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OPINION, U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT
(AUGUST 29, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MELISSA ING,

Plaintiff-Appellant,

v.

TUFTS UNIVERSITY,

Defendant-Appellee.

No. 23-1030

Appeal from the United States District Court
for the District of Massachusetts
[Hon. Richard G. Stearns, U.S. District Judge]
Before: KAYATTA, GELPI, and MONTECALVO,
Circuit Judges.

MONTECALVO, Circuit Judge. Melissa Ing sued her former employer, Tufts University (“Tufts”), alleging that Tufts denied her a full professor position on the basis of sex discrimination and/or retaliation for engaging in protected conduct in violation of federal and state antidiscrimination laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; Title IX of the Education Amendments of 1972,

20 U.S.C. § 1681 *et seq.*; and Mass. Gen. Laws ch. 151B, § 4. The district court denied Ing's claims on summary judgment and declined her invitation to alter or amend that ruling under Fed. R. Civ. P. 59(e). Ing timely appealed the district court's rulings. Seeing no error, we affirm.

I. Background

"We recount the facts in the light most favorable to [Ing], who was the non-moving party at summary judgment."¹ *Planadeball v. Wyndham Vacation Resorts, Inc.*, 793 F.3d 169, 172 (1st Cir. 2015).

A. Harassment Investigation

In 2011, Ing began work as a non-tenure/contract track associate professor at Tufts's School of Dental Medicine ("SDM"). In June 2017, Tufts's Office of Equal Opportunity ("OEO") initiated an investigation into allegations that Ing had been sexually harassed by fellow SDM instructor Roland Vanaria. Ing made

¹ Before the district court, Ing objected to only 8 out of 192 material facts proffered by Tufts and stated that she "d[id] not dispute the other facts set forth by" Tufts. Accordingly, under the applicable local rule, the balance of Tufts's material facts are deemed admitted. L.R. D. Mass. 56.1 ("Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties."); *see also* *López-Hernández v. Terumo P.R. LLC*, 64 F.4th 22, 26 (1st Cir. 2023) ("We have repeatedly emphasized the importance of complying with [such a] local rule and have implored litigants to comply or ignore it 'at their peril.'" (quoting *Mariani-Colon v. Dep't of Homeland Sec. ex rel. Chertoff*, 511 F.3d 216, 219 (1st Cir. 2007))).

the following allegations: (1) that Vanaria had asked her out on a date; (2) that Vanaria had asked her if she wanted to “have some monkey business”; (3) that Vanaria had asked her to lift up her lab coat on numerous occasions; and (4) that Vanaria leered at her breasts and legs.

The OEO investigator separately interviewed Ing, Vanaria, and Peter Arsenault, Ing’s SDM division head. The OEO investigator could only establish that Vanaria had asked Ing on a date and believed Vanaria’s denial as to the balance of Ing’s allegations.

Over the next several months, Ing informed Arsenault on two occasions that she was scheduled to work on the same floor as Vanaria. Notwithstanding Ing’s failure to persuade the OEO investigator that Vanaria had done anything improper, in both instances Arsenault—in concert with OEO and other SDM administrators—adjusted the schedule to ensure that Vanaria was not working on the same floor as Ing. Ing also informed the OEO investigator that Vanaria was spending time in the conference room near her office. Tufts removed Vanaria’s swipe access to the entire office suite where Ing’s office was located.

B. 2018 Promotion Cycle

In November 2017, Ing decided that she wanted to apply to be promoted to a full professor. The guidelines and criteria for faculty promotion require an applicant to receive the endorsement of their department chair before submitting a dossier detailing their experience. When Ing met with her department chair and the SDM Associate Dean for Faculty, she was advised that candidates typically spend six to twelve

App.4a

months compiling their dossiers, which must demonstrate an applicant's achievement in "Service, Citizenship, and Professionalism," and two other areas of excellence. Ing received the endorsement of her department chair and submitted her dossier in February 2018. She selected the Teaching area and Educational Leadership area for her two additional areas of excellence. While compiling her dossier, Ing solicited the opinion of two outside advisors about whether it would pass muster, and both opined that it might not.

The Faculty, Appointments, Promotions, and Tenure Committee ("FAPTC") reviewed Ing's dossier, and her application was presented to the committee twice. First, on March 27, 2018, a committee member relayed his concern that Ing did not satisfy the criteria for the Educational Leadership area of excellence because she purported to be a course director for workshops that met on only two occasions. A second committee member was assigned to present Ing's dossier at the FAPTC's next meeting to confirm the first committee member's conclusion that Ing did not satisfy the criteria for promotion to full professor. The second presentation occurred on April 3, 2018, and this committee member agreed with the initial presentation that Ing did not meet the Educational Leadership criteria. The second committee member went further and noted that Ing did not serve in a leadership position, did not chair any committees, and did not actively participate in any organizations related to education. It is undisputed that not a single member of the FAPTC knew about Ing's complaints against Vanaria.

At the conclusion of the April 3, 2018 meeting, five committee members voted against Ing's promotion,

one abstained, and one voted to table the application. On September 19, 2018, the SDM Associate Dean of Faculty told Ing that she had not been promoted and explained the reasons why, including that “the major problem” was with Ing’s self-selected Educational Leadership area of excellence. Specifically, the SDM Associate Dean of Faculty confirmed that the supporting documents submitted by Ing with her dossier did not qualify her as a “course director” under the promotion guidelines. The following day, Ing’s department chair reviewed the FAPTC’s denial letter with her and the SDM Dean sent Ing a letter reiterating the reasons she was denied a promotion. The FAPTC concluded that Ing was not a “course director” because she had only directed a brief workshop. Ing disputed this conclusion.

In January 2019, Ing requested a more detailed explanation as to why she was denied a promotion. The SDM Dean acquiesced to Ing’s request and sent a letter explaining that she was denied a promotion because Ing’s dossier lacked leadership roles, lacked course directorship, and did not “represent the level of expectations that FAPTC[s] Promotion Guidelines dictate for promotion to the rank of Professor.” Ing did not appeal the promotion denial, despite being advised that she could do so.

C. 2019 Promotion Cycle

As of November 1, 2018—after the decision regarding Ing’s promotion had already been made and communicated to Ing—Andrea Zandona became the new chairperson of Ing’s department. Ing met with Zandona on December 13, 2018, and told her about the sexual harassment report against Vanaria. Ing alleges

that during the January 2019 meeting at which Ing requested a more detailed explanation as to why she was not promoted, Zandona told Ing that she “most likely [was] not going to promote” her. No other attendee of that meeting recalled Zandona making that statement.²

In the ensuing months, Zandona and Ing met several times and communicated repeatedly about how Ing could improve her dossier and chances of promotion. Ing alleges that at one such meeting Zandona asked Ing how often she was attending sexual harassment therapy and told Ing that she needed to go more often. Zandona denies ever saying this.³

Ing implemented some, but not all, of Zandona’s suggestions to improve her dossier. In October 2019, Ing again raised to Zandona her dissatisfaction with the FAPTC’s decision not to promote her during the 2018 cycle and Tufts’ s subsequent handling of the denial. Once again, Zandona gave Ing specific suggestions for improvement and told her that once Zandona felt Ing had met the criteria for promotion, Zandona would write a supportive letter of endorsement. A few weeks later, Zandona informed Ing that she would not endorse her for the 2019 cycle because, in Zandona’s opinion, Ing’s dossier still did not merit promotion.

² Because Ing’s Rule 56.1 statement contradicted this and alleged that Zandona stated that she “most likely [was] not going to promote [Ing],” we assume that the statement was made.

³ Again, because Ing’s Rule 56.1 statement contradicted this denial, we believe Ing’s version of events and assume that Zandona made this statement.

Thereafter, Ing told Zandona that she felt “singled out” and felt that Zandona would never support her promotion. Zandona replied with a letter detailing seven specific ways in which Ing could improve her dossier and reiterated her commitment to helping Ing to work towards a successful submission for full professor.

Ing took a medical leave of absence in December 2019. She never returned to work, and her contract with Tufts expired in June 2021.

II. Standard of Review

We review the grant of summary judgment *de novo*, “scrutiniz[ing] the evidence in the light most agreeable to the nonmoving party, giving that party the benefit of any and all reasonable inferences.” *Noviello v. City of Boston*, 398 F.3d 76, 84 (1st Cir. 2005). However, we will not “draw unreasonable inferences or credit bald assertions, empty conclusions,’ or ‘rank conjecture.” *Brandt v. Fitzpatrick*, 957 F.3d 67, 75 (1st Cir. 2020) (quoting *Pina v. Children’s Place*, 740 F.3d 785, 795 (1st Cir. 2014)). Indeed, we have recognized that “[e]ven in employment discrimination cases” like the one at hand “where elusive concepts such as motive or intent are at issue, summary judgment is appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.” *Id.* (quoting *Ray v. Ropes & Gray LLP*, 799 F.3d 99, 116-17 (1st Cir. 2015)).

“By contrast to the summary judgment standard, ‘we review a district court’s ruling on a Rule 59(e) motion for abuse of discretion.” *Theidon v. Harvard Univ.*, 948 F.3d 477, 495 (1st Cir. 2020) (quoting

Franchina v. City of Providence, 881 F.3d 32, 56 (1st Cir. 2018)). A motion to alter or amend judgment “must either establish a clear error of law or point to newly discovered evidence of sufficient consequence to make a difference.” *Id.* (quoting *Franchina*, 881 F.3d at 56).

III. Discussion

On appeal, Ing insists that she set forth a prima facie case that Tufts denied her application for full professor because of sex discrimination and/or as retaliation for her filing a claim of sexual harassment, all in violation of federal and state antidiscrimination laws. There is substantial overlap between our analysis of these claims, but for sake of clarity we begin with the claims of discrimination, then turn to the claims of retaliation, and finally end with a few words on the district court’s denial of Ing’s Rule 59(e) motion.

A. Sex Discrimination

“Title VII makes it unlawful for employers to discriminate based on sex,” *Gerald v. Univ. of P.R.*, 707 F.3d 7, 16 (1st Cir. 2013), and Title IX similarly “prohibits gender-based discrimination in a wide array of programs and activities undertaken by educational institutions,” *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65 (1st Cir. 2002). Under either statute, absent direct evidence of discrimination, “we invoke the three-step burden-shifting scheme outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to assess whether we can infer discrimination from the undisputed material facts.” *Theidon*, 948 F.3d at 495; see *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896-97 (1st Cir. 1988) (concluding that the standards

governing claims arising under Title VII and Title IX are the same).

At the first step of this scheme, Ing bears the initial burden of establishing a prima facie case of discrimination “[u]nder the *McDonnell Douglas* framework employed by this court in assessing adverse tenure decisions.” *Theidon*, 948 F.3d at 495. To make this showing, Ing must demonstrate that: “(1) she is a member of a protected class; (2) ‘she was a candidate for tenure and was qualified under [Tufts’s] standards, practices or customs’; (3) ‘despite her qualifications she was rejected’; and (4) ‘tenure positions . . . were open at the time [she] was denied tenure, in the sense that others were granted tenure in the department during a period relatively near to the time [Ing] was denied tenure.’” *Id.* (second alteration in original) (quoting *Fields v. Clark Univ.*, 966 F.2d 49, 53 (1st Cir. 1992)).

The dispute at hand centers around whether Ing showed that she was qualified for the position of professor. The SDM Faculty Handbook specifically details what evidence will suffice to show accomplishment in the Educational Leadership area. This evidence may include serving as a dean, department chair, or division head; chairing a standing or management committee; serving as a course director; and/or actively participating in organizations related to education.

Here, the record evidence shows that none of these requirements were met. The evaluators of Ing’s dossier noted their concern with her “weak” Educational Leadership and that she had “minimal or no leadership in [e]ducation.” The evaluators concluded that Ing was not a “course director” as contemplated in the

SDM Faculty Handbook because the purported course was a workshop that met on only two occasions.

The reason for denying Ing a promotion was expounded upon by Tufts in subsequent communications, but each time highlighted the same general deficiencies: lack of academic and administrative leadership roles and “deficiency in . . . course directorship [because] a one-time 3-hour workshop does not compare to a 3, 6 or 9-month course.” Ing wholly fails to engage with this reasoning and instead relies on her own conclusory allegations that she was qualified for promotion to full professor. However, to defeat summary judgment, in light of the raft of credible evidence that Tufts produced showing that Ing was not qualified for promotion, “she cannot rely on ‘conclusory allegations.’” *Theidon*, 948 F.3d at 494 (quoting *Ahern v. Shinseki*, 629 F.3d 49, 54 (1st Cir. 2010)). Moreover, even the individuals Ing herself chose to consult about her dossier expressed doubt as to whether Ing’s experiences and qualifications merited a promotion to professor. These undisputed facts evidence a lack in qualification and make plain that Ing has not made a showing of a prima facie case of discrimination.

Even if we assume that Ing could make out a prima facie case of discrimination, Ing’s claim still fails further down the road of the *McDonnell Douglas* burden-shifting scheme because she has not shown the existence of a material fact to suggest that Tufts’s proffered reason for not promoting her was merely pretextual and that the actual reason was discriminatory. See *Taite v. Bridgewater State Univ., Bd. of Trs.*, 999 F.3d 86, 94 (1st Cir. 2021). Ing contends that “numerous procedural irregularities in the process by which” her “promotion was denied” demonstrate pretext.

As Ing tells it, the FAPTC deviated from standard procedure by failing to keep minutes for the meetings at which her application was discussed.

“Evidence that the employer deviated from its standard procedure or policies in taking an adverse employment action against a plaintiff may be relevant to the pretext inquiry,” *Rodríguez-Cardi v. MMM Holdings, Inc.*, 936 F.3d 40, 50 (1st Cir. 2019), if the deviations are otherwise “inexplicable and troubling.” *Theidon*, 948 F.3d at 499. However, Ing points to no evidence indicating that, at the time her application was before the FAPTC, the committee’s standard practice was to keep meeting minutes. Rather, the evidence in the record before us reveals that, at that time, the FAPTC did not keep meeting minutes for any meetings. And the absence of meeting minutes does not support an inference that Tufts’s proffered reason for not promoting Ing was pretextual because other record evidence shows exactly what the FAPTC considered when making its decision. Specifically, the notes taken by the two committee members who reviewed and presented Ing’s application were solely focused on her lack of accomplishment in Educational Leadership, and every FAPTC member deposed in this case testified that the committee’s discussion focused only on Ing’s dossier and qualifications.

Ing also points to a smattering of other alleged irregularities, such as an FAPTC member being asked to review her application after the vote had already been taken, the letter denying her application undergoing five drafts, and the five-month time gap between when Ing’s application was voted on and when she was notified of the disapproval, to demonstrate pretext. This evidence, however, “is devoid of the

inexplicable and troubling inconsistencies that give rise to a reasonable inference of pretext.” *Theidon*, 948 F.3d at 499 (finding no evidence of pretext where university’s failure to circulate materials to external reviewers amounted to an “administrative error”); see *Ronda-Perez v. Banco Bilbao Vizcaya Argentaria—Puerto Rico*, 404 F.3d 42, 47 (1st Cir. 2005) (finding no evidence of pretext based on employer’s failure to keep notes during investigative interview with plaintiff even though it kept notes during interviews with other employees).

Accordingly, we conclude that there is not even the slightest suggestion that Tufts’s reason for not promoting Ing was pretextual. The district court correctly concluded that Ing’s evidence was insufficient to create a material issue of fact and entered summary judgment in favor of Tufts on the discrimination claims.⁴

B. Retaliation

To establish a *prima facie* case of retaliation under Title VII, Title IX, or Massachusetts state law, Ing must prove: “(1) she engaged in protected conduct; (2) she was subjected to an adverse employment action; and (3) the adverse employment action is causally linked to the protected conduct.” *Theidon*, 948 F.3d at 505 (quoting *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77, 94 (1st Cir. 2018)); see *id.* at 508 (evaluating a *prima facie* case of retaliation

⁴ Because “Massachusetts law also makes use of the *McDonnell Douglas* burden-shifting framework” and requires a plaintiff to present evidence of pretext, *Theidon*, 948 F.3d at 505 (quoting *Ray*, 799 F.3d at 113 n.8), the foregoing analysis applies to both the federal and state discrimination claims.

under Mass. Gen. Laws ch. 151B, § 4 under the same test). The only element in dispute is whether Ing has shown a causal connection between her allegations of sexual harassment and Tufts's subsequent decision not to promote her.⁵ The district court found that Ing's protected activity "could not have been a but-for cause of the FAPTC's decision to reject her application" because "no member of the FAPTC knew of [] Ing's 2017 sexual harassment complaint." This conclusion is supported by the record and uncontested by Ing on appeal.

Instead, to support the requisite causal connection, Ing focuses on a statement made by Zandona in January 2019 when Zandona purportedly told Ing that she "most likely [was] not going to promote [Ing]." Ing argues that a jury could infer retaliatory intent from that comment because it was made "only 27 days after" Zandona and Ing first met and Ing told Zandona that she had filed a sexual harassment report. Ing assumes that the relatively short time span between her telling Zandona about the report and Zandona saying she most likely would not promote Ing renders the causal connection between the two actions obvious.

⁵ As the district court correctly pointed out, the standard of causation under Title VII and Massachusetts state law is that the "protected activity was a but-for cause of the alleged adverse action by the employer." *Theidon*, 948 F.3d at 506 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013)). The standard of causation under Title IX is an unresolved question in this circuit, but we need not address it today because under either possible standard—"but for" or "substantial or motivating factor," see *id.*—Ing has not established a causal connection.

“[T]emporal proximity is one factor from which an employer’s bad motive can be inferred,” but “by itself, it is not enough—especially if the surrounding circumstances undermine any claim of causation.” *Carrero-Ojeda v. Autoridad de Energia Eléctrica*, 755 F.3d 711, 720 (1st Cir. 2014). Here, any inference of a retaliatory mindset is belied by the overwhelming evidence in the record that Zandona’s conduct was inconsistent with bad motive. First, there is no evidence in the record that Zandona had ever met Vanaria. And, by the time Ing spoke to Zandona in December 2018, eighteen months had elapsed since the alleged harassment occurred. Thus, the record offers no basis from which to infer that Zandona would retaliate against Ing merely because Ing had reported sexual harassment allegations Ing had made over a year earlier against someone who was a stranger to Zandona.

Moreover, after Zandona made the alleged comment, she met or communicated with Ing on approximately eight occasions to work on Ing’s dossier. Zandona repeatedly voiced her “goal . . . to . . . support [Ing],” and desire to “work to make[] sure that [Ing’s] submission [to the FAPTC] w[ould] be successful.” Zandona did not definitively indicate that she would not provide Ing with a letter of support until October 2019, and that decision was based on Zandona’s opinion that Ing had failed to “demonstrate[] a significant development compared to [her] last submission in the area of Educational Leadership.” See *Theidon*, 948 F.3d at 507 (concluding that inference of retaliation was “incapacitated” by the fact that the views expressed by department chair reviewing plaintiff’s application for tenure “merely echoed concerns” previously voiced by other reviewers).

In short, Ing's interpretation of Zandona's comment "amounts to, at most, a 'conclusory allegation[] . . . or rank speculation' that cannot prevent summary judgment." *Id.* at 506 n.41 (alteration in original) (quoting *Ahern*, 629 F.3d at 54). Thus, on this record, it cannot be plausibly inferred that the decision to deny Ing a promotion to full professor was tainted by retaliatory animus because Ing cannot establish a causal link between her protected activity and the adverse employment decision. The district court correctly entered summary judgment in favor of Tufts on the retaliation claims.

C. Rule 59(e)

Lastly, we turn to the district court's denial of Ing's motion for an altered or amended judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. A motion to alter or amend judgment "must either establish a clear error of law or point to newly discovered evidence of sufficient consequence to make a difference." *Id.* at 508 (quoting *Guadalupe- Báez v. Pesquera*, 819 F.3d 509, 518 (1st Cir. 2016)). The district court did not abuse its discretion in finding that Ing established neither.

Ing's motion argued that the district court ignored the fact that when Zandona stated she would not promote Ing, Zandona allegedly had no knowledge of Ing's qualifications. However, Ing had already made this argument in opposition to Tufts's motion for summary judgment. And, as the district court aptly noted, a motion to alter or amend is not "a mechanism to regurgitate 'old arguments previously considered and rejected.'" *Biltcliffe v. CitiMortgage, Inc.*, 772 F.3d 925, 930 (1st Cir. 2014) (quoting *Nat'l Metal Finishing*

Co. v. Barclays American/Comm., Inc., 899 F.2d 119, 123 (1st Cir. 1990)). Ing failed to point to a manifest error of law or newly discovered evidence, and the mere “repetition of previous arguments is not sufficient to prevail on a Rule 59(e) motion.” *Prescott v. Higgins*, 538 F.3d 32, 45 (1st Cir. 2008) (quoting *United States v. \$23,000 in U.S. Currency*, 356 F.3d 157, 165 n.9 (1st Cir. 2004)). Accordingly, there is no reason to disturb the district court’s order denying Ing’s Rule 59(e) motion.

IV. Conclusion

For the foregoing reasons, we affirm the district court’s grant of summary judgment and denial of the Rule 59(e) motion to alter or amend the same.

**MEMORANDUM AND ORDER,
U.S. DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
(OCTOBER 13, 2022)**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MELISSA ING,

v.

TUFTS UNIVERSITY

Civil Action No. 21-10032-RGS

Before: Richard G. STEARNS,
United States District Judge.

**MEMORANDUM AND ORDER
ON DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

STEARNS, D.J.

Plaintiff Melissa Ing brought this action against the Trustees of Tufts College (Tufts), alleging that the Tufts University School of Dental Medicine (TUSDM) discriminated against her when it denied her a promotion to full professor. Dr. Ing brings claims of gender discrimination and retaliation under three statutes: Massachusetts General Laws chapter 151B (Counts I and II); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (Counts III and IV);

and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Counts V and VI). Tufts moves for summary judgment. For the following reasons, the court will ALLOW the motion.

BACKGROUND

A. Dr. Ing's 2017 Complaint of Sexual Harassment

TUDSM hired Dr. Ing as an associate professor of dental medicine in 2011. In June of 2017, Dr. Ing informed her division head that fellow TUDSM instructor Dr. Roland Vanaria had sexually harassed her, including in multiple instances asking her to lift up her lab coat and in another asking whether she would like to “have monkey business.” Tr. of Dr. Ing (Dkt # 49-12) at 5-6. Tufts Office of Equal Opportunity (OEO) investigator Alida Bogan-Acosta later found that Dr. Vanaria had asked Dr. Ing on a date, but she accepted his denials of having made other inappropriate remarks. Bogan-Acosta concluded that Dr. Vanaria's conduct was not sufficiently severe and pervasive to violate Tufts's sexual harassment policy. Tufts adjusted Dr. Vanaria's schedule and limited his swipe card access to ensure that Dr. Ing had no further encounters with him.

B. 2018 Promotion Cycle

In November of 2017, Dr. Ing decided to apply for a promotion to a full professorship. TUDSM's guidelines required an applicant to obtain the endorsement of her faculty chair and to submit a dossier demonstrating her achievement in three Areas of

Excellence: the Service, Citizenship, and Professionalism area and two out of the four additional Areas of (1) Teaching; (2) Educational Leadership; (3) Scholarship, Investigation, and Discovery; and (4) Clinical Instruction, Expertise, and Innovation. The Faculty, Appointments, Promotions, and Tenure Committee (FAPTC) reviewed an applicant's dossier to determine whether it met each of the three criteria.

In January of 2018, Dr. Ing met with Dr. Charles Rankin, her department chair, and Dr. Carroll Ann Trotman, the Associate Dean for Faculty. Dr. Trotman typically advised candidates to spend six months to a year compiling their dossiers, and at the January 2018 meeting she similarly advised Dr. Ing. Dr. Ing selected the Teaching and Educational Leadership Areas of Excellence and obtained an endorsement letter from Dr. Rankin. Dr. Rankin's letter described Dr. Ing as a "dynamo" whose "positive contributions to our school and our profession have been exemplary and unique." March 20, 2018 Letter (Dkt # 49-2) at 3-4.

Dr. Ing sought help from outside advisors while compiling her dossier. She sent her curriculum vitae to Dr. Maria Blanco, the Associate Dean for Faculty at the Tufts School of Medicine. She told Dr. Ing that she would likely "need to expand [her] impact a bit more for a professorship," and particularly to publish more scholarship. Jan. 17, 2018 Email (Dkt # 44-28) at 5. Dr. Blanco also counselled Dr. Ing to "not rush it and [to] take the time that you need to better learn about [TUDSM's] expectations." *Id.* at 4. Dr. Ing also sought the opinion of Dr. Mark Wolff, a professor at New York University College of Dentistry who later became the Dean of the University of Pennsylvania

School of Dental Medicine. He told Dr. Ing that her application “would not pass the Professor process [at] NYU Dental.” Jan. 25, 2018 Email (Dkt # 44-29) at 2.

Dr. Ing submitted her dossier in February of 2018, and the FAPTC reviewed her candidacy that spring. No member of the FAPTC knew of Dr. Ing’s previous complaint of sexual harassment. While there are no minutes of the FAPTC meetings, the four FAPTC members who were deposed in this litigation testified that her harassment complaint had not been discussed.

FAPTC member Dr. Roger Galburt presented Dr. Ing’s dossier at a March 27, 2018, FAPTC meeting. He opined that Dr. Ing did not satisfy the Educational Leadership Area of Excellence. Dr. Galburt requested that another FAPTC member present Dr. Ing’s dossier at the FAPTC’s next meeting after an independent review. Accordingly, Dr. Robert Amato presented Dr. Ing’s dossier at the FAPTC’s April 3, 2018, meeting. He agreed with Dr. Galburt that Dr. Ing should not be promoted because she had fallen short of the Educational Leadership standard. Drs. Galburt and Amato’s contemporaneous notes reflect their disagreement with Dr. Ing’s characterization of herself as a “course director,” as she had only directed a brief workshop. Dr. Amato also noted that Dr. Ing had not served in a leadership position at TUDSM, such as a committee chair, and was not involved in any organizations related to the advancement of dental education. After the conclusion of the second meeting, five FAPTC members voted against Dr. Ing’s promotion, one abstained, and one voted to table her application. Following the vote, Dr. Trotman asked Dr. Amato to review the dossier a second time.

Dr. Ing first learned that she would not be promoted at a September 19, 2018, meeting with Dr. Trotman and TUDSM faculty affairs officer Monika Bankowski, where Dr. Trotman outlined the reasons for the denial. The next day, Dr. Rankin disclosed to Dr. Ing the contents of a letter he had received from the FAPTC explaining why she had not been promoted. That same day, Dr. Ing met with and received a letter from Dr. Huw Thomas, the Dean of TUDSM, further discussing the denial and indicating his understanding that Dr. Ing would appeal the FAPTC's decision. Three days later, Dr. Ing wrote a rebuttal letter to Dean Thomas disagreeing with the FAPTC's decision and explaining why she believed she had satisfied the Educational Leadership Area of Excellence. She took particular issue with the FAPTC's purported definition of "course director." On January 9, 2019, Dr. Ing met with Dean Thomas, Dr. Trotman, Ms. Bankowski, and her new department chair, Dr. Andrea Zandona, and requested a more detailed explanation of the reasons why her application had been denied.

A few days later, Dean Thomas sent Dr. Ing another letter discussing her dossier's shortcomings in detail. Dean Thomas reiterated to Dr. Ing that "you did not meet the criteria in your designated secondary Area of Excellence, Educational Leadership." Jan. 15, 2019 Letter (Dkt # 44-39) at 2. He added that "[t]he supporting documents provided for [the Educational Leadership] section were somewhat inaccurate and limited in breadth and scope." *Id.* He outlined three examples of the deficiencies the FAPTC had identified:

- "There was lack of evidence in the area of Tufts academic and administrative leadership roles—*i.e.* chair or co-chair of a committee;

FAPTC felt there were few if any contributions that would constitute as leadership.” *Id.*

- “Despite organizing a 3-hour workshop, FAPTC deemed there was a deficiency in your lack of course directorship; a one-time 3-hour workshop does not compare to a 3, 6 or 9-month course with multiple faculty reporting to you, course grades, etc.” *Id.*
- “Many of the educational leadership roles described in your dossier are solitary presentations and not part of organizing a large local or national meeting and were targeted towards a very narrow audience.” *Id.* at 3.

Dr. Ing did not appeal the decision.

C. 2019 Promotion Cycle

When Dr. Zandona replaced Dr. Rankin, she made efforts to meet with each of the faculty in her department. She first met with Dr. Ing on December 13, 2018. At this meeting, Dr. Ing informed Dr. Zandona of her 2017 sexual harassment complaint, and also her denial of a promotion during the 2018 cycle. Dr. Ing next saw Dr. Zandona at the January 9, 2019, meeting. Dr. Zandona told Dr. Ing that should she reapply, “I most likely am not going to promote you.” Deposition Tr. of Dr. Ing (Dkt # 49-12) at 13 (Ing Tr.).¹ In an email later that day to Ms. Bankowski, copying the Provost, Dr. Ing wrote, “I was quite

¹ Dr. Zandona denies having said this or anything like it, and Dean Thomas, Dr. Trotman, and Ms. Bankowski professed to having no recollection of Dr. Zandona making the remark.

shocked today at the meeting where I was told to meet with the new chairperson and was told that she may not write a positive letter in support like Dr. Rankin did.” Jan. 9, 2019 Email (Dkt # 49-8) at 2.

Throughout the spring, summer, and fall of 2019, Dr. Zandona met with Dr. Ing several times and corresponded with her repeatedly explaining how she could go about improving her dossier. The first such meeting occurred on March 21, 2019, at which Dr. Zandona asked Dr. Ing how often she was attending sexual harassment therapy. Dr. Ing replied that she was attending once per week, to which Dr. Zandona responded, “You need to go more often.” Pls. Interrog. Resps. (Dkt # 49-19) at 4.²

Drs. Ing and Zandona met again on May 21, 2019. The next day, Dr. Zandona wrote to Dr. Ing regarding her potential resubmission that “[m]y goal is to be able to support you!” and suggested ways Dr. Ing could improve her dossier. May 22, 2019 Email (Dkt # 44-43) at 2. Dr. Ing implemented some of Dr. Zandona’s suggestions but not others. The two met again on October 3, 2019, and Dr. Zandona suggested additional steps Dr. Ing could take to improve her chances with the FAPTC. The two emailed the next day, with Dr. Ing highlighting her accomplishments and attempting to explain why, despite the FAPTC’s 2018 decision, she merited promotion. Dr. Zandona wrote that “we need to focus on things that are weighted more heavily on the FAPTC committee. Research projects have [sic] impact as grants and publications, and abstracts are

²Dr. Zandona denies that this interaction took place. For purposes of summary judgment, the court resolves this factual dispute in favor of Dr. Ing, the non-moving party.

good, but they do not carry the same weight as a peer reviewed published manuscript.” October 4, 2019 Email (Dkt # 44-44) at 4. Dr. Zandona also confirmed that “when I feel you have [] met the criteria to be promoted I will write a supportive letter.” *Id.* at 6. In response to Dr. Ing’s statement that “[i]f the committee/administration turns down my promotion this will not bode well for you or for me; and it will send a clear message,” Dr. Zandona replied, “I am sure you don’t want a[n] unsuccessful submission, so let’s work together to make[] sure that your submission will be successful.” *Id.*

Later in October of 2019, Dr. Zandona notified Dr. Ing that she would not endorse her for full a professorship in the 2019 cycle because she felt that Dr. Ing had not sufficiently strengthened her dossier. The two met to discuss the reasons for Dr. Zandona’s decision and discuss a path toward a successful application on November 13, 2019. On November 18, Dr. Ing wrote Dr. Zandona a letter stating that her “accomplishments superseded the guidelines 2 cycles ago” and that she felt “singled out.” November 18, 2019 Letter (Dkt # 44-45) at 2. She also complained that Dr. Zandona had not sufficiently supported her as she worked to improve her dossier. Dr. Ing asked Dr. Zandona to point to deficiencies in her dossier compared to those of other instructors who had recently been promoted.

Dr. Zandona replied in a December 9, 2019 letter. She wrote to Dr. Ing:

I want to assure you that as your Chair, I do support you. My support has been exemplified by the various meetings we have had since I became your chair to review and

analyze your 2018 promotion denial and to assist you in identifying areas of improvement toward a successful submission.

December 9, 2019 Letter (Dkt # 44-46) at 2.

Dr. Zandona's letter repeated seven previously discussed suggestions to Dr. Ing's dossier: (1) working with other faculty, rather than completing solo projects on the Calibration Committee which Dr. Ing chaired; (2) considering leadership roles in venues of organized dentistry; (3) identifying leadership opportunities in STEM generally; (4) focusing leadership efforts on a specific area of expertise, rather than several at once; (5) submitting work to peer-reviewed publications; (6) continuing to work on both clinical and didactic teaching; and (7) continuing service efforts. The letter concluded,

While it is true that I was not prepared to support your submission for promotion in November 2019 because I did not feel you had demonstrated a significant development compared to your last submission in the area of Educational Leadership, this does not mean that I am against your promotion or that I will not work with you towards a successful submission—as described above, I remain committed to doing so.

Id. at 3.

Dr. Ing took a medical leave of absence from Tufts beginning in December of 2019. She did not return, and her contract expired in June of 2021.

DISCUSSION

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed R. Civ. P. 56(a). A dispute is genuine where “the evidence, viewed in the light most flattering to the nonmovant, would permit a rational factfinder to resolve the issue in favor of either party.” *Joseph v. Lincare, Inc.*, 989 F.3d 147, 157 (1st Cir. 2021), quoting *Medina Muñoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990). “Facts are material when they have the ‘potential to affect the outcome of the suit under applicable law.’” *Cherkaoui v. City of Quincy*, 877 F.3d 14, 23 (1st Cir. 2017), quoting *Sánchez v. Alvarado*, 101 F.3d 223, 227 (1st Cir. 1996). “To succeed, the moving party must show that there is an absence of evidence to support the nonmoving party’s position.” *Rogers v. Fair*, 902 F.2d 140, 143 (1st Cir. 1990). The burden then shifts to the nonmoving party to “adduce specific, provable facts demonstrating that there is a triable issue.” *Id.*

A. Discrimination Claims

Dr. Ing brings claims of sex discrimination under Massachusetts General Laws chapter 151B, Title VII, and Title IX. Because there is no direct evidence of discriminatory intent, the *McDonnell-Douglas* burden-shifting framework governs all three claims. See *Prescott v. Higgins*, 538 F.3d 32, 40 (1st Cir. 2008) (applying *McDonnell-Douglas* standard to claims under Title VII and chapter 151B); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896-898 (1st Cir. 1988) (holding Title VII standards apply to Title IX discrimination claims). A plaintiff establishes a *prima facie* case of sex

discrimination by showing that “(1) she is a member of a protected class, (2) she was qualified for an open position for which she applied, (3) she was rejected, and (4) someone possessing similar qualifications filled the position instead.” *Ingram v. Brink’s, Inc.*, 414 F.3d 222, 230 (1st Cir. 2005). If the plaintiff makes that showing, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. See *Forsythe v. Wayfair Inc.*, 27 F.4th 67, 82 (1st Cir. 2022). The burden then shifts back to the plaintiff to show by a preponderance of the evidence that the employer’s articulated reason is a pretext for discrimination. See *Theidon v. Harv. Univ.*, 948 F.3d 477 496 (1st Cir. 2020).

Tufts has produced a raft of credible evidence establishing that Dr. Ing was not qualified for a promotion because she did not meet the criteria for her self-chosen Area of Excellence: Educational Leadership. Tufts points to the uniform conclusions of the FAPTC members, Dr. Zandona, and Dr. Ing’s outside advisors, Dr. Blanco and Dr. Wolff, that she was not qualified for a promotion. Dr. Ing argues in conclusory terms that there is “no question” that she was qualified, relying primarily on the summary of her qualifications from her Charge of Discrimination. Opp’n (Dkt # 48) at 8-9, 21. This summary describes certain teaching accolades and Dr. Ing’s role within TUDSM, but does not address the Educational Leadership criteria. These criteria include the gaps that various decisionmakers identified in Dr. Ing’s application, such as her failure to qualify as a course director or to take on leadership roles either at Tufts or in external dental organizations. See TUDSM

Faculty Handbook (Dkt # 44-25) at 7. No reasonable factfinder could, on the evidence produced, conclude that Dr. Ing was qualified for promotion.

Even if Dr. Ing could surmount the qualification hurdle, Tufts would be entitled to summary judgment because of the absence of any showing of pretext. Tufts identifies Dr. Ing's lack of qualifications as a nondiscriminatory reason for its decision to deny her a promotion. Dr. Galburt and Dr. Amato each cited Dr. Ing's failure to satisfy the Educational Leadership Area of Excellence as their reason for voting against her promotion, and Dean Thomas and Dr. Zandona offered the same rationale.

Dr. Ing offers no evidence that her gender played a role in TUDSM's decision not to promote her, let alone that its proffered reason for the denial was designed to conceal discriminatory animus. She points to certain purported irregularities in the FAPTC process as evidence of pretext. In some cases, an employer's disparate application of policies to support an adverse employment action may establish pretext. See *Miceli v. JetBlue Airways Corp.*, 914 F.3d 73, 84 (1st Cir. 2019). For example, an employee may demonstrate pretext through evidence that "the adverse action departed from a clearly delineated policy" or "the employer applied such a policy differently to similarly situated employees." *Id.*

Dr. Ing cites as procedural irregularities: (1) the absence of minutes from the meetings at which the FAPTC discussed her application; (2) Dr. Trotman's request that Dr. Amato review Dr. Ing's dossier a second time after the FAPTC had voted against her promotion; (3) the fact that Dean Thomas's September 20, 2018 denial letter went through five drafts, each

with more negative language than the last; and (4) the five-month gap between the FAPTC's vote and TUDSM's notification to her that it had denied her promotion request. However, "there is no indication that th[ese] perceived procedural irregularit[ies] w[ere] relevant to or had any bearing on" Tufts's decision not to promote Dr. Ing. *Theidon*, 948 F.3d at 500. The absence of minutes, assuming that there was a policy of taking minutes at FAPTC meetings, represents a "bare showing of administrative error." *Miceli*, 914 F.3d at 84. It would require speculation to infer that the minutes—in contrast to the testimony and notes of the participants—would have contained evidence of discrimination.³ Dr. Ing does not identify a policy that the remaining irregularities deviated from, nor does she show that the FAPTC process was handled differently for other applicants. Because Dr. Ing has failed to show that she was otherwise qualified for promotion or that Tufts's explanation was a pretext

³ Dr. Ing has not established that Tufts spoiled the meeting minutes. To prevail on a spoliation claim, a party must "proffer evidence sufficient to permit the trier to find that the target knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document's potential relevance to that claim." *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir.1998). Further, "the party urging that spoliation has occurred must show that there is evidence that has been spoiled (*i.e.*, destroyed or not preserved)." *Gomez v. Stop & Shop Supermarket Co.*, 670 F.3d 395 399 (1st Cir. 2012). While there is competing evidence regarding whether the meeting minutes existed in the first place, Dr. Ing has failed to show that Tufts destroyed or failed to preserve them with knowledge of their relevance to her prospective claims.

for discrimination, the court will enter summary judgment for Tufts on the discrimination claims.⁴

B. Retaliation Claims

“A retaliation claim requires a showing that (1) the plaintiff engaged in protected conduct; (2) she was subjected to an adverse employment action; and (3) there was a causal connection between the first and second elements.” *Valentin Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 94 (1st Cir. 2006); *see also Theidon*, 948 F.3d at 505 (applying the same standard to Title IX claim). The parties only contest the third element of Dr. Ing’s *prima facie* case. Where an employee relies upon a chronological relationship between the protected activity and the adverse employment action to support causation, “the temporal proximity must be very close.” *Murray v. Warren Pumps, LLC*, 821 F.3d 77, 87-88 (1st Cir. 2016). Under Title VII and chapter 151B, the court as a rule applies a but-for standard of causation, while the standard under Title IX is undecided: some courts apply the but-for standard while others use a “substantial and motivating factor”

⁴To the extent that Dr. Ing asserts a Title IX claim based on the alleged bias of the OEO investigator who examined her sexual harassment complaint against Dr. Varania, that claim is also dismissed. An employer discharges its duty to investigate a complaint of harassment if it conducts a “reasonable investigation,” regardless of whether the findings substantiate the accusations. *Forsythe*, 27 F.4th at 73. Here, it is undisputed that Ms. Bogran-Acosta interviewed Dr. Vanaria, Dr. Ing, and Dr. Ing’s supervisor before concluding that no harassment had taken place. Tufts nonetheless accommodated Dr. Ing by changing Dr. Vanaria’s schedule and swipe access. Whatever the tone of Ms. Bogran-Acosta’s communications with Dr. Ing, Tufts’s response to Dr. Ing’s sexual harassment complaint was reasonable.

standard. *Id.* at 506. Here, the result is the same under either test, as Dr. Ing has failed to establish that her complaint of sexual harassment led to TUDSM's denial of her application for promotion.

In 2018, the decision whether to promote Dr. Ing to full professor belonged to the FAPTC. Tufts submits unrefuted evidence that no member of the FAPTC knew of Dr. Ing's 2017 sexual harassment complaint. Thus, her complaint could not have been a but-for cause of the FAPTC's decision to reject her application. See *Medina-Rivera v. MVM, Inc.*, 713 F.3d 132, 139 (1st Cir. 2013).

In 2019, Dr. Ing did not reapply for promotion because Dr. Zandonata declined to provide a letter of endorsement. Tufts has shown that Dr. Zandonata arrived at Tufts more than a year after Dr. Ing initiated her complaint, that Dr. Zandonata never knew or met Dr. Vanaria, and that Dr. Zandonata worked with Dr. Ing for at least six months to improve her dossier.

Dr. Ing relies on her testimony that Dr. Zandonata told her at the January 9, 2019, meeting that "I most likely am not going to promote you," Ing Tr. at 13, and that Dr. Zandonata commented that she should attend sexual harassment therapy more often in March of 2019. Dr. Ing's recollection of the former remark is undercut by her contemporaneous email stating that Dr. Zandonata had told her that she "may not write a positive letter in support like Dr. Rankin did." Jan. 9, 2019 Email at 2. Moreover, neither comment establishes that Dr. Zandonata associated Dr. Ing's sexual harassment complaint with her resubmission, and both comments occurred long before Dr. Zandonata declined to endorse Dr. Ing's promotion. Dr. Zandonata

continued advising Dr. Ing for six months after the second comment (and ten months after she learned of Dr. Ing's complaint), and her advice repeatedly consisted of ways to address the weaknesses that the FAPTC identified in Dr. Ing's dossier. The court will therefore enter summary judgment for Tufts on Dr. Ing's retaliation claims.

ORDER

For the foregoing reasons, Tufts's motion for summary judgment is ALLOWED. The Clerk will enter judgment for Tufts and close the case.

SO ORDERED.

/s/ Richard G. Stearns
United States District Judge

**ORDER DENYING PETITION FOR
REHEARING, U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT
(SEPTEMBER 19, 2023)**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MELISSA ING,

Plaintiff-Appellant,

v.

TUFTS UNIVERSITY,

Defendant-Appellee.

No. 23-1030

Before: KAYATTA, GELPI, and MONTECALVO,
Circuit Judges.

ORDER OF COURT

Appellant Melissa Ing's petition for rehearing is
denied.

By the Court:

Maria R. Hamilton, Clerk

App.34a

cc:

Mitchell J. Notis
Melissa Ing
Jeremy Michael Sternberg
Cameryn Mercurio
Douglas Sweeney

**Additional material
from this filing is
available in the
Clerk's Office.**