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

DR. SABINA BURTON,

Plaintiff,

v. Case No. 14-cv-0274

BOARD OF REGENTS UNIVERSITY OF WISCONSIN.

Defendants.

BOARD OF REGENTS' REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT

Having conceded to the dismissal of six of her eight claims, Plaintiff Sabina Burton clings to two retaliation claims in the hope of airing her personal grievances against UW-Platteville and its various administrators before a federal jury. As explained in its brief in chief and below, Burton has not met her burden to demonstrate that a genuine issue of material fact exists for trial, and her retaliation claims fail under both Title IX and Title VII as a matter of law. The Board of Regents[1] therefore respectfully requests that this Court enter judgment in its favor on these remaining claims with prejudice and dismiss the matter in its entirety.

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[1]Because Burton has agreed to voluntarily dismiss her claims against the individual defendants, this brief will refer in most cases to the Board of Regents ("Board"), the only remaining defendant.

I. BURTON HAS NOT MET HER BURDEN TO DEMONSTRATE A TRIABLE ISSUE OF FACT.

A. Burton provides no evidence evincing material disputes of fact

In response to at least seventy–five of the Board's proposed findings of fact, Burton writes the word "disputes" but then provides no contrary evidence evincing a dispute. This response is insufficient to create a genuine issue for trial.[2] The Board put forth findings of fact supported by declarations from persons with personal knowledge. It was Burton's burden to offer admissible evidence of her own in support of her remaining claims in order to convince this Court that there is a genuine issue of fact in dispute requiring a trial. She has failed to do so.

Summary judgment is the "put up or shut up" moment in a lawsuit, when the party with the burden of proof must show what evidence she has that would convince the trier of fact to accept her version of events. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003) (quoting *Schacht v. Wis. Dep't of Corr.*, 175 F.3d 497, 504 (7th Cir. 1999)). When responding to a dispositive motion, the plaintiff must set forth specific facts showing that there is a genuine issue for trial. *Becker v. Tenenbaum-Hill Assocs., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990) (citing Fed. R. Civ. P. 56(e)).

In fact, Burton's "disputes" are not disputes at all, they are objections with a request for the court to disregard the defendant's proposed fact. If the court sustains the objection, it then disregards the fact when considering whether the

[2]This figure does not include responses to numerous other findings to which Burton provides at least some record evidence that nonetheless does not put the proposed finding in dispute.

offering party is entitled to judgment as a matter of law. If the court overrules the objection, the court must accept the fact as undisputed—unless the objecting party also offers evidence to contradict the fact. Fed. R. Civ. P. 56(c).

Burton's objections to the Board's evidence are unfounded and should be overruled. With few exceptions, Burton asks the court to disregard declaration testimony that she characterizes as "self-serving and speculative testimony." Notwithstanding the objectionable evidence is made with first-hand knowledge and is otherwise admissible, Burton erroneously objects based on *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 631 (7th Cir. 2009) and *Payne v. Pauley,* 337 F.3d 767, 773 (7th Cir. 2003). Those cases do not apply here, because the proposed facts do not contain "speculation, intuition, or rumor" and they are not "inherently plausible."

For example, Burton objected to a fact based on Caywood's declaration saying, "Caywood believes the issue with the student was mishandled from the start, by nearly everyone involved, including himself." PFOF ¶ 61. Caywood's belief is based on his personal knowledge of his own feelings, and is offered to explain why he chose to write a policy on how certain student complaints should be handled, and distribute it to his department. This is relevant evidence based on first-hand knowledge, offered for the purpose of explaining Caywood's legitimate, non-retaliatory reason for creating a policy.

Another example relates to Caywood's state of mind in supporting the National Science Foundation Grant. (PFOF ¶ 80.) Here, Caywood explains his

comfort-level in going out on a limb for a grant worth nearly half a million dollars versus a grant worth seven thousand. Other than object to the fact as being speculation, uncorroborated, and self-serving, Burton offered no evidence that Caywood's feelings regarding the large grant were not worthy of credence.

Burton further warns the court not to weigh competing facts and inferences, but she did not provide any evidence from which a court could impermissibly weigh facts or reach competing inferences with respect to the many facts she objected to. For example, the Board asserts: *When Throop saw the websites, she had serious concerns about the representations being made because Throop was worried that students would make arrangements to come to UW-Platteville anticipating matriculating in a program that did not, and still does not, exist. Throop felt that students would be rightfully very upset if this happened.* (PFOF 97.) Burton objected that the court may not make credibility determinations, weigh the evidence, or find facts based on competing inferences. Yet again, Burton did not contradict the proposed fact with any evidence that Throop's concerns about the representations Burton made on her website were insincere. Accepting this fact as true does not require the Court to weigh evidence, make credibility determinations, or choose between competing inferences.

Courts apply "the summary judgment standard with special scrutiny to employment discrimination cases, which often turn on the issues of intent and credibility," *Avila v. Bd. of Regents of the Univ. of Wis. Sys.*, 95 F. Supp. 3d 1074, 1080 (E.D. Wis. 2015) (citations omitted), but this does not change the standard

summary judgment procedure. Burton's erroneous interpretation of evidence admissible for summary judgment purposes ignores the burden shifting nature of employment discrimination claims. Burton proceeds under the indirect method of proof and must demonstrate she (1) engaged in a statutorily protected activity; (2) suffered a materially adverse action by her employer; and then must (3) prove a causal link between the two. If Burton were able to make a *prima facie* case, the burden of production shifts to the defendant to provide a legitimate, non-discriminatory reason for doing what it did. *See, e.g., Rizzo v. Sheahan,* 266 F.3d 705, 715 (7th Cir. 2001).

Thus, employment discrimination cases almost always involve testimony from the people accused of—in this case, retaliation—to explain why they did what they did. The court must accept self-serving testimony *unless* it determines the testimony is inherently implausible, fishy, based on rumor or intuition, *or* the plaintiff offers evidence that the proffered reason is pretext. Burton offers no evidence of pretext and the Board's witnesses' testimony does not suffer from inherent unreliability. The actions the Board took which Burton asserts are materially adverse are documented and justified in contemporaneous emails, letters, and memos. (*See*, *e.g.*, Dkts. 36-2, 36-4, 36-5, 37-4, 37-15.)

Burton's responses to the Board's proposed findings do not offer evidence "sufficient to allow a jury to determine that [the] defendant's stated reason for [taking the adverse employment action] was a mere front for an ulterior, unlawful

motive." *Valentino v. Vill. of S. Chicago Heights*, 575 F.3d 664, 673 (7th Cir. 2009) (quotation and citations omitted).

Burton's own speculation concerning a defendant's motive for acting, without more, is not sufficient evidence to withstand summary judgment. *Widmar v. Sun Chem. Corp.*, 772 F.3d 457, 460 (7th Cir. 2014) (citing *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003)); *Cliff v. Bd. of Sch. Comm'rs of City of Indianapolis*, 42 F.3d 403, 412 (7th Cir. 1994) (conclusory assertions of discrimination insufficient to defeat summary judgment). Although the Court construes reasonable inferences in favor of the plaintiff, this does not include denying summary judgment based purely on the plaintiff's speculation that discrimination occurred. *Argyropoulos v. City of Alton*, 539 F.3d 724, 734 (7th Cir. 2008).

Further, Burton must do more than create *some* factual dispute. She must demonstrate that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). In order to meet this burden, the nonmoving party "must do more than simply show there is some metaphysical doubt as to the material facts." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1127 (7th Cir. 1996) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

Burton has produced no evidence to contradict the sworn statements and deposition testimony by Throop, Dalecki, or Caywood in which they provide legitimate reasons for their actions and decisions that bear no relation whatsoever

to Burton's protected activities. Her conspiratorial conjecture is not sufficient to support a pretext for retaliation. *Essex v. United Parcel Service, Inc.*, 111 F.3d 1304, 1310 (7th Cir. 1997) (internal citations omitted).

B. Burton cannot prove the Board's rationale was pretext for unlawful retaliation

Assuming for the sake of argument that Burton can make a prima facie case for retaliation based on either the fall 2012 student complaint or Burton's later EEOC charges and this lawsuit, Burton's submissions have not challenged the evidence presented by the defendants supporting the reasons for their actions. For example, Caywood and Throop explained through admissible evidence their legitimate concerns over how the status of the (still nonexistent) cyber security program was to be discussed in a press release. Burton has not submitted any evidence beyond her own speculation that ties the administration's handling of that press release to the student complaint in October of 2012.

Likewise, Burton has produced no evidence that creates a genuine dispute of fact for trial regarding the motives or reasoning of Dalecki or Throop with respect to course assignments or handling of personnel issues. (*See* argument in Section II, *infra*.) She produced no evidence to contradict or call their reasoning into question and instead interposed inapposite objections. The burden remains at all times with the plaintiff to establish a causal linkage between the alleged protected activity and the adverse employment action, and to prove that the employer's proffered reason for the action is pretextual. *Harden v. Marion Cnty. Sheriff's Dep't*, 799 F.3d 857, 862 (7th Cir. 2015) (citations omitted).

If Burton disagreed with the facts as asserted, it was her duty to marshal some form of admissible evidence to refute them. As it stands, Burton has not created a genuine dispute of material fact for trial and the truly material facts for the purposes of this motion stand undisputed.

C. The undisputed facts entitle the Board to judgment as a matter of law.

The undisputed facts entitle the Board to judgment as a matter of law. Burton's retaliation claims are based on two events: one allegedly protected activity—her reporting of the student complaint to the Dean—and the protected activity of filing an EEOC complaint.[3] The only arguably materially adverse action Burton claims is tied to the student complaint is Caywood's and Throop's reactions to the AT&T press release.[4] However, the undisputed evidence proves that Throop and Caywood had legitimate concerns about the press release because it could be read as boasting a cybersecurity program that everybody admits did not exist at UW-Platteville. What's more, there is absolutely no evidence tying the student complaint to the AT&T press release. With no evidence of pretext and no causal link, the alleged retaliation pointing to the press release must be dismissed.

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[3]The Board does not contest that filing an EEOC charge is a protected activity, as there is no evidence Burton was insincere in her motivations for filing those charges.

[4]Burton asserts that Caywood scolded her in front of her colleagues about one week after the student complaint incident, but this scolding, if it occurred, does not rise to the level of a materially adverse action. Title VII is not a general civility code. Burton appears to also assert that random occurrences that happened well after the student complaint were also made in retaliation, but there is simply no evidence—even temporal proximity—to create a causal link.

In a nutshell, UW Platteville has a clear procedure that must be followed before offering courses or creating new curricula. Burton admits she did not follow those procedures but nevertheless created Websites (unsanctioned by UW Platteville) and supported a press release that misleadingly implied UW Platteville would have a cyber security program in the near future. This made Throop and Caywood understandably nervous. At the same time, both Throop and Caywood voted to grant Burton tenure, and they signed off on extra income opportunities Burton was pursuing at the time. (*See* PFOF ¶¶ 26, 28, 67-70, 89, 90, 93, 115, 125, 251, 301, 351-353.)

As far as Burton's EEOC complaints are concerned, the only arguably materially adverse actions complained of are Dean Throop's October 28, 2014 letter of direction and Dean Throop's January 2015 Chapter 6 complaint against Burton.[5] Burton does not dispute, however, that by the fall of 2014 she was experiencing significant strife with her colleagues, including Dalecki. She admits to the following: 1) sending the objectively unprofessional emails on June 6 and 9, 2014, 2) sending an email threatening a junior colleague's tenure bid, 3) threatening to involve and actually involving her students in her struggles with her colleagues and the Dean. It is undisputed that Dean Throop's letter of direction directly addressed these behaviors. Whether Throop was right or wrong in sending the letter is irrelevant.

[5]Burton asserts various grievances including Dalecki's failure to force Burton's colleague to apologize to her for something the colleague said during a social outing at a pizza parlor, and Dalecki's admonishment of Ron Jacobis for telling Burton what Deborah Rice said about her. These things, while upsetting to Burton, do not violate federal civil rights law. They are not materially adverse. Other grievances related to teaching assignments are not materially adverse within the context of this case, but even if they were, there is no evidence at all tying course assignments to Burton's civil rights complaints. And, Dalecki clearly explained how and why he went about making course assignments. Burton has not disputed the sincerity of Dalecki's testimony in this regard.

Following the letter, Burton admits she did not take responsibility for any of this behavior, but instead accused Throop of bullying her. Dean Throop's subsequent Chapter 6 complaint against Burton directly responded to Burton's refusal to comply with the letter of direction, take responsibility for, and change her behavior. There is no evidence linking Throop's attempts to get Burton to change her behavior to the EEOC complaints. (*See* Dkt. 37-5.)

Burton failed to put at issue any of the most important facts that bear on her remaining claims in this lawsuit. This Court should therefore dismiss the remaining claims with prejudice.

II. BURTON'S TITLE IX RETALIATION CLAIM FAILS

A. Burton's Title IX Claim is Preempted by Title VII and Should Be Dismissed as Duplicative.

Burton did not meaningfully address the case law demonstrating that courts within this circuit have held Title IX claims to be preempted by Title VII. These cases were decided more recently than, and are more on point with the facts of this case than the case law Burton cites for her general proposition that Title IX retaliation claims are available under certain circumstances. Burton does not distinguish, explain, or in any way speak to why this Court should ignore the more recent authorities the Board relied on. Burton thus concedes this argument. The Court should dismiss Burton's Title IX retaliation claim as a result. *Fleming Cos., Inc. v. Krist Oil Co.*, 324 F. Supp. 2d 933, 945 (W.D. Wis. 2004).

As the Board explained in its brief in chief, courts within this circuit have determined that Title IX claims that parrot Title VII claims, as Burton's do here,

are preempted by Title VII's complex statutory and regulatory scheme. *See also Lakoski v. James*, 66 F.3d 751, 758 (5th Cir. 1995); *Mabry v. State Bd. of Cmty. Coll. & Occupational Educ.*, 813 F.2d 311, 317 (10th Cir. 1987); *O'Connor v. Peru State Coll.*, 781 F.2d 632, 642 n.8 (8th Cir. 1986) (Title IX claim that "merely duplicates" Title VII claim and does not challenge access to facilities or supplies barred).

Burton does not distinguish cases like these or those cited in the Board's brief in chief, and she does not explain why *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), which predates all of the decisions the Board cites from within this circuit, invalidates the preemption argument. Burton's Title IX claim is a reiteration of her Title VII claim and should be dismissed.

B. Burton Did Not Suffer Any Materially Adverse Actions.

In response to the Board's motion, Burton identifies two materially adverse employment actions that form the basis for her retaliation claims. First, she claims that Caywood, her then department chair, publicly criticized her. Second, she claims that Caywood and Throop, the dean of the college, retaliated against her when they allegedly withdrew support for Burton's cybersecurity program at UW-Platteville. Even when construed in the light most favorable to Burton, neither claim is actionable under Title VII (or Title IX),[6] and this Court should therefore dismiss this claim.

Unlike other forms of Title VII employment discrimination, retaliation claims do not require adverse *employment* consequences to be actionable. Rather,

[6]All Title VII retaliation arguments apply with equal force to Burton's Title IX claim (should the court not consider it preempted).

retaliation may be actionable when the plaintiff shows that "a reasonable employee would have found the challenged action materially adverse" such that the reasonable employee would be dissuaded from engaging in protected activity. "The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces [materially adverse] injury or harm." The term "materially adverse" excludes trivial harms, petty slights, minor annoyances, and the like. Whether an action is materially adverse depends upon the facts and circumstances of each case. *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 67-69 (2006).

"[N]ot everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (internal quotation marks omitted)).

Burton maintains that after she reported the student complaint to Dean Throop and the provost, Caywood became hostile toward her and criticized her during a department meeting—although Burton admits Caywood did not criticize her by name. (Burton Dec Ex. 14, Dkt. 54-14.) Burton argues that this criticism would dissuade a reasonable employee from reporting sexual harassment and is therefore actionable. (Dkt. 57 at 9-10.) However, Burton's argument ignores numerous cases that have held that mere criticism alone is not an adverse

employment action. *Pantoja v. Am. NTN Bearing Mfg. Corp*., 495 F.3d 840, 847 (7th Cir. 2007). *See also Grube v. Lau Indus., Inc.*, 257 F.3d 723, 729-30 (7th Cir. 2001) (even "unfair reprimands" are not adverse employment actions; *see also Griffin v. Potter*, 356 F.3d 824, 829 (7th Cir. 2004). This is the case even under the modified materiality standard in retaliation claims. *See Recio v. Creighton University,* 521 F.3d 934, 940 (8th Cir.2008); *see also Burlington Northern,* 548 U.S. at 69. Federal employment law does not create a general civility code for the workplace. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

Furthermore, the undisputed facts also establish that Caywood continued to accommodate and support Burton after the student complaint incident. Caywood voted to award Burton early tenure and he signed off on online graduate courses and additional supervision opportunities in the weeks following the student complaint incident that would provide Burton with extra income opportunities.

Burton alleges that both Caywood and Throop withdrew support for a cybersecurity program at UW-Platteville in January of 2013 in retaliation for reporting the student complaint. Even if this Court assumes that Throop and Caywood did withdraw such support, that withdrawal is likewise not materially adverse under *Burlington Northern*'s standard.

Caywood's and Throop's criticism of the press release:

- Did not result in any change to Burton's salary;
- Did not jeopardize her prospects for tenure, which Burton was granted a year early and by a unanimous vote soon thereafter;
- Did not result in any disciplinary action; and

- Did not alter Burton's job duties in any manner.

In short, what Burton characterizes as a withdrawal of support was, in actuality, nothing more than a few proposed revisions to a press release to cure inaccuracies. Although Caywood's January 24, 2013 letter could have been drafted in a softer manner, it was a legitimate criticism of Burton's public pronouncement about developing a program that had not been approved at any level of the university.

Burton made no further efforts to seek the necessary approvals for such a program from her department, the college, the university, or the Board after Caywood's letter, though she admits she knew the process for these approvals. She never again applied for grant funds, whether from AT&T or elsewhere. Thus, Burton cannot support her contention that Caywood's and Throop's suggestions, or Caywood's January 24, 2013 letter, harmed her. Even if the criticisms are unfair or the letter is harsh, they are not materially adverse. Burton's civil rights retaliation claims should therefore be dismissed.

C. There is No Evidence Linking the Student Complaint to Materially Adverse Actions.

Finally, Burton provides no evidence outside of what she contends is suspicious timing that supports even the slightest link between Burton's report of the student complaint in October of 2012 and Caywood's reaction to the AT&T press release in January of 2013. Burton has provided no testimony, documentation, or other admissible evidence to suggest that: 1) either Caywood or Throop acted against her *because of* the student complaint incident or 2) that the reasons the administrators offered for their actions were pretextual.

Suspicious timing alone will not sustain a finding that retaliation has occurred. In *Milligan v. Bd. of Trustees of S. Ill. Univ.*, 686 F.3d 378, 389-90 (7th Cir. 2012), the Seventh Circuit observed that mere temporal proximity between the alleged protected activity and the adverse action against the plaintiff will not create a triable issue of fact except in the most "egregious" of cases. *Id.* (citing *Loudermilk v. Best Pallet Co., LLC*, 636 F.3d 312, 315 (7th Cir. 2011)).

In *Milligan*, several months passed between the time that the plaintiff made a sexual harassment complaint and the time he received the news that he would not retain his position with his employer. The court observed, "We previously have held that a *seven-week* interval, standing alone, is insufficient to create a material issue regarding causation." 686 F.3d at 390 (citing *Argyropoulos*, 539 F.3d at 734) (emphasis added).

In Burton's case, over three *months* passed between the student complaint and the AT&T incident. Caywood's comments implementing a new policy for reporting of student complaints followed more closely, but even this timing alone does not compel a trial, particularly where no action was taken against Burton outside of what she perceives as negative comments or criticism. *See Sklyarsky v. Means-Knaus Partners, L.P.*, 777 F.3d 892, 898 (7th Cir. 2015) (Plaintiff's retaliation claims did not survive summary judgment were suspicious timing between reprimands, suspension, and dismissal was the only evidence presented).

D. Burton Does Not State a Claim for Retaliation Based on Dean Throop's Actions.

With regard to Dean Throop, Burton alleges that three adverse actions support her retaliation claim under Title VII: (1) the October 2014 letter of direction; (2) Dean Throop's December 2014 email in which she accused Burton of canceling a class; and (3) Throop's Chapter 6 grievance against Throop in January of 2015.

As described in greater detail in the proposed findings of fact, Dean Throop's letter of direction counseled Burton to solve her differences with her colleagues without involving higher administration, to be respectful of her colleagues, and not to threaten junior faculty members' tenure prospects. Burton erroneously contends that this letter, which did not carry any disciplinary action such as a suspension, loss of pay, or termination with it, constitutes a materially adverse action. Burton ignores the Seventh Circuit's requirement that all cases must be viewed in their own context. *See Trimble v. Alliance–DeKalb/Rock–Tenn Co.,* 801 F.Supp.2d 764, 774 (N.D.Ill.2011).

The letter of direction legitimately addressed Burton's admitted behaviors. Burton's failure of self awareness does not transform Throop's direction into a materially adverse action. Viewed in context, there is an abundance of evidence that Burton's behavior toward her colleagues was declining. A plaintiff engaging in

inadequate performance cannot misuse EEOC complaint processes and federal lawsuits to insulate herself from legitimate employment actions.[7]

Burton offers no evidence besides her own speculation that the letter is in any way tied to either her EEOC charge or the instant lawsuit, rather than her admitted, frequent, lengthy, and often abrasive email exchanges with colleagues and administrators throughout the previous months.

Burton likewise fails to state a claim as a matter of law as to the Dean's December email. Dean Throop, acting on information she had received that Burton had canceled class during the last week of the semester, emailed her to indicate that if that was the case, Throop would be forced to take disciplinary action. Throop later learned that she was incorrect and that Burton had not canceled the class. Throop never pursued the matter any further.

The email, as well as Throop's and Dalecki's testimony in this case, confirm that it is undisputed Throop believed Burton had canceled a class based on information she received. A single email threatening to issue discipline is unlikely to be materially adverse, particularly in this case, where Burton knew she had not cancelled class, and could have remedied the situation with an email to Throop saying as much.

Even if the email was materially adverse, Dean Throop explained why she sent it, and though the information later turned out to be wrong, Throop's error is

[7]"A letter of reprimand is not an adverse employment action *unless the letter is accompanied by some other action, such as job loss or demotion*." *Krause v. City of La Crosse*, 246 F.3d 995, 1000 (7th Cir. 2001) (citing *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998) and *Smart*, 89 F.3d at 442) (emphasis in original); *see also Atanus v. Perry*, 520 F.3d 662, 676 (7th Cir. 2008).

not pretext for unlawful retaliation. The Seventh Circuit reaffirmed this just days ago in *Dunderdale v. United Airlines, Inc.*, No. 14-2911, 2015 WL 7774848, at *5 (7th Cir. Dec. 3, 2015) (publication pending) (court will only correct an adverse employment decision that is unlawful, not one that is "unwise or even unfair") (citation and quotation omitted); *Harper v. C.R. England, Inc.*, 687 F.3d 297, 311 (7th Cir. 2012). Nothing in Burton's submissions creates a colorable issue of fact on this point, and therefore she cannot state a claim for retaliation based on the December email.

Finally, after Burton had filed several of her own grievances against Throop in the months and years prior, Burton contends that Throop's decision to file a grievance against Burton in January of 2015 constituted retaliation. Yet once again, Burton provides no evidence to support any connection between the Chapter 6 complaint and Burton's EEOC charges, other than her inadequate suspicious timing argument. Furthermore, Burton submitted no evidence suggesting that Throop was even aware of Burton's December 2014 EEOC charge prior to filing her Chapter 6 complaint in January of 2015. *Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 924 (7th Cir. 2007) (retaliation claim fails where there is no evidence the employer had knowledge of the protected activity at issue).

There is also no justification to tie Throop's January 2015 action to any earlier protected activity. Burton cites her August 2013 initial charge and her decision to file this lawsuit in April of 2014 as part of a "constellation of surrounding circumstances, expectations, and relationships," giving rise to an

inference of retaliation, yet, such a cosmic view ignores the numerous steps Throop took during the intervening months that benefitted Burton. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). Throop, independently of any request from Burton, went out of her way to provide Burton with an equity adjustment to her base salary in the spring of 2014. She had numerous opportunities to discipline Burton for inappropriate emails to Burton's colleagues but elected not to do so.

The only reasonable inference to draw based on the record is that Throop took the actions she did after Burton's own behavior finally became so intolerable to Throop and Burton's colleagues that it could no longer be ignored or managed without further action. Even then, the actions taken were not sufficiently severe to meet the legal threshold of a material adverse action. Burton has not tied any of Throop's so-called adverse actions to any protected activity, and her retaliation claims regarding Throop should be dismissed.

E. Burton Does Not State a Claim for Retaliation based on Dr. Dalecki's Actions.

Burton's retaliation claim based on Dalecki's actions also fail. Burton claims that Dalecki (1) encouraged her to drop the lawsuit; (2) threatened a graduate student whom Burton neither advised nor taught by counseling the student not to gossip about professors in the department; and (3) by failing to quash allegedly defamatory remarks made by another faculty member about Burton.

Even taking Burton's rendition of Dalecki's comments in the light most favorable to Burton, Burton does not state a claim for retaliation. Once again,

Burton did not establish she suffered a materially adverse action. Burton does not and cannot truthfully allege that she was denied any promotion, salary increase, or other opportunity by Dalecki due to the fact that she filed EEOC charges or the instant lawsuit. Dalecki's attempts to counsel Burton to move on from the past, abandon her lawsuits, and work toward the future are not materially adverse, involved no threat or *quid pro quo,* and did not harm Burton in any manner.

As for Burton's second and third complaints against Dalecki, Burton makes much of an incident at an off-campus restaurant, during which a graduate student overheard one of Burton's colleagues refer to Burton as mentally ill. The graduate student relayed the comments back to Burton, who became upset with the faculty member and reported the matter up the chain to Human Resources. The undisputed facts establish that (1) when alerted to the issue, Dalecki asked the faculty member to apologize to Burton; (2) the graduate student with whom Dalecki spoke following the incident was neither supervised by nor taught by Burton; and (3) Burton has offered no evidence tying the non-party faculty member's comments to any protected activity by Burton.

No histrionic rendition by Burton about intradepartmental backbiting and scandalous admonitions to graduate students secretly recorded behind closed doors changes the facts in this record. Whether a graduate student failed to have his position renewed due to a lack of funding or because he reported negative comments to Burton has no bearing upon whether *Burton* suffered a materially adverse action. *See Anderson*, 477 U.S. at 248 ("[f]actual disputes that are irrelevant or

unnecessary . . .” do not preclude summary judgment). This Court should resist Burton’s invitation to decide collateral issues that have no bearing on Burton’s retaliation claims and dismiss her allegations pertaining to Dalecki along with her other claims.

CONCLUSION

Rule 56 of the Federal Rules of Civil Procedure exists to ensure nobody's time or money is wasted with a trial when there is nothing for a jury to decide. Here, there are no disputes of fact—there's nothing for a jury to do.

The Board of Regents respectfully requests that this Court enter summary judgment in their favor on Burton’s two remaining claims and dismiss the case in its entirety with prejudice.

Dated this 11th day of December, 2015.

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