IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JODY TALLBEAR, Plaintiff, v. JAMES RICHARD PERRY, in his official capacity as Secretary of the United States Department of Energy, Defendant.	)	Case No. 1:17-cv-00025 (TSC)

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiff cannot plausibly establish that the presence in the federal workplace of paraphernalia associated with a local professional football team, or mention of the term "Redskins" by co-workers in reference to the football team, can create a hostile work environment as a matter of law. Defendant's Motion to Dismiss ("Def.'s Mot.") established that Plaintiff's Complaint is deficient as a matter of law because it fails to allege any act of intentional discrimination based on Plaintiff's status as a Native American, much less a workplace sufficiently "permeated with discriminatory intimidation, ridicule, and insult" so as to "alter the conditions of [her] employment and create an abusive working environment," *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations omitted). Plaintiff's Opposition to the motion ("Opp'n") cites no legal support for the central premises of her argument; to wit: (1) that the use of a professional sports franchise's team name in reference to that sports team can, by itself, create a hostile work environment; or (2) that an employer's failure to remediate alleged discrimination that is itself not actionable can support an inference of direct, intentional discrimination. Accordingly, because Plaintiff has failed to plead a plausible hostile work environment claim as a matter of law, her claim should be dismissed.

Plaintiff's retaliation claims fare no better. In her Complaint, Plaintiff identifies five allegedly adverse employment actions that she contends were the consequence of engaging in protected activity. *See* Def.'s Mot. at 18–19 (detailing alleged adverse employment actions). As explained in Defendant's motion to dismiss, Plaintiff plausibly alleges only one adverse employment action – the stripping of her organizational title and reassignment in December 2015 – and fails to plausibly allege any causal connection between that adverse employment action and protected activity given the more than two-and-half year gap between the two events. Perhaps in recognition of the overwhelming case law in this District rejecting a plausible inference of causation based on much shorter time lapses than are at issue in this case, Plaintiff argues in her

opposition that her job-related presentations on Native American perspectives and stereotypes to other government agencies constitute protected activity under Title VII. As discussed in both Defendant's moving brief and below, however, Plaintiff's Complaint fails to allege that these presentations apprised her employer of any specific discriminatory employment practice. Thus, these presentations do not constitute protected activity under Title VII as a matter of law.

In a last-ditch effort to save her case from dismissal, Plaintiff seeks "additional fact-finding . . . through the discovery process." Opp'n at 30. The purpose of discovery, however, is not to help a party "find out if it has any basis for a claim;" rather, it is "to assist a party to prove a claim it reasonably believes to be viable *without discovery*." *People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric.*, 60 F. Supp. 3d 14, 20 (D.D.C. 2014) (quoting *Mama Cares Found. v. Nutriset Societe Par Actions Cimplifiee*, 825 F. Supp. 2d 178, 184 (D.D.C. 2011)). Indeed, the fundamental flaw with Plaintiff's Complaint is not that it does not present a "compelling Title VII case," Opp'n at 30, but that, as written, it does not allege sufficient facts to establish the essential elements of any Title VII claim. Because Plaintiff has not stated a plausible claim for relief, she is not entitled to any discovery to search for facts that might support a claim she has not pled. Rather, her Complaint should be dismissed on the pleadings.

I. Plaintiff Mischaracterizes Her Pleading Burden

Plaintiff contends in her opposition that DOE "tries to hold her Complaint to a higher standard," Opp'n at 1, that she "[n]eed [n]ot [k]now or [a]ssert [e]very [f]act at the [p]leading [s]tage," *id*. at 9, and that she "need not win this case through her Complaint," *id*. at 10. Plaintiff's arguments are red herrings, and throughout her opposition she mischaracterizes her pleading burden and Defendant's bases for seeking dismissal.

In the context of an employment discrimination case, a plaintiff need not establish a *prima facie* case in order to prevail on a motion to dismiss. *See, e.g., Greer v. Bd. of Trs. of the Univ. of*

D.C., 113 F. Supp. 3d 297, 310 (D.D.C. 2015). This does not mean, however, that the elements of the *prima facie* case are irrelevant at this stage. A plaintiff "must allege facts that, if true, would establish the elements of each claim," *id*. (citation omitted), and courts may "explore the plaintiff's prima facie case at the dismissal stage to determine whether the plaintiff can ever meet his initial burden to establish a prima facie case for Title VII discrimination." *Alston v. Johnson*, 208 F. Supp. 3d 293, 301 (D.D.C. 2016) (citations omitted).

Pursuant to this standard, and contrary to Plaintiff's assertion that motions to dismiss are "viewed with disfavor and rarely granted," Opp'n at 9,[1] courts in this District, including this Court, have often granted motions to dismiss for failure to state a claim in employment cases similar to this one. *See, e.g.*, *Jackson v. Gallaudet Univ.*, 169 F. Supp. 3d 1, 5 (D.D.C. 2016) (dismissing hostile work environment claim because plaintiff's complaint did "not demonstrate that her workplace had become so permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment for her" (alteration in original) (citations omitted)); *Greer*, 113 F. Supp. 3d at 310–11 (dismissing discrimination claims under Title VII and the ADEA for lack of detail necessary to establish the elements of each claim); *Townsend v. United States*, ---F. Supp. 3d----, 2017 WL 727536, at *20 (D.D.C. Feb. 21, 2017) (dismissing hostile work environment claim under Title VII and ADEA where the plaintiff alleged neither "[any] set of facts showing that he was subject to more than the occasional remark that he found hurtful," nor "any facts giving rise to an inference of a working environment permeated with discriminatory intimidation, ridicule, and insult" (citation omitted)); *id*. at *22 (dismissing retaliation claim under Title VII and ADEA

[1] The case on which Plaintiff relies for this proposition, *Link v. United States*, 539 F. Supp. 2d 360 (D.D.C. 2008), relies on case law that predates both *Twombly* and *Iqbal*, and, notably, involved the granting of a motion to dismiss. *See id*. at 361–63.

where complaint revealed "lengthy time lag" of at least eight months between protected activity and adverse employment action, and court found allegations "impossible to reconcile with any inference of a causal relationship between" protected activity and adverse employment action); *Jones v. Castro*, 168 F. Supp. 3d 169, 178–86 (D.D.C. 2016) (analyzing alleged instances of adverse action individually, determining which qualified under the governing legal standards, and concluding that the complaint "has not stated a plausible retaliation claim because of the timing of the events that culminated in the only qualifying adverse action in this case").

Here, as in those cases, reference to the applicable elements reveals that Plaintiff has failed to allege facts sufficient to support either a plausible hostile work environment or retaliation claim. That Defendant relied on some summary judgment cases in his motion to dismiss does not change this conclusion or seek to hold Plaintiff to an "artificially high burden." Opp'n at 10. Although Plaintiff contends that the summary judgment standard is "substantially higher" than the standard for surviving a motion to dismiss under Rule 12(b)(6), *id*. at 10, that difference in standards is not implicated when a court assesses, as a matter of law, whether a party has established the legal elements of a claim. Here, the citations to summary judgment decisions in Defendant's motion did not turn on the difference in standards between Rule 12(b)(6) and summary judgment. *See, e.g.*, *Richardson v. Petasis*, 160 F. Supp. 3d 88, 112 (D.D.C. 2015) (holding that, even accepting the plaintiff's contention that the defendant had some generalized racial prejudices, it would be insufficient as a matter of law to establish a discrimination claim because the statements did not pertain to the plaintiff and were entirely disconnected from the decision making process concerning the adverse employment action).[2] Accordingly, reference to the legal propositions

[2] Plaintiff's opposition references three other summary judgment cases from Defendant's motion to dismiss. *See* Opp'n at 10. Defendant cited each case, however, for its statement of the legal standards applicable to a hostile work environment claim, which are the same whether a court is

contained in these summary judgment decisions is appropriate and demonstrates that Plaintiff's allegations are insufficient as a matter of law to state an actionable Title VII claim.

II. Plaintiff Fails to State a Hostile Work Environment Claim as a Matter Of Law

As demonstrated in Defendant's motion to dismiss, Plaintiff's hostile work environment claim is deficient as a matter of law both because the allegations in her Complaint fail to permit a plausible inference of intentional discrimination and because it is premised entirely on the passive presence of the Washington Redskins team name and mascot in the DOE workplace. *See* Def.'s Mot. at 7-14. As discussed below, Plaintiff's opposition fails to meaningfully address either of these arguments and, accordingly, dismissal of this claim is warranted.

A. Plaintiff Fails to Allege Any Facts That Would Allow For a Plausible Inference of Intentional Discrimination as a Matter of Law

The mere presence of the Washington Redskins mascot and team name in the DOE workplace is insufficient as a matter of law to constitute intentional discrimination. *See* Def.'s Mot. at 7-9. Plaintiff's Complaint does not allege that the term "Redskins" was ever used to target her based on her protected status, or even that it was directed at her specifically. Indeed, Plaintiff's Complaint does not identify any specific person at DOE, whether a member of management or other co-workers, who used the term at all, much less in a discriminatory manner with specific knowledge that Plaintiff found it offensive. Rather, it speaks entirely in terms Plaintiff's "expos[ure]" to the term while other, unidentified DOE employees wore and displayed Washington Redskins paraphernalia and discussed the team amongst themselves while "in her presence." *See* Compl. ¶¶ 20-21. As alleged in the Complaint, the term "Redskins" was used

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assessing a Rule 12 or a summary judgment motion. *See* Def.'s Mot. at 10–11 (citing *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1521 (11th Cir. 1995), *Dudley v. Wash. Metro. Area Transit Auth.*, 924 F. Supp. 2d 141, 152 (D.D.C. 2013), and *Nurriddin v. Goldin*, 382 F. Supp. 2d 79, 108 (D.D.C. 2005), for legal propositions).

exclusively in connection with the local professional sports franchise and unconnected to Plaintiff's presence in the workplace or her status as a Native American. As such, she fails to allege that the term was used because of, rather than in spite of, her protected status and fails to raise a plausible inference of intentional discrimination.

In her opposition, Plaintiff argues that "the continued use of [the term "Redskins"] by DOE leadership and employees around her *after* her complaints certainly can give rise to an inference of intentional discrimination." Opp'n at 11; *see also id*. at 14 (arguing that DOE employees' use of the term "after their knowledge of its offensiveness to [Plaintiff]" could demonstrate discriminatory intent). As indicated above, however, Plaintiff's Complaint does not allege that "DOE leadership" used the word "Redskins" at any time, or that anyone at DOE ever directed the term at her with knowledge of its offensiveness.[3] "It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Arbitraje Casa de Cambo, S.A. de C.V. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003) (citation omitted). In assessing a motion to dismiss, a court looks only "at what the Complaint alleges [the defendants] actually did—apart from the gloss the plaintiff puts on those acts." *Jeffries v. District of Columbia*, 917 F. Supp. 2d 10, 56 (D.D.C. 2013); *see also Durand v. District of Columbia*, 38 F. Supp. 3d 119, 129 (D.D.C. 2014) (finding that a plaintiff cannot "save" his or her complaint by including factual allegations for the first time in an opposition to a motion to dismiss). Accordingly, Plaintiff may not establish a plausible hostile work environment claim based on a claim that "DOE leadership"

[3] In fact, the only allegations concerning the use of the term "Redskins" appear in paragraphs 20 through 22 of Plaintiff's Complaint, where Plaintiff alleges the "casual and widespread spoken use of the term 'redskins' in her presence," without any identification of who made those statements or the context in which they were made; that a trainer used the term 'redskins' and 'skins' throughout the day during a training session; and that an unidentified co-worker left a flyer from the fast food restaurant Subway referencing a "Redskins Special" on Plaintiff's desk. *See* Compl. ¶ 20-22

used the term "Redskins," or that DOE employees directed the term at Plaintiff with knowledge that she found it offensive even after she complained of a hostile work environment.

Perhaps recognizing that her Complaint fails to allege any racial harassment by any DOE employee (against Plaintiff or anyone else), Plaintiff focuses on DOE leadership's response to Plaintiff's hostile work environment complaint as a basis for her claim. *See, e.g.*, Opp'n at 15 (arguing that DOE's "failure to address" the hostile work environment allegedly created by the presence of the "Redskins" mascot in its workplace was itself "based on [Plaintiff's] status as Native American" and made "the environment even more hostile"). Plaintiff, however, offers no legal authority to support this contention, and her argument fails as a matter of law. Absent allegations of actionable underlying discriminatory conduct, an employer's failure to take responsive action is irrelevant and cannot, on its own, create a hostile work environment that does not otherwise exist.

Plaintiff's citation to *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005), offers no support for her claim. In that case, the Ninth Circuit, applying well-recognized principles of vicarious liability in the Title VII context, stated that "[a]n employer may be held liable *for the actionable third party harassment of its employees* where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it." *Id*. at 1022 (emphasis added). The D.C. Circuit has adopted a similar standard. *See Curry v. District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999) ("An employer may be held liable for the harassment of one employee by a fellow employee (a non-supervisor) if the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action."). These cases merely provide a means for holding an employer liable for the actionable discriminatory harassment of its employees; they do not obviate the need to show intentional discrimination or suggest that an employer's failure to

take corrective action to stop conduct that is not itself actionable harassment could somehow on its own create a hostile work environment.[4] In all cases, a plaintiff seeking to prevail on a hostile work environment claim must show that she "was discriminated against because of [her] status." *Burton v. Batista*, 339 F. Supp. 2d 97, 107 (D.D.C. 2004) (citation omitted). Absent such allegations, a plaintiff cannot hold her employer liable based merely on "negligence and ratification." Opp'n at 19.

Furthermore, even if Plaintiff could establish that the failure of management to act is sufficient to support a plausible claim of discriminatory animus or hostile work environment, Plaintiff's well-pled allegations undermine her assertion that the agency failed to act. As alleged in the Complaint, Plaintiff sent a letter to her supervisor, LaDoris "Dot" Harris, the Director of DOE's Office of Economic Impact and Diversity, ("Director Harris'), on March 8, 2013, complaining that the presence of the Redskins team name in the workplace created a hostile work environment. Compl. ¶ 25. She reiterated these concerns to Director Harris and Deputy Director Michael Colbert in a May 21, 2013 email. *Id*. ¶ 27. Approximately three weeks later, DOE's Office of General Counsel ("OGC") sent guidance to Deputy Director Colbert regarding Plaintiff's complaints. *Id*. ¶ 28. In particular, OGC concluded that there was no legal basis to ban such

[4] Similarly, even where a claim for "discriminatory or retaliatory failure to remediate" has been recognized, such a claim is contingent upon a showing that the underlying "uncorrected action" be sufficient on its own to qualify as actionable adverse action under the relevant standard. *See Baird v. Gotbaum*, 662 F.3d 1246, 1249 (D.C. Cir. 2011) ("*Baird I*"); *see also Baird v. Gotbaum*, 792 F.3d 166, 171 (D.C. Cir. 2015) ("*Baird II*") (noting that failure to remediate claim is "not actionable unless the underlying incident would itself be actionable," and emphasizing that "[a] trivial incident does not become nontrivial because an employer declines to look into it"). As Plaintiff's Complaint fails to plausibly allege that the conduct she complained of constituted discrimination, much less a hostile work environment, she cannot show DOE's discriminatory animus based on its alleged failure to remediate or investigate that non-actionable conduct.

paraphernalia[5] and noted that although DOE could provide sensitivity training, such training was not advised at that time. *Id*. OGC further suggested to Deputy Director Colbert that the Office of Personnel Management ("OPM") or the Equal Employment Opportunity Commission ("EEOC") would be the appropriate federal agency to initiate any action regarding Plaintiff's concerns. *Id.*

Thus, Plaintiff's own factual allegations contradict her assertions that DOE failed to act in response to her concerns regarding the Washington Redskins mascot. That Plaintiff might disagree with DOE's ultimate conclusion does not change the fact that DOE carefully considered her complaints and provided an analysis explaining its decision to take no action to prevent its employees from supporting the local NFL team. Even if an employer's failure to act, where there is no actionable discrimination, could somehow permit the inference of discrimination necessary to state a hostile work environment (an assertion for which Plaintiff provides no legal support), Plaintiff's Complaint demonstrates that DOE did take responsive action and forecloses such an inference in this case. Accordingly, Plaintiff's hostile work environment claim should be dismissed with prejudice.

B. The Passive Use of the Term "Redskins" and the Presence of a Professional Football Team's Paraphernalia in the Workplace is Insufficient to Establish an Objectively Hostile Work Environment as a Matter of Law

In addition to failing to allege sufficient facts that would allow for a plausible inference of intentional discrimination, the Complaint does not allege the existence of "discriminatory intimidation, ridicule, and insult," sufficiently "severe or pervasive to alter the conditions of [Plaintiff's] employment and create an abusive working environment." *Harris*, 510 U.S. at 21 (citations omitted). *See* Def.'s Mot. at 10-14. Although Plaintiff argues in favor of the term's

[5] The conclusion of DOE's OGC was eminently reasonable. At bottom, Plaintiff seeks a workplace devoid of any reference to a local professional football team. Not only is such a demand administratively infeasible, it would raise substantial First Amendment concerns.

"objective offensiveness," Opp'n at 13, she offers no case law to support the proposition that the term "Redskins," when used in reference to a football team, can by itself constitute intentional discrimination or a hostile work environment.[6] Indeed, no court has ever held that the Washington Redskins football team name is discriminatory or objectively offensive on its face such that its presence in the workplace can create a hostile work environment. Accordingly, without some plausible allegation that the team name was used to harass, intimidate, or abuse the Plaintiff or other employees on the basis of their status as Native Americans, its mere presence in the office is insufficient to create a hostile work environment as a matter of law. Because Plaintiff has failed to allege a plausible hostile work environment, her claim should be dismissed with prejudice.

III. Plaintiff Fails to State any Plausible Retaliation Claims

In order to successfully state a retaliation claim under Title VII, a plaintiff must plead three elements: (1) that she engaged in statutorily protected activity; (2) that she suffered an adverse employment action; and (3) that there is a causal connection between the two. *Taylor v. Small*, 350 F.3d 1286, 1292 (D.C. Cir. 2003). Plaintiff's opposition chides the Defendant for "nitpicking the specific allegations supporting [Plaintiff's] retaliation claim," Opp'n at 20, but scrutinizing a complaint's well-pleaded factual allegations to determine "whether the plaintiff can ever meet

[6] In fact, the cases Plaintiff does cite in support of the proposition that racial images can evidence discrimination and create a hostile work environment, *see* Opp'n at 16–17, involved severe and pervasive discriminatory conduct that directly threatened and harassed the plaintiffs at issue. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1303–04 (11th Cir. 2012) (finding that hostile work environment claim presented a jury question where the plaintiff showed that his co-workers engaged in a series of escalating racial incidents, including placing bananas in his truck on multiple occasions, wearing clothing depicting the Confederate flag, and engaging the plaintiff in "what reasonably could be perceived as a threatening confrontation"); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 352 (8th Cir. 1997) (upholding district court's finding of hostile work environment and constructive discharge where evidence demonstrated that plaintiff was directly subjected to "a steady barrage of racial name-calling" at the workplace, including an instance in which his superior informed him that he had been asked to join the Ku Klux Klan and was afraid to admit that he had a "black guy" "working for him").

[her] initial burden to establish a prima facie case," *Alston*, 208 F. Supp. 3d at 301 (citation omitted), is precisely a court's duty at this phase in the litigation.

Plaintiff would have this Court ignore the specific legal requirements that form a retaliation claim and instead focus on the fact that, according to Plaintiff, her assorted allegations of protected activity and adverse employment action (cobbled together and devoid of any causal link) "give DOE fair notice of her claim and its basis." Opp'n at 20. As described above, *supra* Sec. I, more is required to plead a retaliation claim. *See also Jones v. Castro*, 168 F. Supp. 3d 169 (D.D.C. 2016) (emphasizing that a plaintiff must meet the plausibility standard in order to survive a motion to dismiss, analyzing separately whether each alleged instance of adverse action was legally sufficient, and dismissing retaliation claim based on lack of temporal proximity between any qualifying protected activity and any qualifying adverse employment action). Because her Complaint does not allege sufficiently that any protected activity was the but-for cause of any materially adverse employment action, Plaintiff's retaliation claims must be dismissed.

A. Neither Plaintiff's Presentations on Native American Issues Nor Her Follow-Up Conversations with DOE Leadership Constitute Protected Activity

In her opposition, Plaintiff contends that she "was engaged in different forms of statutorily protected activity for four years." Opp'n at 20-21. In particular, she focuses on various presentations on Native American perspectives and stereotypes during her tenure at DOE and "specific conversations with both ED Director Harris and DOE's Office of General Counsel in October 2015 about the reasons behind these presentations." Opp'n at 24. Plaintiff's argument fails as a matter of law because the Complaint does not allege that Plaintiff, through these presentations or any related activity, "communicate[d] to her employer a belief that the employer has engaged in a form of employment discrimination." *Townsend v. United States*, ---F. Supp. 3d---, 2017 WL 727536, at *21 (D.D.C. Feb. 21, 2017) (citation omitted).

Plaintiff does allege that she gave presentations "[t]hroughout her employment," Compl. ¶ 14, that touched on "stereotypes, bias, and racism related to Native Americans," *id.*, and that DOE management "was not only aware of but also tacitly approved [Plaintiff's] presentations," *id.* ¶ 16. In particular, Plaintiff alleges that in 2015 she accepted speaking engagements at several federal agencies at which she planned to give presentations that would "educate employees on Native American perspectives and discuss the use of Native Americans as mascots with comparisons to other ethnic groups as mascots." *Id.* ¶ 34. When she notified management of these speaking engagements, Plaintiff stated that her "remarks and presentation would discuss the challenges to achieving Native American inclusion in the federal workplace" and the "stereotypical depictions of Native Americans in mainstream culture including sports team's mascots." *Id.* ¶ 35. Fatal to her claim that any of this could constitute protected activity is the lack of any allegation or indication that the presentations related to discrimination at DOE or that Plaintiff made DOE aware that it was engaged in any specific illegal employment practice through these presentations.

Plaintiff points to no legal authority to support the notion that her presentations constitute protected activity. Indeed, her allegations are similar to those recently rejected by the D.C. Circuit in *Morris v. McCarthy*, 825 F.3d 658 (D.C. Cir. 2016). There, a white female employee at EPA's Office of Civil Rights ("OCR") alleged that she engaged in protected activity "by articulating positions on behalf of OCR and engaging in debates about equal employment issues." *Morris*, 825 F.3d at 673. The D.C. Circuit held that "such job-related policy discussions are not protected" because they did not "oppose any discrete practice that [the plaintiff] reasonably could have believed discriminated on the basis of race, color, religion, sex, or national origin." *Id.* Here, Plaintiff's alleged protected activity – giving presentations on Native American stereotypes and discussing those presentations with DOE leadership – does not represent a specific complaint to

her employer about a hostile work environment. Rather, as Plaintiff's Complaint acknowledges, it fits squarely within Plaintiff's job responsibilities. *See* Compl. at 2 (alleging that, "[a]s part of her DOE mission, [Plaintiff] attempted through presentations to DOE and to other federal agencies . . . to raise an awareness of the harm caused to Native Americans by the stereotypical images of Native Americans"). Labeling Plaintiff's attempts to "promot[e] [] civil rights and workplace diversity efforts," *id*. ¶ 34, a form of protected activity "would risk insulating employees in civil rights roles from adverse employment action, because such debates are presumably part of their everyday duties." *Morris*, 825 F.3d at 673; *see also Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 136 (3d Cir. 2006) (reasoning that to treat basic issue advocacy, "unconnected to employment practices, [as] conduct protected by Title VII would inappropriately stretch the concept of protected activity").

Plaintiff's opposition argues that she is not relying on those presentations alone, but also on her "specific conversations with both ED Director Harris and DOE's Office of General Counsel in October 2015 about the reasons behind these presentations." Opp'n at 24. Her reference to these conversations suffers from the same fatal flaw as her allegations concerning the presentations themselves, however: the Complaint simply does not allege that these conversations involved any complaint of workplace discrimination or the presence of a hostile work environment at DOE. As noted above, it alleges merely that Plaintiff told Director Harris that her planned presentations would discuss "the challenges to achieving Native American inclusion in the federal workplace" and "the stereotypical depictions of Native Americans in mainstream culture including sports team's mascots." Compl. ¶ 35. Contrary to Plaintiff's argument in her opposition, her Complaint does not allege that she ever discussed "her concerns about the unequal treatment of Native American concerns compared to other racial groups," Opp'n at 24, or that she told Susan Beard,

the DOE Assistant General Counsel for General Law, anything about the presentations. *See* Compl. ¶¶ 35-37, 41. Nor does it allege that Plaintiff informed either Director Harris or Assistant General Counsel Beard – the only two individuals whom Plaintiff alleges retaliated against her – that DOE was engaged in any form of illegal employment practice or that the "reasons behind these presentations," Opp'n at 24, were to protest discrimination at DOE. Accordingly, Plaintiff's allegations regarding her presentations and related conversations do not establish protected activity and cannot serve as the basis for a retaliation claim.

B. Plaintiff's Complaints to Outside Agencies Cannot Constitute Protected Activity Because She Does Not Allege DOE was Aware of the Complaints

A fundamental requirement of Title VII protected activity is that it comprise "protected participation or opposition activity about which the employer knew." *Morris*, 825 F.3d at 673; *see also Townsend*, 2017 WL 727536, at *21 (noting that Title VII protects "an employee who communicates to her employer a belief that the employer engaged in a form of employment discrimination" (citation omitted)).

Here, Plaintiff acknowledges that she does not "specifically" allege in her Complaint that either of the two alleged retaliators at DOE, Director Harris and Assistant General Counsel Beard, were aware that she complained of racial discrimination to any other federal agency. Opp'n at 22. She nevertheless contends that because she contacted these other federal agencies at the behest of DOE's OGC, the other agencies "*might* have communicated with DOE about [Plaintiff's] concerns." *Id* (emphasis added). Once again, the well-pled factual allegations in Plaintiff's Complaint do not support the interpretation she now attempts to ascribe to them, and Plaintiff fails to allege a plausible, as opposed to a merely possible, basis for a retaliation claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully.").

The Complaint alleges that on June 7, 2013, DOE's OGC sent Deputy Director Colbert guidance suggesting that that OPM or the EEOC would be the appropriate federal agency to initiate any action regarding Plaintiff's concerns. Compl. ¶ 28. Plaintiff does not allege that this guidance was directed to or received by her at the time, or that anyone at DOE instructed her to contact the EEOC or OPM. Thus, Plaintiff's Complaint does not support the plausible inference that DOE's OGC instructed her to contact any outside federal agency. Further, there is no suggestion in the Complaint that either Director Harris or Assistant General Counsel Beard had any knowledge that Plaintiff subsequently contacted OPM or the EEOC about the issue, much less knowledge of the content of Plaintiff's communications with those agencies. Without such allegations, Plaintiff cannot establish knowledge of protected activity on the part of her alleged retaliators. *See Morris,* 825 F.3d at 674 (holding that employer's alleged knowledge of protected activity was speculative where an employee told her employer that she would "not [] stand for any [] more discrimination or retaliation;" the employer was aware that an employee had been asked to meet with an EEO counsel; and the employee told the employer "multiple times" that the agency was required to provide an EEO counselor in a timely manner).[7]

Moreover, even if Plaintiff's discussion with agencies other than her employer and about which her employer was not aware could constitute protected activity, they are too remote in time from any alleged adverse employment action to plausibly allege causation. The latest of these communications, which Plaintiff alleges occurred in February 2015, *see* Compl. ¶ 33, took place

[7] Plaintiff's Complaint also alleges that on November 2, 2014, Plaintiff wrote a letter to the U.S. Commission on Civil Rights ("USCCR") expressing her concern about the prevalence of racist imagery and terms related to Native Americans in the workplace. Compl. ¶ 31. Plaintiff does not allege that DOE suggested she contact the USCCR or that anyone within DOE – let alone Director Harris or Assistant General Counsel Beard – had any knowledge of this contact. Accordingly, Plaintiff cannot establish that her contact with the USCCR constitutes protected activity.

approximately eight months before the earliest instance of alleged adverse employment action, *see id*. ¶ 37 (alleging that on October 26, 2015, Director Harris postponed Plaintiff's attendance at a leadership conference). This time lapse is well-outside of the "three-month rule" that courts within this circuit use to evaluate causation in retaliation claims that, like this one, are based entirely on temporal proximity. *See generally* Def.'s Mot. at 24-27.

C. Plaintiff Does Not Allege a Retaliatory Hostile Work Environment and Cannot Combine Alleged Adverse Actions to Support a Retaliation Claim

In an attempt to demonstrate a materially adverse employment action, Plaintiff argues that she need not identify specific adverse actions in isolation, but instead may support her claim by alleging "numerous, interconnected adverse actions." Opp'n at 28. Plaintiff does not cite to any case to support this proposition, and her view of the law is mistaken.

In general, "each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002); *see also Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (referring to a single "challenged action" as the unit of analysis for retaliation claims). Notably, Plaintiff has not alleged a claim of retaliatory hostile work environment, but discrete retaliation claims based on individual instances of adverse employment action. *See, e.g.*, *Baird I*, 662 F.3d at 1250 (distinguishing between discrete claims of retaliation and a claim for retaliatory hostile work environment); *Singletary v. District of Columbia*, 351 F.3d 519, 526 (D.C. Cir. 2003) (emphasizing that claims based on hostile work environment are "different in kind" from claims based on discrete acts because they are "comprised of a series of separate acts that collectively constitute one unlawful employment practice" (citations omitted)).[8] As such, she cannot combine

[8] Because Plaintiff raises for the first time in her opposition a theory consistent with a retaliatory hostile work environment claim, such a claim is not properly before the Court. *See Arbitraje Casa de Cambo*, 297 F. Supp. 2d at 170. Even if Plaintiff were permitted to raise a retaliatory hostile

multiple adverse actions into a single claim for retaliation. Rather, it is "appropriate" to analyze her retaliation claims "action by action." *Jones*, 168 F. Supp. 3d at 179 (rejecting plaintiff's claim that "the putative adverse actions should be considered as 'a whole' rather than individually"). For each discrete retaliation claim, Plaintiff must identify not only a single adverse employment action, but also protected activity and a causal link between the adverse action and the protected activity.[9]

D. Plaintiff Fails to Allege Any Materially Adverse Employment Action Other Than Her De Facto Demotion on December 7, 2015

Defendant's motion to dismiss established that Plaintiff failed to allege, as a matter of law, any plausible adverse employment action other than her December 7, 2015 de facto demotion. Def.'s Mot. at 18–23. In her opposition, Plaintiff raises several arguments in an attempt to avoid dismissal. As discussed below, none of her arguments have merit.

As an initial matter, a materially adverse employment action is that which "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 68 (citation omitted). Although Plaintiff accuses Defendant of "misstat[ing] the controlling standard," Opp'n at 26, she misreads Defendant's argument. Defendant's motion to dismiss did not suggest that an employment action must actually deter further protected activity to be considered materially adverse. Rather, it stated the controlling standard as set forth in

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work environment claim for the first time in her opposition, such a claim would fail as a matter of law. As with a hostile work environment claim, a retaliatory hostile work environment claim requires a showing that the retaliatory harassment was "sufficiently severe or pervasive to alter the conditions of . . . employment." *See Bergbauer v. Mabus*, 934 F. Supp. 2d 55, 79–83 (D.D.C. 2013). For the reasons discussed above and in Defendant's motion to dismiss, Plaintiff cannot show, as a matter of law, that she suffered retaliatory harassment (or any kind of harassment) that was sufficiently severe or pervasive to alter the terms or conditions of her employment. Accordingly, any such claim would fail.

[9] At one point, Plaintiff asserts that she "needs only one adverse action to state a plausible retaliation claim." Opp'n at 25. If Plaintiff is suggesting that she can establish a retaliation claim without alleging protected activity or causation, Plaintiff's argument is plainly erroneous.

Burlington Northern and analyzed whether any of Plaintiff's alleged adverse employment actions amounted to direct, tangible, non-speculative harm that would dissuade a reasonable worker from making or supporting a charge of discrimination. *See* Def.'s Mot. at 19-20. In doing so, Defendant argued that several of Plaintiff's alleged adverse actions amounted to "common workplace grievances" that failed to allege any tangible harm, and that this conclusion was reinforced by the fact that the alleged adverse actions did not, in fact, dissuade Plaintiff from engaging in protected activity because they occurred before she contacted an EEO counselor. *Id*. That reference was not presented as a standalone argument for the proposition that employment action taken before participation activity can never constitute materially adverse employment action, but merely as additional support for the conclusion that the alleged adverse actions in this case did not meet the materiality standard.

Indeed, as evidenced above with respect to her arguments about "numerous, interconnected" adverse actions, it is Plaintiff who seems to misinterpret the law governing retaliation claims. For example, at various points, Plaintiff appears to assert that the timing of a given employment action has some bearing on whether it was materially adverse. In particular, she argues that the postponement of her leadership training and the requirement that she take personal leave to conduct her speaking engagements were materially adverse because "both of these actions occurred within days and in direct response to [Plaintiff's] conversations with ED Director Harris and the Office of General Counsel in October 2015." Opp'n at 26; *see also id*. at 27 (arguing that the postponed training was not a "stand alone" basis for a retaliation claim and emphasizing that it was "taken *within three days*" of the October 2015 conversation with Director Harris). As explained in Defendant's motion to dismiss, neither the postponement of a training opportunity nor the requirement that an employee take personal leave to give a presentation

constitutes an adverse employment action without some further allegation of how these actions created tangible, non-speculative harm. *See* Def.'s Mot. at 20–21 (citing *Dorns v. Geithner*, 692 F. Supp. 2d 119, 133 (D.D.C. 2010), *Warner v. Vance-Cooks*, 956 F. Supp. 2d 129, 171 (D.D.C. 2013), and *Gray v. Foxx*, 74 F. Supp. 3d 55, 70–71 (D.D.C. 2014)).[10]

The fact that these actions took place close in time to each other, or in close temporal proximity to alleged protected activity, does not bear on the distinct legal questions of whether the actions constitute materially adverse employment actions. As noted above, Plaintiff cannot consolidate multiple adverse actions into a single retaliation claim, and without further allegation of tangible harm resulting from the training postponement or the personal leave requirement, she cannot establish retaliation claims based on either employment action. And even if it were appropriate to determine whether a particular employment action is sufficiently adverse by referencing temporally proximate protected activity, Plaintiff's October 2015 conversations with Director Harris and DOE's OGC do not constitute protected activity for the reasons discussed above.

Further, Plaintiff appears to have abandoned her argument that she suffered an adverse employment action when she was denied details and excluded from meetings. Her opposition's only reference to the details and meetings impermissibly conflates these discrete employment actions with a separate instance of adverse action: Plaintiff's job reassignment on December 7, 2015. *See* Opp'n at 28. As described above, a plaintiff bringing a claim of retaliation based on

[10] Plaintiff's opposition asserts, for the first time, that both the training postponement and the personal leave requirement constitute "objectively tangible harm" to her career advancement and personal finances. Opp'n at 27-28. As noted above, Plaintiff cannot use her opposition to amend her complaint. Even if these new allegations could be considered, however, they provide no explanation of how these employment actions caused tangible harm to her career or finances and thus these unadorned assertions fail to plausibly allege materially adverse employment action.

discrete acts may not combine those separate acts to form a single materially adverse action. As Plaintiff provides no further response to Defendant's argument that denial of details and exclusion from meetings do not constitute materially adverse employment actions as a matter of law, she has conceded that point and any retaliation claims based on these alleged adverse actions should be dismissed. *See Ali v. D.C. Ct. Servs.*, 538 F. Supp. 2d 157, 161 (D.D.C. 2008) (failure to respond to argument in motion to dismiss treated as conceded).

Finally, Plaintiff argues that Defendant's citation to cases decided on summary judgment paints an unduly "narrow" picture of "what incidents can constitute adverse actions." Opp'n at 26. It is not uncommon, however, for courts in this district to grant motions to dismiss, as a matter of law, for failure to allege a materially adverse employment action under Title VII. *See, e.g.*, *Hornsby v. Watt*, Civil Action No. 16-0517 (GK), 2016 WL 6583602, *5–8 (D.D.C. Nov. 4, 2016) (granting motion to dismiss and holding that placement of employee on paid administrative leave and proposal to remove employee did not constitute adverse employment actions as a matter of law); *Cole v. Powell*, 605 F. Supp. 2d 20, 26 (D.D.C. 2009) (dismissing retaliation claim because, as a matter of law, imposing restrictions on unscheduled absences and limitations on tardiness does not constitute an adverse employment action); *Newton v. Office of the Architect of the Capitol*, 905 F. Supp. 2d 88, 93–94 (D.D.C. 2012) (dismissing retaliation claim because employer's request to review plaintiff's work product, employer's decision to reference disgruntled employees to plaintiff, and a letter of counseling did not constitute adverse employment actions as a matter of law).

Moreover, not all of Defendant's cited cases involved summary judgement. *See Brookens v. Solis*, 616 F. Supp. 2d 81, 91 (D.D.C. 2009) (granting motion to dismiss retaliation claim because denials of details "do not constitute adverse employment actions"). Further, as discussed above,

when a party cites a case for a legal proposition regarding the elements of a claim, it is generally irrelevant whether the case was decided on a motion to dismiss or on summary judgment. *See supra* pp. 4–5. Here, the cases Plaintiff mentions in her opposition were cited for such legal propositions that are unaffected by the difference in standards between Rule 12(b)(6) and summary judgment. *See* Def.'s Mot. at 19–20 (citing *Bridgeforth v. Jewell*, 721 F.3d 661, 663 (D.C. Cir. 2013) and *Sims v. District of Columbia*, 33 F. Supp. 3d 1, 12 (D.D.C. 2014) for legal propositions).

At bottom, Plaintiff's opposition primarily attempts to demonstrate adverse action by conflating the distinct elements of a retaliation claim and impermissibly attempting to combine several discrete employment actions in order to demonstrate material adversity. Focusing individually on each discrete instance of adverse action, as alleged in the Complaint, it is clear that only one action – the December 7, 2015 de facto demotion – could, for purposes of this motion, constitute materially adverse action in support of a retaliation claim. However, because that action was more than two-and-half years removed from any instance of protected activity, Plaintiff's Complaint fails to raise any plausible inference of causation and her retaliation claims should be dismissed.

E. Plaintiff's Complaint Fails to Allege a Causal Connection Between Any Protected Activity and Any Adverse Employment Action

As an initial matter, Plaintiff misstates the legal standard for demonstrating causation in a Title VII retaliation claim by suggesting that she could make the requisite showing not only by demonstrating that her protected characteristic was the "but for" cause of an adverse employment action, but also, "alternatively, that the protected characteristic was just a factor motivating the adverse action." Opp'n at 29. Plaintiff's formulation runs directly contrary to the Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2528 (2013), in which the Court rejected applying the motivating factor standard to retaliation claims

and held that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." Plaintiff's cited case, *Ross v. United States Capitol Police*, 195 F. Supp. 3d 180 (D.D.C. 2016), is not to the contrary. In fact, *Ross* noted that the "because of" standard for discrimination, not retaliation, could be established by the motivating factor standard. *Id*. at 201 n.8. The Court then went on to contrast the discrimination standard to the standard for proving retaliation, which does require but-for causation. *Id*. at 201. Thus, Plaintiff's argument in favor of causation based on her ability to satisfy the inapplicable "motivating factor standard" should be rejected.

Applying the correct standard, Plaintiff's Complaint fails to give rise to a plausible inference of causation. Plaintiff does not dispute that her Complaint reveals a two-and-half year gap between protected activity on May 21, 2013 and potentially adverse action in the form of a de facto demotion on December 7, 2015. Nor does Plaintiff dispute that courts within this district have frequently found, as a matter of law at the motion to dismiss stage, an inference of causation to be implausible based on significantly shorter time lapses. *See* Def.'s Mot. at 25 (citing *Jones*, 168 F. Supp. 3d at 185) (three months); *Wilson v. Mabus*, 65 F. Supp. 3d 127, 133–34 (D.D.C. 2014) (four months); *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 85 (D.D.C. 2003) ("well over a year")).[11]

[11] Plaintiff relies upon this Court's decision in *Bartlette v. Hyatt Regency*, 208 F. Supp. 3d 311 (D.D.C. 2016) for the proposition that on a motion to dismiss, a plaintiff may plead causation "simply by alleging that the adverse actions were caused by [her] protected activity." *Id.* at 323. In so holding, the court relied upon *Bryant v. Pepco*, 730 F. Supp. 2d 25 (D.D.C. 2010). In *Bryant*, the court noted that "[b]ecause causation is often the most difficult element to show in advance of discovery, courts generally rely on the length of time between the protected activity and the adverse action to determine whether causation has been sufficiently pled at the motion to dismiss stage." *Id*. at 31. Rather than announce a broad proscription that temporal proximity may never be considered in evaluating the plausibility of a complaint on a motion to dismiss, the court in *Bryant* held that a four month separation between protected activity and adverse action "neither demonstrate[d] causality conclusively nor eliminates it conclusively." *Id.* at 32. By contrast, in

Indeed, Plaintiff does not address these cases, let alone explain why they do not control the outcome of her retaliation claims. Nor does she explain how the over two-year gap between her alleged protected activity and her alleged adverse employment actions – particularly when coupled with her career advancement and favorable evaluations during this period – create a plausible inference of causation.

Instead, the sole argument she advances in her opposition is premised entirely on close temporal proximity between her "many presentations from 2012-2015 and the specific conversations that [Plaintiff] had with ED Director Harris and the Office of General Council [sic] in October 2015." Opp'n at 28-29. As Defendant has demonstrated, neither Plaintiff's presentations – which, as alleged by Plaintiff fit within her job responsibilities as a civil rights attorney at DOE – nor her subsequent conversations with DOE leadership identified any specific discriminatory employment practice on the part of her employer and, thus, cannot constitute protected activity. *See supra* Sec. III.A; Def.'s Mot. at 15-18.

Once these inadequately pled instances of protected activity are removed from consideration, "[n]o inference of causation is possible" from the allegations in Plaintiff's Complaint, *Jones*, 168 F. Supp. 3d at 185, and her retaliation claims should be dismissed.

CONCLUSION

While Plaintiff may legitimately believe that the use of the term "Redskins" is offensive, her attempt to challenge the team's use of that term by suing her employer under Title VII fails as a matter of law. Accordingly, for the foregoing reasons and those set forth in Defendant's Motion

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this case there is an over two-year delay between the alleged protected activity and the alleged adverse action, making any possibility of temporal proximity implausible.

to Dismiss and accompanying Memorandum, Plaintiff's Complaint should be dismissed with prejudice for failure to state a claim.

Dated: May 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2017, a copy of the foregoing pleading was filed electronically via the Court's ECF system which sent notification of such filing to counsel of record.

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