IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Sabina Burton,

Plaintiff,

v. Case No. 14-CV-274

University of Wisconsin Regents, et al,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

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Plaintiff Sabina Burton is a tenured professor at the University of Wisconsin-Platteville ("UW-Platteville"). She alleges that several individuals at UW-Platteville engaged in a litany of actions against her, spanning several years, and seeks to charge the Board of Regents, Dr. Elizabeth Throop (Dean of the College of LA&E), Dr. Thomas Caywood (former chair of the criminal justice department), and Dr. Michael Dalecki (former interim chair of the criminal justice department) with sex discrimination and retaliation under various federal employment laws. For the reasons that follow, Burton is not entitled to any relief on her various claims.

INTRODUCTION & SUMMARY OF THE ARGUMENT[1]

Sabina Burton is a tenured professor in UW-Platteville's Department of Criminal Justice (CJ), which is within the School of Liberal Arts and Education (LA&E). Burton's tenure began in 2009 when Thomas Caywood, then CJ department chair, hired Burton as an assistant professor. (PFOF ¶¶ 2, 17, 21.)

This case unravels over the course of about two years, wherein Dr. Burton becomes increasingly dissatisfied with her department chair (Caywood), the Dean (Throop), the new department chair (Dalecki), and a host of other faculty in the criminal justice department, including Aric Dutelle, Lorne Gibson, and Pat Solar.

Burton's chief complaints started with two separate incidents, referred to in this brief as the student complaint (October 10, 2012) and the AT&T press release incident (January 24, 2013).

The student complaint incident occurred when Professor Gibson, during a class lecture on breach experiments, handed a female student a note that said "call me!" with his phone number on it. While Gibson intended the note to be an example of an action that would provoke a strong emotion, the student believed Gibson's note was sincere, and confided in Dr. Burton, who in turn informed Dean Throop and Caywood about the incident. What occurred next was a series of emails and meetings that resulted in the Dean being upset with Caywood and Gibson, Caywood being upset that Burton told the Dean about the note before informing him, and Burton believing that Caywood was mad at her. (PFOF ¶¶ 40-66.)

[1] The material, undisputed facts are in the Defendants' proposed findings, filed herewith and expressly incorporated herein. The following is a brief summary.

The AT&T press release incident occurred after Burton had secured a $7,000 donation from AT&T for the purpose of assisting her start a cyber security area of study at UW-Platteville. On the eve the donation was to be presented, Burton sought Caywood's approval of AT&T's press release announcing the donation. The press release indicated that UW-Platteville was developing a cyber security curriculum and made other representations about the existence of a cyber security program. UW-Platteville, however, did not have a cyber security program at the time. Burton was interested in developing one, but she had not submitted a formal proposal to the criminal justice faculty or followed any of the other required channels for establishing a new area of study through the LA&E college, University Curriculum Committee, or Board of Regents. Both Caywood and Throop felt the press release misrepresented the state of a cyber security program, and when they let their feelings be known to Burton, Burton accused them of retaliating against her for taking the student complaint to Dean Throop. (PFOF ¶¶ 74-125.)

Burton's allegations thereafter involve various disputes and disagreements over teaching schedules, committee appointments, sabbaticals from teaching, approval of additional income opportunities, teaching evaluations, and departmental, college, and university policies and bylaws, among many other complaints. Beginning around the summer of 2013, Burton's behavior spirals downward. She sends abrasive emails to her colleagues, involves her students in her disputes with the Dean, accuses her colleagues of conspiracy and abuse, gets upset when her colleagues receive accolades that she thinks she deserved, and shirks her responsibilities. Dean Throop and interim CJ chair Dalecki spend much

of 2014 and 2015 attempting to manage Burton's behavior in a minefield of discrimination and retaliation complaints. (PFOF ¶¶ 137-227.)

Burton's allegations, both numerous and vague, amount to no more than disagreements over departmental governance, interpersonal disputes, and misunderstandings. This case does not belong in federal court.

ARGUMENT

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show 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(c); *Cox v. Acme Health Servs., Inc.*, 55 F.3d1304, 1308 (7th Cir. 1995) (citations and internal quotation marks omitted). A plaintiff raises a material fact only if the evidence is such that a reasonable jury could return a verdict for the moving party. *Eiland v. Trinity Hosp.*, 150 F.3d 747, 750 (7th Cir. 1998). A dispute concerning facts not material to a determinative issue does not preclude summary judgment.

The movants bear the burden of establishing that no genuine issue of material fact exists. *Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995). If the movants meet this burden, the non-movant must establish through admissible evidence that there is a genuine issue of material fact warranting a trial. Fed. R. Civ. P. 56(e); *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992). The federal rules mandate the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element material to the party's

case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The non-movant may not rest upon mere allegations or self-serving denials. *Id.* at 324. The subjective beliefs of the non-movant are not sufficient to create a genuine issue of material fact. *McMillian v. Svetanoff*, 878 F.2d 186, 191 (7th Cir. 1989).

An examination of the record reveals that there is no genuine issue of material fact and the defendants are entitled to judgment on the claims against them as a matter of law.

I. BURTON'S TITLE VII CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS MUST BE DISMISSED, AND DR. MICHAEL DALECKI IS NOT A PROPER PARTY TO THIS LAWSUIT.

In her Second Amended Complaint, Burton alleges a "cause of action against Defendant, Dr. Dalecki, under Title VII," as well as a "cause of action against Defendant, Dean Throop, under Title VII." (Dkt. No. 28 ¶¶ 210, 213.) These claims must be dismissed because individuals cannot be sued under Title VII. Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The Seventh Circuit has declined to impose liability on individuals simply because the "employer" definition includes "a person." *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280-81 (7th Cir.1995). To allow civil liability under Title VII to run against individuals "distorts the statutory framework" of the law. *Id.* at 1281. The proper defendant to a Title VII claim is the employer, not the supervisor. *Sullivan v. Village of McFarland*, 457

F. Supp. 2d 909, 914 (W.D. Wis. 2006). Burton's Title VII claims against Throop and Dalecki must be dismissed.

Burton has not alleged any proper individual claims against Dalecki. Dalecki is therefore not a proper defendant in this action. Because Burton has not stated a cognizable individual claim against Dalecki, he is not a proper defendant to this lawsuit, and he must be dismissed as a defendant entirely.

II. BURTON DOES NOT STATE A VALID TITLE VII CLAIM FOR SEX DISCRIMINATION.

A. Statutory scheme

Title VII makes it "an unlawful employment practice for an employer "to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Title VII prescribes strict time limitations, requiring a complainant first file a charge with the federal Equal Employment Opportunity Commission (EEOC) or the state counter-part, which, in Wisconsin, is the Department of Workforce Development's Equal Rights Division. *Alvey v. Rayovac Corp.*, 922 F. Supp. 1315, 1326 (W.D. Wis. 1996). Such charge must be filed within 300 days of the adverse employment action, which based on the date of Burton's EEOC charge in this case is October 17, 2012. *Beamon v. Marshall & Isley Trust Co.*, 411 F.3d 854, 860 (7th Cir. 2005) (citing 42 U.S.C. § 2000e-5(e)(1)). Under Title VII, Burton may not recover damages based on any action that occurred before October 17, 2012;

however, events outside the statute of limitation may be considered as evidence if those actions are material to an element of the allegation. *Dandy v. United Parcel Serv.*, 388 F.3d 263, 270 (7th Cir. 2004) (observing that the statute of limitations is "subject to equitable considerations" in certain circumstances).

A plaintiff in an employment case may prove discrimination either through direct evidence or indirect evidence, using the burden-shifting test laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a *prima facie* case of gender discrimination, Burton must prove that 1) she is a member of a protected class; 2) she was performing her job to her employer's legitimate expectations; 3) she suffered an adverse employment action; and 4) she was treated less favorably than similarly situated male employees. *Markel v. Bd. Of Regents of the Univ. of Wis. Sys.*, 276 F.3d 906, 911 (7th Cir. 2002). The plaintiff has the burden to establish a *prima facie* case. If she does so, the employer must then produce evidence to rebut the burden, by showing it took the action(s) it did for legitimate, non-discriminatory reasons. *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 983 (7th Cir. 2001). If the employer produces such evidence, the plaintiff must then produce evidence showing the employer's proffered reasons are pretext for discrimination. *Id.*

At the summary judgment stage, assuming the plaintiff makes a *prima facie* case, and if both the employer and plaintiff produce evidence under their respective burden-shifting prongs, the case must proceed to trial. If the plaintiff fails to make a *prima facie* case, the case must be dismissed. If the plaintiff does not produce

evidence that the employer's reasons for taking the adverse action are pretext, the case must be dismissed. *Id.* (citing *Kulumani v. Blue Cross Blue Shield Ass'n,* 224 F.3d 681, 685 (7th Cir.2000)).

Burton cannot make a *prima facie* case under Title VII. Her claim fails because she did not suffer an actionable adverse employment action and she was not treated less favorably than similarly situated male colleagues. Further, the Defendants had legitimate, non-discriminatory reasons for all of the actions they took, and Burton can produce no evidence that these reasons are pretext for sex discrimination.

B. The Board's Actions were not "Adverse Employment Actions" Under Applicable Law.

The Seventh Circuit has established "three general categories of actionable, materially adverse employment actions," defined as the following:

1. Termination or other diminution in employee's "compensation, fringe benefits, or other financial terms" of employment,
2. Lateral transfer that "significantly reduces the employee's career prospects by preventing her from using her skills and experience, so that the skills are likely to atrophy and her career is likely to be stunted;"
3. Change in employment conditions subjecting the employee to a "humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in her workplace environment."

Nichols v. Southern Illinois Univ.-Edwardsville, 510 F.3d 772, 780 (7th Cir. 2007) (citing *O'Neal v. City of Chicago,* 392 F.3d 909, 911 (7th Cir. 2004)).

"[C]ourts have found the criteria for materially adverse employment action to be met where the employee's compensation, benefits or other financial terms of employment are diminished." *Tart v. Ill. Power Co.,* 366 F.3d 461, 475 (7th Cir. 2004) (internal quotation marks omitted). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Nat. Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993). *See also Markel v. Bd. of Regents of Univ. of Wisc. Sys.,* 276 F.3d 906, 911 (7th Cir. 2002) ("Typically, adverse employment actions are economic injuries."); *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761-62 (1998) ("A tangible employment action in most cases inflicts direct economic harm."). "To establish that a materially adverse employment action has been taken, a 'plaintiff must show that a reasonable employee would have found the challenged action materially adverse.'" *Hicks v. Forest Pres. Dist. of Cook Cty.*, No. 11-1124, 2012 WL 1324084 (7th Cir. Apr. 18, 2012) (unpublished) (citing *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 68 (2006)).

"While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action." *Smart v. Ball State Univ.,* 89 F.3d 437, 441 (7th Cir. 1996). The adverse employment action must be "more than a mere inconvenience or an alteration of job

responsibilities." *de la Rama v. Ill. Dept. of Human Servs.*, 541 F.3d 681, 685 (7th Cir. 2008).

Burton's articulated harms range from not getting to teach the classes she wants to teach, not being appointed to serve on various departmental committees (even though she in fact had been appointed to serve on departmental committees), not getting the office she wanted, not being treated the same as a male colleague in terms of release time from teaching (even though the male colleague coordinated a program within the CJ department that demanded his time), and having her recommendation for promotion to associate professor delayed (even though such delay of the recommendation did not cause any delay in the actual promotion decision), among other harms. (*See* Dkt. 28; PFOF ¶¶ 7, 8, 22-25, 299.) Burton's Second Amended Complaint includes other alleged harms related to perceived violations of department bylaws, unhappiness with Departmental Review Board (DRB) evaluations that were made by committee, and feelings that she was humiliated in front of her peers. (*See* Dkt. 28.) None of these are actionable under Title VII because Burton incurred no compensable loss as a result of any of these actions, nor is there evidence to suggest that these actions were taken because of Burton's sex.

It is "entirely rational" to permit state actors "to make individualized decisions when the very nature of their job is to take a wide variety of considerations into account." *Park v. Ind. Univ. School of Dentistry*, 692 F.3d 828, 833 (7th Cir. 2012). That Dr. Burton did not agree with certain decisions of CJ

department or university leadership does not make them the basis for a federal lawsuit. Committee placements, mentoring opportunities, and search and screen placements would not have resulted in any additional compensation or promotional opportunities for Burton. (PFOF ¶¶ 22-26, 28, 230, 350.) They are therefore not actionable under Title VII.

None of the above-listed actions caused Burton any economic or other tangible loss.

The Seventh Circuit has recognized that not every change in employment is actionable.

> Obviously a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.

Williams v. Bristol-Myer Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996). Burton never experienced, nor does she allege, a transfer, demotion, termination, or change to her fringe benefits. Burton does not allege that she was laterally transferred such that her career development would likely be stunted. And to the extent Burton contends that she was subjected to a humiliating or degrading work environment, none of the above-listed allegations rises to that level either. This Court should therefore dismiss any allegations related to Burton's complaints listed above.

C. Burton Was Not Treated Less Favorably Than Her Male Colleagues.

Burton has alleged that she was treated less favorably than her colleagues with regard to a number of aspects of her employment at UW-Platteville. She often points to her doctorate to substantiate her belief that colleagues without this credential should have received lesser treatment. "[H]olders of academic doctorates are not a protected class under the discrimination laws." *Senner v. Northcentral Tech. College*, 113 F.3d 750, 756 (7th Cir. 1997). In order to prevail on her claims, Burton must prove that she was treated less favorably than her colleagues because she was a woman—not because the University used different criteria or weighed those criteria differently when making decisions than Burton herself would have if she were in charge of making the decisions. Because Burton cannot prove that any allegedly adverse employment decisions were made because of her sex, this Court should enter summary judgment on her Title VII discrimination claim.

1. Promotions

Burton received each and every promotion for which she applied and for which she was qualified, in some cases received these promotions even earlier than would be typically expected. Burton was hired as an assistant professor in 2009. She applied for, and ultimately received, a promotion from assistant to associate professor in spring of 2012. Burton makes much of the fact that this promotion was delayed due to a paperwork error, but Burton also admits that she suffered no loss as a result of the short delay. (PFOF ¶¶ 21-25.) She also sought and received tenure a year later, even though she had only been at the University for four years

at that time and would not typically have been considered. (PFOF ¶¶ 28; 360-363.) Burton cannot claim any injury from the fact that her colleague, Aric Dutelle, was considered for and received a similar promotion. Burton's tenure application was unanimously supported by the CJ department, including Caywood, who supposedly was discriminating and retaliating against her at the time.

Additionally, Burton cannot claim that she was denied a promotion to chair of the criminal justice department because her own testimony confirms that she never nominated herself as a candidate for this position nor did she apply for it when a nationwide search was conducted in 2014. (PFOF ¶ 367.) A plaintiff cannot make out a case of failure to promote where the plaintiff cannot show that she actually applied for the promotion in the first place. *Ledbetter v. Jackson Cty. Ambulance Serv.*, No. 07-2647, 264 F. App'x 517, 519 (7th Cir. 2008) (citing *Hudson v. Chicago Transit Auth.*, 375 F.3d 552, 558-59 (7th Cir. 2004)). None of the defendants can be said to have denied Burton the opportunity to pursue a position for which she never submitted an application. The same is true for Burton's allegation that professors Gibson and Dutelle were provided financial opportunities that she was not—including overload courses, release time, and work outside of UW-Platteville. (*See* Dkt. 28.) Yet, Burton can produce no evidence that she was *denied* opportunities that she requested, and she cannot base a federal discrimination case on the fact that other professors may have been more enterprising and aggressive than she was in pursuing other income opportunities. Moreover, Burton was enterprising and assertive herself. She taught online courses

as overloads, taught overload courses almost every semester, supervised interns and graduate papers, developed an online graduate-level cybersecurity course, and lead a delegation of students to Germany, all of which Burton was compensated for. (PFOF ¶¶ 36, 233-35, 241-43, 251, 257, 315; Ex. A.)

In sum, Burton received every promotion she ever sought for which she was qualified, and was approved for nearly all extra-income opportunities she applied for or put in for. She therefore cannot state a claim related to promotional opportunities.

2. Salary/Monetary Opportunities

Additionally, Burton cannot establish that she was treated less favorably than her male colleagues when it comes to salary payments and opportunities. A plaintiff may not prevail on a claim for gender discrimination simply by presenting salary evidence without context for the salary decisions. *Packer v. Trustees of Ind. Univ. Sch. Of Medicine*, 800 F.3d 843, 850-51 (7th Cir. 2015) (salary information produced by the plaintiff without foundation or context unhelpful to discrimination claim). There is no direct evidence in this case that Burton was paid any less than a male colleague due to her sex. In order to prevail, Burton must therefore establish a *prima facie* case of discrimination under the *McDonnell Douglas* framework. Assuming that Burton can make out such a case, the employer must meet a burden of production to demonstrate a legitimate, non-discriminatory reason for the differential. The employer does not take on a burden of proof of persuading the Court that it was actually motivated by the proferred reasons, but need only set

forth the reasons for the differential. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

Burton was not paid less than her male colleagues, nor denied any additional monetary or development opportunities over and above base salary, on the basis of her sex. Rather, any differences are explained by the following reasons:

Burton Allegation	**Reason**
Burton was paid less in base salary than Dutelle, Gibson, and Caywood	All three experienced a significant, but temporary, bump in their base salary due to a grant from the University of Wisconsin System based on prior learning assessments. (PFOF ¶¶ 288-295.)
Burton was assigned fewer interns than her proportionate share	Interns were assigned proportionately, sometimes interns dropped their courses. In 2015, due to medical restrictions provided by Burton, she was assigned interns who were local or with whom she could connect via Skype. (PFOF ¶¶ 253-56; 258.)
Burton was not assigned as many overload courses as Gibson	Burton did not request to teach overload courses that were denied. (PFOF ¶ 240.)

Burton did not receive grant money in the amounts Dutelle, Gibson, and Caywood did	Burton did not apply for the same grants, and she did not receive a sizeable grant she applied for. (PFOF ¶¶ 77, 80, 83, 246-47.)
Burton did not receive the same amount of release time (teaching few courses) that her colleague, Aric Dutelle did.	Dutelle developed and coordinated the Forensic Investigation program, which is a separate major from criminal justice. Other managerial positions within the department (department chair, director of the online graduate program, undergraduate online coordinator) also received 50% release time. (PFOF ¶¶ 7, 8, 299, 320, 323, 324, 326.)
Dutelle was allowed to teach his UW-Platteville courses remotely for a few weeks to allow him to teach a course on an aircraft carrier, where he received additional, outside funds for that teaching.	Burton never requested similar consideration in order to allow her to teach a course on an aircraft carrier.

Burton's base salary differed from several of her male colleagues because her duties differed from theirs, particularly in the case of Aric Dutelle, who was the administrative head of the Forensic Investigation (FI) program and devoted a full 50% of his time to the duties associated with overseeing that program. Additionally, Caywood, Dutelle, and Gibson applied for and received a grant in 2011 from the UW System that required each to devote significant time over and above their full-time university duties to implementing a program for military veterans to apply their work and combat experience toward a degree in criminal justice. Burton was provided with a salary increase, effective August of 2013, to cure what would have been a salary inversion between Burton and an incoming more junior faculty member. She neither requested nor received such an adjustment (nor did anyone request one on her behalf) prior to this date because the differences in base salary were tied to an outside funding source. (PFOF ¶¶ 301-09; *and see* PFOF citations in table above.)

The record reveals nothing outside of Burton's own belief that the above differences in pay were due to her sex. A plaintiff's "bare speculation" that gender discrimination has occurred is not enough to avoid summary judgment and afford the plaintiff a jury trial. *Senner v. Northcentral Tech. College*, 113 F.3d 750, 757 (7th Cir. 1997). There is no evidence in the record that the above-listed reasons, none of which have anything to do with sex, are a pretext for discrimination against Burton when it comes to salary opportunities.

3. Office Placement

Burton also alleges that she was placed in a less desirable office than her colleagues. Courts have determined that moving an individual to a less desirable office can constitute an adverse employment action in some circumstances. *Vargas-Harrison v. Waukegan Cmty. Unit Sch. Dist. #60*, No. 97-C-1071, 1998 WL 831837, at *7 (N.D. Ill. Nov. 25, 1998) (unpublished) (movement to windowless office in basement of building could support claim). Burton did receive an interior office without a window when she joined UW-Platteville in 2009, but the record establishes that she received that office because the offices were assigned by seniority—specifically, based upon the length of time the individual had spent teaching at UW-Platteville—and not on any factor related to sex. (PFOF ¶¶ 330-35.) Burton can offer no evidence that she was offered an interior office because she is a woman, and because the decision to provide her with this office occurred years before Burton complained of any discrimination, she cannot claim that her office placement constitutes an act of retaliation. Claims related to the fact that Burton had an interior office should therefore be dismissed.

III. BURTON CANNOT STATE A CLAIM FOR RETALIATION.

To establish a claim for retaliation, Burton must prove: 1) she engaged in a statutorily-protected activity; 2) she suffered a materially adverse action by her employer; and 3) a causal connection exists between the two. *Porter v. City of Chicago*, 700 F.3d 652, 664 (7th Cir. 2011). The burden of proof rests at all times with the plaintiff. *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524, 531 (7th Cir.

2003). Burton did not experience any actionable adverse employment actions. Additionally, Burton's retaliation claim fails because she did not engage in protected activity and because she cannot establish that any such activity was the but-for cause of a materially adverse action.

A. The "Student Complaint Incident" in 2012 Does Not Constitute Statutorily-Protected Activity.

Burton attempts to tie her decision to forward someone else's harassment complaint to Dean Throop and Dr. Caywood in October of 2012 to every subsequent allegation she makes against the defendants. However, this action does not constitute protected activity for the purposes of retaliation analysis, and her retaliation claims therefore fail insofar as she ties the actions to forwarding that complaint.

There is no doubt that filing a discrimination charge with the EEOC is conduct protected by Title VII. *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006). Burton did not file an EEOC charge in this matter until August 13, 2013. (Dkt. No. 1 ¶ 4.) She therefore cannot predicate any retaliation for the EEOC charge on any conduct occurring prior to that date. Burton maintains that she was retaliated against in the University's handling of her misrepresentations in the AT&T press release because she forwarded a student complaint to defendants Caywood and Throop in October of 2012. The mere act of forwarding the complaint does not satisfy the definition of protected activity.

The statutory language at issue provides:

> It shall be an unlawful employment practice for an employer to discriminate against [an employee] . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] 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). Burton's decision to forward the student's complaint does not qualify as protected activity under the language of the statute. The conduct complained of was an incident between a student and a teacher, and while potentially inappropriate, it was not an "unlawful employment practice" under Title VII because there was no employment relationship between the two. Additionally there is no dispute that Burton did not make a charge based on Dr. Gibson's conduct in fall of 2012; Burton was not the one who was allegedly harassed.

There is nothing in the record to indicate that the student filed such a charge. There is therefore also no dispute that Dr. Burton did not testify, assist, or participate in an "investigation, proceeding, or hearing under this subchapter" because no such investigation, proceeding, or hearing by the EEOC ever occurred. Burton therefore cannot state a retaliation claim for any activity predating her EEOC charge in August of 2013. This includes, but is not limited to, her complaints about the handling of the press release for the AT&T grant. Any retaliation allegations predating Burton's first EEOC charge on August 13, 2013, must therefore be dismissed. *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 889 (7th Cir. 2004) (citation omitted); *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1122 (7th Cir. 2009) (actual knowledge of statutorily protected activity required to state claim for retaliation).

B. Burton Cannot Establish That She Suffered A Materially Adverse Employment Action.

Much like her Title VII sex discrimination claim, Burton cannot prevail on her retaliation claim under Title VII because she did not suffer a materially adverse employment action. Federal law protects an employee only from retaliation that produces an injury, and therefore an employer's allegedly retaliatory conduct is only actionable "if it would be materially adverse to a reasonable employee." *Stephens v. Erickson*, 569 F.3d 779, 790 (7th Cir. 2009). Title VII does not set forth "a general civility code for the American workplace." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998)). 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 Northern*, 548 U.S. at 68-69.

An action is materially adverse if it would have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Stephens*, 569 F.3d at 790. Materially adverse employment actions fall into three groups of cases involving: 1) the employee's current wealth, such as compensation, fringe benefits, and financial terms of employment including termination; 2) the employee's career prospects thus impacting the employee's future wealth; and 3) changes to the employee's work conditions including subjecting her to humiliating, degrading, unsafe, unhealthful, or otherwise significant negative alteration in the work

environment. *Arizanovska v. Wal-Mart Stores*, 682 F.3d 698, 704 (7th Cir. 2012) (citation omitted) (internal quotation marks omitted).

The Seventh Circuit has also set forth conduct that is not actionable as retaliation. For example, "personality conflicts at work that generate antipathy and snubbing by supervisors and co-workers are not actionable." *Brown v. Advocate South Suburban Hosp.*, 700 F.3d 1101, 1107 (7th Cir. 2012); *see also Recio v. Creighton Univ.*, 521 F.3d 934, 940-41 (8th Cir. 2008) (getting the silent treatment from colleagues not actionable). Statements that a colleague or supervisor is "trying to terminate" the plaintiff are similarly not actionable. *Brown*, 700 F.3d at 1107. Even a change in job duties does not meet the threshold unless the change "represents a *significant* alteration to the employee's duties, which is often reflected by a corresponding change in work hours, compensation, or career prospects." *Stephens*, 569 F.3d at 791 (collecting cases) (emphasis in original).

Burton, in essence, maintains that every aspect of her employment with which she disagrees, from stray comments to mentoring assignments, derives either from her decision to pass a student complaint to Dean Throop in the fall of 2012 or from her decision to later file two EEOC charges and this lawsuit. Burton, however, has not alleged any material loss of benefits, whether present or future, in any of her complaints as compared with her colleagues who have not taken such actions. Indeed, the defendants arguably treated Burton *better* than her colleagues. For example:

- Caywood approved funding for Burton's students to attend two conferences in the same school year, though Caywood could not recall having grant two such requests for the same faculty member ever (PFOF ¶¶ 351-54)
- Caywood approved additional payments for Burton to develop online graduate courses (PFOF ¶¶ 126-136)
- In 2013, Burton received tenure earlier than is typically considered, and by a unanimous vote of her department (including Caywood) (PFOF ¶¶ 360-363)
- Burton's salary was increased at defendant Throop's direction effective August of 2013 (PFOF ¶¶ 286, 301).

The defendants conferred each of these benefits on Burton in the months immediately following her report of the student complaint. These were actions that the defendants took in Burton's favors that resulted in actual, tangible consequences—from having to pay Burton more in base salary, to allocating money out of scare budgetary resources to fund course development and conferences, to conferring additional rights and privileges associated with tenure on Burton. If the defendants were truly retaliating against Burton, they would not have taken these actions.

In contrast, the actions of which Burton complains amount to nothing more than petty disagreements with her colleagues and caused her no damage whatsoever. For example, Burton complains that her colleagues didn't respond to

certain of her emails, that defendant Dalecki advised a graduate student that Burton neither taught nor supervised not to spread gossip about members of the department, that Burton lost a mentoring assignment after asking the individual to housesit for her, and that she was assigned to teach lower level classes—even though she herself expressed to department leadership that experienced faculty should be teaching such classes (and despite the fact that Caywood, the department's most senior member, was himself assigned to teach the introductory class). (Dkt. 28l PFOF ¶¶ 72-73, 168-69, 219-20.) Burton complains of a seemingly endless litany of minutiae that have no economic or practical impact on either her current career or future prospects. Several of her allegations on which she is particularly focused, however, bear some additional explanation.

Burton applied for and received a small grant from AT&T in the fall of 2012. Burton claims that when both Caywood and Throop informed Burton of their concerns about the misrepresentations in the proposed AT&T press release in late January of 2013, both individuals were retaliating against her for reporting the student complaint in October of 2012. Burton, however, suffered no damage. She received the $7,000 grant, as scheduled, in a public ceremony attended by the provost and vice chancellor as well as a number of others, including public officials. The press release, with the misstatements corrected, was sent out as scheduled. Any reputational damage that Burton claims she suffered is nothing more than speculation; she 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. (PFOF ¶¶ 88-118, 124.)

Additionally, Burton claims that Throop appointed Dalecki as the interim dean in 2013 after Caywood's departure in retaliation for filing her EEOC charge. There is absolutely nothing in the record to support such a claim. Indeed, the only evidence indicates that Dalecki made efforts to be supportive of Burton, even to the point of having conversations about Burton developing applicable experience to be chair of the CJ department at a future date. For his trouble, Burton repaid Dalecki by engaging in an active email campaign to undermine his leadership, even to the point of involving students in the CJ department by encouraging them not to bring legitimate concerns they had expressed about another professor to Dalecki's attention, asserted that he was "biased." (PFOF ¶¶ 145, 155-57, 159, 161, Throop Decl. Ex. WWW.)

Even Dean Throop's letter of direction from October of 2014 is not a materially adverse action. The letter sets out expectations for Burton's behavior based upon a lengthy record of declining professionalism in Burton's manner toward her colleagues, from Burton's repeated efforts to undermine Dalecki up to and including threatening a junior faculty member's tenure bid. The letter did not, however, result in any public reprimand, loss of pay, suspension, termination, or other loss of benefits. Where an employee is not "formally disciplined, terminated, or denied pay or benefits," the conduct in question is generally not actionable. *Brown*, 700 F.3d at 1107.

Burton has not established a materially adverse action that supports her claim for retaliation under Title VII, and this claim should therefore be dismissed.

C. Burton Cannot Establish That Her Activity Was the but-for Reason for Any Adverse Employment Action.

In *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. --, 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." In other words, a plaintiff must prove that her act of opposing workplace discrimination was the sole reason she suffered an adverse employment action. *Id.* at 2527; *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 178 (2009). Burton cannot do so.

There is no direct evidence in the record indicating that any negative action the defendants took following the student complaint, or following Burton's decision to file an EEOC charge or this lawsuit, was tied to any protected activity. Burton can only point to the timing of the so-called adverse actions in establishing a connection. Evidence of temporal proximity, standing on its own, is insufficient to establish a causal connection for a claim of retaliation. *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)). "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).

Ultimately, the question regarding the AT&T donation was whether Burton's handling of the student complaint was the "but for" reason why Caywood and Throop reacted the way they did to the AT&T press release (that is assuming the student complaint constitutes protected activity under any federal law). There is no

factual dispute, however, that Caywood and Throop had legitimate concerns with the wording of the press release. Burton admitted that as of January 2013 UW-Platteville did not offer cybersecurity courses, she admitted no courses had been approved by the college or university curriculum committees, she admitted she had never submitted a proposal to the criminal justice department. Yet, the press release stated, "UW Platteville's Department of Criminal Justice is currently developing the cyber security curriculum in consultation with faculty from the School of Engineering and experts in the field" and that the "university is also developing an online graduate course in cyber security to be taught starting in the spring of 2014," and the websites she created stated that the program would "develop an emphasis in home & cyber security within Criminal Justice" and then "turn [that] emphasis into a major in homeland & cyber security in the next years," and that submissions to the websites would "aid our efforts in gaining funding for this project." There is absolutely nothing tying Caywood's and Throop's concerns about the press release to the student complaint other than Burton's speculation. (PFOF ¶¶ 103-04, 112, *see also* Throop Decl., Exs. HHH and III; Caywood Decl. Ex. YY.)

Moreover, Burton's own conduct following the incident with AT&T was the cause of any damage that she allegedly suffered. Burton confirmed that after this incident, she never pursued developing and receiving approval for a cybercrime curriculum through the proper channels, and she never applied for another grant from AT&T (or from anyone else) to support work in this area. She also never met

with Dean Throop or Dr. Caywood to discuss the issues either raised regarding the press release, and indeed refused an invitation to do so. (PFOF ¶¶ 116, 119, 125.)

Furthermore, Dean Throop did not send Burton the letter of direction until October 2014—two years after the student complaint incident, and six months after Burton filed her lawsuit.. The letter of direction clearly and specifically delineates 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 counsels Burton to change how she treats her colleagues. (PFOF ¶¶ 155-62, 176, 195, 204-07, 209-11, 215-18.) 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 over time. *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 689-90 (7th Cir. 2000). Burton's own intervening behavior undercuts her claim that she suffered from retaliation, and her retaliation claim should therefore be dismissed.

Finally, to the extent Burton's role in the student complaint incident constitutes protected activity under any of Burton's claims, intervening support for Burton by those allegedly retaliating against her negate any causal connection between the student complaint and any acts of alleged retaliation, including Throop's and Caywood's reaction to the AT&T press release. Within two months after the October 10, 2012 student complaint incident, Throop and Caywood approved additional income opportunities for Burton totaling $4,375. (PFOF 241-243.) In March of 2013, Caywood approved an additional income opportunity for

Burton totaling $3,750. (PFOF ¶¶ 128-136.) In March of 2014, Burton was awarded a several thousand dollar base salary adjustment. (PFOF ¶ 286.)

Burton can point to no evidence tying the student complaint, her EEOC complaint, or her federal lawsuit to any adverse employment action. All of her retaliation claims—whether brought pursuant to Title VII or Title IX—must be dismissed.

IV. ALL CONDUCT POST-DATING BURTON'S FIRST EEOC CHARGE IS NOT ACTIONABLE AS A MATTER OF LAW DUE TO THE LACK OF SPECIFICITY IN THE SUBSEQUENT CHARGE.

Prior to filing a Title VII suit, a plaintiff must exhaust her administrative remedies with the EEOC. *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 128-29 (7th Cir. 1989). A corollary of this exhaustion requirement is that generally, a plaintiff cannot base her complaint on claims she did not include in her EEOC charge. *Garcia v. Fry*, 972 F. Supp. 1133, 1136 (N.D. Ill. 1997). Allegations outside of the body of the charge may be considered only where it is clear that the charging party intended the agency to investigate those allegations. *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 502 (7th Cir. 1994) (citing *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1110-11 (7th Cir. 1992)). The EEOC charge must, at a minimum, describe the same conduct and implicate the same individuals. *Cheek*, 31 F.3d at 501 (citing *Rush*, 966 F.2d at 1110).

Burton filed two EEOC charges and has filed a total of three complaints in this lawsuit (an original complaint and two amended complaints). In her second

EEOC charge, Burton only vaguely alleges that she has been "subjected to intimidation and disciplinary action," without specifying what actions were taken against her, and that she is "not selected for assignments though I express interest in them and I have been assigned to teach lower level, undergraduate courses." Burton's lack of detail dooms the allegations in her amended complaint. She does not identify the individuals who took these actions, specify any disciplinary action to which she was subjected, which assignments she expressed interest in but did not receive, or explain on what ways she believes she was "treated differently and harassed because of [her] sex." (PFOF 395, Bensky Decl. Ex. HHHH.)

Burton's Second Amended Complaint, in stark contrast, is replete with over one hundred paragraphs of new allegations, names an additional defendant (Dalecki) whose name appeared in neither charge, and purports to bring into the lawsuit dozens of perceived slights that allegedly occurred between the filing of the two charges without having put either the defendants or the investigating agency on notice of her complaints. "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge." *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863 (7th Cir. 1985). In such situations, partial summary judgment on those claims and allegations not exhausted is an appropriate remedy. *Id.* at 864. Defendants therefore request that this Court grant summary judgment on those allegations related to her Title VII claims in the

Second Amended Complaint that post-date the timing of Burton's initial EEOC charge, or those allegations dated after August 13, 2013.

V. BURTON'S TITLE IX CLAIM FAILS BECAUSE IT IS PREEMPTED BY TITLE VII.

Courts within the Seventh Circuit have determined that discrimination claims under Title IX are preempted by the statutory scheme of Title VII. Title VII "provides a comprehensive statutory scheme for protecting rights against discrimination in employment…It is well-established that Title VII's own remedial mechanisms are the only ones available to protect the rights created by Title VII." *Yasiri v. Bd. of Regents of Univ. of Wis. Sys.*, No. 99-C-0051-C, 2000 WL 34230253, at *8 (W.D. Wis. Jan. 28, 2000) (unpublished) (citing *Waid v. Merrill Area Public Schools*, 91 F.3d 857, 862 (7th Cir. 1996) (abrogated on other grounds by *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009)).

When Congress enacted Title IX, it intended "to bolster the enforcement of the pre-existing Title VII prohibition of sex discrimination in federally funded educational institutions; Congress did not intend to create a mechanism by which individuals could circumvent the pre-existing Title VII remedies." *Ludlow v. Northwestern Univ.*, --- F. Supp. 3d ----, No. 14-C-4614, 2015 WL 5116867, at *4 (N.D. Ill. 2015) (unpublished) (citing *Lakoshi v. James*, 66 F.3d 751, 755 (5th Cir. 1995)). In *Ludlow*, a recent case from within this Circuit, the Northern District of Illinois dismissed a professor's Title IX claim alleging that the University had violated Title IX by investigating certain sexual harassment allegations against the

professor by a graduate student. The court determined that Title VII preempted any Title IX employment discrimination suit and noted that, when determining that Title IX claims were preempted, the courts expressed "concern that by allowing a comparable cause of action under Title IX the very comprehensive, detailed, and express provisions of Title VII could be completely avoided," and observed that "Congress did not intend that Title IX serve as an additional protection against gender-based discrimination regardless of the available remedies under Title VII." *Id.* (citing *Howard v. Bd. of Educ. of Sycamore Cty. Unit Sch. Dist. No. 427*, 893 F. Supp. 808, 815 (N.D. Ill. 1995) (citation omitted)).

In other words, a litigant may not use Title IX to litigate claims, such as the employment discrimination claims in this case, that she may pursue under Title VII. Other cases within the district are in agreement. In *Kowal-Vern v. Loyola Univ. of Chicago*, No. 97-C-6409, 2002 WL 1880131, at *5 (N.D. Ill. Aug. 14, 2002) (unpublished), for example, a professor sued claiming gender discrimination under both Title VII and Title IX, just as Burton has done here. The court observed that she could not bring a private cause of action under Title IX because she alleged the same set of facts to support both claims and asked for the same remedies. Under these circumstances, "Title VII is the exclusive remedy for her claim of employment discrimination based on gender." *Id.* Similarly, in *Blazquez v. Bd. of Educ. of City of Chicago*, 2006 WL 3320538, No. 05-CV-4389 at *11 (N.D. Ill. Nov. 14, 2006) (unpublished), the court dismissed a teacher's Title IX gender discrimination claim, observing that the action concerned the teacher's own allegations of harassment

and that to "protect[] the sanctity of Title VII's comprehensive scope, as well as the lawmakers' intention to see that its remedial scheme not be bypassed," the plaintiff was limited to seeking relief under Title VII.

Tellingly, Burton's Title IX claim does not allege that she was denied access to an educational benefit or program, as Title IX requires. *Kowal-Vern*, No. 97-C-6409, 2002 WL 1880131, at *5 (N.D. Ill. Aug. 14, 2002) (unpublished) (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999)). Burton's claim under Title IX against the Board is preempted by Title VII because it mirrors her Title VII claim, and the Title IX claim should therefore be dismissed. In the alternative, Burton's claim fails for the same reasons her Title VII claims fail, and the Title IX claim should therefore be dismissed.

VI. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON BURTON'S EQUAL PROTECTION CLAUSE CLAIM.

Because UW-Platteville personnel are state actors, the Equal Protection Clause of the Fourteenth Amendment applies. *Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999). While Title VII discrimination claims and discrimination claims based on the Equal Protection have much in common, an important distinction is that the plaintiff with an Equal Protection claim must prove that the defendants *intentionally* discriminated against her on the basis of a protected category. *King v. Bd. Of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990).

Discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or

reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (internal footnote, citation, and quotation marks omitted). The Equal Protection Clause "does not prohibit all negative employment actions against women," and courts recognize that where, "as a purely personal matter, a boss and a particular employee are not compatible," it is not sexually discriminatory to take actions against the employee on that basis. *King*, 898 F.2d at 539.

Because Burton cannot meet the threshold to establish her discrimination case under Title VII, she *ipso facto* cannot meet the higher burden of establishing discriminatory intent by either Caywood or Dean Throop that suffices to state a claim for violation of the Fourteenth Amendment's Equal Protection Clause. Dean Throop did not take any adverse employment actions against Burton, and even secured an unsolicited upward salary adjustment for Burton. There is no evidence whatsoever to indicate that Throop's letter of direction (which does not constitute an actionable employment action) was motivated by animus toward Burton because of her sex. Furthermore, Burton has offered no evidence that Throop "turn[ed] a blind eye" to Caywood's allegedly discriminatory actions, as she alleges in her Second Amended Complaint. (Dkt. No. 28 ¶ 195.)

As to Caywood, Burton's Equal Protection Clause claim likewise fails. Construing Burton's allegations in the light most favorable to her, Burton maintains that Caywood made comments that a woman's salary is secondary to a

man's salary. Isolated comments that are no more than stray remarks in the workplace are insufficient to establish that a particular decision was motivated by discriminatory animus for the purposes of a Title VII claim. *Petts v. Rockledge Furniture LLC*, 534 F.3d 715, 721 (7th Cir. 2008). A stray remark can raise an inference of discrimination if it is made by the decision maker around the time of the decision and in reference to an adverse employment action. *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 478, 491 (7th Cir. 2007).

Burton alleges that Caywood made negative remarks about a woman's salary in fall of 2009, in March of 2011, and in October of 2012. (Dkt. No. 10 ¶15, Response to Rg. 6; DEP.) While Caywood denies making these statements, they are nonetheless immaterial for summary judgment purposes, because Caywood was not responsible for setting salaries, the (female) Dean and Provost were. (PFOF ¶ 19.) Burton was free to seek out additional income opportunities for herself, both inside and outside of UW-Platteville, just as any other professor was. Certainly, Caywood cannot be responsible for treating people differently when all he does is sign the dotted line to forms submitted by various professors. (PFOF ¶¶ 231, 233-40.) There is therefore no basis upon which to infer discriminatory animus. Furthermore, Caywood voted in support of Burton's promotion and tenure, and approved several different additional income opportunities that Burton sought out for herself. Burton therefore suffered no damage as a result of alleged statements related to a woman's salary.

Burton has offered no other evidence that any action Caywood supposedly took against her was motivated by a discriminatory animus, a necessary element to proving her claim. Caywood explained the reasons for his alleged withdrawal of support for the cybercrime program, a focus of many of Burton's claims—namely, that Burton had not followed the university processes and protocols required for the implementation of a program, and Caywood and other University leadership therefore could not support statements about the status of a nonexistent curriculum. Caywood made Burton aware of these processes months before issuing his letter. (PFOF ¶¶ 67-125.)

Burton cannot establish that either Caywood or Throop took any action against her due to a discriminatory intent, and her Equal Protection claim should therefore be dismissed.

VII. BURTON CANNOT ESTABLISH A VIOLATION OF THE EQUAL PAY ACT.

The Equal Pay Act provides that no employer shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate at which it pays wages to employees of the opposite sex, for equal work, requiring equal skill, effort and responsibility, unless the employer men and women are paid differently for any reason other than their sex. 29 U.S.C. § 206(d)(1); *Fallon v. State of Ill.*, 882 F.2d 1206, 1208 (7th Cir. 1989). Simply put, federal law prohibits employers from paying men more than women, for the same work, if the pay differential is because of sex. While the Equal Pay Act does not require proof of discriminatory intent, it aims to remedy gender discrimination, not to punish

employers for paying employees differently. The Equal Pay Act affords protection to both women and men. *Ende v. Bd. of Regents of Regency Univ.*, 757 F.2d 176, 177 (7th Cir. 1985). A plaintiff may only state a claim under the Equal Pay Act for payments going back two years, or three years if a violation is found to be willful. *Reiff v. Bd. of Regents of Univ. of Wis. Sys.*, No. 13-cv-192, 2014 WL 4546041 (W.D. Wis. Sept. 12, 2014) at *5. The original complaint was filed in this matter on April 14, 2014, meaning that any Equal Pay Act violation is limited to April 14, 2012 forward or April 14, 2011 if the Court determines that any alleged violation was willful.

A. The *Prima facie* case

To establish a *prima facie* claim under the Equal Pay Act, the plaintiff must prove: 1) an employee of the opposite sex received higher wages; 2) for equal work requiring substantially similar skill, effort, and responsibilities; and 3) the work was performed under similar working conditions. *Cullen v. Ind. Univ. Bd. of Trustees*, 338 F.3d 693, 698 (7th Cir. 2003) (citing *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998)). "Wages" under the EPA are defined to include “all payments” made to the employee “as remuneration for employment,” and “all forms of compensation.” 29 C.F.R. § 1620.10. This includes, among other things, bonuses, commissions, and fringe benefits.

In determining whether the two jobs are equal, the critical inquiry is whether the jobs to be compared have a common core of tasks, or whether a significant portion of the two jobs is identical. Id. "The Equal Pay Act does not give the court a

mandate to evaluate jobs for the purpose of determining a proper or fair pay differential between two employees performing unequal work." *Id.* (citations omitted). Except in rare exceptions grounded in unique factual circumstances, plaintiffs who are faculty members at universities (like Burton) may not satisfy their *prima facie* burdens by identifying alleged comparators outside of their own departments. *Strag v. Bd. of Trustees, Craven Cmty. College*, 55 F.3d 943 (4th Cir. 1995).

B. Equal Pay Act defenses

Once a plaintiff establishes a *prima facie* case, the burden of persuasion shifts to the defendant to prove "the pay disparity is due to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any other factor other than sex." *Fallon*, 882 F.2d at 1211 (citing 29 U.S.C. § 206(d)(1)(i)-(iv)), and also *Corning Glass Works v Brennan*, 417 U.S. 188, 196 (1974). The fourth defense—any other factor other than sex—means just what it says. It is "a broad 'catch-all' exception and embraces an almost limitless number of factors, so long as they do not involve sex." *Id.*

When considering defendant's factors other than sex, courts may not "substitut[e] their judgment for the employer's judgment." *Fallon*, 882 F.2d at 1211; *see also Harris v. Warrick Cty. Sheriff's Dep't.*, 666 F.3d 444, 449 (7th Cir. 2012) (Title VII and 42 U.S.C. § 1981 case, holding a court should not "sit as a super-personnel department" in determining whether certain discipline was appropriate). Factors other than sex need not "be related to the requirements of the particular

position" nor be "a 'business-related reason'" at all. *Fallon*, 882 F.2d at 1211 (citing *Covington v. S. Ill. Univ.*, 816 F.2d 317, 321, 322 (7th Cir. 1987), *cert. denied,* 484 U.S. 848 (1987)). The Equal Pay Act asks whether the employer has a reason other than sex for the differential, "not whether it has a 'good' reason." *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005). Rather, in cases such as the present one, courts ask "only whether the factor is discriminatorily applied." An employer's factor other than sex must be bona fide, meaning the employer must have utilized the factor in good faith. *Fallon*, 882 F.2d at 1211.

Burton maintains that the Board violated the Equal Pay Act because her male colleagues, Aric Dutelle and Lorne Gibson, were paid more for equal work. However, Burton cannot state an Equal Pay Act claim as to Dutelle because Dutelle is not a proper comparator. Nevertheless, Burton's Equal Pay Act claim fails because she cannot prove she was paid less for equal work.

C. Dutelle is not a proper comparator because he was in charge of the Forensic Investigation program, then was appointed to be the Interim Director in the Office of Sponsored Programs

Dutelle was the program coordinator of the forensic investigation program, a degree program within the CJ department. He was instrumental in the design and development of the program's forensic investigation research facility, also known as a "crime scene house," where students learn various forensic investigation techniques as part of a curriculum. Dutelle's job duties included leading, planning, and managing the FI program, managing the FI budget, providing faculty oversight

within the FI program, training faculty, developing and revising courses, supervising, recruiting, and managing program personnel, advertising the program, and recruiting students, among other duties. Dutelle received 50% release time as part of his contract for these duties, and performed teaching duties the remaining 50% of the time. In the fall of 2013 when Dutelle move to the Office of Sponsored programs, he was no longer in the criminal justice department and was thus not a proper comparator. (PFOF ¶¶ 7-8, 296, 299, 317-26.)

Burton cannot state an Equal Pay claim with regard to Dutelle because only half of Dutelle's job duties even arguably consisted of the same work (namely, teaching two courses). The "proper domain of the Equal Pay Act consists of standardized jobs in which a man is paid significantly more than a woman (or anything more, if the jobs are truly identical) and there are no skill differences." *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007). At no time did Burton's job responsibilities encompass the budgeting, training, management, and recruiting skills that Dutelle utilized to run the FI program.

D. Differences in Base Salaries between Burton, Dutelle, and Gibson are due to factors other than sex

The base salary for the individuals Burton identifies as comparators temporarily exceeded Burton's not because of Burton's sex, but because the individuals she identifies received a significant, but temporary, salary bump for a time from a source outside UW-Platteville known as the Prior Learning Assessment (PLA) grant. The University of Wisconsin System provided a two year grant to Caywood, Dutelle, and Gibson for prior learning assessments through the Lumina

Foundation to explore offering veterans university credit for their prior learning experience serving in the military. Dutelle, Gibson, and Caywood submitted the grant proposal in late 2011, resulting in a higher salary for the three for the following two years due to the additional work implementing the grant proposal. All three men invested in excess of 100 hours on the project, with both Gibson and Dutelle investing 290 hours each above and beyond their full-time teaching duties. (PFOF ¶¶ 245-250.)

Burton cannot establish a violation of the Equal Pay Act because the difference in salary is explained by both the outside grant payment and the additional hours of work above and beyond the requirements of a full-time professor's schedule. In short, Burton is not alleging a complaint for equal pay for equal work, but rather a complaint that she should have been paid as much as her male colleagues who engaged in additional work. Burton was paid less than her male counterparts due to a factor other than sex, and therefore her claim should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court GRANT their Motion for Summary Judgment and dismiss this case with prejudice.

Dated this 10th day of November, 2015.

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