, even if she was accused of harassing another co-worker, that accusation does not rise to the level of a

[5] Plaintiff also appears to argue in her Opposition to Summary Judgment that Defendant retaliated against her by failing to thoroughly investigate her Beacon Line complaint and by failing to promote her in 2016. [Dkt. 52 at 56, 59.] Plaintiff did not include those alleged instances of retaliation in her Complaint, and may not allege them for the first time in her Opposition to Summary Judgment. *Thomas v. Egan,* 1 F. App'x 52 (2d Cir. 2001) ("[I]t is inappropriate to raise new claims for the first time in submissions in opposition to a summary judgment motion."). The Court accordingly does not consider whether those actions constituted actionable retaliation.

"materially adverse action," but rather it constitutes at most a "trivial harm," "petty slight" or "minor annoyance." *Id.* at 568. *See Burlington N. and Santa Fe Fy. Co. v. White*, 548 U.S. 53, 68 (2006); *Teppervien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 567-68 (2d Cir. 2011) (finding a "verbal threat" of possible termination did not rise to the level of "materially adverse action" because it was not acted upon). Under the objective standard, a reasonable employee in this circumstance would not view Nadeau's purported threat to "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination." *Tepperwien*, 663 F.3d at 568 (quoting *Burlington*, 548 U.S. at 67- 68). Nadeau's comment is better characterized as a notice that the IT department did not have the time or resources to investigate her emails a third time, but nothing more.

In addition, at step four, Plaintiff has not offered evidence that the threat was causally connected to Plaintiff's Beacon Line complaint, even under the *de minimis* standard. *Woodman,* 411 F.3d at 76. Plaintiff has not asserted that Nadeau referenced the Beacon Line complaint when informing Plaintiff that the IT department had exhausted its investigation of Plaintiff's emails, and has not offered any other evidence that the two events are causally connected. The Court has searched the record and can find no such evidence. Accordingly, Plaintiff's retaliation claim regarding Nadeau's "threat" must fail.

Assuming *arguendo* that Plaintiff satisfied her prima facie case, her claim would still fail. At the second stage of the analysis, Defendant raises legitimate, nondiscriminatory reasons for its actions.

. First, Defendant offers affidavits from Nadeau and Mariana Emanuelson,

who was also present at the meeting, denying that Nadeau accused Plaintiff of harassing Ciurylo. [Dkt. 52-51 at 5 (Nadeau stating "I was respectful and courteous . . . . I never used the word "harassment" or indicated in any way that Ms. Flowers' actions were "bordering on harassment"); Dkt. 52-52 at 3 (Emanuelson stating Nadeau "was respectful and courteous" and "professional throughout the meeting, and did not raise her voice, use a threatening tone or words, or in any way disrespect or threaten Ms. Flowers. Ms. Nadeau did not accuse Ms. Flowers of harassment or of conduct bordering on harassment.").] After making clear Defendant's position that Nadeau did not state Flowers harassed Ciurylo, Defendant offers a legitimate, nondiscriminatory reason why Nadeau communicated to Flowers that IT would no longer investigate Flowers' email-related question. Defendant points to Nadeau's affidavit to explain that Plaintiff's question about her emails "had now been reviewed twice by IT, and Bob Ciurylo had met with her twice to report his findings." [Dkt. 52-51 at 5.] Nadeau "told her that Mr. Ciurylo's team would not continue to investigate the same issue again and again, but if she had any new issues, she could certainly bring them to IT." *Id.* Defendant has offered evidence of a legitimate, nondiscriminatory reason for its actions.

The burden accordingly shifts back to Plaintiff to establish that Defendant's legitimate, nondiscriminatory reason for ending the IT department's investigation was mere pretext for discrimination.

Plaintiff cites no evidence to support her contention that Nadeau characterized her communications with the IT department as "borderline

harassment," or that Nadeau did so in retaliation against Plaintiff's Beacon Line complaint. Rather, she cites to her own deposition statement and EEOC complaint, and what she characterizes as a "note [from Ms. Nadeau] directing [Plaintiff] who to contact in IT Security" to investigate Plaintiff's allegation of email "spoofing." [Dkt. 52 at 23, 25 (citing Dkt. 52-50).] However, Defendant does not contest that Nadeau instructed Plaintiff to contact the IT department with email-related questions.

Plaintiff also cites email correspondence between herself and Mr. Ciurylo in which Plaintiff thanks Mr. Ciurylo for investigating her email-related inquiry but states that she is "not in total agreement" with his explanation and "would like to further discuss the topic . . . at a future date." [Dkt. 52-55.] Again, the fact that Plaintiff and Ciurylo discussed her email-related inquiry is not in dispute.

Plaintiff may have perceived Nadeau's "matter-of-fact" statement that the IT department would no longer investigate Plaintiff's email-related inquiry as an accusation of borderline-harassment. [Dkt. 52-51 at 5.] However, Plaintiff cites no evidence aside from her own "conclusory allegations" indicating that Ms. Nadeau actually accused her of "harassment." Nor does Plaintiff offer evidence that Nadeau insinuated that if Plaintiff continued her behavior she would be reprimanded or terminated. In addition, Plaintiff offers no evidence supporting her contention that Nadeau's "threat," or conveyance that the IT department would not investigate her email-related question a third time, was retaliation for Plaintiff's Beacon Line complaint.

Defendant's motion for summary judgment as to Plaintiff's claim that Nadeau threatened her in retaliation for her Beacon Line complaint is GRANTED.

ii. Plaintiff's Claim of False Accusations

Plaintiff has established a prima facie case of retaliation in the form of Temple's 2013 review. The first two steps are unchallenged as with Plaintiff's previous retaliation claim. At step three, Plaintiff has made a *de minimis* showing through her deposition testimony that Temple's 2013 review of Plaintiff included "blatant lies." *Id.* at 261-62; *Ibok v. Secs. Indus. Automation Corp.*, 369 F. App'x 210 (2d Cir. 2010) (citing *Burlington*, 548 U.S. at 68) (finding a negative performance review may be considered a "materially adverse action"). At step four, Plaintiff has made a *de minimis* showing of causation given the timing of Temple's review. Temple submitted his 2013 review in January of 2014, five months after Plaintiff's Beacon Line complaint. The Court notes that courts within the Second Circuit have "not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action." *Echevarria v. Utitec, Inc.*, 15-cv-1840 (D. Conn. Sept. 25, 2017) (VLB) (collecting cases). However, as was the case in *Echevarria*, there is an identifiable reason for the delay here. *See id.* (finding a "three to four month gap" between protected activity and allegedly retaliatory action supported an inference of causation where Plaintiff was on extended medical leave during the period in question). In this case, Defendant submits reviews in January of each year for the preceding year.

[*See* Dkt. 26-5.] Temple's January 2014 review was the first opportunity he had to formally review Plaintiff after her Beacon Line complaint. *See id.* Accordingly, the Court finds that Plaintiff has made a *de minimis* showing that Temple's 2013 review was causally connected to the Beacon Line complaint given the temporal proximity of the two events.

Defendant in turn raises legitimate, nondiscriminatory reasons for Temple's 2013 review: the critiques in the review are accurate. Temple's 2013 review is consistent with Plaintiff's reviews which predate the Beacon Line complaint. As stated previously in this decision, Plaintiff consistently rated as a "Successful Contributor" in 2010 through 2012, which means she met expectations. [Dkt. 26-2 at 4-5.] In addition, in 2010 and 2012, Plaintiff rated "Needs Improvement" in the "Taking Accountability and Ownership" category. *Id.* Plaintiff's 2013 ratings were commensurate with her past performance. In 2013,

Plaintiff rated "Successful Contributor" in every category but two, "Ownership and Accountability" and "Trust and Respect," which appears to have been a new category introduced that year. *Id.* at 5-6.

In addition to showing that Plaintiff's 2013 review was consistent with her pre-Beacon Line reviews, the 2013 review also shows that Temple's critiques were well-supported by facts. For example, Temple states that "[a]lthough Pat works hard, the quality and timeliness of her work is inconsistent." *Id.* As an example of poor quality work, he notes that a particular action item was not assigned to the director of Operations & Compliance for review as required, and Flowers' failure

to assign the action item for review was "a contributing cause to a NERC violation." *Id.* In addition to critiques supported by specific examples, Temple's review includes positive remarks.

For example, Temple states Flowers "[p]roactively seeks out opportunities to improve business performance and customer service. Responds positively to new demands or circumstances. Exhibits a 'can-do' attitude to successfully implement changes in priorities and work processes." *Id.* at 4. Defendant has offered evidence that Temple's 2013 review was based on legitimate, nondiscriminatory reasoning – it reflected Plaintiff's performance.

As with her prior retaliation claim, Plaintiff has not shown that Defendant's legitimate, nondiscriminatory reason for Temple's 2013 review is a mere pretext for discrimination. Plaintiff provides only her own "self-serving statements" to allege that the review contains "blatant lies." *Deebs*, 346 F. App'x at 657; [Dkt. 52 at 57 (citing Plaintiff's own deposition testimony and Plaintiff's own rebuttal statement regarding the 2013 review).] Her testimony does not "square . . . with the hard evidence adduced during discovery" that Plaintiff has consistently been critiqued for failure to follow directions or double-check her own work. *Deebs*, 346 F. App'x at 657; [Dkt. 26-5 at 22 (stating Plaintiff was placed on a "Success Plan" in July of 2013 because peers and management expressed frustration at Plaintiff's ability to retain and follow instructions).] Plaintiff has not asserted a question of fact regarding whether Defendant's legitimate, nondiscriminatory basis for Plaintiff's 2013 review a mere pretext for unlawful retaliation was. Defendant's motion for summary judgment on this point is GRANTED.

iii. Plaintiff's Undue Scrutiny Claim

Finally, Plaintiff has failed to establish a prima facie case of retaliation in the form of undue scrutiny. As with Plaintiff's prior two retaliation claims, the fist two steps of the prima facie case are not in dispute. At step three, Plaintiff has not shown that Temple subjected her to actionable supervision. Plaintiff has not identified, nor is the Court aware, of any case in which additional oversight over an employee's work product constitutes a "materially adverse action." While this court does not subscribe to the notion that excessive scrutiny can and is often used to achieve a discriminatory end and the heightened pressure may undermine an employee's ability to perform and result in underperformance, such cases are typically brought as hostile work environment or disparate treatment claims supported by facts establishing a nefarious motive. . As noted above, the facts of this case do not make such a showing.

There is ample case law indicating that even "excessive" or "undue" supervision is not materially adverse. *See, e.g., Rebaudo v. AT&T Servs., Inc.*, No. 3:09-CV-00437 (DJS), 2013 WL 5435489, at *10 (D. Conn. Sept. 30, 2013) ("Reprimands, threats of reprimands, and excessive scrutiny of an employee, on the other hand, do not constitute materially adverse employment actions.") (quoting *Oliphant v. Conn. Dep't of Transp.*, No. 3:02-cv-700 (PCD), 2006 WL 3020890, at *6 (D. Conn. Oct. 23, 2006); *Green v. Jacob & Co. Watches, Inc.*, ---F. Supp. 3d---, 2017 WL 1208596, at * 5 (S.D.N.Y. 2017) ("However, 'excessive scrutiny, criticism, and negative evaluations of an employee's work are not

materially adverse employment actions unless such conduct is accompanied by negative consequences, such as demotion, diminution of wages, or other tangible loss.'"); *Bathelor v. City of New York*, 12 F. Supp. 3d 458, 475-76 (E.D.N.Y. 2014) ("As for Plaintiff's excessive scrutiny and discipline at AMKC, while Plaintiff undoubtedly felt subjectively discouraged by the excessive verbal scrutiny and imposition of report-writing requirements, the undesirable rotating schedule and the unwarranted command disciplines, there is no evidence that these actions by Defendants prevented her from advancing in her career or otherwise materially altered the conditions of her employment."); *Borrero v. Am. Exp. Bank Ltd.*, 533 F. Supp. 2d 429, 437-38 (S.D.N.Y.) (finding "public criticism, overbearing scrutiny, and other less than civil behavior" did not constitute a "materially adverse action" under Title VII, but ruling that such non-material actions in conjunction with "other claims, such as unequal pay," were sufficient to establish that materially adverse actions were motivated by gender discrimination).

In addition, at step four, Plaintiff has not alleged a *de minimis* causal connection between Temple's supervision and her Beacon Line complaint. *Woodman,* 411 F.3d at 76. Evidence indicates that Temple monitored Plaintiff's work product both before and after her Beacon Line complaint. [Dkts. 52-27, 52-28.] Plaintiff has not alleged that Temple's supervision intensified or changed in any way after her Beacon Line complaint, and the Court's review of Temple's notes has not revealed evidence of intensification. *Id.* In fact, Plaintiff was placed on a "Success Plan," arguably the most hands-on form of supervision imposed on her, *before* the Beacon Line complaint. [Dkt. 26-5 at 22 (showing Plaintiff was

placed on a Success Plan in July 2013, a month before her Beacon Line complaint).] Where a Plaintiff has failed to raise evidence of causation, and "gradual adverse job actions began well before the Plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise." *Rafael v. Conn. Dep't of Children & Families*, No. 3:14-cv-1746, 2017 WL 27393, at *5 (D. Conn. Jan. 3, 2017) (VLB) (citing *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001). Plaintiff has offered only vague accusations devoid of factual support and the facts actually adduced refute her claim. Accordingly her Flowers has not made a *de minimis* showing that Temple's supervision was causally connected to her Beacon Line complaint and her claim must accordingly fail.

In addition, even if it proceeded to the next step of the analysis, Plaintiff's claim would fail. Defendant in turn raises a legitimate, nondiscriminatory reason for its actions. Defendant offers proof that Temple monitored Plaintiff's performance because her work quality was inconsistent. [Dkt. 26-5.] Defendant's reviews of Plaintiff indicate that Plaintiff needed to work on making fewer mistakes and requiring fewer revisions. *See, e.g., id.* at 17 (2013 review stating "there were a number of errors and lack of follow through to correct the errors"). Annual reviews also indicated that Plaintiff "relied on coworkers to notify her" of action items and required "reminders . . . to complete overdue . . . assignments." *Id.*

At the third stage of the analysis, the burden shifts back to Plaintiff to offer evidence that Defendant's legitimate reason for supervising her was a mere pretext for discrimination. Plaintiff fails to offer such evidence. Plaintiff asserts that others

were supervising her at Temple's direction, but makes no showing that Temple orchestrated any level of supervision as racial discrimination rather than as a quality-control measure in light of her inconsistent work product. [Dkt. 52 at 9 (citing Dkt. 52-27 (Temple's notes regarding Plaintiff's work product, which do not indicate the basis for his supervision, but which do include substantive comments memorializing conversations with Plaintiff about her tardiness and need to double-check her work); Dkt. 52-28 (same))]. In addition, Plaintiff cites an email from a coworker ostensibly apologizing for subjecting her to undue scrutiny. [Dkt. 52 at 9.] However, the email does not mention supervision of Plaintiff, but rather states "I was not in a good place at NU – sorry you had to deal with that." [Dkt. 52-32.] Plaintiff presents no evidence which supports her assertion that Temple orchestrated supervision of Plaintiff to retaliate against her for filing the Beacon Line complaint or out of racial animus.

Further, Defendant monitored Plaintiff's work product both before and after the Beacon Line complaint. [Dkt. 52-27 (Temple's notes memorializing meetings with Plaintiff and feedback given to Plaintiff dating back to 2010).] Plaintiff does not offer evidence of an upswing in Temple's supervision of Plaintiff after the Beacon Line complaint which might support a retaliation claim.

Finally, while Plaintiff testified that her work product did not require oversight by others, she also "concur[red] with th[e] assessment" that in 2012 she required "several reminders" about how to complete tasks and her "quality reviews of documents could also be improved." [Dkt. 26-5 at 15 ("I can see where the

quality of my work has suffered.").] Plaintiff's claim relies on self-serving testimony which the Plaintiff herself contradicted and "failed to explain away." *Jeffreys v. City of N.Y.*, 426 F.3d 549, 555 (2d Cir. 2005).

Plaintiff has failed to establish a prima facie case of retaliation in the form of undue scrutiny. In addition, Plaintiff has failed to raise a question of fact whether Defendant's legitimate, nondiscriminatory reason for monitoring Plaintiff's work product mere pretext for retaliation against her Beacon Line complaint was. Defendant's motion for summary judgment as to this retaliation claim is GRANTED.

V. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment is GRANTED as to all claims. The Clerk is directed to close this file.

"s/" Vanessa Bryant
Hon. Vanessa L. Bryant
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of July, two thousand nineteen.

Patricia A. Flowers

Plaintiff-Appellant

v.

Connecticut Light and Power Company, AKA Northeast Utilities, AKA Eversource Energy,

Defendant – Appellee

ORDER

Docket No.18-2415

Appellant, Patricia A. Flowers, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

"/s" Catherine O'Hagan Wolfe, , Clerk