

APPENDIX

APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

16-3562

[Filed October 11, 2017]

JILL S. MEYER, M.D.,	)
<i>Plaintiff-Appellant,</i>	)
	)
v.	)
	)
DAVID J. SHULKIN, Secretary,	)
Department of Veterans Affairs,	)
<i>Defendant-Appellee.</i>	)

AMENDED SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT’S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of October, two thousand seventeen.

Present:

DEBRA ANN LIVINGSTON,
GERARD E. LYNCH,
DENNY CHIN,
Circuit Judges,

For Plaintiff-Appellant:

ALAN E. WOLIN, Wolin & Wolin, Jericho, New
York.

For Defendant-Appellee:

BRIDGET M. ROHDE, Acting United States
Attorney, VARUNI NELSON & JAMES R. CHO,
Assistant United States Attorneys, Eastern
District of New York, Brooklyn, New York.

Appeal from a judgment of the United States
District Court for the Eastern District of New York
(Irizarry, *C.J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED** that the
judgment of the district court is **AFFIRMED**.

Dr. Jill S. Meyer (“Meyer”) appeals from the
September 30, 2016 order of the United States District
Court for the Eastern District of New York (Irizarry,
C.J.), adopting the findings of a July 28, 2016 Report
and Recommendation (Tiscione, *M.J.*) and granting the

defendant's motion for summary judgment. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

A. Background

From December 1994 to February 2004, Meyer worked as a psychiatrist for the New Jersey Veterans' Affairs Medical Center (the "New Jersey VA Center"). Meyer received many formal reviews during her employment there. Although they contained some scattered praise, the reviews were mixed to negative, and regularly commented on Meyer's poor time management, documentation, and interpersonal skills. Two reports expressed concern that Meyer's "interpersonal conflicts and difficulties have . . . had significant adverse impact on treatment team efficiency." J.A. 372–73, 374–75. Another report similarly noted that Meyer "[n]eed[ed] [r]eview and [p]ractice" in her ability to "[b]uild[] an atmosphere of trust by being trustworthy," and "[p]rovid[e] support to [her] fellow employees in accomplishing [their] mission." J.A. 128. Meyer herself admitted during discovery that her evaluations at the New Jersey VA Center were "poor" and "not very good." J.A. 492, 493–94.

In February 2004, Meyer voluntarily resigned from her position with the New Jersey VA Center. In January 2009, she applied for a psychiatrist position in the VA Medical Center in Syracuse, New York ("the Syracuse VA Center"). During her interview, she met with Dr. Helen MacGregor ("MacGregor"), the Chief of Psychiatry, and Linda Zavalauskas ("Zavalauskas"), a human resources representative. Meyer mentioned her

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admittedly “poor” evaluations from the New Jersey VA Center in her discussion with MacGregor. Meyer recalls MacGregor responding that it “wasn’t a big deal.” J.A. 456.

Shortly after the interview, MacGregor and the Syracuse VA Center staff recommended Meyer for the vacant position. On January 29, 2009, the Syracuse VA Center asked the National Personnel Records Center to send over Meyer’s Official Personnel Folder (“OPF”). On February 6, 2009, the Syracuse VA Center’s human resources manager, Mark Antinelli (“Antinelli”), sent Meyer an offer letter. The letter explicitly noted that the offer was “contingent upon a suitability determination that will be made after [Meyer] completed the application for employment and any related documents,” and after “a review of [Meyer’s] references [and] credentials.” J.A. 113.

The Syracuse VA Center received Meyer’s OPF after Antinelli sent his letter. Antinelli and another Syracuse VA employee, Dr. Judy Hayman, reviewed Meyer’s OPF. After doing so, they both concluded that the offer letter should be retracted. Antinelli later explained in an affidavit that “after [he] reviewed [Meyer’s] OPF, [he] determined that the performance and interpersonal problems documented therein made [Meyer] unsuitable for employment at the Syracuse [VA Center]. Said another way, the employment offer was retracted due to her previous VA work record.” J.A. 427.

On February 24, 2009, Antinelli informed Meyer over the phone that he was retracting the offer due to the “low satisfactory rating[s] on her proficiency reports.” J.A. 46. Antinelli sent Meyer a formal

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retraction letter later that day. The letter of retraction stated: “After carefully reviewing [your OPF], it has been determined that the performance and interpersonal problems documented therein make you unsuitable for employment with our Medical Center.” J.A. 381.

On June 3, 2009, Meyer filed a complaint of employment discrimination. She claimed that Antinelli discriminated against her because of her age, religion, and national origin, and that Antinelli rescinded her offer not because of her performance evaluations, but as an act of reprisal for the numerous EEO complaints she filed during her employment at the New Jersey VA Center. On March 16, 2012, an administrative law judge dismissed Meyer’s claim, finding that Meyer had not carried her burden of demonstrating either discrimination or retaliation. Among other things, the judge noted that Meyer failed to establish that Antinelli even knew about her EEO activity when he decided to rescind the offer.

On November 12, 2012, Meyer filed the instant Title VII lawsuit in the Eastern District of New York, naming then-Secretary of the Department of Veterans Affairs Eric K. Shineski as the defendant.¹ Like her EEO complaint, Meyer’s complaint here alleges discrimination on the basis of age and religion, as well as retaliation. On or about April 6, 2015, the defendant moved for summary judgment. Meyer opposed this motion only as to her retaliation claim, and she abandoned her age and religious discrimination claims.

¹ Since then, Shineski has been replaced by David J. Shulkin, the current named defendant.

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The district court referred Meyer's case to a magistrate judge. In a commendably clear and thorough Report & Recommendation ("R & R"), the magistrate judge recommended that the district court grant the defendant's motion for summary judgment. On September 30, 2016, the district court adopted the R & R in its entirety, granted the defendant's motion for summary judgment, and dismissed Meyer's case. The question for our review is whether the district court erred in granting the defendant's motion for summary judgment on Meyer's retaliation claim.

B. Discussion

We review a district court's grant of summary judgment *de novo*. *McElwee v. Cty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012). In doing so, we "constru[e] the evidence in the light most favorable to the nonmoving party and draw[] all reasonable inferences in [her] favor." *Id.* 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). "A fact is 'material' . . . if it 'might affect the outcome of the suit under the governing law.'" *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 212 (2d Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). And a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Put another way, summary judgment is appropriate if, "even after drawing all inferences in the light most favorable to [the plaintiff], no reasonable jury could have issued a verdict in [her] favor." *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005).

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We analyze Title VII retaliation claims by using the three-step “burden-shifting evidentiary framework” that the Supreme Court outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Littlejohn v. City of New York*, 795 F.3d 297, 315 (2d Cir. 2015). At step one, the plaintiff must demonstrate “a *prima facie* case of retaliation.” *Hicks v. Baines*, 593 F.3d 159, 164 (2d Cir. 2010).² If the plaintiff successfully establishes a *prima facie* case of retaliation, then she has created a “presumption of retaliation” and we move to step two. *Id.* (quoting *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005)). At step two, the defendant must “articulate a legitimate, non-retaliatory reason for the adverse employment action.” *Id.* (quoting *Jute*, 420 F.3d at 173). If the defendant does so, then “the presumption of retaliation dissipates,” *id.*, and we move to step three. At step three, the plaintiff must demonstrate “that the desire to retaliate was the but-for cause of the challenged employment action,” and if she fails to do so, her claims are dismissed. See *Ya-Chen Chen v. City Univ. of New York*, 805 F.3d 59, 70, 73 (2d Cir. 2015) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013)).

We affirm the grant of summary judgment here because Meyer’s claims fail at step one. That is, even after viewing all of the admissible evidence in Meyer’s

² To do so, she must establish: (1) participation in protected activity; (2) the defendant’s knowledge of the protected activity; (3) an adverse employment action on behalf of the defendant; and (4) “a causal connection between the protected activity and the adverse employment action.” *Hicks*, 593 F.3d at 164 (quoting *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005)).

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favor, she still fails to carry her *de minimis* burden of showing that a rational finder of fact might conclude that her EEO activity caused Antinelli to rescind her offer. *See Hicks*, 593 F.3d at 164 (quoting *Jute*, 420 F.3d at 173). Accordingly, the district court did not err in granting the defendant's motion for summary judgment.

Meyer failed to offer any evidence to show a causal link between her EEO activity and Antinelli's decision. A plaintiff can establish *prima facie* causation "directly"—such as "through evidence of retaliatory animus directed against the plaintiff by the defendant"—or "indirectly," through circumstantial evidence. *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000). Ultimately, however, causation is a question of fact. *See Redd v. New York Div. of Parole*, 678 F.3d 166, 178 (2d Cir. 2012). Thus, a court may grant a defendant's motion for summary judgment in a Title VII retaliation suit only if there is "no genuine dispute" that the plaintiff's protected activity, so far as the evidence stands, was unrelated to the defendant's adverse employment action. *See Fed. R. Civ. P. 56(a)*. In this case, then, summary judgment is appropriate if "no reasonable jury" could find that Meyer's EEO activity caused Antinelli to withdraw Meyer's offer. *See Jeffreys*, 426 F.3d at 554.

We agree with the district court that no reasonable jury could find for Meyer on this issue. No rational finder of fact could conclude that Antinelli even *knew* about Meyer's EEO activity when he decided to terminate her offer. Meyer's sole pieces of evidence to support this claim are that: (1) she believes that she saw references to her EEO activity when she reviewed

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her OPF in preparing for litigation, and (2) she speculates that the chief of human resources at the New Jersey VA Center informed Antinelli about her EEO activity. But she offers no evidence to back up either of these claims.³ Antinelli swore under penalty of perjury that he was not aware of Meyer's EEO complaints. And the record contains a "true and correct copy" of Meyer's entire OPF. J.A. 51. Meyer does not point to a single page in this copy that references her EEO activity, and after a thorough review we could not find such a reference. In short, Meyer's evidence consists solely of the "unsubstantiated speculation," *Jeffreys*, 426 F.3d at 554 (quoting *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 428 (2d Cir. 2001)), and "conjecture," *id.* (quoting *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 188 (2d Cir. 1992)), that we have held do not suffice to defeat a motion for summary judgment, *see id.*; *see also Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008) ("Even in the [Title VII] discrimination context, . . . a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment.").

On appeal, Meyer argues as follows: (1) Zavalauskas and MacGregor knew about Meyer's poor reviews at the New Jersey VA Center, and decided to recommend that she be hired nonetheless; (2) accordingly, "nothing that was contained in her OPF concerning her job performance would have been a surprise"; and (3) thus,

³ On appeal, Meyer contends that "[t]he EEO complaints were part of [her] official file," and that her OPF contained correspondence on EEO-related matters. Pl.-Appellant's Br. at 26. Her sole citations to the record to support these assertions, however, are her own speculative statements in deposition testimony.

her EEO activity *must* have been mentioned in her OPF, since “[t]he only new fact that [Antinelli] could have ascertained upon receipt of the OPF was notice as to the extent of [her] prior EEO activity.” Pl.-Appellant’s Br. at 25. This argument, however, misses the mark. First, Meyer never disputes that the OPF in the record is a “true and correct copy” of her OPF, and, as stated above, the OPF in the record contains no reference to her EEO activity. Second, although Meyer did generally mention her evaluations to Zavalauskas and MacGregor, there is no indication that she told them about the poor marks she received for interpersonal skills. Antinelli specifically considered Meyer’s interpersonal skills—a description of which was laid out in Meyer’s OPF—to be a critical factor in his decision to rescind her offer. *See* J.A. 428 (“I do not believe [that Meyer] possesse[d] the interpersonal skills necessary to establish and maintain effective work relationships. The ability to establish and maintain effective work relationships are [*sic*] essential skills to successful employment.”). Meyer is therefore incorrect in claiming that “[t]he only new fact that [Antinelli] could have ascertained upon receipt of the OPF was notice as to the extent of [Meyer’s] prior EEO activity,” Pl.-Appellant’s Br. at 25.

In sum, because Meyer fails to carry her burden of establishing *prima facie* retaliation, the district court properly granted the defendant’s motion for summary judgment on her retaliation claim. We have considered Meyer’s remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

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FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

APPENDIX B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

12-CV-6337 (DLI) (ST)

[Filed September 30, 2016]

JILL MEYER,	)
Plaintiff,	)
	)
-against-	)
	)
ERIC K. SHINSEKI, Secretary,	)
Department of Veterans Affairs,	)
Defendant.	)

SUMMARY ORDER

**DORA L. IRIZARRY, Chief United States District
Judge:**

Plaintiff Jill Meyer (“Plaintiff”) brought this action against the Secretary¹ of the United States Department of Veterans Affairs (“Defendant”) alleging that she was the victim of unlawful retaliation, in violation of

¹ As noted in United States Magistrate Judge Steven Tiscione’s Report and Recommendation, pursuant to Federal Rule of Civil Procedure 25(d), Robert A. McDonald, the current Secretary of the Department of Veterans Affairs, has been substituted for former Secretary Shinseki. Report and Recommendation, Dkt. Entry No. 37 at 1.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (“retaliation claim”).² *See* Verified Complaint (“Ver. Compl.”), Dkt. Entry No. 1 at ¶¶ 41-46.

On November 6, 2014, Defendant moved for summary judgment on all three claims. *See* Mot. for Summ. J. (“S.J. Mot.”), Dkt. Entry Nos. 26-29. Plaintiff opposed Defendant’s motion on February 10, 2015. *See* Opp. to Mot. for Summ. J. (“Opp. Mot.”), Dkt. Entry Nos. 30-33. Defendant’s reply papers were served—and filed along with the S.J. Mot. and Opp. Mot.—on April 6, 2015. *See* Def.’s Reply Mem. in Further Supp. of Mot. for Summ. J. (“Def.’s Reply”), Dkt. Entry No. 34.

On June 16, 2016, this Court referred Defendant’s Motion for Summary Judgment to the Hon. Steven Tiscione, U.S.M.J. On July 28, 2016, Magistrate Judge Tiscione issued a thorough and well-reasoned Report and Recommendation (“R & R”) recommending that this Court grant Defendant’s Motion for Summary Judgment. *See generally* R & R. In sum, Magistrate Judge Tiscione determined that Defendant’s motion should be granted because: (1) Plaintiff failed to establish a causal relationship between her protected activities and the adverse employment action necessary to make out a *prima facie* retaliation claim (*i.e.*, the causation element); and (2) even if Plaintiff had made

² Plaintiff also alleged claims of religious discrimination in violation of the Civil Rights Act of 1964 and age discrimination in violation of the Age Discrimination in Employment Act. *See* Ver. Compl. at ¶¶ 47-67. However, in the memorandum of law opposing Defendant’s Motion for Summary Judgment, Plaintiff explicitly abandoned those causes of action. *See* Pl.’s Mem. of Law in Opp. to Def.’s Mot. for Summ. J. (“Opp. Br.”), Dkt. Entry No. 32 at 1 n.1.

out a *prima facie* retaliation claim, Defendant presented evidence supporting a legitimate, non-retaliatory reason for the adverse employment action and Plaintiff offered no evidence even remotely suggesting that the reason for her adverse employment action was pretextual. *See* R & R at 13-21 (causation), 21-29 (pretext). On August 12, 2016, Plaintiff timely filed objections to the R & R that were not objected to. *See* Pl.’s Objs. to R & R (“Objs.”), Dkt. Entry No. 38.

For the reasons set forth below, the R & R is adopted in its entirety.

DISCUSSION³

When a party objects to an R & R, a district judge must make a *de novo* determination as to those portions of the R & R to which a party objects. *See* FED. R. CIV. P. 72(b)(3); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). However, if a party “simply relitigates his original arguments, the Court reviews the Report and Recommendation only for clear error.” *Antrobus v. New York City Dep’t of Sanitation*, No. 11-CV-5434 (CBA) (LB), 2016 WL 5390120, at * 1 (E.D.N.Y. Sept. 26, 2016) (internal citations and quotation marks omitted); *see also Rolle v. Educ. Bus Transp., Inc.*, No. 13-CV-1729 (SJF) (AKT), 2014 WL 4662267, at *1 (E.D.N.Y. Sept. 17, 2014) (explaining that to allow “a rehashing of the same arguments set forth in the original papers . . . would reduce the magistrate’s work to something akin to a meaningless dress rehearsal.”) (internal citations and quotation

³ The Court assumes familiarity with the facts as outlined in the R & R. *See* R & R at 2-10.

marks omitted). Similarly, the Court will not consider “arguments, case law and/or evidentiary material which could have been, but [were] not, presented to the magistrate judge in the first instance.” *Santiago v. City of New York*, No. 15-CV-517 (NGG) (RER), 2016 WL 5395837, at *1 (E.D.N.Y. Sept. 26, 2016) (internal citation and quotation marks omitted). After its review, the district court may then “accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” FED. R. CIV. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1).

Here, Plaintiff’s objections are a prime example of attempting to relitigate issues that were briefed before, and decided by, a magistrate judge. To bear this out, one needs to only compare the arguments from the ten-page opposition memorandum submitted to Magistrate Judge Tiscione to those in the eight-page objections that were submitted to this Court. The arguments are identical. The following example speaks to the shortcomings of Plaintiff’s “objections.”

Attempting to create an issue of fact concerning Defendant’s non-discriminatory and non-retaliatory reasons for the adverse employment action, Plaintiff wrote:

There is a question of fact as to whether defendant had legitimate and non-retaliatory reasons to rescind [P]laintiff’s offer of employment and whether such reasons were pretextual.

Plaintiff categorically disputes the alleged legitimate and non-retaliatory reasons put forth

by [D]efendant. More specifically, based upon her recitation of the material facts, [P]laintiff disputes the assertion that her employment history with [D]efendant's New Jersey facility rendered her unsuitable. Quite the contrary, her record, as well as the assessments provided by supervisors in Syracuse indicate that [P]laintiff was very competent and that her New Jersey record was not sufficiently adverse to warrant the rescission [sic] of the offer, especially in light of the lack of candidates in the first place.

Opp. Br. at 5. With the exception of one word, the submission to this Court is a mirror image:

There is also a question of fact as to whether [D]efendant had legitimate and non-retaliatory reasons to rescind [P]laintiff's offer of employment and whether such reasons were pretextual.

Plaintiff categorically disputes the alleged legitimate and non-retaliatory reasons put forth by [D]efendant. More specifically, based upon her recitation of the material facts, [P]laintiff disputes the assertion that her employment history with [D]efendant's New Jersey facility rendered her unsuitable. Quite the contrary, her record, as well as the assessments provided by supervisors in Syracuse indicate that [P]laintiff was very competent and that her New Jersey record was not sufficiently adverse to warrant the rescission [sic] of the offer, especially in light of the lack of candidates in the first place.

Objs. at 5. In fact, Plaintiff asks even the same rhetorical question of both courts. *Compare* Opp. Br. at 9, *with* Objs. at 8. In both filings, Plaintiff argues that she sufficiently established causation. *Compare* Opp. Br. at 6-9, *with* Objs. at 1-4. In both filings, Plaintiff claims that she has exposed the proffered non-discriminatory reasons as a pretext. *Compare* Opp. Br. at 9-10, *with* Objs. 4-8. In both filings, the arguments are the same and the differences are, at best, aesthetic.

Turning first to causation, in both filings, the argument and the logical flaw is the same: Defendant provided undisputed evidence that it had no knowledge of Plaintiff's previous EEOC filings. Plaintiff merely proffered her own self-serving testimony, unsubstantiated by any of the evidence. *Compare* Opp. Br. at 8, *with* Objs. at 4. As Magistrate Tiscione explained, that argument cannot defeat Defendant's motion, since a plaintiff "may not merely argue that 'the jury might, and legally could, disbelieve the defendant,' without offering 'concrete evidence from which a reasonable juror could return a verdict in the plaintiff's favor.'" *Jian Long Li v. Li Qin Zhao*, 35 F. Supp.3d 300, 304 (E.D.N.Y. 2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see also* R & R at 18-21; *Rodriguez v. Westbury Pub. Schs.*, No. 13-CV-4976 (LDW) (SIL), 2015 WL 4459351, at *4 (E.D.N.Y. Jul. 15, 2015) ("The nonmoving party . . . must set forth concrete particulars showing that a trial is needed.") (internal citations and quotation marks omitted).

As for pretext, Plaintiff's objection to the R & R does little more than cite to additional documents in the record that further support the Magistrate Judge's

conclusion that Defendant proffered a legitimate, non-pretextual reason for refusing to rehire Plaintiff. For example, as to her poor work evaluations, she merely challenges their accuracy. *See* Objs. 5-7. This is unavailing. As the Magistrate Judge explained, whether the reports were accurate or not, the fact remains that the poor work evaluations provided to Defendant would have given it a legitimate reason to rescind her conditional employment offer. *See* R & R at 21-29; *see also Sanghvi v. Frendel*, No. 00-7538, 2000 WL 1804506, at *1-2 (2d Cir. Dec. 7, 2000) (explaining that “unsatisfactory job performance” provides a “legitimate, non-discriminatory reason[]” for not hiring an individual).

CONCLUSION

Upon due consideration and review, the objections are overruled; the R & R is adopted in its entirety; summary judgment is granted to Defendant; and this action is dismissed.

SO ORDERED.

Dated: Brooklyn, New York
September 30, 2016

/s/
DORA L. IRIZARRY
Chief Judge

App. 19

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

12-CV-6337 (DLI)

[Filed September 30, 2016]

JILL MEYER,	)
Plaintiff,	)
	)
-against-	)
	)
ERIC K. SHINSEKI, Secretary,	)
Department of Veterans Affairs,	)
Defendant.	)
	)

JUDGMENT

An Order of Honorable Dora L. Irizarry, United States District Judge, having been filed on September 30, 2016, adopting in its entirety the Report and Recommendation of Magistrate Judge Steven L. Tiscione, dated July 28, 2016; granting Defendant's motion for summary judgment in its entirety; and dismissing the action, with prejudice; it is

ORDERED and ADJUDGED that Defendant's motion for summary judgment is granted in its entirety; and that the action is dismissed, with prejudice.

Dated: Brooklyn, New York
September 30, 2016

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Douglas C. Palmer
Clerk of Court

by: Brenna B. Mahoney
Brenna B. Mahoney
Chief Deputy for
Court Operations

APPENDIX C

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

12-CV-6337 (DLI) (ST)

[Filed July 28, 2016]

JILL MEYER,	)
Plaintiff,	)
	)
-against-	)
	)
ERIC K. SHINSEKI, Secretary,	)
Department of Veterans Affairs,	)
Defendant.	)

REPORT AND RECOMMENDATION

TISCIONE, United States Magistrate Judge:

Dr. Jill Meyer commenced litigation against Defendant Eric K. Shinseki, in his role as the Secretary of the Department of Veterans Affairs,¹ in this District on December 26, 2012, alleging employment discrimination based upon age, religion, and retaliation for prior protected activities in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*,

¹ Pursuant to Fed. R. Civ. P. 25(d), the current Secretary of the Department of Veterans Affairs, Robert A. McDonald, has been substituted for former Secretary Shinseki.

and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* See Dkt. No. 1 (“Complaint”). Defendant moved for summary judgment on all three claims on April 6, 2015. See Dkt. No. 26.² The Honorable Dora L. Irizarry referred Defendant’s motion to me for a Report and Recommendation on June 16, 2016. For the following reasons, I respectfully recommend that Defendant’s motion for summary judgment be granted in its entirety.

I. FACTUAL BACKGROUND³

² In her opposition, Plaintiff concedes that Defendant’s motion should be granted as to her age and religious discrimination claims, but asserts that summary judgment must be denied with regard to the retaliation claim. See Dkt. No. 32 (“Plaintiff’s Opp.”) at 1 n.1.

³ Unless otherwise noted, the following facts are undisputed and are supported by admissible evidence. See *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (“The district court may not rely solely on the statement of undisputed facts contained in the moving party’s Rule 56.1 statement. It must be satisfied that the citation to evidence in the record supports the assertion.”) (citation omitted); see also *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001) (“[A] Local Rule 56.1 statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.”).

In addition, the Federal Rules of Civil Procedure provide that a party who asserts that a fact “cannot be or is genuinely disputed must support the assertion by” either citing to materials on the record or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1). When the summary judgment motion or opposition relies upon an affidavit or declaration, it “must be made on personal knowledge, set out facts that would be admissible in

A. Plaintiff's Employment with the Department of Veterans Affairs

Plaintiff worked as a psychiatrist for the Department of Veterans Affairs (the "VA") at the New Jersey Health Care System located in Lyons and East Orange, New Jersey (the "New Jersey VA Center"), from December 1994 to February 2004. *See* Dkt. No. 31 (Plaintiff's Response to Defendant's Local Rule 56.1 Statement ("56.1")), ¶¶ 5, 6; Dkt. No. 27 (Declaration of Orelia E. Merchant in Support of Defendant's Motion for Summary Judgment) ("Merchant Decl."), Ex. D (Plaintiff's CV) at 3. While working at the New Jersey VA Center, Plaintiff filed at least eight EEO complaints alleging discrimination based on her sex (female), religion (Jewish), race (white), national origin (Jewish), and retaliation for prior EEO activity. *See* Merchant Decl., Ex. S ("EEO Counselor's Report") at 2. In her written affidavit in the matter that led to the instant lawsuit, Plaintiff claimed that the EEO activity for which she is the "subject of reprisal" was a 2001 complaint that she "was not receiving equal pay as compared to [her] colleagues due to [her] age, religion and national origin." *See* Merchant Decl., Ex. Y ("Plaintiff's EEO Aff.") at 2; 56.1, ¶ 14. The VA received and responded to letters concerning or mentioning

evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). If a party fails to properly address another party's assertion of fact, the Court may, *inter alia*, "consider the fact undisputed for purposes of the motion," or "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

Plaintiff's 2001 EEO complaint. *See* Dkt. No. 30 ("Pl. Aff."), Ex. 4. However, Plaintiff has filed other EEO complaints as recently as 2002 and 2003. *See* EEO Counselor's Report at 2.

1. Plaintiff's Proficiency Reports

During her employment at the New Jersey VA Center, Plaintiff received a number of formal reviews. She received six reviews known as "Proficiency Reports" for periods from December 1994 to November 1995 (Merchant Decl., Ex. K ("95 Proficiency Report")); December 1995 to December 1996 (*id.*, Ex. L ("96 Proficiency Report")); December 1996 to December 1997 (*id.*, Ex. M ("97 Proficiency Report")); December 1999 to December 2000 (*id.*, Ex. N ("00 Proficiency Report")); December 2000 to December 2001 (*id.*, Ex. O ("01 Proficiency Report")); and December 2002 to December 2003 (*id.*, Ex. P ("03 Proficiency Report")).

For each Proficiency Report, there were five categories of evaluation (though Plaintiff was not reviewed in every category in each Proficiency Report) and a sixth category for overall rating. *See, e.g.*, '95 Proficiency Report. The five categories for evaluation were clinical competence, evaluating Plaintiff's diagnosis, therapeutic ability, patient management, and recordkeeping skills; educational competence, evaluating Plaintiff's effectiveness in teaching, monitoring, and coordinating educational activities; research and development, evaluating Plaintiff's ability to plan and execute a research program and communicate the results; administrative competence, evaluating Plaintiff's ability to supervise, effectiveness in planning, and administrative judgment; and personal qualities, evaluating Plaintiff's emotional

stability, dependability, relations with staff and community, and ability to elicit cooperation. *See, e.g.*, '96 Proficiency Report. Each category had five levels of performance, ranging from unsatisfactory to low satisfactory to satisfactory to high satisfactory to outstanding. *See, e.g.*, '97 Proficiency Report. As is relevant here, low satisfactory was defined as "Usually met reasonable expectations but performance sometimes marginal," while satisfactory was defined as "Fully met and sometimes exceeded expectations." *Id.* Each Proficiency Report also contained a narrative summary. *Id.*

In the '95 Proficiency Report, Plaintiff received low satisfactory ratings for administrative competence, educational competence, and personal qualities, but was deemed satisfactory overall and in clinical competence, and high satisfactory ("Usually exceeded reasonable expectations by a substantial margin") in research and development. *See* '95 Proficiency Report. It was reported that feedback about Plaintiff's teaching "has been generally less than satisfactory," that Plaintiff "has had significant difficulties in efficient planning, time management and developing a cohesive working relationship within the interdisciplinary group," and that "[t]here have been problems in relations with staff which has resulted in attempts at resolution." *Id.* Plaintiff "has the clinical training and potential for performance beyond what has been manifested thus far," but "[t]he most significant area of difficulty has been interpersonal, the inability to effectively organize and exhibit leadership abilities within the interdisciplinary team." *Id.*

In the '96 Proficiency Report, Plaintiff received low satisfactory ratings for administrative competence and personal qualities, but was deemed satisfactory overall and in two other categories. *See* '96 Proficiency Report. It was reported that Plaintiff's administrative competence "continues to be problematic," and her "planning, time management, [and] difficulties in developing a cohesive working relationship with the unit staff have been less than satisfactory." *Id.*

In the '97 Proficiency Report, Plaintiff received low satisfactory ratings for administrative competence, personal qualities, and overall. *See* '97 Proficiency Report. It was reported that Plaintiff "has continued to experience significant problems in establishing positive rapport with the interdisciplinary team. In conclusion, interpersonal conflicts and difficulties have persisted which has had significant adverse impact on treatment team efficacy. A transfer to outpatient clinic is being considered in an effort to reduce the above difficulties." *Id.* Plaintiff received two satisfactory ratings. *Id.*

In the '00 Proficiency Report, Plaintiff received low satisfactory ratings for administrative competence, personal qualities, and overall. *See* '00 Proficiency Report. It was reported that Plaintiff transferred units "as interpersonal conflicts and difficulties persisted which had significant adverse [impact] on the treatment team efficiency," but that even after her transfer, Plaintiff "has continued to experience problems in establishing positive rapport." *Id.* Plaintiff received two satisfactory ratings. *Id.*

Plaintiff was not reviewed for the period from December 2000 to December 2001 because she was on extended leave. *See* '01 Proficiency Report.

In the '03 Proficiency Report, Plaintiff received low satisfactory ratings for administrative competence, personal qualities, and overall. *See* '03 Proficiency Report. It was reported that Plaintiff "continues to have difficulties with organizing her scheduling and appointments of patients," and that Plaintiff's "quality of documentation, clinical presentations as well as interactions with other staff [*sic*] members continues to be at the low satisfactory level and rating." *Id.* Plaintiff received two satisfactory ratings. *Id.*

Plaintiff states that she disagreed and disagrees with the low satisfactory ratings she received (*see* Pl. Aff., ¶¶ 18, 20, 22, 30, 36), and states, "I do not believe that I had poor interpersonal skills" (*see id.* ¶ 37).

2. Plaintiff's Competency Assessments

Plaintiff was also reviewed on two occasions in reviews called "Competency Assessments." *See* Pl. Aff., ¶¶ 25-27, 32-34. The broad categories of competencies listed in the Competency Assessments were technical skills; personal mastery; interpersonal effectiveness; customer service; flexibility/adaptability; creative thinking; systems thinking; and organizational stewardship. *See, e.g.*, Merchant Decl., Ex. J (Plaintiff's Official Personnel Folder ("OPF")) at 13-19 ("'02 Competency Assessment"). These reviews were binary: Plaintiff was either given an S, for "Satisfactorily Meets (Area of Strength)" or N, for "Needs Review and Practice (Area for Development)." *Id.* Plaintiff received Competency Assessments in October 2000 and December 2002. *See* '02 Competency Assessment; OPF at 27-32 ("'00 Competency Assessment").

In the '00 Competency Assessment, Plaintiff satisfactorily met the vast majority of categories, including all technical skills, creative thinking, and customer service. *See* '00 Competency Assessment. However, Plaintiff needed review and practice in being “Interactive with patients and staff,” in “Creat[ing] a climate of collaboration rather than competition,” and for her “Ability to work effectively with a variety [*sic*] of professionals[,] agencies[,] and systems.” *Id.*

In the '02 Competency Assessment, Plaintiff also satisfactorily met the vast majority of categories, including all technical skills, personal mastery, flexibility/adaptability, and creative thinking. *See* '02 Competency Assessment. However, Plaintiff received a number of reviews indicating a need for review and practice in several categories, including some aspects of interpersonal effectiveness, customer service, systems thinking, and organizational stewardship. *Id.* For example, Plaintiff was deemed not to be satisfactory in “Giv[ing] courteous, accurate, and complete responses,” being “Courteous in all interactions with patients, visitors, and co-workers,” “Acknowledg[ing] that sacrifices may need to be made in some areas in order to improve overall performance,” and “Build[ing] an atmosphere of trust by being trustworthy.” *Id.*

Plaintiff alleges that she was reviewed on other occasions (*see* Pl. Aff., ¶ 35) but produces no additional records.

3. Plaintiff's Disciplinary Record, Other Performance Indicators, and Departure from the New Jersey VA Center

Plaintiff has provided two letters from her employment at the New Jersey VA Center indicating that she performed well. *See* Pl. Aff., ¶¶ 14-16. In a December 2000 letter, the Acting VISN3 Veterans Center Coordinator in Newark, Ann. M. Talmage, wrote to Plaintiff, "Without exception, all patients referred to you have expressed sincere appreciation for your compassion and responsiveness. . . . It is a privilege to work together with you in caring for 'he who has borne the battle.'" *See* Pl. Aff., Ex. 3. In a May 2001 letter, the associate chief of psychiatry at the East Orange location of the New Jersey VA Center, Dr. A.Y. Ghali, reports that Plaintiff "managed a high case load of patients and provided them with competent care," and that she "is cooperative and willing to extend her help when such is needed." *See id.*

In February 2002, Plaintiff was suspended from the New Jersey VA Center for three days. *See* Merchant Decl., Ex. Q (Notification of Personnel Action). According to the notification of personnel action, one reason for the suspension was "insubordination and failure to complete an assignment," and the document also indicates that Plaintiff was "AWOL from 11/22/01 to 2/19/02 & fail[ed] to follow proper leave procedures." *Id.*

In February 2004, Plaintiff voluntarily resigned from her position with the New Jersey VA Center. 56.1, ¶ 6; Pl. Aff., ¶ 11. At her deposition, Plaintiff recalled that her supervisor wanted her to stay in her position,

but Plaintiff declined to do so. *See* Pl. Aff., ¶ 13; Pl. Aff., Ex. 1 at 89:10-23.

B. Plaintiff's Application to the Syracuse VA Center

In approximately January of 2009, Plaintiff applied for a psychiatrist position at the VA Medical Center in Syracuse, New York (the "Syracuse VA Center"). *See* 56.1, ¶ 7; Pl. Aff., Ex. 1 at 143:9-23. That month, at her interview, Plaintiff met with at least four employees of the Syracuse VA Center: a human resource representative named Linda Zavalauskas, the chief of psychiatry named Dr. Helen MacGregor, and two male psychiatrists. *See* 56.1, ¶¶ 10, 11, 12, 19-21; Pl. Aff., Ex. 1 at 148:17-20, 150:4-14. According to Plaintiff, she told Ms. Zavalauskas and Dr. MacGregor about her reviews and her EEO activity at the New Jersey VA Center. *See* Pl. Aff., ¶¶ 58, 63; Pl. Aff., Ex. 1 at 204:6-22.

After the interview, the Syracuse VA Center requested Plaintiff's OPF from the central federal records center on January 29, 2009. *See* 56.1, ¶ 22; Merchant Decl., Ex. E. After Plaintiff's interview, Dr. MacGregor and the staff of the Syracuse VA Center recommended that Plaintiff be hired. *See* 56.1, ¶ 52; Merchant Decl., Ex. G. The human resource manager of the Syracuse VA Center, Mark Antinelli, conditionally offered the position to Plaintiff by letter on February 6, 2009, "contingent upon a suitability determination that will be made after you have completed the application for employment and any related documents," and "contingent upon a review of your references [and] credentials." *See* 56.1, ¶¶ 25, 26; Merchant Decl., Ex. I (Conditional Offer Letter).

The Syracuse VA Center subsequently received Plaintiff's OPF. *See* 56.1, ¶ 27; *see generally* OPF. After receiving Plaintiff's OPF, Mr. Antinelli and Dr. Judy Hayman, who would have been Plaintiff's supervisor if she had been hired, reviewed it. *See* Merchant Decl., Ex. Z ("Antinelli Aff.") at 2-3; 56.1, ¶ 35. According to Mr. Antinelli, he and Dr. Hayman agreed that the conditional offer of employment should be retracted because "after I reviewed [Plaintiff's] OPF, I determined that the performance and interpersonal problems documented therein made her unsuitable for employment at the Syracuse [VA Center]. Said another way, the employment offer was retracted due to her previous VA work record." *See* Antinelli Aff. at 3. Mr. Antinelli stated that he was the official responsible for retracting the conditional offer of employment. *See id.* at 2. Plaintiff has alleged that during her employment with the VA, she was always "in good standing," and that "nothing in her professional past . . . could legitimately disqualify her" because she was "satisfactorily employed for many years." *See* Complaint, ¶ 34.

On or about February 24, 2009, Mr. Antinelli spoke with Plaintiff by telephone to inform her that the conditional offer of employment had been retracted. *See* 56.1, ¶ 41. According to Plaintiff, Mr. Antinelli mentioned Plaintiff's "previous file and [her] previous activity at East Orange" with the New Jersey VA Center. *See* Pl. Aff., Ex. 1 at 168:13-21. Plaintiff states that Mr. Antinelli was aware of her prior EEO activity (as were Ms. Zavalauskas and Dr. MacGregor). *See, e.g.,* Pl. Aff., Ex. 1 at 77:3-6 ("A. [Mr. Antinelli] in the material that I saw, he was aware of the EEOC complaints, and that's why the offer was taken back.");

id. at 211:8-17 (Mr. Antinelli “knew my EEO history” because he “had contact with Mr. Terry Stewart, who was a Human Resource director” at the New Jersey VA Center). Plaintiff did not dispute that “Mr. Antinelli’s stated reason for retracting the conditional offer of employment was because she received low satisfactory rating[s] on her proficiency reports, and he did not give any other reason.” *See* 56.1, ¶ 64. Mr. Antinelli states that he was not aware of Plaintiff’s prior EEO activity. *See* Antinelli Aff. at 2.

By letter dated February 24, 2009, Mr. Antinelli formally retracted the Syracuse VA Center’s conditional offer of employment. *See* 56.1, ¶ 53; Merchant Decl., Ex. R (Retraction of Offer). The retraction letter stated, “In connection with the VA’s re-employment process, we received your previous employment records from the East Orange, New Jersey, VA Medical Center. After carefully reviewing these records, it has been determined that the performance and interpersonal problems documented therein make you unsuitable for employment with our Medical Center.” *Id.* Plaintiff has no knowledge of whether or by whom the position to which she applied was filled. *See* 56.1, ¶ 63.

II. PROCEDURAL HISTORY

On or about April 23, 2009, Plaintiff contacted an EEO counselor regarding her claim that she was discriminated against on the basis of age, national origin, religion, and reprisal when she was not selected for the position at the Syracuse VA Center. *See* 56.1, ¶ 68; Merchant Decl., Ex. S. On June 3, 2009, Plaintiff filed a formal EEO complaint for discrimination. *See* 56.1, ¶ 70; Merchant Decl., Ex. T. An EEO investigator

reported the results of her investigation (*see* Merchant Decl., Ex. V), and on March 16, 2012, an administrative law judge found that there were no genuine issues of material fact and that Plaintiff had not met her burden of proving discrimination (*see* Merchant Decl., Ex. W). The VA issued a final agency decision on March 22, 2012, adopting the administrative judge's finding that Plaintiff failed to prove discrimination, and the EEOC affirmed the VA's final order on October 4, 2012. *See* Merchant Decl., Ex. X. The instant litigation followed.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is proper when “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). The moving party bears the burden of “demonstrat[ing] the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When determining whether a genuine issue of fact exists on summary judgment, “the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (citations omitted); *see also* *Dickerson v. Napolitano*, 604 F.3d 732, 740 (2d Cir. 2010) (similar).

“[T]he moving party bears the initial burden of establishing that there are no genuine issues of material fact[;] once such a showing is made, the non-movant must ‘set forth specific facts showing that there is a genuine issue for trial.’” *Weinstock v. Columbia*

Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)). “A fact is ‘material’ for these purposes if it ‘might affect the outcome of the suit under the governing law,’” and “[a]n issue of fact is ‘genuine’ if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 212 (2d Cir. 2001) (quoting *Anderson*, 477 U.S. at 248). In a Title VII case like this one, this inquiry “often requires an assessment of individuals’ motivations and state of mind, matters that call for a ‘sparing’ use of the summary judgment device because of juries’ special advantages over judges in this area.” See *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir. 2001) (citations omitted).

Nonetheless, “[a] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment,” because “[m]ere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist.” *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (internal quotation marks and citation omitted). Moreover, “[t]he mere existence of a scintilla of evidence supporting the [non-movant’s] case will be insufficient [to defeat summary judgment]; there must be evidence on which the jury could reasonably find for the [non-movant].” *Anderson*, 477 U.S. at 252. If a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” then the Court must enter summary judgment. See *Celotex*, 477 U.S. at 322.

B. Title VII Retaliation

Title VII was created to help ensure “a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status.” *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (citation omitted). “The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of [Title VII]’s basic guarantees.” *Id.* Title VII provides that an employer may not “discriminate against any of his employees or applicants for employment . . . because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a).

Under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the burdens of production and burden of proof are allocated in Title VII cases in the following manner: first, the plaintiff must establish a prima facie case of discrimination; second, the defendant must articulate a legitimate, nondiscriminatory reason for the employment action; and third, the burden shifts back to the plaintiff, who must prove by a preponderance of the evidence that the reason offered by the defendant was a pretext for discrimination. *See Reeves*, 530 U.S. at 142-43. The plaintiff bears the ultimate burden of proof. *See Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

To establish a prima facie case of retaliation in the Second Circuit, a plaintiff must show that (1) she engaged in a protected activity; (2) the employer was

aware of this activity; (3) the employer took adverse action against the plaintiff; and (4) there is a causal connection between the protected activity and the adverse action. *See, e.g., Littlejohn v. City of New York*, 795 F.3d 297, 315-16 (2d Cir. 2015). With regard to establishing a prima facie case, the plaintiff's burden is *de minimis*, and the court's only role is to determine whether proffered admissible evidence would be sufficient for a rational factfinder to infer a retaliatory motive. *See Hicks*, 593 F.3d at 164.

IV. ANALYSIS

A. Plaintiff Fails to Establish a Prima Facie Claim of Retaliation

Three of the four elements of a prima facie claim of retaliation are not truly at issue in this case. First, Defendant does not dispute the first element, that Plaintiff engaged in protected activity by filing her EEO complaints. Second, Defendant does not dispute the third element, that the VA took adverse action against Plaintiff when the Syracuse VA Center retracted Plaintiff's conditional offer of employment. Moreover, while Defendant contends that the decision-maker in this case did not know of Plaintiff's EEO activity, this argument is essentially irrelevant to the question of whether Plaintiff has established the second element of a prima facie claim of retaliation: Defendant's awareness of Plaintiff's protected activity. Under settled Second Circuit precedent, "[n]either this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity." *Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 210 (2d Cir.

2006) (quoting *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000)). Insofar as the element of the employer's awareness is concerned, Plaintiff has clearly satisfied the requirement here because the VA received and responded to letters concerning or mentioning Plaintiff's 2001 EEO complaint. *See* Pl. Aff., Ex. 4. Plaintiff also attests that she informed at least two of her interviewers about her prior EEO activity when she was being considered for employment at the Syracuse VA Center. *See* Pl. Aff., Ex. 1 at 204:6-22; Pl. Aff., ¶ 63. This too suffices to establish a prima facie case as to the element of general corporate knowledge.

Thus, the sole element requiring more extensive discussion is the fourth element of a retaliation claim: causation. “[P]roof of causation can be shown either: (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant.” *Hicks*, 593 F.3d at 170 (quoting *Gordon*, 232 F.3d at 117).

As an initial matter, Plaintiff has failed to allege direct proof of retaliatory animus, and the record is bereft of any such explicit evidence. In addition, Mr. Antinelli, who made the decision to retract the conditional offer of employment, swore in an affidavit that he was not aware of Plaintiff's EEO activity. *See* Antinelli Aff. at 2. Similarly, Plaintiff has not attempted to provide circumstantial evidence of causation through an analysis of similarly situated

individuals. In fact, Plaintiff is not even aware of who (if anyone) filled the position at the Syracuse VA Center to which she applied. *See* 56.1, ¶ 63.

Therefore, Plaintiff's only proffered argument in support of causation is based on the timing of the adverse employment action vis-à-vis her protected activity. In the typical Title VII case, causation can be established circumstantially if the plaintiff's protected activity is "closely followed in time by the adverse action." *See, e.g., Summa v. Hofstra Univ.*, 708 F.3d 115, 128 (2d Cir. 2013) (quoting *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001)). Under this framework, there is no "bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship," but the Second Circuit has held that seven months is not too long to establish a causal relationship, while fifteen months or two years is too long. *See Bowen-Hooks v. City of New York*, 13 F. Supp. 3d 179, 229 (E.D.N.Y. 2014) (citing cases).

In this case, Plaintiff states that her protected activity "was far more extensive than defendant recognizes" and lasted past her 2001 EEO complaint to "at least" her February 2004 resignation from the New Jersey VA Center. *See* Plaintiff's Opp. at 7. However, even assuming that Plaintiff's protected activity lasted until February 2004, that is still five years before the conditional offer was retracted and nearly as long before Plaintiff even applied for the position at the Syracuse VA Center. Under general Title VII case law, such a large gap in time would be insufficient to establish causation based on the temporal proximity of the protected activity and the adverse action. *See, e.g.,*

Chang v. Safe Horizons, 254 F. App'x 838, 839 (2d Cir. 2007) (affirming summary judgment for defendant because plaintiff's termination "occurred almost one year after her complaint of discrimination, thus undermining any causal nexus based on temporal proximity") (citation omitted); *John v. Kingsbrook Jewish Med. Ctr./Rutland Nursing Home*, 2014 WL 1236804, at *20 (E.D.N.Y. Mar. 25, 2014) (granting summary judgment to defendant on retaliation claim because plaintiff's suspension and termination two years after initial complaint and ten months after last complaint were "too attenuated in this instance to establish that her termination was in retaliation for any protected activity") (citations omitted).

The context of this case, however, requires a slightly more nuanced analysis. Courts generally analyze the time period between a plaintiff's protected activity and the adverse employment action because in the vast majority of cases, that is the operative time period for ascertaining retaliatory intent and causation. This makes perfect sense when the plaintiff is still employed by the same employer he or she complains about, as the employer presumably receives notice of the protected activity contemporaneous with the activity itself. Indeed, that is exactly what occurred in this case, as the New Jersey VA Center was notified about Plaintiff's EEO complaints when they were filed. Thus, if Plaintiff had alleged retaliation on the part of the New Jersey VA Center, the typical causation analysis would apply and the large gap in time would preclude any inference of retaliation.

On the other hand, in a case where the protected activity was directed against a former employer, like it

was here, the operative time period for purposes of divining intent and circumstantial evidence of causation is the time that elapsed between the new employer (or prospective employer) *learning about* the plaintiff's protected activity and the adverse employment action. Thus, if Plaintiff here were able to establish that Mr. Antinelli learned of Plaintiff's prior EEO activity and then immediately retracted the conditional offer of employment, Plaintiff may well meet her burden of demonstrating circumstantial evidence of causation.⁴

Plaintiff's foremost explanation of how Mr. Antinelli could have known of her EEO activity is that her EEO complaints were part of her OPF. Plaintiff, in her deposition testimony and her affidavit, makes clear that she believes that her EEO complaints were accessed by the Syracuse VA Center because the documents that she reviewed with her attorney during discovery contained both her personnel file and her EEO complaints. *See* Pl. Aff., Ex. 1 at 77:3-21 ("A. [Mr. Antinelli] in the material that I saw, he was aware of the EEOC complaints, and that's why the offer was taken back." "Q. I understand that that's your belief. What is that based on?" . . . "A. The material that my attorney gave me of official files. It acknowledges my history of EEO activity." "Q. So your belief is based on your interpretation or understanding of the files that

⁴ Mr. Antinelli's knowledge is the threshold issue here because a plaintiff cannot rely on general corporate knowledge to establish the causation prong. *See Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 844 n.4 (2d Cir. 2013) ("[The employer] is correct that [plaintiff] cannot satisfy the causation prong through mere corporate knowledge").

you received from your attorney through the course of this action?” “A. Yes.”); *id.* at 75:7-13 (“Q. You’re saying your belief that your EEO claims were part of your official personnel file are based on the fact that part of the documents that you reviewed during the course of discovery were both your personnel files and your EEO complaints?” “A. Yes.”); *see also* Pl. Aff., ¶¶ 61, 62, 64.

Plaintiff’s deposition testimony and affidavit are certainly self-serving, but that alone is not sufficient reason to disregard competent evidence at this stage. *See, e.g., Lee v. Am. Int’l Grp., Inc.*, 31 F. App’x 764, 765 (2d Cir. 2002) (vacating summary judgment for defendant on age discrimination claim because plaintiff’s affidavit including alleged statement by defendant’s officer, who may have had a role in making adverse employment decision, “was competent evidence” that should have been “credited by the court in ruling on the motion” even though the officer filed her own affidavit expressly denying the statement); *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 57 & n.5 (2d Cir. 1998) (“There is nothing in [Rule 56] to suggest that nonmovants’ affidavits cannot – as a matter of law – suffice to defend against a motion for summary judgment. . . . To hold, as defendants ask us to do, that the nonmovant’s allegations of fact are (because ‘self-serving’) insufficient to fend off summary judgment would be to thrust the courts – at an inappropriate stage – into an adjudication of the merits. Such a radical change in the courts’ role would be inappropriate not just in the discrimination context, but everywhere.”) (citation omitted).

Ultimately, however, Plaintiff’s evidence is insufficient to defeat summary judgment, even at this

stage. Plaintiff's deposition testimony and affidavit are conclusory and speculative statements that are not borne out by the record: A true and correct copy of Plaintiff's OPF was submitted with Defendant's summary judgment motion (*see* Merchant Decl., Ex. J), and Mr. Antinelli, who actually made the decision to retract the conditional offer of employment, swore in an affidavit that he was not aware of Plaintiff's EEO activity (*see* Antinelli Aff. at 2). This is not the type of "he-said, she-said" factual dispute that would defeat a summary judgment motion. Plaintiff has failed to point to any actual "concrete evidence" of her EEO complaints being in the official personnel folder that the Syracuse VA Center received "from which a reasonable juror could return a verdict in [her] favor." *See Dister v. Cont'l Grp., Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988) (citation omitted). Instead, Plaintiff has made the type of conclusory and "self-serving statement, without direct or circumstantial evidence to support the charge," that is insufficient to create a genuine issue of material fact to defeat a motion for summary judgment. *See Risco v. McHugh*, 868 F. Supp. 2d 75, 99 (S.D.N.Y. 2012) (citation omitted). A close review of the deposition testimony that Plaintiff cites in support of her argument suggests that Plaintiff is simply confusing materials she reviewed with her attorney prior to her deposition, which may well have contained her EEO complaints, and her official

personnel file, which does not.⁵ *See, e.g.*, Pl. Aff., Ex. 1 at 77:3-21.

Similarly, Plaintiff's related contentions that Mr. Antinelli spoke about Plaintiff's EEO activity with Mr. Stewart, a human resources employee at the New Jersey VA Center, and that Plaintiff told Ms. Zavalauskas and Dr. MacGregor about her EEO activity so Mr. Antinelli must have learned of it, fare no better. Again, Plaintiff asks the Court to make several inferential leaps without sufficient support; the record before the Court is bereft of evidence of conversations between Mr. Antinelli and Mr. Stewart or between Mr. Antinelli and Ms. Zavalauskas or Dr. MacGregor (aside from references and allusions in Plaintiff's own statements), let alone evidence that would allow a reasonable factfinder to conclude that the content of such conversations included Plaintiff's nearly five-year old EEO activity.

For example, while Plaintiff states that a conversation between Mr. Antinelli and Mr. Stewart took place, she has absolutely no personal knowledge to support that assertion. Indeed, a close review of her deposition transcript reveals that Plaintiff's belief is wholly derived from the supposition that since her OPF was transferred from a human resources officer at the New Jersey VA Center to Mr. Antinelli, Mr. Antinelli

⁵ As discussed, Plaintiff's OPF was produced in this case and a true and correct copy is attached as Exhibit J to the Merchant Declaration. *See also* Merchant Decl., ¶ 11. Despite Plaintiff's objections (*see* 56.1, ¶ 58; Pl. Aff., Ex. 1 at 77:3-21 & 75:7-13), there is no reference to Plaintiff's EEO activity in the OPF; Plaintiff has not identified any specific document in the OPF that references her EEO activity and the Court can find no such reference.

and Mr. Stewart must have spoken about Plaintiff. *See* Pl. Aff., Ex. 1 at 211:9-24. This speculative conclusion is insufficient to establish even that such a conversation occurred at all, much less that it involved Plaintiff's EEO activity or in any way suggests a retaliatory motive or a connection between Plaintiff's prior EEO activity and the retraction of the conditional offer of employment. This is especially true in light of Mr. Antinelli's concrete, specific testimony that he was not aware of Plaintiff's prior EEO activity as of August 3, 2009, when Plaintiff's instant retaliation claim (among others) had already been accepted for investigation by the EEOC. *See* Antinelli Aff. at 2, 4.⁶

Even in a Title VII case that turns on an employer's intent or state of mind, summary judgment may be appropriate if the party resisting summary judgment relies upon "conclusory allegations and unsubstantiated speculation." *See Spector v. Bd. of Trustees of Cmty. Tech Colls.*, 316 F. App'x 18, 20 (2d Cir. 2009) (citation and internal quotation marks omitted); *see also Gross v. Nat'l Broad. Co.*, 232 F. Supp. 2d 58, 67 (S.D.N.Y. 2002) ("Mere conclusory statements, speculation or conjecture cannot by themselves create a genuine issue of material fact.") (citation omitted). Where an employer's intent, motivation, or state of mind is the issue, "summary judgment should be used sparingly," but a plaintiff "must nevertheless offer 'concrete evidence from which

⁶ In the same way, Plaintiff states that she told Ms. Zavalauskas and Dr. MacGregor about her EEO activity. *See* Pl. Aff., Ex. 1 at 204:6-22; Pl. Aff., ¶ 63. Plaintiff does not allege or establish that Ms. Zavalauskas or Dr. MacGregor spoke with Mr. Antinelli, let alone that they mentioned Plaintiff's EEO activity to Mr. Antinelli.

a reasonable juror could return a verdict in his favor.” *Dister*, 859 F.2d at 1114 (citations omitted); see *Krishnapillai v. Donahoe*, 2013 WL 5423724, at *9 (E.D.N.Y. Sept. 26, 2013). Plaintiff presents only speculation and conjecture, and therefore fails to provide concrete evidence from which a reasonable factfinder could infer a retaliatory motive.

Upon reviewing the entire record and making all reasonable inferences in favor of the non-moving party, the Court finds that Plaintiff’s reliance upon her own speculative and conjectural statements alone is insufficient to allow a reasonable factfinder to establish causation between her protected EEO activity and the retraction of the conditional offer of employment. Accordingly, I respectfully recommend that Defendant’s motion for summary judgment be granted on this ground.

B. Defendant’s Legitimate, Nonretaliatory Reason for Retracting the Conditional Offer of Employment

Assuming *arguendo* that Plaintiff had established a prima facie claim of retaliation, the burden would then shift to Defendant to articulate a legitimate, nonretaliatory reason for the adverse action. “This burden is one of production, not persuasion; it ‘can involve no credibility assessment.’” See *Reeves*, 530 U.S. at 142 (quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)). Further, this burden “is not a particularly steep hurdle” because “[i]t is not a court’s role to second-guess an employer’s personnel decisions, even if foolish, so long as they are non-discriminatory.” *Brierly v. Deer Park Union Free Sch. Dist.*, 359 F. Supp. 2d 275, 291 (E.D.N.Y. 2005).

Here, Defendant satisfies his burden by showing that the conditional offer of employment was retracted due to Plaintiff's low satisfactory reviews and disciplinary record at the New Jersey VA Center. It is uncontested that Plaintiff's OPF includes numerous Proficiency Reports where Plaintiff received low satisfactory ratings in several categories, indicating that Plaintiff "[u]sually met reasonable expectations but [her] performance [was] sometimes marginal." *See, e.g., '03 Proficiency Report.*

There are only Proficiency Reports in the record for 1994-95, 1995-96, 1996-97, 1999-2000, 2000-01, and 2002-03. In each of her last three Proficiency Reports with ratings,⁷ Plaintiff was deemed low satisfactory overall. Furthermore, of the categories (not including her overall rating) in which Plaintiff was evaluated in the five Proficiency Reports where Plaintiff received a rating, at least half of her ratings in each Proficiency Report were low satisfactory and Plaintiff only once (in her first Proficiency Report) received higher than a satisfactory rating in any category. The narratives in Plaintiff's Proficiency Reports were similarly underwhelming, consistently indicating that, among others, Plaintiff had issues communicating and working with her team: Plaintiff had "difficulties in developing a cohesive working relationship with the unit staff" (*see '96 Proficiency Report*) and had "significant problems in establishing positive rapport with the interdisciplinary team," causing a "significant adverse impact on treatment team efficacy" (*see '97 Proficiency Report*). Plaintiff also "had significant

⁷ Plaintiff was on extended leave in 2000-01 and was not evaluated. *See '01 Proficiency Report.*

difficulties in efficient planning, time management, and developing a cohesive working relationship within the interdisciplinary group” (see ‘95 Proficiency Report) and had continuing “difficulties with organizing her scheduling and appointments of patients,” leading the “quality of documentation, clinical presentations as well as interactions with other staff [*sic*] members to be at the low satisfactory level and rating” (see ‘03 Proficiency Report). Plaintiff was also suspended for 3 days “for insubordination and failure to complete an assignment. [Plaintiff was] AWOL from 11/22/01 to 2/19/02 & fail[ed] to follow proper leave procedures.” See Merchant Decl., Ex. Q (Notification of Personnel Action).

Under settled law, a job applicant’s “unsatisfactory job performance” constitutes “a non-discriminatory reason for [an employer’s] failure to hire” the applicant. See *Sanghvi v. Frendel*, 2000 WL 1804506, at *2 (2d Cir. Dec. 7, 2000) (citation omitted); see also *Strickland v. Cnty. of Monroe*, 2005 WL 1522802, at *3-4 (W.D.N.Y. June 28, 2005) (finding a legitimate, nondiscriminatory reason not to hire plaintiff whose work performance “had not been satisfactory” in an “apparently similar” position to that for which plaintiff applied, because “an unfavorable job performance in another position also justifies the failure to hire”).

Accordingly, Defendant has articulated a legitimate, nondiscriminatory reason for retracting the conditional offer of employment given to Plaintiff.

C. Plaintiff Fails to Establish Pretext

Once the defendant establishes a legitimate, nondiscriminatory reason for not hiring the plaintiff,

then the presumption of discrimination is rebutted and it “simply drops out of the picture.” *See St. Mary’s Honor Ctr.*, 509 U.S. at 511 (citation omitted). The plaintiff must then “prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reason, but were a pretext for discrimination.” *See Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 253). As the Supreme Court has held, “Title VII claims must be proved according to traditional principles of but-for causation,” which “requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2533 (2013); *see Kwan*, 737 F.3d at 845 (“The Supreme Court recently held [in *Nassar*] that a plaintiff alleging retaliation in violation of Title VII must show that retaliation was a ‘but-for’ cause of the adverse action, and not simply a ‘substantial’ or ‘motivating’ factor in the employer’s decision.”) (quoting *Nassar*, 133 S.Ct. at 2526, 2533).

“Therefore, during the final stage of the burden shifting framework, the plaintiff must show that retaliation was a but-for cause of the adverse employment action. . . . In order to establish but-for causation, Plaintiff would have to prove that [the adverse employment action] would not have occurred in the absence of a retaliatory motive.” *Dall v. St. Catherine of Siena Med. Ctr.*, 966 F. Supp. 2d 167, 195-96 (E.D.N.Y. 2013) (citations omitted); *see Moore v. Kingsbrook Jewish Med. Ctr.*, 2013 WL 3968748, at *20 (E.D.N.Y. July 30, 2013) (similar). “A plaintiff may prove that retaliation was a but-for cause of an adverse employment decision by demonstrating weaknesses,

implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action." *Kwan*, 737 F.3d at 846.⁸ Here, Plaintiff is unable to meet this burden because she cannot show that but for her EEO activity, the Syracuse VA Center would not have retracted its conditional offer of employment.

In this case, in reviewing the entire record, there is neither "incompatibility between explanations [n]or evidence to suggest that an initial explanation was fabricated." See *Richardson v. Bronx Lebanon Hosp.*, 2014 WL 4386731, at *17 (S.D.N.Y. Sept. 5, 2014)

⁸ In *Kwan*, the Second Circuit vacated summary judgment dismissing retaliation claims. Regarding the pretext component of the retaliation claim, the Second Circuit applied *Nassar* and noted that "but-for" causation does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive." *Kwan*, 737 F.3d at 846. Because "a plaintiff's injury can have multiple 'but-for' causes, each one of which may be sufficient to support liability," the plaintiff does not have a burden at this stage to show that retaliation "was the 'sole' cause" of the adverse action. *Id.* at 846 n.5 (citation omitted). Furthermore, the Second Circuit noted, "The determination of whether retaliation was a 'but-for' cause, rather than just a motivating factor, is particularly poorly suited to disposition by summary judgment, because it requires weighing of the disputed facts, rather than a determination that there is no genuine dispute as to any material fact." *Id.* Unlike in *Kwan*, as discussed in more detail below, Plaintiff here fails to demonstrate any "weaknesses, implausibilities, inconsistencies or contradictions" in Defendant's legitimate, nonretaliatory reasons for its action, such that "a reasonable juror could conclude that the explanations were a pretext for a prohibited reason." *Id.* at 846 (defendant proffered "shifting and somewhat inconsistent explanations for [plaintiff's] termination").

(citations omitted). The VA has consistently maintained that the conditional offer of employment was retracted because the contents of Plaintiff's official personnel folder, namely her performance reviews and disciplinary record, led Mr. Antinelli to conclude that Plaintiff was not a good fit for employment at the Syracuse VA Center. *See* Pl. Aff., ¶¶ 53-54 (“[Mr. Antinelli] made reference to getting the file from East Orange. He made reference to something about my previous file and my previous activity at East Orange. . . . He made reference to a low satisfactory rating on my 2001 proficiency [report].”); Pl. Aff., Ex. 1, at 168:16-169:2 (“Q. Did [Mr. Antinelli] give you any reason why?” “A. He might have mentioned, he might have mentioned getting my file from East Orange. He made reference to something about my previous file and my previous activity at East Orange.” “Q. And so he had indicated to you that he had possession of your personnel file from East Orange?” “A. Knowledge and possession, I believe he did have possession, yes.”); Merchant Decl., Ex. R (Retraction of Offer) (“In connection with the VA’s re-employment process, we received your previous employment records from the East Orange, New Jersey, VA Medical Center. After carefully reviewing these records, it has been determined that the performance and interpersonal problems documented therein make you unsuitable for employment with our Medical Center.”).⁹

⁹ *See also* Merchant Decl., Ex. V, at 3 (Mr. Antinelli “explained to [Plaintiff] that after review of her OPF, he determined that the performance interpersonal problems documented made her unsuitable for employment at the Syracuse [VA Center]. . . . He stated the decision was ‘... predicated upon her previous work record, which documented performance and interpersonal

In trying to establish pretext, Plaintiff essentially argues that the ratings and narratives in her Proficiency Reports were inaccurate, and that she actually performed well when she worked at the New Jersey VA Center, so the only reason that Mr. Antinelli would have had to retract the conditional offer of employment was retaliation. *See* Pl. Aff., ¶¶ 13-37; *id.*, Exs. 2 & 3. At the same time, Plaintiff does not dispute that a rating of low satisfactory means that her performance was “less than satisfactory.” *See* 56.1, ¶ 29. Furthermore, “it is well-established that a ‘[p]laintiff’s subjective opinion about her own performance is insufficient to give rise to a triable issue of fact regarding pretext.’” *See Pergament v. Fed. Express Corp.*, 2007 WL 1016993, at *12 (E.D.N.Y. Mar. 30, 2007) (quoting *Paddock v. Brockport*, 418 F.

problems that I thought made her unsuitable for employment at our Medical Center.’ . . . ‘In short, [Plaintiff’s] proficiency ratings outlined interpersonal problems, which in my view, made her unsuitable for employment at our Medical Center.’ Those documents include a SF-50 documenting a 3-day Suspension for insubordination, copies of [Plaintiff’s] proficiency reports documenting ratings of Low Satisfactory and problems with other staff members, and her Competency Assessments documenting area that ‘needs review and practice.’”); Plaintiff’s EEO Aff. at 3 (“I spoke with Mr. Antinelli. He told me that the offer was rescinded because of ‘what was in my file.’”); Antinelli Aff. at 3 (“I explained to [Plaintiff] that . . . after I reviewed her OPF, I determined that the performance and interpersonal problems documented therein made her unsuitable for employment at the Syracuse [VA Center]. Said another way, the employment offer was retracted due to her previous VA work record. . . . [The decision to rescind the offer of employment] was predicated upon her previous work record, which documented performance and interpersonal problems that I thought made her unsuitable for employment at our Medical Center.”).

Supp. 2d 288, 295 (W.D.N.Y. 2006)); *see also Milano v. Astrue*, 2008 WL 4410131, at *41 (S.D.N.Y. Sept. 26, 2008) (“Plaintiff’s further argument that, under two prior Directors, he had experienced ‘no problems’ serving as a Team Leader and had, in fact, received performance awards . . . is also insufficient to raise a genuine issue of disputed fact with respect to pretext.”) (citations omitted).

This is especially true here. Plaintiff’s disagreement with her Proficiency Reports while at the New Jersey VA Center is a step removed from relevance, because whether they were truly accurate or not, Mr. Antinelli would have only had the OPF, and the Proficiency Reports contained therein were a reasonable justification for the Syracuse VA Center not to hire Plaintiff. Plaintiff’s disagreement with her ratings in the Proficiency Reports, which she concedes were contained in her file and never changed despite her objections, simply does not establish a retaliatory motive on the part of the Syracuse VA Center.¹⁰ *See Bowen-Hooks*, 13 F. Supp. 3d at 232 (“Whether Defendants’ actions were unreasonable, unfair, or even

¹⁰ Plaintiff points to her Competency Assessments in an attempt to undermine the reasonableness of the justification for the Syracuse VA Center’s retraction of the conditional offer of employment. While these two Competency Assessments contain a higher ratio of satisfactory ratings than her Proficiency Ratings, the coding options have different meanings (“satisfactorily meets” is compared only to “needs review and practice” in the Competency Assessments) and, even more significantly, Plaintiff’s interpersonal and organizational issues that are identified in the Proficiency Reports are also reflected in the Competency Assessments. *See* ‘00 Competency Assessment; ‘02 Competency Assessment.

untrue, as Plaintiff alleges, without any showing of retaliatory motive, they do not support Plaintiff's retaliation claim.") (citations omitted); *see also Miller v. Nat'l Ass'n of Sec. Dealers, Inc.*, 703 F. Supp. 2d 230, 247 (E.D.N.Y. 2010) (in context of age discrimination claim, "[t]he relevant inquiry is not whether the performance-based justification for plaintiff's termination articulated by defendant is accurate or fair, but whether plaintiff can show any evidence that it was not the actual justification. . . . Plaintiff cannot accomplish this by stating his disagreement with his supervisors' negative assessment of his performance, 'even [if he] has evidence that the decision was objectively incorrect.'" (citations omitted).

Here, there are no disputed facts that could reasonably suggest retaliation. Plaintiff has not produced any evidence to show that retaliation was the true basis for the retraction of the offer. As discussed above, Plaintiff's conclusory allegations that her OPF referred to her EEO activity and that Mr. Antinelli must have spoken with a human resources officer at the New Jersey VA Center about Plaintiff's EEO activity are quintessential "speculation or conjecture as to the true nature of the facts" that "cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines*, 593 F.3d at 166 (internal quotation marks and citation omitted). Considering all of the evidence presented, Plaintiff has failed to present "concrete evidence from which a reasonable juror could return a verdict in [her] favor." *See Dister*, 859 F.2d at 1114 (citations omitted).

Put another way, considering the evidence as a whole, and resolving all conflicts in the evidence and

drawing all reasonable inferences in Plaintiff's favor, no reasonable trier of fact could find anything other than that the conditional offer of employment was retracted because of the well-documented history of Plaintiff's unsatisfactory job performance at the New Jersey VA Center. *See Floyd v. New York City Dep't of Educ.*, 2014 WL 171156, at *12 (S.D.N.Y. Jan. 13, 2014); *John*, 2014 WL 1236804, at *21 ("Defendant claims that it terminated Plaintiff for running a su-su. . . . Plaintiff has offered no evidence to refute this legitimate nonretaliatory reason nor has she presented any evidence from which any reasonable jury could find that but-for Plaintiff's complaint of discrimination, she would not have been terminated. Plaintiff has provided no evidence that her termination was motivated by retaliation rather than for her running a su-su. Plaintiff's retaliation claim is therefore dismissed.") (citation omitted); *see also Crawford v. Dep't of Investigation*, 324 F. App'x 139, 142 (2d Cir. 2009) ("[I]f the record conclusively reveal[s] [a] nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only a weak issue of fact [as to pretext] and there [i]s abundant and uncontroverted independent evidence that no discrimination ha[s] occurred,' then the employer is entitled to judgment as a matter of law.") (quoting *Reeves*, 530 U.S. at 148).

Without additional evidence that the Syracuse VA Center retracted the conditional offer of employment because of Plaintiff's EEO activity, Plaintiff cannot show that, but for that activity, the offer would not have been retracted. *See, e.g., Joseph v. Owens & Minor Distrib., Inc.*, 5 F. Supp. 3d 295, 320 (E.D.N.Y. 2014); *Dall*, 966 F. Supp. 2d at 196 ("[B]ased on the evidence in the record, a reasonable jury could not conclude that

had Plaintiff not filed a sexual harassment complaint against Birmingham, [Plaintiff] would not have been terminated after Defendant's investigation into Birmingham's complaint of sexual harassment against Plaintiff. Defendant's motion for summary judgment as to Plaintiff's retaliation claims is granted."); *see also* *Goins v. Bridgeport Hosp.*, 555 F. App'x 70, 74 (2d Cir. 2014) (affirming summary judgment for defendants where plaintiff "has not offered evidence to show pretext or to create a triable issue of material fact as to whether the negative review and termination 'would not have occurred in the absence of the alleged wrongful action or actions of the employer.'"") (quoting *Nassar*, 133 S.Ct. at 2533).

V. CONCLUSION

Plaintiff's retaliation claim cannot be sustained because she has failed to demonstrate prima facie causation between her protected EEO activity and the Syracuse VA Center's retraction of the conditional offer of employment, and because she has failed to establish that the legitimate, nonretaliatory reason provided by Defendant was pretextual. Moreover, Plaintiff has conceded that her age and religious discrimination claims must be dismissed. Therefore, I respectfully recommend that Defendant's motion for summary judgment be granted in its entirety.

VI. OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections.

Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 46 (2d Cir. 2002); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

SO ORDERED.

/s/ _____
Steven L. Tiscione
United States Magistrate Judge
Eastern District of New York

Dated: Brooklyn, New York
July 28, 2016