No. 16-2982

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

DR. SABINA BURTON,

Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, CASE NO. 2014-CV-274, THE HONORABLE JAMES D. PETERSON, PRESIDING

RESPONSE BRIEF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

Rules

Page

Regulations

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Dr. Sabina Burton's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. The law of retaliation under Title IX of the Education Amendments of 1972 and Title VII of the Civil Rights Act of 1964 requires that the plaintiff engage in protected activity and suffer a material adverse action. A material adverse action must be action sufficient to dissuade a reasonable person from engaging in protected activity. Petty slights and minor annoyances by superiors are not material adverse actions. Here, a university chair created a policy for students and faculty after Burton assisted a student who complained about another professor's alleged harassment. And the chair and a dean constructively criticized Burton's efforts to develop a cybercrime curriculum at the university. Did Burton fail to show that Defendant-Appellant Board of Regents of the University of Wisconsin System ("the Board") retaliated against Burton?
2. A retaliation claim also requires that the protected activity be the but-for cause of the material adverse action. Here, Burton engaged in protected activities when she filed her own complaints of discrimination and retaliation with the Wisconsin Equal Rights Division (ERD) and

U.S. Equal Employment Opportunity Commission (EEOC). Later, after a dean sent Burton a letter of direction, which Burton ignored, the dean filed a complaint against her with the chancellor. Did Burton fail to show that her complaints were the but-for cause of the dean's material adverse action in her Title VII retaliation claim?

3. On summary judgment, a district court must construe all facts in the light most favorable to the non-moving party, and draw all reasonable inferences in the non-moving party's favor when determining whether a genuine dispute of material fact exists. Did the district court follow summary judgment procedure in its summary judgment analysis?

STATEMENT OF THE CASE

I. Statement of Facts

Plaintiff-Appellant Dr. Sabina Burton began working at the University of Wisconsin-Platteville (UWP) in 2009 as a tenure-track assistant professor in the criminal justice department, which is part of the College of Liberal Arts and Education. (Dkt. 64:8 ¶ 24; Dkt. 62:1, 4 ¶¶ 2, 21.)[1] In January 2012, she was promoted to associate professor. (Dkt. 64:8 ¶ 26; Dkt. 62:5 ¶ 25.) At the time, Thomas Caywood was chair of the criminal justice department. (Dkt. 62:3 ¶¶ 13–14, 16.) Elizabeth Throop became dean of the College in June 2012. (Dkt. 62:2–3 ¶¶ 9–12.)

[1] "Dkt." refers to the district court record.

In October 2012, one of Burton's colleagues in the criminal justice department, Dr. Lorne Gibson, was lecturing on the subject of "breach experiments," which are essentially provocations designed to display social norms by violating them so that they can be studied. The professor demonstrated a breach experiment: in plain view of the class, he handed a female student a note that read "call me tonight" and included his cell phone number. (Dkt. 51-1; Dkt. 62:7 ¶¶ 40–41; Dkt. 64:36 ¶ 117.) The student did not recognize the exchange as a demonstration. Later that day, she sought out Burton to talk about the incident. (Dkt. 62:8–9 ¶ 44.) Burton then emailed the dean, alerting her to the apparent harassment of the student. (Dkt. 62:9 ¶ 45.) Throop suggested that the student speak to the dean of students and human resources director, Jeanne Durr. (Dkt. 64:36 ¶ 119.)

The next day, Burton followed up on the student's complaint and spoke with Caywood. Burton also forwarded to Caywood an email that she had received from the student the night before, with an image of the note. (Dkt. 62:9 ¶ 46.) Caywood spoke with Gibson that day, learned that the note had been part of a demonstration, and advised the professor to send an apology to the entire class, which he did. (Dkt. 62:9–10 ¶¶ 47–51.) When Caywood emailed Burton to explain the situation, Burton suggested that department faculty be informed about all such experiments in the future. Caywood responded that this was not necessary and that if students had

problems with faculty members, then they needed to come see him to sort out those problems.

The chancellor, the provost, and the human resources department became aware of this matter. (Dkt. 62:10 ¶¶ 53–54.) Over the next two days, Throop emailed Caywood to express her concerns with the experiment and with Caywood's response to it. (Dkt. 64:34 ¶¶ 127–128.) Throop also emailed Burton asking her to assure the student that the matter would be taken seriously and resolved as quickly as possible. (Dkt. 64:40 ¶ 131.) When Caywood asked to interview the student to find out what happened, the director of human resources told him to drop the issue because her office would handle it. (Dkt. 62:11 ¶¶ 57–58.)

In the following months, Caywood prepared a memo outlining the steps that faculty members should take if a student came to them with a problem concerning another faculty member. The memo instructed that students should first contact the faculty member in person to resolve the issue directly if the problem was along the lines of a low grade or poor attendance. For complaints about what a faculty member said or did, students were to come directly to Caywood. For behavior that could potentially amount to criminal conduct, faculty members were to contact campus police. Caywood circulated this memo to the members of the criminal justice department in mid-October 2012. (Dkt. 62:12–13 ¶¶ 62–63.)

At a department meeting in November 2012, Caywood reiterated his instruction that student issues should be brought to his attention so that harmless matters did not go all the way to the provost. (Dkt. 64:45 ¶ 145–146.) Burton felt that the announcement was a veiled public reprimand from her department chair, and she emailed the director of human resources at the university to request a meeting. She wrote that Caywood's comments were in retaliation against her for assisting the student and that she could not accept Caywood's "ongoing bitterness." (Dkt. 54-14.)

In the meantime, Burton had made efforts to develop a new curriculum in cybersecurity, which Burton, Caywood, and others had been working on since February 2012. (Dkt. 62:15 ¶ 74; Dkt. 64:12–14 ¶¶ 40–44, 46–48.) The process was lengthy. Establishing a new course required approval from the college curriculum committee, and then approval of the university curriculum committee. A new emphasis, program, major, or minor, would ultimately need approval from the Board of Regents. (Dkt. 62:14–15 ¶¶ 67–71.) As a preliminary step, Burton and Caywood had worked together on a grant application to the National Science Foundation to secure substantial funding for the cybersecurity curriculum, but the application was unsuccessful and they did not obtain the grant. (Dkt. 62:15–18 ¶¶ 77–79, 81–84.)

In the fall of 2012, Burton secured an informal offer from AT&T of private funding for the cybercrime program. (Dkt. 64:25 ¶ 81.) In the formal written

application to AT&T, Burton wrote that the university would use the money "[t]o support the development and implementation of a cyber-security curriculum for undergraduate and graduate students." (Dkt. 37-1:2.) The application also indicated that UWP was "in the process of developing a curriculum for cyber-security," and that a milestone of the project would be to develop and implement an undergraduate cyber-security course by February 2013. (Dkt. 37-1:2–3.)

Throop and Caywood were concerned with how Burton was portraying the status of the university's cybersecurity program. (Dkt. 62:19, 24–26 ¶¶ 88–92, 105–108; Dkt. 64:50–51 ¶¶ 158, 161.) In January 2013 (three months after the student harassment incident), an AT&T representative drafted a press release to announce the company's donation. The representative sent the release to Burton, who edited the draft and returned it the next morning. Burton attached her edits to an email on which Caywood and Throop were copied. As edited, the release referred to "the development of a new cyber security program," and to a "new course . . . expected to be available to undergraduate students beginning spring of 2012." (Dkt. 36-7; Dkt. 62:23–24 ¶¶ 101–103.) But Burton had not yet formally submitted any proposed cybersecurity courses to the college or university curriculum committee or to the university curriculum committee. (Dkt. 62:24, 28–29 ¶¶ 104–105, 114, 116.)

Throop responded to the draft press release in an email to Burton, Caywood, and AT&T's representative, writing that: "This press release concerns me deeply. There are a number of highly inaccurate—indeed, misleading—statements regarding the status of cyber-security curricula at the University of Wisconsin-Platteville. I am not confident that the ceremony being planned is wise given this." (Dkt. 53-16:1; Dkt. 62:23 –26 ¶¶ 103–104, 107–108.) Caywood also responded to Burton's email, noting similar concerns and cautioning Burton "on how [she was] presenting [her] ideas and visions in the media." (Dkt. 53-4:2; Dkt. 62:26–27 ¶¶ 109–111.) Later that same day, however, Throop emailed Burton and Caywood to explain that she and the AT&T representative had talked over the phone and agreed to additional revisions that would alleviate Throop's concerns. (Dkt. 42:21–22.) On January 30, 2013, AT&T presented $7000 to Burton in a public ceremony. (Dkt. 62:29 ¶ 118.)

Around the same time, Caywood and Throop also identified issues with two websites that Burton had created, both of which discussed a cybersecurity program at the university. Caywood and Throop felt that these websites inaccurately suggested that the university had developed or was actively developing a cybercrime program. (Dkt. 62:20–23, 27 ¶¶ 95–100, 112.) Throop tried to arrange a meeting with Burton and Caywood to discuss

the issues with the websites and the AT&T funding, but Burton refused to meet. (Dkt. 62:29 ¶ 119.)

In January 2013, Burton applied for tenure. She was granted tenure, effective for the 2013–14 academic year. (Dkt. 62:5, 28.) As a result, Burton enjoyed substantial job security: tenure extends for an unlimited period, and tenured faculty can be dismissed "only for just cause and only after due notice and [a] hearing." *See* Wis. Admin. Code § UWS 4.01.

In August 2013, Burton filed a discrimination charge with the ERD of the Wisconsin Department of Workforce Development. The charge alleged that: (1) Caywood had discriminated against her because she was a woman and retaliated against her for reporting the student harassment; (2) Throop and the human resources director had discriminated against her; (3) Throop had defamed her; and (4) the university had been deliberately indifferent to her grievances. In the summer of 2013, Caywood stepped down, and defendant Michael Dalecki became interim chair of the criminal justice department. (Dkt. 62:6, 82–83 ¶¶ 31–32, 364–366.)

Dalecki told Burton that she could not expect to file a lawsuit without suffering consequences, reminding her to think about how her actions would affect her chances of eventually becoming chair of the criminal justice department. (Dkt. 62:43–44 ¶¶ 164–167.)

Burton continued to disagree with Dalecki and others throughout the 2013–14 academic year and into the summer. The disagreements concerned committee appointments, personnel changes, and departmental management. (Dkt. 62:37–41 ¶¶ 144–156.)

Burton commenced this civil action by filing a complaint on April 14, 2014. (Dkt. 1.)

On October 24, 2014, Burton filed an intake questionnaire with the EEOC complaining about ongoing sex discrimination and retaliation by the university. (Dkt. 54-2:1–10.)

On October 28, 2014, Throop wrote Burton a letter of direction. The letter identified seven events that Throop described as showing "a consistent pattern of unprofessional and inappropriate behavior." (Dkt. 37-15:5.) Throop was concerned that Burton had:

- accused Dalecki of misconduct without a factual basis for doing so, and made these accusations public by emailing the entire department, the provost, and the chancellor;
- written an inflammatory email to the entire department incorrectly accusing a recently resigned colleague of unethical behavior and implying that she would ask the Wisconsin Attorney General to investigate;
- abruptly passed off responsibility for a visit from colleagues in Germany after having organized the visit;
- asked a new assistant professor who had been Burton's mentee to house-sit for Burton during the summer (which Throop felt was unprofessional, given Burton's seniority over the mentee);

- sent an email to a staff member using an unnecessarily accusatory and unprofessional tone;
- threatened a junior faculty member with consequences to his future bid for tenure because Burton incorrectly believed that he had improperly carried out his duties as the chair of a committee; and
- encouraged students to bypass the department chair with complaints against other professors because he was biased.

(Dkt. 37-15:4–5.) Throop concluded the letter by providing Burton with five specific directions, and she warned Burton that failure to follow the directions would result in disciplinary action. (Dkt. 37-15:5–6.) Throop's letter encouraged Burton to resolve any legitimate disagreements with colleagues. (Dkt. 62:54–55 ¶¶ 209–211.)

On November 12, 2014, Burton filed a grievance against Throop concerning the letter of direction. (Dkt. 37-15:7; Dkt. 62:55–56 ¶ 212.) Burton responded to the letter of direction in writing. She disagreed with Throop's summary of the relevant facts, and she flatly refused to accept any of Throop's directions. (Dkt. 62:55–57 ¶¶ 213–218; Dkt. 54-17:2; Dkt. 37-15:30–38.) In December, Burton completed her October 2014 intake questionnaire by filing a formal EEOC charge of discrimination. (Dkt. 54-2:16.)

Given Burton's written response and non-compliance with the letter of direction, Throop filed a complaint with the chancellor on January 5, 2015, pursuant to Wis. Admin. Code § UWS 6.01.4. Throop asked the chancellor to

write Burton a formal letter of reprimand that would be placed in her personnel file. (Dkt. 37-15.)

In December 2014, Throop incorrectly accused Burton of cancelling a class without permission. Throop emailed Burton about the canceled class, and she copied Dalecki. The email was terse, and it concluded by stating, "I will be forced to pursue disciplinary measures as a result." (Dkt. 43-3:2; Dkt. 62:58 ¶ 223.) Throop's information turned out to be incorrect: Burton had not cancelled class. (Dkt. 62:58 ¶ 224.) But rather than responding directly to Throop to explain, Burton sent an email to her class:

> Subject: I need your help!!!
>
> Dear Student,
>
> Dean Throop falsely accused me of canceling my class last Friday and wants to fire me over it. Please see the email below to see her extremely harsh and false accusations.
>
> I ask that you please reply to this email with your confirmation that I did teach my class last Friday, Dec 12, 2014 to prove to Dean Throop that I did not cancel the class. This is extremely important for me. Dean Throop wants to fire me. If you came to class on Friday, Dec 12, 2014 you know that I was there. Dean Throop wants to discipline me for not being at the class. She is just looking for reasons to "discipline" me. Your confirmation that I was in class on that day will convince her that she has her facts wrong and could save me from severe discipline that I don't deserve.
>
> Why does Dean Throop want to hurt me you ask? Well, since I am asking you for an honest response I will give you an honest answer to this question.
>
> On Oct 11, 2012 a female student came to me with a complaint of a sexual advance by a male faculty member. I helped the student report the complaint to Student Affairs. I have been mercilessly harassed since then for my actions in assisting that student.

> I have tried to keep students out of this conversation but the Dean has put me in a position where I need students to confirm my presence in my classes last Friday. I need your help. Please reply to this email as soon as you can with your confirmation that I was in class on Friday, Dec 12, 2014.
>
> Thank you so much.
> Below is Dean Throop's email to me:

(Dkt. 43-3:1–2; Dkt. 62:57–58 ¶¶ 225–226.)

Throop did not discipline Burton for cancelling class. (Dkt. 62:58 ¶¶ 223–224.)

II. Procedural History

Burton commenced this civil action on April 14, 2014. (Dkt. 1.) She then filed an amended complaint on August 29, 2014. (Dkt. 10.) After firing her attorney in December (Dkt. 13), two months later in February 2015 Burton reported suffering from an acute medical condition, which resulted in the court extending filing deadlines by several months (Dkt. 17.). Thereafter, the court granted Burton leave to file a second amended complaint, which she did file on September 11, 2015. (Dkt. 28.) After answering (Dkt. 31), Defendants then moved for summary judgment (Dkt. 32 to 45.). In response, Burton abandoned all claims save for retaliation claims under Title VII and Title IX against only Defendant Board of Regents. (Dkt. 57:4.) On March 18, 2016, the district court granted Defendants' summary judgment motion and entered judgment in their favor. (Dkt. 90 to 91.) After Burton's second attorney withdrew (Dkt. 95 to 97), Burton, then pro se, moved for reconsideration

(Dkt. 99 to 103.). The district court denied her motion on June 22, 2016. (Dkt. 106.) This appeal followed. (Dkt. 108.)

SUMMARY OF THE ARGUMENT

Burton attacks the district court's alleged narrowing of two of the three elements of her retaliation claims: protected activity and material adverse actions. Burton argues that she engaged in other protected activities and suffered more material adverse actions than the district court addressed. This, Burton claims, resulted in the district court erring in its analysis of the third and final element of a retaliation claim–causation. (Brief of Plaintiff-Appellee ("Pl-Ap. Br.") 20.) The problem with Burton's argument on appeal is that the district court addressed exactly what she raised. Burton may not raise new theories on appeal in an attempt to show error by the district court; they are forfeited. Burton also argues that the district court did not consider the facts in the light most favorable to her. But that is not so.

As to the merits of Burton's Title IX retaliation claim, the district court correctly held that her support of a student's harassment complaint was protected activity, but that she suffered no material adverse action as a result. That is because Burton put forward evidence of nothing more than petty slights and minor annoyances, which support no claim.

As to her Title VII retaliation claim, the district court correctly held that Burton engaged in two protected activities—filing her state and federal

agency discrimination complaints—and that she suffered material adverse action through Throop's letter of direction and formal complaint to the chancellor, but that these protected activities were not the "but for" cause of the material adverse actions. Rather, Throop's actions were the result of Burton's refusal to comply with the letter of direction, a legitimate non-discriminatory reason that Burton did not show to be pretext. The district court properly granted summary judgment to Defendants-Appellees. (Dkt. 90:23, 26.)

STANDARD OF REVIEW

Burton seeks review of a summary judgment decision, which this Court reviews de novo. *Carson v. ALL Erection & Crane Rental Corp.*, 811 F.3d 993, 995 (7th Cir. 2016). To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). The opposing party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c); *see also Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991). The opposing party must show there is more than a "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). If the evidence is "merely colorable"

or not "significantly probative," summary judgment is appropriate. *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1330 (7th Cir. 1989).

ARGUMENT

I. Summary judgment on Burton's Title IX retaliation claim in favor of the Board of Regents should be affirmed.

Burton first argues that she suffered retaliation in violation of Title IX. To establish a claim of retaliation under Title IX, a plaintiff must submit evidence from which a jury could reasonably conclude that: (1) she engaged in statutorily protected activity; (2) she suffered a material adverse action; and (3) a causal link between the two. *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 388 (7th Cir. 2012). A retaliation claim requires traditional but-for causation, not a lesser "motivating factor" standard of causation. *Id.*

Assuming, for the sake of argument, that Burton satisfied the first element (a protected activity) with her support of the student's harassment complaint, it would make no difference because her claim fails under the second element: Burton could not prove that she suffered a material adverse action. (Dkt. 90:13.) Neither Caywood's creation of a policy to address student allegations against professors, nor his discussion about it during a department meeting, was a material adverse action. Nor was any withdrawal of support by Caywood and Throop for Burton's cybersecurity initiative.

Further, her arguments that she engaged in other protected activities and suffered other material adverse actions than the district court considered either were abandoned or have been forfeited. And her causation argument can be ignored because the district court did not need to reach the issue. As a result, Burton cannot prove a retaliation claim under Title IX. The district court's decision should be affirmed.[2]

A. The Board of Regents did not retaliate against Burton on the basis of her support of a student's harassment complaint because she did not suffer a material adverse action.

1. Burton suffered no material adverse action because no action was taken that would dissuade a reasonable person from engaging in protected activity.

In her Title IX claim, Burton has failed to produce sufficient evidence to convince a reasonable jury that she suffered material adverse actions

[2] Burton has not argued that defendants-appellees Thomas Caywood, Elizabeth Throop, and Michael Dalecki are relevant parties on appeal. Before the district court, Burton abandoned her equal protection, Equal Pay Act, and Title VII discrimination claims against them. (Dkt. 57:4.) She proceeded only on claims of retaliation under Title VII and Title IX against the Board of Regents. (Dkt. 28:37–39; Dkt. 57:4; Dkt. 90:1, 11.) And before this Court, Burton continues to argue only her retaliation claims against the Board of Regents. (Pl-Ap. Br. 2, 17.) Thus, Burton has abandoned all claims but for two retaliation claims against defendant-appellee Board of Regents. *See Palmer v. Marion Cty.*, 327 F.3d 588, 598 (7th Cir. 2003) (holding that a claim not raised in district court brief in opposition to motion for summary judgment and not raised in appellate brief is abandoned); *see also* Fed. R. App. P. 28(a)(8)(A) (requiring the appellant's brief to include an argument containing "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

premised on her support for the student who claimed harassment by another professor. Rather, at most, she points to trivial impacts.

"Not everything that makes an employee unhappy is an actionable adverse action." *Stephens v. Erickson*, 569 F.3d 779, 790 (7th Cir. 2009). The materially adverse standard "must be objective" so as to be "judicially administrable" and to avoid using "a plaintiff's unusual subjective feelings" to determine whether injury has actually occurred. *Burlington N. & Santa Fe Ry. V. White*, 548 U.S. 53, 68–69 (2006).[3] "In a retaliation case, an adverse action is one that a reasonable employee would find to be materially adverse such that the employee would be dissuaded from engaging in protected activity." *Silverman v. Bd. of Educ. of Chi.*, 637 F.3d 729, 740 (7th Cir. 2011) (quotation omitted).

This Court has explained that material adverse actions are not "trivial harms." *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1106–07 (7th Cir. 2012). For example, "personality conflicts at work that generate antipathy and snubbing by supervisors and co-workers are not actionable." *Id.* at 1107. And statements that a colleague or supervisor is "trying to terminate" the plaintiff are similarly not actionable. *Id.*

[3] The legal standard for materiality is the same in Title IX and Title VII cases. *See Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 728–29 (7th. Cir. 2009).

These kinds of non-actionable alleged harms are precisely what Burton alleged here: (1) that Caywood publically criticized Burton in the months after her report of student harassment; and (2) that Caywood and Throop withdrew their support of Burton's efforts to develop a cybercrime curriculum. (Dkt. 57:10–19.) The district court correctly rejected Burton's arguments that these actions were materially adverse under Title IX. (Dkt. 90:15.)

a. Any criticism of Burton by Caywood was not a material adverse action.

Burton takes issue with Caywood's creation of a new policy and statement about it at a department meeting, which Burton took to be a criticism directed at her. (Pl-Ap. Br. 22.) This argument fails. Burton did not suffer a material adverse action when Caywood criticized her handling of the note incident.

Rather than showing a material adverse action directed at Burton, this incident reveals ordinary administrative processes. Caywood realized that part of the problem with the university's handling of the note incident was the lack of a policy that instructed faculty about how to handle student complaints directed to one professor that concern another professor. To remedy that, Caywood created a policy and distributed it at a departmental

meeting that occurred sometime around October 16, 2012. (Dkt. 62 ¶¶ 62–63.) The policy was not directed at Burton. As the district court explained in its analysis:

> But the evidence of record is that Caywood developed a policy for how faculty should handle issues that students had with professors because he believed that the lack of instruction was at least partly responsible for how the student incident had been handled—or "mishandled," to use Caywood's words. Dkt. 36, ¶ 31. The policy did not expressly denounce the way that Burton addressed the incident; it merely established a different procedure for responding to similar events in the future. Dkt. 53-6.

(Dkt. 90:16.)

Burton further complains that at a later department meeting Caywood spoke about his memorandum, requesting that student issues be brought to him rather than first going to the provost. Burton claims that Caywood said that someone "made a big deal out of a student complaint and before notifying him took it all the way to the provost." (Dkt. 54-14.)

That adds nothing of substance here. As the district court correctly concluded, "no reasonable jury could conclude that the lone statement would deter professors from helping students report sexual harassment in the future." (Dkt. 90:17.) The purpose was to give faculty a uniform procedure. (Dkt. 90:17.) Even if Caywood's general statement could even be construed as an oral rebuke to Burton, she still could not prevail. Rather, this Court has held that something much more formal—for example, two written reprimands—would not support the adverse action element.

See Lloyd v. Swifty Trans., Inc., 552 F.3d 594, 602 (7th Cir. 2009) (holding that two written reprimands were not adverse actions for purposes of a retaliation claim).

The district court properly described–and rejected–Burton's position that she suffered a material adverse action at the hands of Caywood:

> Burton's dissatisfaction with how Caywood presented the policy and treated her in the months following the student incident is essentially a complaint about the "petty slights or minor annoyances that often take place at work and that all employees experience," but which do not qualify as materially adverse actions. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Neither a bruised ego, nor a lone instance of public humiliation constitutes actionable retaliatory conduct. *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994); *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 885–86 (7th Cir. 1989). Burton therefore cannot base a Title IX retaliation claim on Caywood's response to how she handled the student incident.

(Dkt. 90:17–18.) Put simply, Burton did not suffer a material adverse action when Caywood created a new policy and discussed it at a department meeting.

b. The alleged withdrawal of support for Burton's cybersecurity initiative was not a material adverse action.

Burton claims that Caywood and Throop withdrew support for her efforts to develop a new curriculum in cybersecurity and that this constitutes a material adverse action. (Pl-Ap. Br. 23.) The argument is unpersuasive.

Burton complains about the handling of a press conference related to a grant she received from AT&T. She claims that when both Caywood and

Throop informed her of their concerns about the misrepresentations in the proposed AT&T press release in late January 2013, they damaged her reputation. Burton complains that Throop "rashly suggested that the AT&T grant ceremony be cancelled at the last-minute because of some minor wording that needed revision in the draft press release." (Pl-Ap. Br. 29.) Burton, however, suffered no damage as a result of the suggestion. To the contrary, Throop later confirmed that the press release, with the misstatements corrected, could be sent out as scheduled. And Burton received the $7000 grant, as scheduled, in a public ceremony attended by the provost and vice chancellor and other public officials. Burton never again applied for additional funding from AT&T, and there is no evidence in the record that Burton otherwise suffered from any compensable harm. (Dkt. 62:19–29, 31 ¶¶ 88–118, 124–125.)

During this time period, Caywood also sent an email to Burton about the press release and her representations about the university's cybersecurity curricula on Burton's websites. (Dkt. 62:27–28 ¶ 112.) He reasonably explained that he was concerned about how Burton was presenting her initiative to the public. Caywood did not send the email to the press, her peers, or to the general public. Nor was his explanation inaccurate. Again, this feedback had no adverse consequence: she later received tenure. (Dkt. 90:18–19; Dkt. 62:5, 28.)

Burton's argument that Caywood's and Throop withdrawal of support for her cybersecurity initiative was a legally significant material adverse action is unsupported by the evidence.

2. The district court properly considered only the two alleged material adverse actions asserted by Burton.

Burton complains that the district court considered only the two adverse actions discussed above, which she advanced before the district court. (Pl-Ap. Br. 22.)[4] (Dkt. 57:10–19; Dkt. 90:14.) On appeal, for the first time in this case, she provides examples of several other actions that she argues, in combination, could dissuade a reasonable person from engaging in protected activity. (Pl-Ap. Br. 22–25.) In other words, she argues that *all* these actions by various university staff constitute a material adverse action against her. (Pl-Ap. Br. 22–28.) Burton's new "combination" argument should be rejected because it was not raised in the district court. *See Milligan*, 686 F.3d at 386 ("[T]he forfeiture doctrine applies not only to a litigant's failure to raise a general argument . . . but also to a litigant's failure to advance a specific point in support of a general argument . . . ."); *G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012) ("We have repeatedly held that a party waives an argument by failing to make it before the district court.")

[4] Because Burton limits her appellate brief to a discussion about material adverse actions as to her *Title IX* retaliation claim, the Board asserts, as explained below, that Burton has not put forth a material adverse action argument related to her Title VII claim, and has therefore forfeited it.

To the extent she claims that she did raise these other adverse action examples before the district court, it does not matter because she did not raise them as part of her *Title IX* retaliation claim. She only raised some of them as part of her separate *Title VII* retaliation claim. (Dkt. 57:23–30.) She cannot raise arguments in support of her Title IX retaliation claim on appeal that she did not raise them before the district court. *See Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 600 (7th Cir. 2014) ("The non-moving party waives any arguments that were not raised in its response to the moving party's motion for summary judgment.").

Further, Burton's examples are just more of the same petty slights that are not materially adverse, such as Caywood opposing Burton's bid for tenure (Pl-Ap. Br. 23) and members of the administration allegedly saying "nasty things" about her in front of a group of university students and staff (Pl-Ap. Br. 24-25.). *See Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68.

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Because Burton did not suffer a material adverse action, summary judgment in favor of the Board on Burton's Title IX retaliation claim was proper.

B. The district court properly considered only the protected activity asserted by Burton—assistance to the student who filed a complaint about the "call me" note.

In an attempt to save her Title IX retaliation claim, Burton argues that the district court's causation analysis was too narrow because it was limited to one particular protected activity: her support for the student's alleged harassment by Gibson's "call me" note. (Pl-Ap. Br. 16, 20–21.) But none of her other asserted protected activities were raised in the district court, and so these arguments should be rejected out of hand. Further, they add nothing legally significant, anyway, because it remains the case that Burton suffered no material adverse action.

For the first time on appeal, Burton asserts that she engaged in four additional protected activities other than her assistance to the student: (1) a November 17, 2012, email to human resources director Jeanne Durr, in which Burton requested a meeting to discuss her allegations of retaliation by Caywood for her reporting of the "call me" note; (2) a December 10, 2012, email to Throop accusing Caywood of discrimination against her and other women on the basis of sex and of retaliation for having reported the note; (3) a March 2013 grievance she filed with the Complaints and Grievance Commission against Caywood "for retaliation on the basis of sex" by

withdrawing support for her cyber security initiative before Burton was to receive the AT&T grant. (Pl-Ap. Br. 20–21.)

None of these additional arguments were preserved. To the district court, Burton argued that her only protected activity was her assistance to the student who filed the harassment complaint. (Dkt. 57:6–9.) The law is well settled that she cannot raise any new arguments on appeal. This Court has "repeatedly held that a party waives an argument by failing to make it before the district court." *G & S Holdings*, 697 F.3d at 538; *see also Liberles v. Cook Cty.,* 709 F.2d 1122, 1126 (7th Cir. 1983) ("It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal."). Because she did not raise these protected activity arguments below, she has forfeited them on appeal.

It is true, however, that Burton referenced the December 10, 2012, email she sent to Throop (Dkt. 53-57) in her summary judgment brief (Dkt. 57:9.). But she did not develop the argument that this single email is a separate or distinct protected activity apart from her assistance to the student. Indeed, she concluded the paragraph in which she cited this email by once again referencing her "assistance to the student." (Dkt. 57:9.) "Perfunctory and undeveloped arguments are waived, especially when, as here, a party fails to

develop the factual basis of a claim on appeal and, instead, merely draws and relies upon bare conclusions." *Campania Mgmt. Co. v. Rooks, Pitts & Poust,* 290 F.3d 843, 852 n.6 (7th Cir. 2002).

Burton's argument that the district court did not consider other protected activities in which she engaged is too late. Further, even if these other bases were properly part of the case, it would not matter because it remains the case that Burton suffered no material adverse action, as discussed above.

C. The district court did not need to address the third element of Burton's Title IX retaliation claim--causation.

The district court did not address the third element in Burton's Title IX retaliation claim—causation—because it held that Burton failed to adduce evidence of a materially adverse action. (Dkt. 90:19.) That conclusion, alone, meant her claim failed. Thus, Burton's arguments about causation lack a proper starting point: they are premised on a nonexistent material adverse action. Rather, her causation arguments are based on a combination of alleged protected activities and material adverse actions which she did not raise before the district court in the first instance, and which appear to combine her Title IX and Title VII claims. (Pl-Ap. Br. 28–31.) Burton's scattershot approach—largely based on allegations not properly at issue in this appeal—goes nowhere.

Even if Burton had presented a coherent theory, the Board disagrees that any theory would support causation and so does not concede the point. Rather, in the event this Court otherwise reverses the district court and finds that Burton suffered a material adverse action as to her Title IX retaliation complaint, disputes about causation would properly be decided by the district court on remand, as that issue was never reached in these proceedings.

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Because Burton did not produce sufficient evidence to allow a jury to reasonably conclude that she suffered a material adverse action as a result of assisting the student who filed a complaint about the "call me" note, she cannot survive summary judgment as to her Title IX retaliation claim. The district court's decision should be affirmed.

II. Summary judgment on Burton's Title VII retaliation claim in favor of the Board of Regents should be affirmed.

Burton also pursued a second retaliation claim, one under Title VII, regarding her own discrimination and retaliation complaints filed with the ERD and EEOC. The elements of a retaliation claim under Title VII are identical to a Title IX retaliation claim. To establish a claim of retaliation under Title VII, a plaintiff must submit evidence from which a jury could reasonably conclude that: (1) she engaged in statutorily protected activity; (2) she suffered a material adverse action; and (3) a causal link between the

two. *Cung Hnin v. TOA (USA), LLC*, 751 F.3d 499, 508 (7th Cir. 2014) (Title VII). Traditional but-for causation is required. *Id*.

Much like with her Title IX claim, Burton claims that the district court's decision that she could not prove causation in her Title VII retaliation claim was erroneous because, in part, the court limited its protected activity (Pl-Ap. 17–20) and material adverse action analyses (Pl-Ap. 21–28.). However, Burton's argument wholly ignores the fact that she raised only subsets of her political activity and material adverse action arguments before the district court. Thus, the district court properly limited its causation analysis to the theories actually raised, and correctly concluded that Burton could not prove that causation existed. This Court should affirm.

A. Burton has preserved only limited theories on appeal regarding protected activities and material adverse actions.

The district court properly based its no but-for causation holding on the two protected activities and two material adverse actions that Burton argued in the district court. Any other theories that Burton attempts to raise on appeal are forfeited.

1. The district court properly considered the protected activities raised by Burton—the August 13, 2013, ERD complaint, and the December 9, 2014, EEOC charge.

Burton has only preserved limited theories related to the protected activities prong of her retaliation claim.

Burton states that the district court "did not consider" whether she engaged in any protected activities other than the complaint filed with the ERD on August 13, 2013, and the charge of discrimination filed with the EEOC on December 9, 2014. (Pl-Ap. Br. 18–19.) Specifically, she complains that the district court ignored: (1) a December 10, 2012, email to Dean Throop accusing Caywood of discrimination against her and other women on the basis of sex; (2) a March 2013 grievance she filed with the Complaints and Grievance Commission against Caywood "for retaliation on the basis of sex"; (3) a June 6, 2014, email to the Criminal Justice Department of the university alleging that Dalecki gave Burton lower marks on teaching performance due to her sex; and (4) an October 20, 2014, charge of discrimination filed with the EEOC alleging retaliation and discrimination based on her sex. (Pl-Ap. Br. 18–19.)[5]

[5] Notably, on appeal Burton does not argue that the filing of this lawsuit with the Western District of Wisconsin was a protected activity under Title VII (Pl-Ap. Br. 17–20), and therefore, she has abandoned the argument.

The reason the district court did not address these four alleged protected activities is simple. Burton did not raise them. Thus, she did not give the district court the opportunity to address them. Indeed, her summary judgment response brief did not expand her "protected activities" argument beyond two—the August 13, 2013, ERD complaint and the December 9, 2014, EEOC charge. (R. 57:22–23.) This means she forfeited these arguments below and cannot raise them for the first time on appeal. *See Liberles,* 709 F.2d at 1127; *Milligan*, 686 F.3d at 386; *G & S Holdings LLC*, 697 F.3d at 538.

Consequently, going forward with the Title VII retaliation analysis, this Court should only consider Burton's August 13, 2013, ERD complaint and the December 9, 2014, EEOC charge as protected activities, just as the district court did.

2. The district court properly considered the material adverse actions raised by Burton and limited them to Throop's October 28, 2014, letter of direction and January 5, 2015, complaint to the chancellor.

As to the material adverse actions prong, it is undisputed that only two actions are relevant to Burton's claim. They are: (1) Throop's October 28, 2014, letter of direction (Dkt. 62:54 ¶ 209; Dkt. 37-15:4–6); and (2) Throop's January 5, 2015, complaint to the chancellor pursuant to Wis. Admin. Code § UWS 6.01 (Dkt. 37-15.). These are the only material adverse actions at issue in this appeal. That is because the Board does not

disagree with the district court's conclusion that these two actions are materially adverse. (Dkt. 90:22.) And Burton has either abandoned or forfeited any other alleged material adverse actions.

Burton claims for the first time on appeal that Dalecki removed Burton's assignment to a mentor a young professor, Dr. Valerie Stackman, without explanation. (Pl-Ap. Br. 24.) Not only is this argument forfeited but also it is undeveloped on appeal, meaning it is treated as waived—Burton provides no legal authority in support of the argument that this was a material adverse action. *See United Cent. Bank v. Davenport Estate LLC*, 815 F.3d 315, 318 (7th Cir. 2016) (arguments without legal citation are perfunctory and undeveloped, and thus, are waived).

Burton also argues that many of Caywood's actions were materially adverse to her (Pl-Ap. Br. 22–23), but she has forfeited these arguments by not raising any of Caywood's actions in her summary judgment brief filed with the district court in support of her Title VII retaliation claim.[6] (Dkt. 57:23–27.)

Further, even if not forfeited, this Court's previous decisions already have rejected Burton's additional argument that threatened discipline is a

[6] To the district court Burton specifically distinguished material adverse actions between her Title IX and Title VII retaliation claims, and she argued none of the actions Caywood took against her were related to her Title VII claim, only to her Title IX claim. (Compare Dkt. 57:9–19 and Dkt. 57:23–28.) Burton cannot now mix the alleged material adverse actions together as to both claims.

material adverse action. Mere pressure is not materially adverse. And unfulfilled threats that result in no material harm cannot be adverse action in a Title VII retaliation claim. *See Hottenroth v. Vill. of Slinger*, 388 F.3d 1015, 1030 (7th Cir. 2004); *Dunn v. Wash. Cty. Hosp.*, 429 F.3d 689, 692 (7th Cir. 2005) ("Almost all of what Dunn characterizes as 'retaliation' is verbal requests from Coy to withdraw her complaint of sexual harassment. . . Yet his statements did not cause Dunn any injury (that is to say, no adverse employment action occurred)."). Here, the district court considered Burton's assertion that Dalecki repeatedly pressured her to drop her charges of discrimination and retaliation. The district court also considered Burton's claim that Throop threatened disciplinary action against her after wrongly accusing Burton of cancelling a class. (Dkt. 90:21–22.) The district court held Burton did not suffer a material adverse action at the hands of Dalecki or Throop because, at most, these are mere unfulfilled threats. (Dkt. 90:22.)

As argued above, Burton does not put forth a clear argument challenging the district court's material adverse action conclusions. Rather, on appeal she combines alleged material adverse actions in her Title IX and Title VII retaliation claims. Burton's new "combination" argument should be rejected because it was not raised in the district court. *See Milligan*, 686 F.3d at 386; *G & S Holdings LLC*, 697 F.3d at 538.

In sum, the only two preserved adverse actions are not disputed. The Board does not disagree that Throop's letter of direction and the complaint filed with the chancellor were material adverse actions. This Court properly considers only those two in its causation analysis.

B. The district court correctly held that Burton did not establish that either of her two protected activities was the but-for reason of the two material adverse actions.

Burton did not establish that either of her two protected activities—the August 13, 2013, ERD complaint, and the December 9, 2014, EEOC charge, was the but-for reason of the two material adverse actions—Throop's October 28, 2014, letter of direction and January 5, 2015, complaint to the chancellor. Her Title VII retaliation claim therefore fails.

In *University of Texas Southwestern Medical Center. v. Nassar*, 133 S.Ct. 2517, 2533 (2013), the United States Supreme Court held that a Title VII retaliation claim "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *See also Gross v. FBL Fin. Servs.*, 557 U.S. 167, 178 (2009). Burton does not meet that high standard here.

Burton argued before the district court that Throop's October 28, 2014, letter of direction, which was the basis for the second material adverse action, the complaint to the chancellor, was so clearly false that it was proof of pretext and that she could establish but-for causation between it and her

protected activities. (Dkt. 57:26–28; Dkt. 90:24.) The district court properly rejected the argument. (Dkt. 90:26.)

Throop's letter of direction clearly and specifically delineated Burton's escalating, offensive conduct toward her colleagues—including individuals who were not named in the lawsuit and have nothing to do with the allegations—and counseled Burton to change how she treats her colleagues. (Dkt. 62:40–43, 46, 50, 52–57, ¶¶ 155–62, 176, 195, 204–07, 209–11, 215–18.) Burton's direct refusal to comply with the letter of direction in the subsequent months reasonably resulted in Throop filing a complaint with the chancellor against Burton in January 2015. Engaging in protected activity at one point in time does not give the employee carte blanche to engage in bad behavior thereafter with impunity, particularly when the bad behavior escalates. *See, e.g.*, *Vulcan Basement Waterproofing of Ill., Inc. v. NLRB*, 219 F.3d 677, 689–90 (7th Cir. 2000). Burton's own intervening behavior between the letter of direction and complaint to the chancellor undercuts her claim that she suffered retaliation due to her December 2014 EEOC charge. Burton cannot prove the letter of direction to be false, that is, a pretext for retaliation.

Beyond this, Burton mistakenly points to an EEOC charge filed October 24, 2014, as the cause of Throop's October 28, 2014, letter of direction. (Pl-Ap. Br. 30.) However, Burton's reference to the "October 20 2014, charge

of discrimination" is not correct. The document was in fact an "intake questionnaire," dated October 24, 2014. Burton did not file a formal discrimination charge until December 9, 2014.[7] (Dkt. 62:88 ¶ 395.) These are not separate EEOC charges, as Burton asserts. (Pl-Ap. Br. 30.)

Regardless, even if the intake questionnaire can be considered an EEOC charge, there is no evidence or argument by Burton that Throop knew about the intake questionnaire when she sent her letter of direction a mere four days later. Actual knowledge is a legal requirement to prove retaliation. *See Tomanovich v. City of Indianapolis*, 457 F.3d 656, 668 (7th Cir. 2006) (employer's actual knowledge of the plaintiff's complaint necessary for its action to be retaliatory).

Further, the time between the intake questionnaire and the letter of direction alone is not enough for Burton. "Speculation based on suspicious timing alone . . . does not support a reasonable inference of retaliation." *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 918 (7th Cir. 2000). "Evidence of temporal proximity…standing on its own, is insufficient to establish a causal connection for a claim of retaliation. *See Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 549 (7th Cir. 2008) (citing *Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 759 (7th Cir. 2006)).

[7] Burton also, through counsel, supplemented her EEOC charge in July 2015. (Dkt. 54-2:12–15.)

Also as a matter of law, there can be no causation based solely on the time passing between Burton's August 2013 ERD complaint and Throop's October 28, 2014, letter of direction or her January 2015 complaint filed with the chancellor. Too much time had passed. *See Argyropoulos v. City of Alton*, 539 F.3d 724, 734 (7th Cir. 2008) (seven-week interval between sexual harassment complaint and arrest and termination, without more, did not amount to direct evidence of retaliation).

In contrast to those topics properly before this Court, Burton's causation argument on appeal, unlike her clear Title VII causation argument made to the district court (Dkt. 57:27–30), is based on a combination of alleged protected activities and material adverse actions that she did not raise before the district court in the first instance, and that combine her Title IX and Title VII claims (Pl-Ap. Br. 28–31.). Again, Burton's scattershot approach—since it is based on so much that is not properly at issue in this appeal, and is an entirely new argument—goes nowhere.

Accordingly, summary judgment to the Board on Burton's Title VII retaliation claim was properly granted by the district court because she cannot prove causation.

C. In the alternative, the Board of Regents did not retaliate against Burton in violation of Title VII on the basis of her support of a student's harassment complaint because Burton did not engage in a statutorily protected activity.

In addition to the other flaws, and as an alternative reason a Title VII retaliation claims fails, the district court correctly ruled that Burton did not assert a claim based on her support of the student's harassment complaint "because there was no employment relationship between the student and the professor and because Burton was not complaining that she herself was harassed." (Dkt. 90:19–20.) An employment relationship is generally required to state a Title VII claim. *See* 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . .").[8] Here, however, a claim related to a student's harassment complaint concerns no employment relationship.

Further, noticing that Burton did not address the Board's "no employment relationship" argument in response to its motion for summary judgment (Dkt. 57), the district court stated that she had "essentially conceded the point" (Dkt. 90:20.). *See Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 600 (7th Cir. 2014) ("The non-moving party waives any arguments that

[8] 42 U.S.C. § 2000e-3(a) also prohibits entities other than "employers" from discriminating, such as labor organization, and also prohibits discrimination of applicants for employment, but these prohibitions are not relevant here.

were not raised in its response to the moving party's motion for summary judgment."). In addition, Burton does not make the argument on appeal. (Pl-Ap. Br. 18.) *See Ajayi v. Aramark Bus. Servs., Inc.*, 336 F.3d 520, 529 (7th Cir. 2003) (failure to raise issues in opening appellate brief results in waiver of the issues).

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Burton can point to no evidence tying her ERD complaint or EEOC charge to Throop's letter of direction or complaint to the chancellor. Her retaliation claim under Title VII was properly dismissed on summary judgment.

III. The district court did not improperly draw factual inferences in favor of the Board of Regents.

Lastly, Burton contends that the district court violated summary judgment procedure by not construing all facts in the light most favorable to her, the non-moving party, and by not drawing all reasonable inferences in her favor when determining whether a genuine dispute of material fact existed. (Pl-Ap. Br. 31–36 (citing *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996)).) She gives numerous examples, citing descriptions of incidents and choice of wording by the district court, but none of them show that the district court erred.

As an initial matter, she cites *Simpson v. Merchants Recovery Bureau, Inc.*, 171 F.3d 546 (7th Cir. 1999), for the proposition that the district court

could not have construed all facts in a light most favorable to her because it did not consider her full account of the facts. (Pl-Ap. Br. 32.) *Simpson* is easily distinguishable. In *Simpson*, the district court sua sponte entered summary judgment for the defendant, despite no motion being filed. *Id.* at 551. This Court reversed, holding that summary judgment was inappropriate because the lower court "never afforded [the plaintiff] the opportunity to present her account of the facts." *Id.* In addition, the *Simpson* court held that the district court could not have construed *all* facts in the light most favorable to the plaintiff because she had no chance to submit anything. *Id.*

Here, Burton had every opportunity to present her account of the facts. Defendants filed a summary judgment motion and she responded. And during summary judgment she was represented by counsel. That her counsel decided not to raise particular issues and not to make particular arguments that Burton's new counsel now does on appeal, does not equate to having "no opportunity" to do so before.

Moving on to Burton's examples, none of them show that the district court ignored the law on summary judgment. Rather, all of her examples either relate to immaterial factual quibbles, incomplete readings of the district court decision, or legal, not factual, conclusions.

Burton first complains that the district court stated that Dr. Gibson, who gave the female student the "call me" note, apologized to the class. She points

out that a grievance committee found that his apology was not proper. (Pl-Ap. Br. 32) (Dkt. 90:3.) But the evidence shows that he did apologize. In his email to the class he wrote, "I would like to apologize to any students who weren't aware of the experimental nature of the note." (Dkt. 53-32:1.)

Burton also complains that the district court referred to Gibson as the "breach-experimenting professor," which, she claims, resolved the factual question that the note was a "breach experiment" rather than resolving the question in Burton's favor that it was not. (Pl-Ap. Br. 32–33.) But the district court's shorthand for Dr. Gibson, even if it shows that the district believed he was indeed conducting an experiment, has no relationship to the material factual findings and legal conclusions in this case. It has no bearing on the district court's conclusion that Burton suffered no material adverse action as to her Title IX retaliation claim.

Next, Burton complains about the district court's characterization of Caywood's instruction to the department at a subsequent meeting that student issues should be brought to his attention so that "harmless matters" did not go all the way to the provost. She states that these words ignore Throop's acknowledgment that the "call me" note could have been "significant HR and Title IX issues." (Pl-Ap. Br. 33.) But, upon reading the entire paragraph of the district court's opinion, it is apparent that it was not specifically describing *that note* as a harmless matter. (Dkt. 90:4.)

Burton also asserts that the district court improperly characterized her November 17, 2012, email to Durr as "ongoing bitterness" against Caywood. She claims this characterization ignores her complaint within the email that she felt retaliated against. (Pl-Ap. Br. 33.) To the extent Burton is complaining that the district court should have concluded that her complaint was a protected activity, that is an argument about a question of law, not a question of fact. (Dkt. 90:15.) Burton also takes issue that Caywood's public criticism was not a material adverse action. (Pl-Ap. Br. 35.) But again, this is a question of law. It has no place in her argument that the district court did not construe facts in a light most favorable to her.

Burton next claims that the district court consistently indicated that she merely "perceived" hostility and other negative actions towards her. (Pl-Ap. Br. 33.) But that is certainly true and that does not mean that hostility did not exist. Moreover, whether or not there was in fact hostility is irrelevant because the district court found that the negative actions toward her did not constitute material adverse actions related to her support for the student who filed the harassment complaint.

Burton further complains about the district court writing that Burton "is not immune from supervision and discipline." She points out that she has a statutory right to be immune from discipline where it arises from her engagement in protected activities, and there are no allegations that she

actually violated university policy. (Pl-Ap. Br. 33.) Burton reads the district court's opinion too literally. In context, the court was making the point that, in this case, Burton asserted that mere threats of discipline were material adverse actions. The law, however, holds otherwise. (Dkt. 90:22 (citing *Vill. of Slinger*, 388 F.3d at 1030 (in Title VII retaliation claim analysis, court held that unfulfilled threats that result in no material harm cannot be adverse action).)

Next Burton takes issue with the district court calling Burton's grievances concerning Dalecki's alleged violations of university policy and law as "disagreements." (Pl-Ap. Br. 33–34.) But that was right: a *grievance* is defined as "a cause of distress (as an unsatisfactory working condition) felt to afford reason for complaint or resistance" and *disagree* means "to differ in opinion." Merriam-Webster On-line Dictionary, http://www.merriam-webster.com/dictionary. She similarly complains that the district court unfairly characterized Burton's various issues with Throop as a mere "conflict," because that "downplayed the seriousness of Burton's claims of retaliation and ignores the breadth of evidence on record." (Pl-Ap. Br. 34.) *Conflict* is certainly a proper description of Burton's legal claims, since the word means "antagonistic state or action (as of divergent ideas, interests, or

persons)." Merriam-Webster On-line Dictionary, http://www.merriam-webster.com/dictionary. In any event, these quibbles with word choice are legally irrelevant.

Burton also argues that, if the district court had taken the facts in a light most favorable to her, it would have found that "insufficient funds" was a pretextual reason a graduate student had lost his position. (Pl-Ap. Br. 34.) This graduate student, who told Burton about negative comments he overheard university officials making about her at a social event, was later chastised by Dalecki after he found out about the disclosure. (Dkt. 62:44–45 ¶¶ 168–170.) But whether this graduate student truly lost his position due to insufficient funds is completely irrelevant *to Burton's* retaliation claims.

Finally, Burton disagrees with the district court stating that "[t]he record demonstrates that Throop had a factual basis for her conclusions" in the letter of direction she gave to Burton. (Pl-Ap. Br. 34.) The district court explained:

> By and large, Burton did not dispute then (and does not dispute now) that she wrote the emails that Throop described or that she took the actions that Throop identified. *See, e.g.*, Dkt. 37-12; Dkt. 37-14; Dkt. 37-15, at 8–29; Dkt. 54-11.

(Dkt. 90:25.) The cited docket entries are from Burton's own declarations. The district court further wrote:

> What Burton wants to challenge is how Throop *perceived* and *characterized* those events, and whether Throop should have accepted Burton's explanations for each of them. But these are the

> types of internal business and personnel decisions which federal courts do not second guess, absent some evidence that the employer's decision was "completely unreasonable." *Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 646 (7th Cir. 2013). Here, the record demonstrates that Throop had a factual basis for her conclusions. Burton's mere disagreement with Throop's decisions and with how Throop viewed Burton's conduct is not evidence of pretext.

(Dkt. 90:24–25.)[9] The district court correctly concluded there was no evidence reasonably supporting the pretext theory.

Burton's argument that the district court did not construe facts in a light most favorable to her must be rejected.

CONCLUSION

For the reasons stated, this Court should affirm the district court's order granting summary judgment to Defendants-Appellees.

Dated this 2nd day of December, 2016.

Respectfully submitted,

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[9] Burton complains that this quotation reveals that the district court applied the wrong legal standard for summary judgment. (Pl-Ap. Br. 35–36.) But Burton incorrectly conflates the legal analysis of pretext in a discrimination case with the legal standard for summary judgment.

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/s/ Steven C. Kilpatrick
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Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on December 2, 2016, I electronically filed the foregoing Response Brief of Defendants-Appellees with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 2nd day of December, 2016.

/s/ Steven C. Kilpatrick
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