APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (UNBOUND COPY)

No. 23-754

In The Supreme Court of the United States

HARISADHAN PATRA AND PETULA VAZ
Petitioners,

v.

PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION *et al.*
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2320

HARISADHAN PATRA; PETULA VAZ,
Appellants

v.

PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION; BLOOMSBURG UNIVERSITY, of Pennsylvania; FRANK T. BROGAN, individually and in his official capacity as Chancellor; DAVID SOLTZ, individually and in his official capacity as President of Bloomsburg University; RICHARD ANGELO; JORGE E. GONZALEZ; IRA BLAKE; ROBERT P. MARANDE; THOMAS R. ZALEWSKI

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 4-14-cv-02265)

SUR PETITION FOR REHEARING

BEFORE: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG and McKEE[1] *Circuit Judges.*

The petition for rehearing filed by **Appellants** in the above-entitled case having been submitted to the judges who participated in the decision of this Court

[1] Judge McKee's vote is limited to panel rehearing only.

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

BY THE COURT:

s/ Theodore A. McKee
Circuit Judge

Dated: November 30, 2023
Sb/cc: All Counsel of Record
Harisadhan Patra
Petula Vaz

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2320

HARISADHAN PATRA; PETULA VAZ,
Appellant

v.

PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION; BLOOMSBURG UNIVERSITY, of Pennsylvania; FRANK T. BROGAN, individually and in his official capacity as Chancellor; DAVID SOLTZ, individually and in his official capacity as President of Bloomsburg University; RICHARD ANGELO; JORGE E. GONZALEZ; IRA BLAKE; ROBERT P. MARANDE; THOMAS R. ZALEWSKI

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 4-14-cv-02265)
District Judge: Honorable Matthew W. Brann

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 4, 2021
Before: MCKEE, SHWARTZ and RESTREPO,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant

to Third Circuit LAR 34.1(a) on January 4, 2021. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered May 27, 2020, be and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

s/Patricia S. Dodszuweit
Clerk

DATED: July 19, 2023

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2320

HARISADHAN PATRA; PETULA VAZ,
Appellant

v.

PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION; BLOOMSBURG UNIVERSITY, of Pennsylvania; FRANK T. BROGAN, individually and in his official capacity as Chancellor; DAVID SOLTZ, individually and in his official capacity as President of Bloomsburg University; RICHARD ANGELO; JORGE E. GONZALEZ; IRA BLAKE; ROBERT P. MARANDE; THOMAS R. ZALEWSKI

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Submitted Pursuant to Third Circuit LAR 34.1(a)
January 4, 2021
Before: MCKEE, SHWARTZ and RESTREPO,
Circuit Judges
(Opinion filed July 19, 2023)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Harisadhan Patra and Petula Vaz appeal pro se from the District Court's order granting summary judgment to the defendants. We will affirm the District Court's judgment.

I.

Patra and Vaz, who are married and originally from India, were hired as professors at Bloomsburg University in 2010. The plaintiffs alleged that, during their interview, Defendants Richard Angelo (the Department Chair at the time) and Robert Marande (the College Dean) orally agreed to cover the couple's relocation costs and provide them with 75,000 dollars in "start-up funds" for two laboratories with specific equipment. See ECF No. 73-2 at 17 [hereinafter "Vaz Dep."]. Angelo and Marande also assured the couple that they would be allowed to teach in their areas of expertise. These oral agreements were not included in the plaintiffs' written contracts. See ECF Nos. 72-4 at 83 (Patra's contract) and 72-8 at 114 (Vaz's contract); see also ECF No. 73-1 at 35 [hereinafter "Patra Dep."] (explaining Patra's unsuccessful efforts to formalize the oral agreements).

Upon the plaintiffs' arrival at Bloomsburg in August 2010, Angelo and Marande reneged on their oral agreements, citing department-wide financial issues. In their depositions, Patra and Vaz asserted that they were denied relocation and start-up costs and given inadequate lab space and equipment, while other professors received start-up funds and had well-equipped labs. Unlike her colleagues, Vaz was not assigned to teach in her area of expertise. She was also made to teach a consolidated course, giving her, in essence, five courses rather than the usual four.

Additionally, another professor, Defendant Jorge Gonzalez, was arrogant and disrespectful to the plaintiffs.

Like all new hires, the plaintiffs were evaluated annually to determine whether their appointments would be renewed.[1] During their first year, Patra and Vaz received overall positive evaluations. The Provost observed that Patra had started to establish his lab and was expected to pursue his research agenda. He described Vaz's departmental service as "admirable." ECF No. 72-9 at 1. Two evaluators noted that Patra needed to provide clearer explanations to his students, and the Provost stated that Vaz's student evaluations indicated "room for improvement." See id. Marande encouraged Vaz to participate on a university-wide committee. The plaintiffs' contracts were renewed.

The following year, the plaintiffs continued to have disputes with the department about their funding and equipment needs. According to the plaintiffs, Angelo became increasingly hostile. On February 23, 2012, after Patra confronted him about his alleged misappropriation of the plaintiffs' internal grant funds, Angelo became irate and "completely lost it," screaming at Patra. See Vaz Dep. at 22–23.

Patra's second-year evaluations were mixed. He was commended for his publication record; however, the evaluation committee expressed concern about his teaching, observing that most of his students "have a hard time following or understanding [Patra's] explanations." ECF No. 72-5 at 34–35. Patra was also encouraged to secure external grant funds. Vaz's

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[1] The evaluators included the Department Chair, other professors from Patra and Vaz's department, and several non-departmental administrators.

evaluations were more positive, noting that her teaching had improved. She was again encouraged to pursue university-wide service opportunities. The plaintiffs' contracts were again renewed.

The following fall, Angelo (who had been promoted to Assistant Dean) and Gonzalez (who had become the Department Chair) made several offensive remarks to the plaintiffs about their race and religion.[2] Angelo mocked the Hindu practice of making food offerings to God, see Vaz Dep. at 58–59, and Gonzalez told Patra that "Indian men have vaginas" and "cannot control their wives," Patra Dep. at 97. More than once, Gonzalez told the plaintiffs that if he were not a professor, he would be a "sniper," and that there are "some people in the world who deserve to be taken out." Vaz Dep. at 63–64.

In December 2012, the plaintiffs submitted charges of discrimination to the Equal Employment Opportunity Commission ("EEOC"). Soon after, Patra's teaching assignments were changed, and Gonzalez began to surveil and "stalk" the plaintiffs. See id. at 105–06. To escape the abusive work environment at Bloomsburg, Patra and Vaz applied for openings at Utah State University. Utah State offered them the positions, which they accepted in early 2013. However, the couple decided to remain at Bloomsburg. In March 2013, the plaintiffs made additional EEOC complaints.

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[2] The plaintiffs do not know exactly when or how often these comments were made. Patra alleged that Angelo made ethnically offensive comments for the first time in 2011 and "several times" in 2012. See Patra Dep. at 89. Gonzalez's comments were made in 2012, but he kept making "[t]hese types of comments" after 2012. Id. at 99–100.

Additionally, in fall 2012, Patra and Vaz discovered that the graduation statistics being published by their department were incorrect and reported the inaccuracies to Angelo, Marande, and Gonzalez. They continued to raise the issue in department meetings and e-mails to administrators throughout the school year.

The plaintiffs' third-year evaluations were worse than before. Patra's student reviews had plummeted, and several students had met with Marande to discuss Patra's problematic teaching and grading practices. The evaluation committee observed that Vaz's teaching had continued to improve but expressed concern that her publications to date had been made using her previous affiliation with the University of Nebraska, not Bloomsburg. Gonzalez and Marande noted that Vaz had not used the clinical space or equipment provided to her. The Provost opined that Vaz's lack of research development was reasonable given that she had been focused on improving her teaching, but suggested that, moving forward, she work with the department to establish an "aggressive timeline" for establishing a functional lab. ECF No. 72-10 at 49. The plaintiffs' contracts were renewed, although three evaluators recommended against Patra's renewal.

The plaintiffs alleged that, throughout their fourth year, Gonzalez continued to generally intimidate and harass them. They filed additional EEOC charges in October 2013 and raised numerous internal complaints via e-mail and in meetings with administrators. They asserted that department and university administrators conspired to harass them and thwart their success in retaliation for their filing EEOC charges and whistleblowing about the

inaccurate graduation rates.

In early 2014, the plaintiffs were notified that their contracts at Bloomsburg would not be renewed. Patra's student evaluations had shown no improvement, and there were severe inadequacies with regard to his research and departmental service. While Vaz's undergraduate student evaluations were positive, a large number of her graduate students rated her as "average." See ECF No. 72-11 at 27. She also had not progressed in developing an independent line of research at Bloomsburg, nor had she attempted to receive outside funding. The evaluators noted that tenure-track professors are expected to demonstrate not only strength in teaching, scholarship, and service, but also continual improvement—and that Vaz had stagnated or even regressed in the areas of research and service. The departmental evaluation committee's decisions not to renew were unanimous as to both Patra and Vaz and supported by the university-wide tenure committee.

In November 2014, the plaintiffs filed a complaint in the District Court against the University, its state-controlled parent organization, and several Bloomsburg employees, alleging: (1) Title VII discrimination and retaliation based on their race and religion, (2) retaliation in violation of the First Amendment, (3) conspiracy under 42 U.S.C. § 1983, and (4) violations of state law. The defendants moved for summary judgment. The District Court granted the motion on procedural grounds, citing the plaintiffs' noncompliance with the Federal Rules of Civil Procedure. The plaintiffs appealed, and we issued a partial remand to revisit the merits of the plaintiffs' claims. See Patra v. Pa. State Sys. of Higher Educ., 779 F. App'x 105 (3d Cir. 2019). With direction from

the District Court, the plaintiffs submitted a new brief in opposition to the defendants' motion. Addressing the merits of the plaintiffs' case, the District Court determined that the defendants were entitled to judgment as a matter of law. Patra and Vaz appealed.[3]

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment. See Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 265 (3d Cir. 2014). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although "[w]e view the facts and favor," we will conclude that "[a] disputed issue is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party." Resch v. Krapf's Coaches, Inc., 785 F.3d 869, 871 n.3 (3d Cir. 2015). We may affirm for any reason supported by the record. Brightwell v. Lehman, 637 F.3d 187, 191 (3d Cir. 2011).

III.

We first address the plaintiffs' Title VII discrimination claims. To establish a prima facie case of disparate treatment under Title VII, Patra and Vaz

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[3] To the extent that Patra and Vaz now challenge the District Court's orders regarding the deposition schedule, see ECF Nos. 58 and 61; Appellants' Br. at 76–78 (explaining that the plaintiffs "do not seek reversal" of these orders), the issue is forfeited because it was not raised in their prior appeal, see Beazer E., Inc. v. Mead Corp., 525 F.3d 255, 263 (3d Cir. 2008).

were required to show that: (1) they belong to a protected class, (2) they were qualified for the positions they occupied, and (3) they were subject to an adverse employment action ("AEA") (4) under circumstances that give rise to an inference of unlawful discrimination. See In re Tribune Media Co., 902 F.3d 384, 401 (3d Cir. 2018). After a prima facie case is made, the burden shifts to the defendants to offer a legitimate, non-discriminatory reason for the AEA. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Then, the burden shifts back to the plaintiffs to demonstrate that the defendants' reason was, in fact, pretext for discrimination. Id. at 803–04.

Patra and Vaz argue that the District Court erred in concluding that the defendants' negative fourth-year evaluations and the non-renewal of their contracts were the only AEAs that they suffered. See Mem. Op., ECF No. 109 at 13–14. They claim that the record supports additional AEAs: (1) the defendants' failure to provide them with promised relocation costs and start-up funds, (2) the defendants' failure to provide them with functional labs and equipment, and (3) the defendants' failure to provide them with teaching opportunities in their areas of expertise and summer teaching opportunities. See Appellants' Br. at 44–45. This argument is unavailing because the plaintiffs failed to establish that the additional AEAs arose under circumstances that could give rise to an inference of discrimination.

Declining to provide the plaintiffs with funds, equipment, or teaching opportunities could be considered AEAs. See Weston v. Pennsylvania, 251 F.3d 420, 431 (3d Cir. 2001) overruled in part on other grounds by Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (explaining that an AEA is one that

renders a "material change" in working conditions). However, "[t]he central focus of the prima facie case is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." Sarullo v. U.S. Postal Serv., 352 F.3d 789, 798 (3d Cir. 2003) (per curiam) (internal quotation marks and citation omitted). Here, the record does not support an inference that Patra and Vaz were denied funds or opportunities that other professors in the department received—let alone that the defendants denied them such things on account of their race or religion.

The plaintiffs' allegations that they were treated differently than their non-Indian peers are, for the most part, vague, speculative, and riddled with contradictions. For example, Patra's assertion that he was asked to give some research equipment to a non-Indian professor, is not, without more, evidence of racial animus. See Patra Dep. at 71–72. And there is no support for the plaintiffs' allegation that other professors received start-up funds rather than being made to solicit funding through grants. See ECF Nos. 72-4 at 83 and 72-8 at 114 (showing that grant-writing activities were "expected" as part of the plaintiffs' contracts). Nor does the record support the contention that the plaintiffs were given unusual teaching assignments. See Patra Dep. at 85 (noting that other professors complained about being made to teach lower-level courses).

Moreover, the plaintiffs failed to support their more specific allegations with evidence that other professors were "similarly situated" with regard to them. See Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002). The plaintiffs stated that a non-Indian professor named Robert Nozza was

provided with relocation costs, see Vaz Dep. at 51, and that a non-Indian professor named Pam Smith was given a more reasonable teaching assignment than Vaz, see id. at 88. However, the plaintiffs did not show that either non-Indian professor was "directly comparable to [them] in all material respects." See Patterson, 281 at 680. Thus, as to the additional AEAs, Patra and Vaz failed to state a prima facie case of disparate treatment.

As to the AEAs that the District Court did address—the defendants' negative fourth-year evaluations and the non-renewal of the plaintiffs' contracts—we agree that the plaintiffs failed to show that the defendants' ample and well-supported non-discriminatory reasons were mere pretext for discrimination under the McDonnell Douglas burden-shifting framework. See Mem. Op., ECF No. 109 at 14–16. Accordingly, the District Court properly granted summary judgment on the plaintiffs' disparate treatment claim.

IV.

We now turn to the plaintiffs' Title VII retaliation claim. To establish a prima facie case of retaliation, Patra and Vaz were required to show that: (1) they engaged in activity protected by Title VII, (2) the defendants took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse action. Moore v. City of Philadelphia, 461 F.3d 331, 340–41 (3d Cir. 2006). The McDonnell Douglas burden-shifting framework applies in the retaliation context, too. Id. at 342.

As with their discrimination claim, the plaintiffs argue that the District Court erred in failing to

consider certain retaliatory AEAs. In addition to their negative evaluations and the non-renewal of their contracts, the plaintiffs argue that the following actions were AEAs: (1) the defendants' misappropriating grant funds, (2) the defendants' assigning unreasonable work schedules and teaching assignments outside of the plaintiffs' specialty areas, and (3) the defendants' refusing to allow Patra to resume teaching after he returned from medical leave. See Appellants' Br. at 47. This argument fails for similar reasons as the plaintiffs' previous argument.

First, the record does not support the assertion that the defendants misappropriated the plaintiffs' grant funds. Nor, as explained above, does the record support the assertion that Patra and Vaz were given unreasonable teaching assignments. There is also no evidence demonstrating that the defendants' refusal to allow Patra to resume teaching after returning from medical leave was an unusual practice. See Patra Dep. at 216, 221 (explaining that Patra was not permitted to return to teaching because changing instructors around the finals period risked disrupting the class). Besides, none of these actions would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." See Moore, 461 F.3d at 341. Indeed, the plaintiffs were not dissuaded: Patra and Vaz made continuous internal and external complaints from 2012 until their termination. See Patra Dep. at 291.

Second, even if the record did support the plaintiffs' alleged AEAs, the couple failed to establish causation. Patra stated that the defendants changed his teaching assignment in response to the plaintiffs' filing their first EEOC charges in December 2012. See id. at 81, 140. However, he had been receiving poor

student evaluations for several semesters prior to the change. See Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 258 (3d Cir. 2017) (explaining that a plaintiff must show that the AEA would not have been committed "but for" the protected activity). Moreover, the temporal proximity between when the plaintiffs filed their first EEOC complaint (December 2012) and when the defendants decided not to renew their contracts (January 2014) is not "unusually suggestive of retaliatory motive." See id. at 260.

Accordingly, the plaintiffs did not state a prima facie case of retaliation under Title VII. Additionally, even if the plaintiffs had stated a prima facie case, under the McDonnell Douglas burden-shifting framework, they failed to overcome the defendants' well-documented reasons for not renewing their contracts.

V.

Patra and Vaz also argue that the District Court did not consider the evidence in support of their hostile work environment claim. To succeed on such a claim, the couple had to show that: (1) they suffered intentional discrimination because of their race or religion, (2) the discrimination was severe or pervasive, (3) the discrimination detrimentally affected them, (4) the discrimination would detrimentally affect a reasonable person in similar circumstances, and (5) the existence of respondeat superior liability. Tribune, 902 F.3d at 399. They failed to do so.

The plaintiffs made numerous allegations about Angelo and Gonzalez's hostile behavior. However, most of the alleged incidents had nothing to do with the couple's race or religion, see, e.g., Vaz Dep. at 62

(claiming that Gonzalez entered Patra's locked office without his permission and took one of his books), and none of their allegations were corroborated. We agree with the District Court that the few comments that Angelo and Gonzalez made about the plaintiffs' race or religion, while offensive, were too isolated to support a hostile work environment claim. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Moreover, the plaintiffs failed to account for the fact that, despite being offered positions at Utah State at the alleged height of the defendants' abusive behavior, they chose not to leave Bloomsburg[4]. Accordingly, Patra and Vaz failed to make a prima facie hostile work environment claim under Title VII.

VI.

The plaintiffs also argue that the District Court incorrectly decided their First Amendment claim, which was based on their whistleblowing regarding the department's inaccurate published graduation rates. To make a First Amendment retaliation claim, Patra and Vaz had to show that: (1) their speech was protected by the First Amendment, and (2) the defendants' retaliatory action was substantially motivated by the protected activity. Hill v. Borough of Kutztown, 455 F.3d 225, 241 (3d Cir. 2006). Public employees' speech is only protected when they speak as citizens rather than within the scope of their duties.

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[4] There is nothing in the record to support Patra's suggestion that their appointments at Utah State fell through because of the defendants' investigation into Patra's failure to send in his grades while on medical leave. According to Patra, the investigation was never disclosed to Utah State. See Patra Dep. at 231; see also Vaz Dep. at 200 (explaining that their Utah State contacts were "really upset" that Patra and Vaz backed out of the agreement).

See Javitz v. Cty. of Luzerne, 940 F.3d 858, 864–65 (3d Cir. 2019) (explaining that *who* the plaintiffs spoke to, *what* they spoke about, and *why* they spoke are central to the protected speech inquiry).

During their depositions, the plaintiffs stated that they reported the department's inaccurate graduation statistics as "citizen[s] of the state," and that such reporting was not part of their official duties. Vaz Dep. at 135–36. However, their speech was limited to internal e-mails and private conversations with colleagues, not the community at large, and thus it was not protected. See id. at 134–35; see also De Ritis v. McGarrigle, 861 F.3d 444, 454 (3d Cir. 2017) (explaining that, generally, public employees' internal complaints about internal policies are not protected speech). Even if the plaintiffs' speech *was* protected under the First Amendment, they concede that, far from "chilling" their speech, see Appellants' Br. at 66–77, the defendants' actions never dissuaded them from speaking out about the school's graduation rates, see Patra Dep. at 291 (stating that the plaintiffs "never stopped" blowing the whistle). Besides, there is no indication from the record that the defendants' ultimate decision not to renew the plaintiffs' contracts was a result of their whistleblowing rather than their increasingly inadequate performance in the areas of teaching, research, and departmental service. [5] Thus, Patra and Vaz's First Amendment claim fails.[6]

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[5] In fact, because of the plaintiffs' reporting, Bloomsburg revised the incorrect graduation statistics. See ECF No. 73 at 26 n.11.

[6] Because the plaintiffs failed to establish that their constitutional rights were violated, their § 1983 conspiracy claim also fails. See Dykes v. Se. Pa. Transp. Auth., 68 F.3d 1564, 1570

VII.

Finally, the plaintiffs' state law claims lack merit. Their claims under the Pennsylvania Human Relations Act ("PHRA") fail for the same reasons that their Title VII claims fail. See Simpson v. Kay Jewelers, Inc., 142 F.3d 639, 644 n.4 (3d Cir. 1998) (explaining that we use the same framework to assess Title VII and PHRA claims). Additionally, the plaintiffs' allegations—supported by nothing but their own deposition testimony—that the defendants intentionally inflated the graduation statistics for their personal gain are too speculative to establish a claim under the Pennsylvania Whistleblower Law. See generally Sukenik v. Twp. of Elizabeth, 131 A.3d 550, 555–56 (Pa. Commw. Ct. 2016). And there is nothing in the record to support the plaintiffs' claims of defamation, intentional infliction of emotional distress, or loss of consortium.

VIII.

For the above reasons, we will affirm the judgment of the District Court. The plaintiffs' motion to expand the record pursuant to Federal Rule of Appellate Procedure 10(e) is denied.

(3d Cir. 1995) (concluding that we need not reach the issue of conspiracy where there is no cognizable violation of constitutional rights).

APPENDIX 3
(DCR#110; FILED ON MAY 27, 2020)

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARISADHAN PATRA and PETULA VAZ, Plaintiffs, v. PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION, *et al.*, Defendants.	No. 4:14-CV-02265 (Judge Brann)

ORDER

AND NOW, this 27TH day of May 2020, in accordance with the accompanying memorandum opinion, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Summary Judgment, Doc. 70, is **GRANTED**.
2. Final Judgment is entered in favor of Defendants and against Plaintiffs.
3. The Clerk of Court is directed to close the case file.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARISADHAN PATRA and PETULA VAZ, Plaintiffs, v. PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION, *et al.*, Defendants.	No. 4:14-CV-02265 (Judge Brann)

MEMORANDUM OPINION

May 27, 2020

I. BACKGROUND

Defendants have again moved for summary judgment. For the reasons that follow, Defendants' motion is granted.

II. DISCUSSION

A. Standard of Review

I begin my analysis with the standard of review which undergirds summary judgment. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."[1] 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

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[1] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

as a matter of law."[2] "Facts that could alter the outcome are 'material facts,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct."[3] "A defendant meets this standard when there is an absence of evidence that rationally supports the plaintiff's case."[4] "A plaintiff, on the other hand, must point to admissible evidence that would be sufficient to show all elements of a *prima facie* case under applicable substantive law."[5]

"The inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."[6] Thus, "if the defendant in a run- of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[7] "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for

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[2] Fed. R. Civ. P. 56(a).

[3] *Clark v. Modern Grp. Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993) (Hutchinson, J.) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) and *Celotex*, 477 U.S. at 322).

[4] *Clark*, 9 F.3d at 326.

[5] *Id.*

[6] *Liberty Lobby, Inc.*, 477 U.S. at 252.

[7] *Id.*

the plaintiff."[8] "The judge's inquiry, therefore, unavoidably asks . . . 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'"[9] The evidentiary record at trial, by rule, will typically never surpass that which was compiled during the course of discovery.

"A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact."[10] "Regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied."[11]

Where the movant properly supports his motion, the nonmoving party, to avoid summary judgment, must answer by setting forth "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."[12] For movants and nonmovants alike, the assertion "that a fact cannot be or is genuinely

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[8] *Id.*

[9] *Id. (quoting Schuylkill & Dauphin Imp. Co. v. Munson*, 81 U.S. 442, 447 (1871)).

[10] *Celotex*, 477 U.S. at 323 (internal quotations omitted).

[11] *Id.*

[12] *Liberty Lobby*, 477 U.S. at 250.

disputed" must be supported by: (i) "citing to particular parts of materials in the record" that go beyond "mere allegations"; (ii) "showing that the materials cited do not establish the absence or presence of a genuine dispute"; or (iii) "showing . . . that an adverse party cannot produce admissible evidence to support the fact."[13]

"When opposing summary judgment, the non-movant may not rest upon mere allegations, but rather must 'identify those facts of record which would contradict the facts identified by the movant.'"[14] Moreover, "if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may ... consider the fact undisputed for purposes of the motion."[15] On a motion for summary judgment, "the court need consider only the cited materials, but it may consider other materials in the record."[16]

Finally, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[17] "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."[18] "If the

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[13] Fed. R. Civ. P. 56(c)(1).

[14] *Port Auth. of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 233 (3d Cir. 2003) (Weis, J.).

[15] Fed. R. Civ. P. 56(e)(2).

[16] Fed. R. Civ. P. 56(c)(3).

[17] *Liberty Lobby*, 477 U.S. at 249.

[18] *Id.*

evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted."[19]

B. Undisputed Facts

With that standard outlining the Court's framework for review, I now turn to the undisputed facts of this matter.

1. Introduction

Dr. Harisadhan Patra and Dr. Petula Vaz signed Contracts of Appointment to employment with Bloomsburg University on May 18, 2010.[20] Dr. Patra was hired as an Assistant Professor in Bloomsburg's Department of Audiology and Speech Pathology beginning August 28, 2010.[21] Dr. Vaz was hired as an Associate Professor in the same department also beginning August 28, 2010.[22]

The relevant collective bargaining agreement provided for annual evaluations.[23] In Patra and Vaz's first through fourth years of service, they received performance evaluations that followed this annual timeframe.[24]

2. Dr. Patra's Evaluations and Non-Renewal

In Patra's first-year evaluation, Dr. Ira Blake, Bloomsburg's provost, stated that Patra was "reported

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[19] *Id.* at 249-50 (internal citations omitted).

[20] Doc. 71 at ¶ 1.

[21] Doc. 71 at ¶ 2.

[22] Doc. 71 at ¶ 3.

[23] Doc. 71 at ¶ 5.

[24] Doc. 71 at ¶ 6.

to be a satisfactory instructor by the chairperson, peers and students," but that "[a]ll evaluations indicate room for improvement."[25] Blake listed ways in which Patra could improve his performance. Blake recommended that Patra's contract be renewed for the following year.[26]

In Patra's second-year evaluation, Blake stated that Patra's "overall performance . . . is satisfactory." But she noted "a need for more improvement during the next evaluation period."[27] Blake listed five areas in which Patra "need[ed] to seek assistance from the chairperson and peers." Blake also encouraged Patra to "review the topics of [certain] workshops in order to identify some that might be helpful."[28]

In Patra's third-year evaluation, Blake stated that Patra's cumulative student evaluations had "plummet[ed] significantly across the board."[29] Robert Marande, Bloomsburg's dean, reported that students had met with him in May 2012 to raise concerns about Patra's teaching.[30] Marande met with Patra, who "confirmed that he would make the appropriate changes to his teaching such that these issues would not occur again. Also, at that time Dr. Patra did not dispute any of the concerns that the students had."[31] Marande also reported that in October 2012 students

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[25] *See* Doc. 71 at ¶ 7.

[26] *See* Doc. 71 at ¶ 8.

[27] *See* Doc. 71 at ¶ 9.

[28] *See* Doc. 71 at ¶ 10.

[29] *See* Doc. 71 at ¶ 11.

[30] *See* Doc. 71 at ¶12.

[31] *See* Doc. 71 at ¶ 13.

from a different Patra class "raised concerns regarding Dr. Patra's grading practices."[32] Patra met with Marande, "acknowledged that the issues raised by the students were correct," but did not inform Marande "on how everything was resolved."[33] Marande described Patra's student evaluations as "not very impressive" and noted that on each of three evaluation questions, Patra's rating was over 14% below the college average.[34]

Marande did not recommend renewing Patra's contract for a fourth year.[35] Despite this, Blake did recommend that Patra's contract be renewed for the following academic year.[36] Blake noted that the "plummet[ing]" of student evaluations, "the contradictory peer observations and several student letters (including one from an entire class cohort of 2014) raise serious concern about Dr. Patra's progress as an instructor."[37] With respect to Patra's service, which had been "primarily at the departmental level," Blake "suggest[ed] that Dr. Patra consult with his dean and chairperson regarding additional service opportunities at the college and university levels."[38]

In Patra's fourth year, Bloomsburg's Tenure Committee, by unanimous vote, recommended that Patra's contract not be renewed because of

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[32] *See* Doc. 71 at ¶ 14.

[33] *See* Doc. 71 at ¶ 15.

[34] *See* Doc. 71 at ¶ 16.

[35] *See* Doc. 71 at ¶ 17.

[36] *See* Doc. 71 at ¶ 18.

[37] *See* Doc. 71 at ¶ 19.

[38] *See* Doc. 71 at ¶ 20.

"deficiencies in the areas of teaching, research, and service. In particular there are significant concerns regarding professional development. Further, the majority of peer and the chair observation[s] indicate that good instructional and professional practice is not consistently evident in this case."[39] Bloomsburg's Evaluation Committee also did not recommend Patra for continued employment.[40]

The acting dean at the time, Jonathan Lincoln, noted in a letter to Patra that "[t]he need for you to address certain aspects of your teaching has been noted annually in evaluations conducted by your dean and the provost since your first year. Your teaching evaluations have not improved and you present no evidence of following previous recommendations to seek assistance for teaching."[41] Further, Lincoln noted that "[y]our activity in the areas of scholarship and service are below expectations for a fourth year faculty member in the College of Science and Technology."[42]

By letter dated January 27, 2014, Patra was advised that his contract would not be renewed for the following year.[43] His contract ended at the end of the Spring 2014 semester – May 30, 2014.[44]

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[39] *See* Doc. 71 at ¶ 21.

[40] *See* Doc. 71 at ¶ 24.

[41] *See* Doc. 71 at ¶ 22.

[42] *See* Doc. 71 at ¶ 23.

[43] *See* Doc. 71 at ¶ 25.

[44] *See* Doc. 71 at ¶ 26.

3. Dr. Vaz's Evaluations and Non-Renewal

In Vaz's first-year evaluation, Blake reported that Vaz was an "effective instructor" but that her "[s]tudent evaluations present a varied profile and room for improvement."[45] Blake recommended that Vaz's contract be renewed for the following academic year while also "encourag[ing]" Vaz to "consult with her chairperson and peers for instructional strategies in" five discrete areas.[46]

In Vaz's second-year evaluation, Blake found that Vaz's "overall performance as a second-year probationary faculty member [was] sound." Blake also noted that Vaz "should continue addressing the" discrete areas that Blake had set forth in the first-year evaluation.[47] Blake recommended Vaz for a renewed contract.[48]

In Vaz's third-year evaluation, Blake found that Vaz was "reported to be an effective instructor by the chairperson and peers for this evaluation period," with "improvement since the last evaluation period."[49] Blake "suggest[ed] that Dr. Vaz continue to attend to the following areas: clarity and conciseness of explanations, encouragement of active student learning and problem solving, and enhancement of student's knowledge construction and communication

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[45] *See* Doc. 71 at ¶ 27.

[46] *See* Doc. 71 at ¶ 28.

[47] *See* Doc. 71 at ¶ 29.

[48] *See* Doc. 71 at ¶ 30.

[49] *See* Doc. 71 at ¶ 31.

skills."[50] Blake also noted that "[t]here is an expressed concern by the dean and chairperson regarding Dr. Vaz's non-use of research equipment and the fact that Bloomsburg University is not the institutional affiliation for her publications to date."[51] Blake recommended that Vaz's contract be renewed for the following academic year.[52]

In Vaz's fourth year, the Tenure Committee, by unanimous vote, recommended that Vaz's contract not be renewed because of "deficiencies in the area[s] of research and service, with particular concerns regarding the lack of professional development. Further, the majority of peer and the chair observations indicate that professional practice is not consistently evident in this case."[53]

In evaluations before her fourth year, Vaz had been encouraged to review her course content and materials for certain classes as a means of improving student evaluations. But the Evaluation Committee reported that Vaz's fourth-year student evaluations indicated "an 'average' rating from close to 50% of our students in key evaluation areas." Per the Evaluation Committee, this was "not an acceptable level of graduate-level teaching performance."[54] The Evaluation Committee also reported that in Vaz's evaluations before her fourth year:[55]

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[50] *See* Doc. 71 at ¶ 32.

[51] *See* Doc. 71 at ¶ 33.

[52] *See* Doc. 71 at ¶ 34.

[53] *See* Doc. 71 at ¶ 35.

[54] *See* Doc. 71 at ¶ 36.

[55] *See* Doc. 71 at ¶ 37.

> Dr. Vaz was advised to develop a line of independent and self-driven research in her area of expertise here at Bloomsburg University that would result in peer-reviewed journal publications and research presentations at national and international level conferences. . . . Though Dr. Vaz claims her area of research experience as being in the area of pediatric swallowing disorders and has been provided with departmental equipment funds for that area of research, she shows no evidence of initiating or developing a body of research investigation in this area here at Bloomsburg University. Dr. Vaz not only denies herself scholarly progress in her claimed area of expertise, but also potentially precludes students from pursing research opportunities and experience in the area of pediatric swallowing.

The Evaluation Committee found "[m]ost disconcerting . . . Dr. Vaz's performance (or lack thereof) in the area of Service." As the Evaluation Committee reported, "In her third year evaluation, Dr. Vaz was encouraged to increase her active participation in the departmental committees on which she serves, and was also strongly encouraged to submit her name for appointment or election to both College and University-wide committees. Instead, since those recommendations were made, Dr. Vaz has been absent from over 78% of departmental meetings and provides no evidence of attempts to provide service at College and/or University-wide levels."[56]

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[56] *See* Doc. 71 at ¶ 38.

In concluding its evaluation, the Evaluation Committee reasoned that:[57]

> While Dr. Vaz's teaching performance at the graduate-level may be amenable to improvement, Dr. Vaz's progress in scholarly activity has been limited and her service record has been substandard. When all three areas of evaluation (Teaching, Scholarship, and Service) are taken into account, combined with the expectations that this committee have for a faculty member who was hired at the rank of Associate Professor and who has several years of university-level teaching experience prior to coming to Bloomsburg University, it is the unanimous opinion of this committee that Dr. Vaz is not making acceptable progress towards tenure here at Bloomsburg University.

The Evaluation Committee did not recommend Vaz for continued employment at Bloomsburg University.[58] By letter dated January 27, 2014, Vaz was advised that her contract would not be renewed with Bloomsburg University for the following year.[59] Vaz's contract ended at the end of the Spring 2014 semester.[60]

4. Dr. Patra and Dr. Vaz's EEOC Complaints

On December 29, 2012, Patra filed two complaints with the Equal Employment Opportunity

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[57] *See* Doc. 71 at ¶ 39.

[58] *See* Doc. 71 at ¶ 40.

[59] *See* Doc. 71 at ¶ 41.

[60] *See* Doc. 71 at ¶ 42.

Commission.[61] On March 11, 2013, October 31, 2013, and October 14, 2014, Patra filed additional EEOC complaints.[62] Vaz filed EEOC complaints on December 4, 2012, March 11, 2013, October 31, 2013, and October 14, 2014.[63]

C. Analysis

1. Title VII Employment Discrimination (Counts I, II, and V)[64]

A *prima facie* case of employment discrimination requires the following showing: "(1) the plaintiff belongs to a protected class; (2) he/she was qualified for the position; (3) he/she was subject to an adverse employment action despite being qualified; and (4) under circumstances that raise an inference of discriminatory action, the employer continued to seek out individuals with qualifications similar to the plaintiff's to fill the position."[65] "To prevail on a claim of disparate treatment under Title VII . . . the plaintiff must demonstrate purposeful discrimination."[66]

An adverse employment action is "one which is

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[61] Doc. 71 at ¶ 54.

[62] Doc. 71 at ¶ 55-57; Doc. 72-16

[63] Doc. 71 at ¶¶ 58-61.

[64] The Court analyzes Title VII discrimination (Plaintiffs' Counts I and II) and Pennsylvania Human Relations Act discrimination (Plaintiffs' Count V) claims under the same legal standard. *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 643-44 n.4 (3d Cir. 1998). The Court won't, then, discuss Plaintiffs' PHRA discrimination claim separately.

[65] *Sarullo v. U.S. Postal Serv.*, 352 F.3d 789, 797 (3d Cir. 2003).

[66] *Weldon v. Kraft, Inc.*, 896 F.2d 793, 796 (3d Cir. 1990).

serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." It is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." A court may find an adverse action if "an employer's act significantly decreases an employee's earning potential and causes significant disruption in his or her working conditions." By contrast, an employment action that involves "no reduction in pay and no more than a minor change in working conditions," and that "does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action."[67]

Here, the potential adverse actions are Defendants' non-renewal of Patra and Vaz's employment contracts, as well as the Evaluation Committee's negative fourth-year performance evaluations of Patra and Vaz, which factored into the non- renewal of their contracts.[68] Plaintiffs complain of other perceived adverse actions,[69] but,

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[67] *Torres v. Deblasis*, 959 F. Supp. 2d 772, 780 (E.D. Pa. 2013) (citations and quotations omitted).

[68] Defendants argue that these evaluations should not constitute adverse actions, but, as the above facts show, these evaluations were clearly accompanied by the "tangible job consequences" of Plaintiffs' non-renewal. *Shenk v. Pennsylvania*, No. 1:11-CV-1238, 2013 WL 1969311, at *9 (M.D. Pa. May 13, 2013). The first-year through third-year evaluations are distinguishable because, as Defendants point out, both Patra and Vaz had their contracts renewed after their third year of teaching.

[69] *See* Doc. 103 at 10-11.

unfortunately, their assertions are misplaced.[70] For example, reducing laboratory space is not an adverse employment action.[71] Teaching assignments that a plaintiff merely sees as unfair or undesirable are not adverse employment actions.[72] Being criticized or spoken to in a harsh, derogatory manner does not constitute an adverse employment action.[73]

But even assuming the existence of a *prima* facie case of discrimination, Plaintiffs here have not shown that Defendants' proffered non-discriminatory reasons for the evaluations and non-renewals were a pretext for discrimination. To discredit a proffered reason, a plaintiff must "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence, and hence infer that the employer did not act for the [stated] non-discriminatory reasons."[74] The

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[70] The Court acknowledges the United States Court of Appeals for the Third Circuit's statement that "the plaintiffs alleged numerous adverse actions in their counterstatement of facts." *Patra v. Pennsylvania State Sys. of Higher Educ.*, 779 F. App'x 105, 107 (3d Cir. 2019). Based on the record before the Court at this time, as well as the authorities cited below, the Court is compelled to hold that only the non-renewals and evaluations qualify as adverse actions.

[71] *Summy-Long v. Pennsylvania State Univ.*, 226 F. Supp. 3d 371, 417 (M.D. Pa. 2016), *aff'd*, 715 F. App'x 179 (3d Cir. 2017).

[72] *Dorsett v. Bd. of Trustees for State Colleges & Universities*, 940 F.2d 121, 123 (5th Cir. 1991).

[73] *Yarnall v. Philadelphia Sch. Dist.*, 57 F. Supp. 3d 410, 421 (E.D. Pa. 2014) (collecting cases).

[74] *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994).

plaintiff must "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action."[75] A plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[76]

Plaintiffs have not proven by a preponderance of the evidence that the legitimate reasons offered by Defendants were a pretext for discrimination. Plaintiffs have identified insensitive race-based comments and statements made by Defendants.[77] Yet the Court finds that these comments "are too isolated for a factfinder to reasonably find a nexus between the comments and any potential unlawful discrimination."[78] Further, Plaintiffs point out instances of Defendants holding non-Indian / non-Hindu faculty members to a different standard. But "[i]n the absence of such a significant degree of difference in qualifications that may arouse a suspicion of discrimination, [a district court should]

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[75] *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996)

[76] *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

[77] *See* Doc. 103-7 at ¶ 45A.

[78] *Johnson v. Penske Truck Leasing Co.*, 949 F. Supp. 1153, 1180 (D.N.J. 1996).

defer to the employer's hiring decisions."[79] The Court fails to find "such a significant degree of difference" here.

2. Title VII Retaliation (Counts III and V)[80]

"A prima facie case of illegal retaliation requires a showing of (1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action."[81] "To establish the requisite causal connection a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link."[82]

"Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test."[83] "This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful

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[79] *Steele v. Pelmor Labs. Inc.*, 642 F. App'x 129, 135 (3d Cir. 2016).

[80] As before, the Court treats Title VII and PHRA claims under the same legal standard.

[81] *E.E.O.C. v. Allstate Ins. Co.*, 778 F.3d 444, 449 (3d Cir. 2015) (Hardiman, J.) (internal quotation marks omitted).

[82] *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007).

[83] *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

action or actions of the employer."[84]

Defendants argue that Patra and Vaz cannot prove their *prima facie* case of retaliation because they have not proven a causal connection between (a) their filing of EEOC complaints against Bloomsburg and (b) the decision not to renew their contracts.[85] According to Defendants, the gist of their rationale was that Patra and Vaz "performed poorly and failed to meet contractual obligations."[86]

Plaintiffs have failed to prove the requisite causal connection. With respect to a "pattern of antagonism," any "disciplinary actions" that Plaintiffs have offered in support of a causation finding do not suffice because Plaintiffs have not offered a "basis for linking the disciplinary actions to [their] [protected activity]."[87] Further, Plaintiffs have not presented a "consistent, continuous course of discriminatory treatment" following the filing of their EEOC complaints.[88]

Finally, the Court finds that the ten months between Plaintiffs' first filing of their EEOC complaints and the Evaluation Committee's fourth-year negative evaluations is not an "unusually

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[84] *Id.*

[85] *See* Doc. 73 at 9-11.

[86] Doc. 73 at 16.

[87] *Wells v. Retinovitreous Associates, Ltd.*, 2016 WL 3405457, *3 (E.D. Pa. June 21, 2016) (J. Sánchez) (*citing Barton v. MHM Correctional Servs, Inc.*, 454 F. App'x 74, 79 (3d Cir. 2011).

[88] *Wright v. Shore Mem'l Hosp.*, No. CIV. 11-5583 JBS/AMD, 2013 WL 6080072, at *12 (D.N.J. Nov. 19, 2013).

suggestive temporal proximity."[89]

3. First Amendment Retaliation (Count VI)

A First Amendment retaliation claim requires "(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action."[90] Speech is "protected conduct" when "(1) in making it, [the plaintiff] spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have an adequate justification for treating the employee differently from any other member of the general public as a result of the statement he made."[91]

With respect to speaking as a citizen, when "public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[92] The critical question, here, is "whether

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[89] *See, e.g., Daniels v. Sch. Dist. of Philadelphia*, 776 F.3d 181, 198 (3d Cir. 2015) (ten months did not qualify as an "unusually suggestive temporal proximity"); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3d Cir. 2007) (three months did not qualify).

[90] *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006) (citations omitted).

[91] *Hill v. Borough of Kutztown*, 455 F.3d 225, 241-42 (3d Cir. 2006) (quotations omitted).

[92] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Plaintiffs argue that per *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014), *Garcetti* should not control my analysis. I disagree for two

the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." Further, "though speech may be protected even if it concerns information related to or learned through public employment, an employee does not speak as a citizen if the mode and manner of his speech were possible only as an ordinary corollary to his position as a government employee."[93] As the United States Court of Appeals for the Third Circuit analyzed in a recent decision, it is important whether "[*w*]*ho* [the plaintiff] spoke to, *what* she spoke about, and *why* she spoke at all" fell "outside the scope of her primary job duties and evidence citizen speech."[94] "A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social, or other concerns to the community."[95]

To show the requisite "causal link," a plaintiff must show that their "protected activity was a substantial motivating factor in the state actor's decision to take

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reasons. First, *Demers* is a decision from the United States Court of Appeals for the Ninth Circuit and is not binding on this Court. Second, the court in *Demers* limited its holding to speech concerning "teaching and academic writing." *Id.* at 411. Plaintiffs have made no showing that their speech here concerned their teaching or academic writing.

[93] *Javitz v. Luzerne Cty.*, No. 3:15-CV-2443, 2018 WL 1545589, at *9 (M.D. Pa. Mar. 29, 2018), *reconsideration denied*, No. 3:15-CV-2443, 2018 WL 2376096 (M.D. Pa. May 24, 2018), *and aff'd in part, rev'd in part and remanded sub nom. Javitz v. Cty. of Luzerne*, 940 F.3d 858 (3d Cir. 2019).

[94] *Javitz v. Cty. of Luzerne*, 940 F.3d 858, 865 (3d Cir. 2019).

[95] *Majewski v. Fischi*, 372 F. App'x 300, 303 (3d Cir. 2010).

the adverse action."[96] The plaintiff is not required to show that the protected activity was the sole, dominant, or primary factor in the decision.[97] "Defendants can counter this "by showing that [they] would have taken the same action even in the absence of the protected conduct."[98] At that point, Plaintiffs may only prevail by "discrediting [Defendants'] proffered reason for [the employment action], ... or by adducing evidence ... that discrimination was more likely than not a motivating or substantial cause of the adverse action."[99]

I find that Plaintiffs have not shown that their protected activity – commentary on Bloomsburg's graduation rates–was "a substantial motivating factor" in Defendants' decisions to issue the fourth-year negative evaluations and ultimately not renew Patra and Vaz's contracts. Just as Plaintiffs have failed to show that Defendants' proffered legitimate reasons for their actions were a pretext for discrimination based on race, religion, or national origin, Plaintiffs have failed to show that Defendants' proffered legitimate reasons for their actions were a pretext for retaliating against Plaintiffs' commentary

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[96] *Brightwell v. Lehman*, 637 F.3d 187, 194 (3d Cir. 2011) (citations omitted).

[97] *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000) (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977)).

[98] *Ambrose v. Twp. of Robinson*, 303 F.3d 488, 493 (3d Cir. 2002).

[99] *Montone v. City of Jersey City*, 709 F.3d 181, 202 (3d Cir. 2013) (citations omitted).

on graduation rates.[100] This absence of causation is dispositive.

4. Civil Conspiracy (Count VII)

A Section 1983 conspiracy claim requires "(1) the existence of a conspiracy involving state action; and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy."[101] A conspiracy without the accompanying deprivation of civil rights does not yield liability.[102] A conspiracy itself requires "a combination of two or more persons to do a criminal act, or to do a lawful act by unlawful means or for an unlawful purpose."[103]

Plaintiffs' conspiracy claim fails for two independent reasons. First, as I explain in the surrounding analysis, Defendants have not deprived Plaintiffs of their civil rights. Second, Defendants have not conspired as a matter of law. because they were not acting as "two or more persons"—they were all acting as agents of Bloomsburg University, an entity within the Pennsylvania State System of

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[100] *See Gorum v. Sessoms*, 561 F.3d 179, 188 (3d Cir. 2009) (plaintiff could only make inference that defendant was aware of protected activity); *O'Connell v. Williams*, 241 F. App'x 55, 58 (3d Cir. 2007) ("Because Appellant has not demonstrated that these actions would not have been taken against him had he not [engaged in protected activity], we agree with the determination of the District Court that he has not stated a claim for retaliation.").

[101] *Marchese v. Umstead*, 110 F. Supp. 2d 361, 371 (E.D. Pa. 2000).

[102] *See Holt Cargo Sys. Inc. v. Delaware River Port Auth.*, 20 F.Supp.2d 803, 843 (E.D. Pa. 1998)

[103] *Hammond v. Creative Fin. Planning Org., Inc.*, 800 F. Supp. 1244, 1249 (E.D. Pa. 1992).

Higher Education. "Conspiracy requires an agreement—and in particular an agreement to do an unlawful act—between or among two or more separate persons. When two agents of the same legal entity make an agreement in the course of their official duties, however, as a practical and legal matter their acts are attributed to their principal. And it then follows that there has not been an agreement between two or more separate people."[104]

5. Hostile Work Environment

Though Plaintiffs have not listed hostile work environment as a formal claim, the parties have, nonetheless, briefed the issue. "To succeed on a hostile work environment claim, the plaintiff must establish that 1) the employee suffered intentional discrimination because of his/her [race or religion], 2) the discrimination was severe or pervasive, 3) the discrimination detrimentally affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable person in like circumstances, and 5) the existence of *respondeat superior* liability."[105] "The first four elements establish a hostile work environment, and the fifth determines employer liability." "The statute prohibits severe or pervasive harassment; it does not mandate a happy workplace. Occasional insults, teasing, or episodic instances of ridicule are not enough; they do not 'permeate' the workplace and change the very nature of the plaintiff's employment." Factors to be weighed include "the frequency of the discriminatory conduct; its severity; whether it is

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[104] *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017).

[105] *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013).

physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." No one factor is dispositive, and the analysis must focus on the "totality of the circumstances."[106]

Defendants argue that Patra and Vaz have not established that any comments made about Patra and Vaz's race and religion were severe or pervasive enough to change the terms and conditions of their employment. Per Defendants, this failure dooms Patra and Vaz's hostile work environment claim.[107] I find that Defendants are correct; the comments that Plaintiffs list were "isolated" and "sporadic" and did "not demonstrate the pervasive atmosphere of harassment required to prove a Title VII violation."[108]

6. Plaintiffs' State Law Claims (Counts IV, V, VIII, IX, X, and XI)

Under Pennsylvania statute, sovereign immunity bars claims brought against the Commonwealth, its agencies, and its employees when they are acting within the scope of their office or employment.[109] Sovereign immunity applies to claims that plaintiffs assert against Commonwealth officials in their individual capacities. And it encompasses liability for

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[106] *Jensen v. Potter*, 435 F.3d 444, 451-52 (3d Cir. 2006) (Alito, J.).

[107] *See* Doc. 73 at 16-17.

[108] *King v. City of Philadelphia*, 66 F. App'x 300, 305 (3d Cir. 2003).

[109] 1 Pa. C.S. § 2310.10.

intentional torts.[110]

An employee's actions are within the scope of their employment if the actions are of the kind the employee was employed to perform, occurred substantially within the employee's authorized time and space limits, and are "actuated, at least in part, by a purpose to serve the master."[111] "Even willful misconduct does not vitiate a Commonwealth employee's immunity if the employee is acting within the scope of his employment, including intentional acts which cause emotional distress."[112]

Defendants argue that sovereign immunity protects them from Patra and Vaz's state law claims. According to Defendants, Defendants were within the scope of their employment during all of these events, and that triggers the protections of sovereign immunity.[113] Plaintiffs' opposition argument is disjointed and difficult for the Court to interpret. It appears to rely on the Eleventh Amendment of the United States Constitution, which provides a different grant of immunity than does the Pennsylvania statute I cite above,[114] Further, Plaintiffs' opposition

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[110] *See Shoop v. Dauphin Cty.*, 766 F. Supp. 1327, 1334 (M.D. Pa.), *aff'd*, 945 F.2d 396 (3d Cir. 1991).

[111] *Johnson v. Townsend*, 314 F. App'x 436, 440 (3d Cir. 2008)

[112] *Cooper v. Beard*, No. CIV.A. 06-0171, 2006 WL 3208783, at *16 (E.D. Pa. Nov. 2, 2006).

[113] *See* Doc. 73 at 23-24.

[114] Plaintiffs' statement that the Pennsylvania legislature has waived sovereign immunity for Pennsylvania Human Relations Act claims is incorrect in this context. "[T]he legislature waived the Commonwealth's immunity from suit under the PHRA—but only in state court." *Nelson v. Com. of*

argument does not contest that Defendants were acting within the scope of their employment during the relevant events here.[115]

Sovereign immunity bars Plaintiffs' Count IV (aiding and abetting discrimination and retaliation pursuant to the PHRA), Count V (discrimination and retaliation pursuant to the PHRA), Count VIII (retaliation in violation of Pennsylvania's Whistleblower Law), Count IX (defamation), Count X (intentional infliction of emotional distress), and Count XI (loss of consortium).

III. CONCLUSION

For the above reasons, Defendants' motion for summary judgment is granted. An appropriate Order follows.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
United States District Judge

Pennsylvania Dep't of Pub. Welfare, 244 F. Supp. 2d 382, 391 (E.D. Pa. 2002).

[115] *See* Doc. 103 at 21-22.

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2320

Harisadhan Patra; Petula Vaz,
Appellants

v.

Pennsylvania State System of High Education; Bloomsburg University of Pennsylvania; Frank T. Brogan, individually and in his official capacity as Chancellor; David Soltz, individually and in his official capacity as President of Bloomsburg University; Richard Angelo; Jorge E. Gonzalez; Ira Blake; Robert P. Mirande; Thomas R. Zalewski

(M.D. Pa. No. 4-14-cv-02265)

Present: McKEE*, SHWARTZ and RESTREPO, Circuit Judge

1. Request for Permission to File a Motion Within 10 days for Defendants' Fraud on the Court.

2. Motion Request for Permission to File a Motion Within 10 days for Defendants' Fraud on the Court.

3. Motion to Rule on Petition for Rehearing or Rehearing En Banc and Request/Motion for Permission to File a Fraud on the Court Motion with 7800 Words.

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* Judge McKee assumed senior status on October 21, 2022.

Respectfully,
Clerk/sb

ORDER

The foregoing motions are denied.

By the Court,

s/Theodore A. McKee
Circuit Judge

Dated: November 30, 2023

Sb/cc: All Counsel of Record
Harisadhan Patra
Petula Vaz