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,[1] Defendant.	)	Case No. 1:17-cv-00025 (TSC)

DEFENDANT'S MOTION TO DISMISS

Defendant, Secretary of the Department of Energy Rick Perry, in his official capacity, hereby moves to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6). Accompanying this motion is a memorandum of points and authorities in support of the motion and a proposed order. Defendant respectfully requests that the Court grant the motion for the reasons stated in the attached memorandum.

Dated: March 13, 2017

Respectfully submitted,

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/s/ R. Charlie Merritt
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[1] Pursuant to Fed. R. Civ. P. 25(d), Department of Energy Secretary Rick Perry is substituted in his official capacity as the Defendant in this case.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiff Jody TallBear ("Plaintiff") brings this lawsuit against her employer, the United States Department of Energy ("DOE"), for violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. Specifically, Plaintiff, who is an enrolled member of the Cheyenne-Arapaho Tribes of Oklahoma and holds herself out as a Native American, *see* Compl. ¶ 1, ECF No. 1, alleges that the presence of Washington Redskins paraphernalia in the DOE workplace, as well as the widespread spoken use of the term "Redskins," created a hostile work environment on the basis of her protected status as a Native American. Further, she alleges that DOE retaliated against her in various ways for engaging in protected activity, such as complaining about the allegedly hostile work environment to responsible DOE officials and filing formal and informal complaints of discrimination. Plaintiff's allegations, however, fail to support any plausible Title VII claim. Accordingly, her Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

The passive display of a professional sports team's mascot is not facially discriminatory conduct, and Plaintiff alleges no facts suggesting that the Redskins moniker was ever disassociated from the National Football League franchise and directed at Plaintiff in a manner that would suggest an intent to discriminate based on her protected status. As such, Plaintiff's Complaint does not give rise to a plausible inference of discrimination and fails to state a claim for hostile work environment. Even if reference to the Redskins mascot could constitute intentionally discriminatory conduct, however, Plaintiff fails to allege that this conduct was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). At most, the spoken use of the term "Redskins" and passive display of the team name on items of clothing and corporate

advertising materials constitute offensive utterances, which, on their own, do not "sufficiently affect the conditions of employment to implicate Title VII." *Id.* Without any allegations that the Redskins mascot was deployed to intimidate or abuse Plaintiff or other Native American employees, Plaintiff's hostile work environment claim should be dismissed because it fails as a matter of law to allege an objectively hostile work environment.

Similarly, Plaintiff fails to allege a plausible claim that DOE retaliated against her because she engaged in activity protected by Title VII. Many of the retaliatory acts identified in the Complaint, including Plaintiff's allegations that she was denied detail opportunities and excluded from meetings following her filing of an EEO complaint, are insufficient to constitute materially adverse employment action. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). The remainder of the alleged retaliatory acts, even if they could constitute materially adverse employment action, occurred almost two-and-a-half years after Plaintiff engaged in any protected activity, well beyond the "three-month rule" that courts within this district typically use "to establish causation on the basis of temporal proximity alone." *McIntyre v. Peters*, 460 F. Supp. 2d 125, 133 (D.D.C. 2006). Because Plaintiff fails to allege that she suffered any materially adverse employment action in close temporal proximity to any protected activity, or otherwise allege facts to support a link between any protected activity and any materially adverse employment action, her Title VII retaliation claims should be dismissed.

BACKGROUND

Plaintiff is an attorney at DOE who, at all times relevant to her Complaint, "has held herself out to be Native American." Compl. ¶ 1. She was hired as an Attorney Adviser at the DOE's Office of Economic Impact and Diversity ("ED") on May 17, 2011. *Id.* ¶ 8. Within ED, she was specifically assigned to the Office of Civil Rights ("OCR"). *Id.* In this capacity, Plaintiff alleges that she engaged in high level energy policy and stakeholder engagement and, from May 2011

until December 2015, served as the lead for ED's tribal and Native American engagement, programming, and policy. *Id.* ¶ 9. Plaintiff's primary professional focus, according to her Complaint, is "engaging Native Americans and Tribal communities in DOE programs and in the broader energy sector." Compl. at 1.

Plaintiff alleges that her job duties expanded to include work on organization-wide initiatives in the spring of 2012 when LaDoris "Dot" Harris ("Director Harris") was appointed to serve as Director of ED. *Id.* ¶ 11. Further, in 2013, Plaintiff alleges that she was "detailed" to a new position titled "Strategic Initiatives and Policy Advisor," a position which reported directly to Director Harris and allowed Plaintiff the opportunity to engage in policy work related to the ED mission and meet with leaders throughout both the public and private sector. *Id.* ¶ 12. Plaintiff alleges that she was offered this position permanently in July 2015. *Id.* Additionally, Plaintiff contends that she received positive performance reviews "[t]hroughout her tenure" at DOE, and that she was able to rise from a GS-11 level employee to a GS-15 level employee in a relatively brief four-year period following her 2011 hiring. *Id.* ¶ 13.

Nonetheless, Plaintiff alleges that, for the duration of her employment at DOE, she was subjected to a hostile work environment on the sole basis that DOE tolerated the presence of Washington Redskins paraphernalia, such as posters and clothing, and allowed the team's name to be spoken in the workplace. *See id.* ¶ 20. Plaintiff further alleges that DOE allowed vendors in its facility to post and sell "Redskins" paraphernalia, and that she frequented this facility on an unidentified number of occasions. *Id.* According to Plaintiff, the term "Redskins" is a racial slur, *see id.* ¶ 18, and the presence of the team's logo "made [her] feel unwelcomed, alienated, and disrespected in her workplace." *Id.* ¶ 24. Although she alleges that she was subjected to the term "[s]everal times each day," *id.* ¶ 20, she points to only two specific examples: (1) on February 7,

2012, a presenter at a leadership training wore a Washington Redskins tie while the terms "Redskins" and "skins" were referenced throughout the day; and (2) on December 10, 2012, another attorney left a "Redskins Special" flyer from the fast food chain Subway on Plaintiff's desk. *Id*. ¶¶ 21-22.

Plaintiff alleges that she took steps to make DOE leadership aware of these concerns by sending Director Harris and others two communications in the spring of 2013. First, on March 8, 2013, she sent a memorandum asserting that the prevalence of Indian mascot depictions at DOE was fostering a hostile work environment. *Id*. ¶ 25. She followed up with an email on May 21, 2013, reiterating her concerns and urging the prohibition of all stereotypical images and racial slurs in the workplace. *Id*. ¶ 27. Plaintiff's concerns were passed along to the DOE Office of General Counsel, which responded on June 7, 2013 that it could discern "no legal basis" to ban Redskins paraphernalia in the DOE workplace. *Id*. ¶ 28. Although Plaintiff subsequently raised the issue with various federal agencies outside DOE, including the Equal Employment Opportunity Commission, the Office of Personnel Management, and the United States Commission on Civil Rights, *id*. ¶¶ 29-33, she does not allege that anyone at DOE was aware of these communications.

Plaintiff further contends that beginning on October 26, 2015, more than two years after her most recent communication with anyone at DOE about the potentially hostile work environment, DOE began retaliating against her. The primary alleged retaliatory action is that Plaintiff was reassigned on December 7, 2015 from the ED Director's Office to OCR to process Title VII complaints, which Plaintiff alleges is a "de facto demotion in both the complexity of work performed and the level of influence and responsibility within DOE." Compl. ¶ 43. Other alleged retaliatory actions include DOE's exclusion of Plaintiff from various meetings and work assignments, denial of her detail requests, postponement of her attendance at the Federal Executive

Institute for which she had been approved, and precluding Plaintiff from lecturing about Native American mascots at several federal agencies in her official capacity. *See id*. ¶¶ 37-46.

On December 10, 2015, Plaintiff timely filed an informal complaint of discrimination. *Id*. ¶ 5. On March 2, 2016, she filed a formal EEO complaint, and on January 5, 2017, Plaintiff filed the instant action under Title VII, alleging that DOE created a hostile work environment based on race and/or national origin and retaliated against Plaintiff for engaging in activity protected by Title VII.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. (quoting *Twombly,* 550 U.S. at 557). In reviewing a Rule 12(b)(6) motion, the court accepts as true all well-pleaded facts in the complaint, but disregards legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id*.

In the context of an employment discrimination claim, a plaintiff who lacks direct evidence of discrimination "is not required to plead every fact necessary to establish a *prima facie* case to survive a motion to dismiss." *Jones v. Air Line Pilots Ass'n, Int'l*, 642 F.3d 1100, 1104 (D.C. Cir. 2011) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002)). Nonetheless, the complaint must still meet the *Twombly*/*Iqbal* plausibility standard. *See Jones v. Castro*, 168 F. Supp. 3d 169, 184 (D.D.C. 2016). The "guiding lodestar" in assessing a motion to dismiss in an employment discrimination case "is whether, assuming the truth of the factual allegations, taken collectively, .

. . the inferences of discrimination drawn by the plaintiff are reasonable and plausibly supported." *Townsend v. United States*, ---F. Supp. 3d----, 2017 WL 727536, at *7 (D.D.C. Feb. 21, 2017) (Howell, C.J.)

ARGUMENT

I. Plaintiff Fails to State a Hostile Work Environment Claim As a Matter of Law

"A plaintiff may establish a violation of Title VII by proving that the employer created or condoned a discriminatorily hostile or abusive environment." *Peters v. District of Columbia*, 873 F. Supp. 2d 158, 187–88 (D.D.C. 2012) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64–65 (1986)). To state a claim for hostile work environment, a plaintiff must show "that his employer subjected him to 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (quoting *Harris*, 510 U.S. at 21).

Where, as here, a hostile work environment claim is based on racial discrimination, "a plaintiff must demonstrate '(1) that he or she suffered intentional discrimination because of race; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same race in that position; and (5) the existence of *respondeat superior* liability.'" *Richard v. Bell Atl. Corp.*, 167 F. Supp. 2d 34, 42–43 (D.D.C. 2001) (quoting *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081 (3d Cir. 1996)); *see also Kriesch v. Johanns*, 468 F. Supp. 2d 183, 187 (D.D.C. 2007).

Plaintiff's Complaint is deficient as a matter of law because it does not allow a plausible inference that either (1) she suffered intentional discrimination on the basis of her status as a Native American; or (2) that any allegedly discriminatory conduct was sufficiently severe or pervasive to constitute an objectively hostile work environment under the totality of the circumstances.

A. Plaintiff's Allegations are Insufficient to Permit an Inference of Discrimination

Plaintiff's hostile work environment claim is based exclusively on the presence of the Washington Redskins team name in the DOE workplace, whether printed on paraphernalia and corporate advertising materials or verbally uttered. Her Complaint's use of the passive voice, *see* Compl. ¶ 20 (alleging that Plaintiff "has been repeatedly exposed to 'Washington Redskins' paraphernalia"); *id*. (alleging that Plaintiff is "subjected to Indian mascot depictions" several times each day at work), reveals the fundamental flaw with her claim: it fails to allege that any specific DOE employee directed any harassing behavior, much less any discriminatory act, towards Plaintiff because of her race and/or national origin. Expressing support for a professional sports franchise by referencing its team name is not facially intentionally discriminatory conduct, and without further allegation that the mascot was used against Plaintiff in a discriminatory or harassing manner, its mere presence is insufficient to constitute intentional discrimination.

As it applies to the federal government, Title VII requires that all personnel actions "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Consistent with this animating principle of anti-discrimination, the Supreme Court has required that Title VII claims based on hostile work environment be the result of intentional "discriminatory intimation, ridicule, and insult." *Harris*, 510 U.S. at 21. Accordingly, a plaintiff must allege that any alleged hostile work environment was the result of discrimination based on a protected status. *See Burton v. Batista*, 339 F. Supp. 2d 97, 107 (D.D.C. 2004) (collecting cases for the proposition that "'to sustain a hostile work environment claim . . . [plaintiff] must produce evidence that [he] was discriminated against because of' his status" (alterations in original) (citation omitted)); *Na'im v. Clinton*, 626 F. Supp. 2d 63, 73 (D.D.C. 2009) ("hostile behavior, no matter how unjustified or egregious, cannot support a claim of hostile work

environment unless there exists some linkage between the hostile behavior and plaintiff's membership in a protected class").

Discriminatory purpose "implies more than intent as volition or intent as awareness of consequences;" rather, it suggests that the alleged discriminating party "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." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *see also McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 885 (7th Cir. 2012) (applying the *Feeney* standard for demonstrating intentional discrimination to Title VII disparate treatment claims); *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1273–74 (11th Cir. 2000) (same). For a claim based on hostile work environment, "it must be shown that 'had the plaintiff [not been part of the protected class,] she would not have been treated in the same manner.'" *Richard*, 167 F. Supp. 2d at 43 (alteration in original) (quoting *Aman*, 85 F.3d at 1083)).

Here, Plaintiff does not identify any discriminatory conduct that occurred because of her protected status. Indeed, her Complaint supports precisely the opposite inference; she contends that discussion of the local professional football team and the wearing of "Redskins" clothing were commonplace and occurred in spite of, rather than because of, her presence. Compl. ¶ 20. No court has ever held that the term "Redskins," when used as a sign of support for a local football team, is discriminatory on its face, and Plaintiff expressly alleges that her exposure to the term was in connection with its status as a team mascot. This association readily provides a benign explanation for the presence of "Redskins" paraphernalia in the DOE workplace and prevents the conclusion that the mere presence of the mascot, without more, constitutes facially discriminatory conduct. *See Webber v. Int'l Paper Co.*, 417 F.3d 229, 239–40 (1st Cir. 2005) (finding that ambiguous expression that could be plausibly interpreted as either discriminatory or benign does

not, on its own, reflect illegal discriminatory animus). The passive presence of a particular sports franchise's mascot within the workplace, while perhaps carrying an offensive connotation in the Plaintiff's mind, exists independently of her presence (or the presence of any other Native American employee) in the workplace. *See Townsend*, 2017 WL 727536, at *18 ("The 'conduct at issue [must] not [be] merely tinged with offensive . . . connotations, but actually constitute[] discrimination . . . because of' the employee's protected status.") (alterations in original) (quoting *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 81 (1998))); *Turner v. Barr*, 811 F. Supp. 1, 4 (D.D.C. 1993) (noting that while a plaintiff's evidence of harassment need not carry explicit racial overtones, it must "show that the harassment would not have occurred but for the Plaintiff's race").

Simply put, Plaintiff has failed to allege facts that would permit an inference that the presence of the Redskins moniker in the DOE workplace was motivated because of its adverse effect on Native Americans rather than in spite of that effect. From the Complaint, it is just as likely (if not more so) that the presence of Redskins paraphernalia was motivated by support for the local football franchise as it was discrimination on the basis of race. *See Richardson v. Petasis*, 160 F. Supp. 3d 88, 112 (D.D.C. 2015) (finding evidence that employer used the term "boy" to refer to some male staff members insufficient to support inference of discrimination where the use of the term was "common and innocuous," did not carry "any racial connotation," and did not pertain to the plaintiff directly). Stated differently, it is implausible to suggest that, in the absence of Plaintiff's presence in DOE's offices, DOE employees would discontinue wearing Redskins paraphernalia or discussing the local football team. In the absence of any factual allegations giving rise to a plausible inference that Plaintiff was discriminated against because of her race, her hostile work environment claim must fail.

B. The Conduct that Plaintiff Complains of is Insufficient as a Matter of Law to Constitute an Objectively Hostile Work Environment

Even if the generic use of a professional sports team's mascot by DOE employees and contractors could constitute intentional discrimination on the basis of Plaintiff's protected status, the Complaint fails to demonstrate that this conduct is "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Baloch*, 550 F.3d at 1201 (quoting *Harris*, 510 U.S. at 21).

Harassing conduct "must be sufficiently extreme to constitute an alteration in the conditions of employment so that Title VII does not evolve into a 'general civility code.'" *Dudley v. Washington Metro. Area Transit Auth.*, 924 F. Supp. 2d 141, 152 (D.D.C. 2013) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris*, 510 U.S. at 21. In evaluating whether a plaintiff has established a hostile work environment claim, courts must consider "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. at 23. Here, Plaintiff alleges no "physically threatening or humiliating" conduct, *id*., and at most complains of offensive utterances that, in the context in which they were made, do not constitute severe harassment. Moreover, as described below, her positive work performance and rapid upward advancement within DOE show that the allegedly hostile work environment did not unreasonably interfere with her work.

The central premise of Plaintiff's Complaint is that the term "Redskins" is a racial slur, *see* Compl. ¶ 18, and that its use or display in any capacity contributes to a hostile work environment.

In general, however, the "'mere utterance of an . . . epithet which engenders offensive feelings in a[n] employee,' does not sufficiently affect the conditions of employment to implicate Title VII." *Harris*, 510 U.S. at 21 (omission in original) (quoting *Meritor*, 477 U.S. at 67). "[R]acial slurs allegedly spoken by co-workers ha[ve] to be so 'commonplace, overt and denigrating that they create[] an atmosphere charged with racial hostility.'" *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1521 (11th Cir. 1995) (citation omitted); *see also Park v. Howard Univ.*, 71 F.3d 904, 906 (D.C. Cir. 2005) ("Although there is no requirement of psychological harm, it remains true that 'casual or isolated manifestations of a discriminatory environment, such as a few ethnic or racial slurs, may not raise a cause of action.'" (quoting *Bundy v. Jackson*, 641 F.2d 934, 943 n.9 (D.C. Cir. 1981))).

Here, as discussed above, Plaintiff does not allege that any employee's use of the Redskins moniker was used to intimidate or threaten her, or to achieve any purpose other than to show support for a favored sports franchise. Her allegations that various DOE employees discussed the Washington Redskins football team and demonstrated their support by wearing paraphernalia fall short of depicting "an atmosphere charged with racial hostility." *Edwards*, 49 F.3d at 1521. This is especially true given the Complaint's failure to allege that any employee addressed the Redskins name to Plaintiff individually or connected his or her use of the term to Plaintiff's protected status. *See Nurriddin v. Goldin*, 382 F. Supp. 2d 79, 108 (D.D.C. 2005) ("When racial statements are not made directly to a plaintiff, generally a hostile environment cannot be established."); *Hampton v. Vilsack*, 760 F. Supp. 2d 38, 56 (D.D.C. 2011) (finding that sporadic racial jokes, especially where the "alleged use of a racial slur was not made in [the] plaintiff's presence," did not amount to the type of "discriminatory intimidation, ridicule, and insult" necessary to state a Title VII claim).

In rare circumstances, a particular symbol—such as a hangman's noose—may be so associated with violence and racial discrimination that its mere presence, unaccompanied by any further suggestion of intimidation or abuse, can be sufficient to create an objectively hostile environment. *See Burkes v. Holder*, 953 F. Supp. 2d 167, 179 (D.D.C. 2013) (finding that employee's allegation of the presence of a monkey hanging by a noose in the workplace, standing alone, was sufficient to state a hostile work environment claim given that "the noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence" (quoting *Williams v. N.Y.C. Hous. Auth.*, 154 F. Supp. 2d 820, 824 (S.D.N.Y. 2001))). Short of this extreme example, however, courts have commonly found that indisputably offensive racial symbols are insufficient on their own to create a hostile work environment. *See Adams v. Austal USA, LLC*, 754 F.3d 1240, 1254 (11th Cir. 2014) (finding that plaintiff failed to show a hostile work environment, despite exposure to racist graffiti, the Confederate flag, and the "n-word," because such exposure was not directed at the plaintiff and thus "not directly humiliating or threatening"); *Barrow v. Ga. Pac. Corp.*, 144 F. App'x 54, 57–58 (11th Cir. 2005) (no hostile work environment despite exposure to Confederate flag, Ku Klux Klan graffiti, and a noose in common areas); *Woodland v. Joseph T. Ryerson & Son, Inc.*, 302 F.3d 839, 844 (8th Cir. 2002) (no severe and pervasive racial hostility despite the plaintiff's exposure to Ku Klux Klan graffiti drawings, a swastika, a hooded-figure, and a racist, sexist, and homophobic poem); *cf. Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356 (8th Cir. 1997) (finding the presence of a hostile work environment, in part because "this is not a situation where racial jokes and innuendo were merely bandied about the workplace with no particular target"); *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1297 (11th Cir. 2012) (noting that it would be reasonable to conclude that monkey

imagery was intended as a racial insult, and thus to support an actionable racial harassment claim, "*where no benign explanation for the imagery appears*") (emphasis added)).

Here, unlike with the racial symbols above, the use of the term "Redskins"—especially when not accompanied by any threatening or abusive behavior—does carry a benign explanation: support for a local professional sports franchise. For the same reasons that passive display of Redskins gear is not facially intentionally discriminatory behavior, *see supra* Sec. I.A., neither should it be considered severe discriminatory behavior sufficient on its own to create a hostile work environment. Without more to suggest discrimination, it is just as likely that a person who wears a "Redskins" tie or other paraphernalia, or uses the term in casual conversation, is demonstrating support for a sports team as it is that he or she is intentionally discriminating against Native American employees. If Redskins paraphernalia is discriminatory at all, it is not so severe that it can, standing alone, create an objectively hostile work environment.

That the presence of the Redskins mascot did not unreasonably interfere with Plaintiff's work performance is evidenced by the fact that she worked in the Office of Economic Impact and Diversity for nearly two years before making any complaints. *See* Compl. ¶ 8 (alleging that Plaintiff was hired at ED on May 17, 2011); *id.* ¶ 25 (alleging that Plaintiff sent a memorandum to Director Harris expressing concerns about the prevalence of Indian mascot depictions in the workplace on March 8, 2013). Even after she complained, Plaintiff alleges that, "[t]hroughout her tenure at DOE," she "consistently received positive performance reviews." Compl. ¶ 13. In the four years between joining DOE and filing her Complaint, Plaintiff was able to rise rapidly from a GS-11 to GS-15 level employee. *Id.* This job performance suggests that Plaintiff's work environment was not so hostile as to unreasonably interfere with her work. *See Peters v. District of Columbia*, 873 F. Supp. 2d 158, 195 (D.D.C. 2012) (noting that presence of positive job

performance evaluations and positive descriptions about performance during relevant period prevented conclusion that "the allegedly hostile work conditions unreasonably interfered with [the plaintiff's] work performance").

For these reasons, Plaintiff fails to state a plausible claim for hostile work environment, and her first cause of action should be dismissed with prejudice.

II. Plaintiff Fails to State any Plausible Retaliation Claims

To state a *prima facie* claim of retaliation under Title VII, a plaintiff must show that: "(1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between the two." *Taylor v. Small*, 350 F.3d 1286, 1292 (D.C. Cir. 2003). As discussed below, Plaintiff has failed to state any plausible retaliation claims.

A. At Most, Plaintiff Engaged in Protected Opposition Activity on March 8 and May 21, 2013 and Protected Participation Activity on December 7, 2015 and March 10, 2016

"Title VII's antiretaliation provision protects two kinds of activity: (1) participation in EEO proceedings, such as making a charge, testifying, assisting, or otherwise participating in an EEO investigation, proceeding, or hearing; and (2) opposition to any practice made an unlawful employment practice by Title VII." *Grosdidier v. Chairman, Broad. Bd. of Governors*, 774 F. Supp. 2d 76, 107 (D.D.C. 2011).

Plaintiff asserts that her protected activities included, "but [were] not limited to, attempting to raise awareness of the impacts that stereotypical images and racial slurs have on Native American federal employees, filing formal complaints within DOE, and filing an EEO complaint." Compl. ¶ 59.[2] Defendant does not dispute that, for purposes of the instant motion to dismiss,

[2] Plaintiff cannot meet her pleading burden under *Iqbal* and *Twombly* by use of such language as "including but not limited to," as this language constitutes a threadbare allegation. Accordingly, Defendant's motion addresses only the well-pled allegations of alleged protected activity or opposition identified in Plaintiff's Complaint.

Plaintiff has sufficiently alleged that her March 8, 2013 and May 21, 2013 communications to Director Harris, in which she states that the presence of Indian mascot depictions and use of the term "Redskins" in the DOE workplace fostered a hostile work environment, *id*. ¶¶ 25, 27, constitute protected opposition activity. Similarly, Defendant does not dispute that Plaintiff's filings of an informal complaint on December 10, 2015 and formal complaint on March 2, 2016, *id*. ¶ 5, constitute protected participation activity. *See, e.g., Richardson v. Gutierrez*, 477 F. Supp. 2d 22, 27 (D.D.C. 2007).

Although unclear from Plaintiff's Complaint, if she alleges that other actions constitute protected activity, such allegations fail as a matter of law.

As an initial matter, an employee seeking to establish a retaliation claim "must have engaged in protected participation or opposition activity about which the employer knew." *Morris v. McCarthy*, 825 F.3d 658, 673 (D.C. Cir. 2016); *see also Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365 n.9 (4th Cir. 1985) (noting that if the employer had no knowledge of protected activity "a causal connection to the adverse action cannot be established"). Thus, if Plaintiff contends that her communication and meetings with agencies other than her employer regarding her alleged hostile work environment constitute protected opposition activity, *see* Compl. ¶¶ 29-33, such a claim must fail as a matter of law because she does not allege anyone at DOE (let alone the alleged retaliators) was aware of such communications.

Similarly, Plaintiff's presentations at various federal agencies during Native American Heritage Month in 2015, *see* Compl. ¶ 35, do not constitute protected activity. The "opposition clause" of Title VII's anti-retaliation provision is used to analyze activities prior to the instigation of statutory proceedings, *see Scheske v. Univ. of Mich. Health Sys.*, 59 F. Supp. 3d 820, 827 (E.D. Mich. 2014), and "protects an employee who 'communicates *to her employer* a belief that the

employer has engaged in a form of employment discrimination.'" *Townsend*, 2017 WL 727536, at *21 (emphasis added) (quoting *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 55 U.S. 271, 276 (2009)). An employee who proceeds under the opposition clause must "demonstrate a good faith, reasonable belief that the challenged practice violates Title VII." *George v. Leavitt*, 407 F.3d 405, 417 (D.C. Cir. 2005). Not every complaint, however, "garners its author protection under Title VII," and a plaintiff "must in some way allege unlawful discrimination, not just frustrated ambition." *Broderick v. Donaldson*, 437 F.3d 1226, 1232 (D.C. Cir. 2006).

At a minimum, "opposition to an illegal employment practice must identify the employer and the practice." *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 135 (3d Cir. 2006). "A plaintiff must complain of discrimination in sufficiently specific terms so that the employer is put on notice that the plaintiff believes he or she is being discriminated against on the basis of race, gender, national origin, or any other characteristic protected by Title VII." *Lolonga-Gedeon v. Child & Family Servs.*, 106 F. Supp. 3d 331, 336 (W.D.N.Y. 2015) (citation omitted).

Here, Plaintiff alleges that her planned remarks and presentations at these events "would discuss the challenges to achieving Native American inclusion in the federal workplace and would discuss the stereotypical depictions of Native Americans in mainstream culture including sports team's mascots." Compl. ¶ 35. However, giving an outside presentation about raising cultural awareness and promoting inclusion, which Plaintiff alleges was within the mission of ED, *id*. ¶ 34, is not the legal equivalent of complaining to an employer about a specific discriminatory employment practice. *See Thomas v. District of Columbia*, 197 F. Supp. 3d 100, 113 (D.D.C. 2016) (noting that Title VII opposition clause "forbids retaliation by employers against employees who *report* workplace race or gender discrimination" (citation omitted)); *Brangman v.*

AstraZeneca, LP, 952 F. Supp. 2d 710, 721 (E.D. Pa. 2013) ("The plaintiff must therefore be opposing unlawful discrimination by expressing their criticism."). While the subject matter of Plaintiff's presentation could be viewed as general opposition to the stereotypical depiction of Native Americans throughout mainstream culture, including in the federal workplace, such "public protests or expressions of belief [are not] protected conduct absent some perceptible connection to the employer's alleged illegal employment practice." *Curay-Cramer*, 450 F.3d at 135. *See Dupont-Lauren v. Schneider (USA), Inc.*, 994 F. Supp. 802, 823 (S.D. Tex. 1998) (noting that "[v]agueness as to the nature of the grievance . . . prevents a protest from qualifying as protected activity," and finding that employee's vague comments during a deposition that "failed to apprise the employer of any particular practices she viewed as discriminatory" did not constitute protected activity).

In contrast to the memoranda that Plaintiff sent to Director Harris in the spring of 2013, Plaintiff does not allege that the prepared presentations identify the existence of a hostile work environment or otherwise apprise her employer of any specific unlawful or discriminatory employment practice within the DOE workplace; indeed, she does not ever allege that they were even addressed to anyone at DOE. As such, these presentations to outside groups cannot constitute protected activity.

This point is underscored by the fact that Plaintiff accepted the speaking arrangements in her official capacity because, as she alleges, the promotion of civil rights and workplace diversity efforts are within the mission of ED. *See* Compl. ¶ 34. Regardless of whether it was appropriate for her to give these specific presentations in her official capacity, Plaintiff's understanding that she was furthering the mission of her employer makes clear that she was not engaged in any protected oppositional activity. *See Morris*, 825 F.3d at 673 (finding that "job-related policy

discussions are not protected"). As the D.C. Circuit has recently recognized, "[l]abeling generalized policy disagreements 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." *Id.*

Plaintiff was a civil rights attorney working within an office dedicated to promoting diversity and fostering inclusion; her presentation providing commentary on such issues, without identifying any specific discriminatory practice on the part of DOE, is not protected activity. If it were, any commentary on the need for further diversity and inclusion in the federal workplace—especially by a civil rights attorney—would constitute protected activity, a result that the *Morris* court warned against. *Id.*; *see also Grosdidier*, 774 F. Supp. 2d at 122 (rejecting interpretation of Title VII that would allow protected activity to comprise opposition to a practice that a plaintiff "reasonably believes is *not* prohibited by Title VII but which might, if left unchecked, some day ripen into an unlawful hostile work environment," because such a reading "would provide protection for nearly all employee complaints about offensive conduct in the workplace" and impermissibly convert Title VII into a "general civility code").

Accordingly, Plaintiff did not engage in any protected activity between sending an email to Director Harris on May 21, 2013 and filing an informal EEO complaint on December 10, 2015.

B. Plaintiff Identifies Only One Cognizable Materially Adverse Employment Action, Which Took Place on December 7, 2015

The Complaint alleges that DOE took a number of materially adverse employment actions against Plaintiff for engaging in protected activity. Chronologically, these include (1) postponement of attendance at the Federal Executive Institute on October 26, 2015 (Compl. ¶ 37); (2) reassignment to significantly different job responsibilities than those she had previously been assigned to perform, a process that began on October 27, 2015 and culminated on December 7,

2015, when Plaintiff alleges she was formally "stripped" of her organizational title and reassigned from the Office of the Director to the Office of Civil Rights (Compl. ¶¶ 39, 43) ; (3) requirement that Native American Heritage Month presentations be given in personal rather than official capacity, and accompanying requirement that Plaintiff take personal leave to give them, which was formally imposed on October 29, 2015 (Compl. ¶ 41); (4) exclusion from meetings and assignments which fell within the position description for Plaintiff's role (specific meetings alleged to have occurred on February 26, 2016 and March 18, 2016) (Compl. ¶¶ 45, 46); and (5) denial of detail requests in February and June 2016 (Compl. ¶ 46). Defendant concedes that Plaintiff has sufficiently alleged, at this stage in the litigation, that the job reassignment, which formally occurred on December 7, 2015, could, if true, constitute an adverse employment action because, as alleged by Plaintiff, the result was "a de facto demotion in both the complexity of the work performed and the level of influence and responsibility within DOE." Compl. ¶ 43.

The remainder of Plaintiff's identified actions, however, are insufficient as a matter of law to constitute materially adverse employment action. An action is deemed materially adverse when "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citation omitted). Although adverse actions in the retaliation context "encompass a broader sweep of actions than those in a pure discrimination claim," *Baloch*, 550 F.3d at 1198 n.4, a plaintiff alleging retaliation based on employment action that does not obviously affect a significant change in employment status must allege harm that is not "unduly speculative." *Bridgeforth v. Jewell*, 721 F.3d 661, 663 (D.C. Cir. 2013). "'Actionable retaliation claims are limited to those where an employer causes *material* adversity,' and the plaintiff . . . must suffer some objectively tangible

harm." *Morales v. Gotbaum*, 42 F. Supp. 3d 175, 196 (D.D.C. 2014) (quoting *Wiley v. Glassman*, 511 F.3d 151, 161 (D.C. Cir. 2007)).

Here, with the exception of her alleged job reassignment, Plaintiff's Complaint is devoid of allegations that she suffered any direct, tangible, non-speculative harm that would dissuade a reasonable worker from making or supporting a charge of discrimination. As an initial matter, several of these alleged adverse actions—including the postponed training opportunity at the Federal Executive Institute and the requirement that Plaintiff not attend certain speaking engagements in her official capacity but rather that she take personal leave to do so—occurred before Plaintiff filed her EEO complaint in December 2015. That none of these "common workplace grievances" prevented Plaintiff from actually filing EEO complaints demonstrates that they would not "deter a *reasonable* employee from making or supporting a charge of discrimination." *Rattigan v. Gonzales*, 503 F. Supp. 2d 56, 76 (D.D.C. 2007) (citing *White*, 548 U.S. at 68). Accordingly, they cannot be considered adverse employment actions.

Further, the mere postponement of a training opportunity does not, standing alone, constitute an adverse employment action. *See Hernandez v. Gutierrez*, 850 F. Supp. 2d 117, 121 n.1 (D.D.C. 2012) (finding allegations that employee was denied training insufficient to constitute adverse action where they "amount[ed] to no more than general dissatisfaction with [the employee's] job"); *Sims v. District of Columbia*, 33 F. Supp. 3d 1, 12 (D.D.C. 2014) (acknowledging that the denial of training opportunities, standing alone, would be insufficient to establish a *prima facie* case of retaliation). Here, Plaintiff fails to allege harm that is tangible, rather than merely speculative, because she admits that she was approved for the training and does not allege that the training was canceled or denied, only that it was postponed. *See* Compl. ¶ 37. Accordingly, Plaintiff cannot show that the postponed training is a materially adverse action. *See*

Dorns v. Geithner, 692 F. Supp. 2d 119, 133 (D.D.C. 2010) (finding an employee's allegations of being denied training opportunities insufficient to support a retaliation claim where she "failed to demonstrate that the denial of her training request produced any adverse consequences in her employment status, conditions, or benefits"); *Warner v. Vance-Cooks*, 956 F. Supp. 2d 129, 171 (D.D.C. 2013) (finding employee's conclusory assertions that a training opportunity would have provided experience that would be determinative in future promotion decisions to allege speculative rather than tangible harm). The same is true of Plaintiff's assertion that officials at DOE prevented her from giving presentations at federal agencies for Native American Heritage Month in her official capacity, and required her to take personal leave to give such presentations (Compl. ¶ 41). *See Gray v. Foxx*, 74 F. Supp. 3d 55, 70–71 (D.D.C. 2014) (holding that employee's allegation that she was removed by employer from making a presentation at a seminar was insufficient to constitute materially adverse action).[3]

Similar analysis applies to those of Plaintiff's alleged adverse employment actions, including denial of several detail requests and exclusion from meetings, that occurred after she filed her informal EEO complaint on December 10, 2015. "Generally, a lateral transfer or the denial of such a transfer, without 'some other adverse change in the terms, conditions or privileges of employment,' does not amount to an adverse action." *Dorns*, 692 F. Supp. 2d at 132 (quoting *Stewart v. Evans*, 275 F.3d 1126, 1135 (D.C. Cir. 2002)). Importantly, "simply stating that [a requested] transfer would have provided growth potential does not establish an adverse action." *Id*. Plaintiff does not allege that any of the detail opportunities she sought out were for vertical,

[3] In any case, Plaintiff alleges that both this action and the postponed training took place in October of 2015, approximately twenty-nine months after she had engaged in protected activity. This period of time between protected activity (May 2013) and adverse action (October 2015), as discussed *infra* Sec. II.C, is too long to support an inference of causation and prevents Plaintiff from being able to state a retaliation claim based on these events.

rather than lateral, transfers or how they would have improved her promotion opportunities with respect to any specific position. *See Brookens v. Solis*, 616 F. Supp. 2d 81, 91 (D.D.C. 2009) (finding no adverse action based on employer's denials of detail request where the plaintiff failed to "allege any injury or harm resulting from these denials," and the presence of any materially adverse consequences as a result was "mere speculation"); *cf. Browne v. Donovan*, 12 F. Supp. 3d 145, 154–55 (D.D.C. 2014) (finding that denial of detail request did constitute adverse action where the detail "represent[ed] not simply a temporary lateral transfer, but rather a temporary vertical transfer to a superior positon"). Without more, the bare allegation that Plaintiff was denied the opportunity to go on detail is insufficient to constitute materially adverse employment action.

Plaintiff's allegations that she was excluded from meetings are similarly insufficient. Although she alleges at various points that she was excluded from meetings which fell within her job responsibilities, *see, e.g.*, Compl. ¶¶ 39, 45, she identifies with specificity only two instances of exclusion: (1) a meeting on February 26, 2016 to discuss the creation of a report documenting Director Harris' accomplishments at DOE, *id*. ¶ 45, and (2) a March 18, 2016 meeting with the Montana Governor's Office, *id*. ¶ 46. Plaintiff cannot rely on unspecified meetings beyond those specifically identified in the Complaint to support her claim. *See Hayslett v. Perry*, 332 F. Supp. 2d 93, 105 (D.D.C 2004) (finding plaintiff's allegations of being excluded from job-related meetings insufficient to constitute adverse employment action where the plaintiff "identified no specific meetings" and failed to show how exclusion from unspecified meetings had "any adverse impact on her employment terms or conditions or caused any objectively tangible harm").

Moreover, where she does identify two specific meetings, Plaintiff does not provide any further details regarding these meetings or how her non-attendance caused any tangible harm. As is the case with her allegations regarding detail assignments and training opportunities, Plaintiff

fails to identify any materially adverse consequences or non-speculative harm that resulted from her non-participation in the specified meetings. *See Allen v. Napolitano*, 943 F. Supp. 2d 40, 46 (D.D.C. 2013) (finding exclusion from meetings was not adverse action where the plaintiff failed to show any "effects on her grade level, salary, or promotion opportunities," "that the meetings would have contributed significantly to her professional advancement," or "that nonparticipation otherwise tangibly impacted the terms and conditions of her employment"); *Warner*, 956 F. Supp. 2d at 172 n.29 (finding exclusion from meetings insufficient to constitute adverse employment action where the plaintiff "neither provided details of the meetings to evaluate their significance nor demonstrated how the exclusions interfered with her job performance").

C. Plaintiff Fails to Allege a Causal Connection Between Protected Activities and Adverse Employment Actions

In addition to the other substantial defects in Plaintiff's Complaint, her retaliation claims also fail because she does not allege a plausible causal connection between any protected activity and any materially adverse employment action. As discussed above, Plaintiff's protected activity occurred on March 8 and May 21 of 2013, when she complained of a hostile work environment to her supervisor, Director Harris, and on December 10, 2015 and March 2, 2016, when she made her informal and formal EEO complaints, respectively. Of the five adverse employment actions alleged by the Plaintiff, however, three occurred in the fall of 2015, *before* she filed her informal complaint on December 10, 2015 and well over *two years after* her May 21, 2013 email to Director Harris.[4] Under these circumstances, even if these alleged actions could constitute materially

[4] These three employment actions, as alleged in the Complaint, are that: (1) on October 26, 2015, Plaintiff's attendance at the Federal Executive Institute was postponed (Compl. ¶ 37); (2) on October 29, 2015, Plaintiff was prevented from lecturing about Native American mascots in her official capacity as a DOE employee (Compl. ¶ 41); and (3) on December 7, 2015, Plaintiff was stripped of her organizational title and reassigned to the DOE Office of Civil Rights, which she contends isolated her from her ED activities (Compl. ¶ 43).

adverse employment actions, Plaintiff cannot establish a sufficient temporal connection between any of them and any instance of protected activity to raise an inference of causation as a matter of law.[5]

For a retaliation claim, an employee is required to show "but-for" causation: "that the adverse action would not have occurred 'but for' the protected activity." *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 84 (D.D.C. 2003); *see also Wang v. Washington Metro. Area Transit Auth.*, ---F. Supp. 3d----, 2016 WL 4007067, at *24 (D.D.C. July 25, 2016) ("'Title VII retaliation claims must be proved according to traditional principles of but-for causation,' not the motivating-factor standard applicable to discrimination claims." (citation omitted)). "A plaintiff may satisfy this third element of a prima facie case by showing 'the employer had knowledge of the employee's protected activity, and . . . the adverse personnel action took place shortly after that activity.'" *Holcomb v. Powell*, 433 F.3d 889, 903 (D.C. Cir. 2006) (omission in original) (quoting *Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985)).

Temporal proximity, however, can support an inference of causation only "where the two events are 'very close' in time." *Woodruff v. Peters*, 482 F.3d 521, 529 (D.C. Cir. 2007) (citation omitted). Although the D.C. Circuit has declined to adopt any bright line rules, courts within this district have "often followed a three-month rule to establish causation on the basis of temporal proximity alone." *McIntyre v. Peters*, 460 F. Supp. 2d 125, 133 (D.D.C. 2006) (collecting cases);

[5] The two remaining alleged adverse actions that post-date Plaintiff's December 2015 informal EEO complaint and March 2016 formal EEO complaint—the exclusion from meetings on February 16, 2016 and March 18, 2016, and the denial of details in February and June 2016—do not constitute materially adverse actions as a matter of law and thus cannot support a claim for retaliation for the reasons stated above. *See supra* Sec. II.B. And, of course, Plaintiff may not rely upon her December 2015 informal EEO complaint to establish causation for alleged adverse action that occurred before that date. *See Massaquoi v. District of Columbia*, 81 F. Supp. 3d 44, 50 (D.D.C. 2015) (holding that allegedly adverse employment actions that occur before the protected activity are irrelevant in a Title VII retaliation claim).

see also Hamilton v. Geithner, 666 F.3d 1344, 1357 (D.C. Cir. 2012) (acknowledging Supreme Court precedent recognizing that "in some instances a three-month period between the protected activity and the adverse employment action may, standing alone, be too lengthy to raise an inference of causation"); *Brodetski v. Duffey*, 141 F. Supp. 2d 35, 43 (D.D.C. 2001) (noting that "courts generally have accepted time periods of a few days up to a few months and seldom have accepted time lapses outside of a year in length"). In general, "the greater the time that elapses between the protected activity and the alleged retaliation, the more difficult it is to justify an inference of causal connection between the two." *Chandamuri*, 274 F. Supp. 2d at 85.

Here, a time lapse of almost two-and-a-half years is insufficient, without more, to support the inference of causation necessary for Plaintiff to establish her *prima facie* case. *See Payne v. D.C. Gov't*, 722 F.3d 345, 354 (D.C. Cir. 2013) ("Once the time between a protected disclosure and a negative employment action has stretched to two-thirds of a year, there is no 'temporal proximity' that supports a causal connection between the two, nothing else appearing."); *Jones v. Castro*, 168 F. Supp. 3d 169, 185 (D.D.C. 2016) (finding that "[n]o inference of causation is possible" where more than three months elapsed between the plaintiff's final protected activity and adverse action); *Wilson v. Mabus*, 65 F. Supp. 3d 127, 133–34 (D.D.C 2014) (finding that plaintiff failed to state retaliation claim where four months passed between alleged protected activity and any adverse employment action and plaintiff failed to allege any other facts demonstrating a causal link); *Chandamuri*, 274 F. Supp. 2d at 85 (finding that lapse of "well over a year" between protected activity and allegedly retaliatory action "precludes a finding that there was a causal connection between the two").

Absent a demonstration of close temporal proximity, Plaintiff cannot create a reasonable inference of causation or state a retaliation claim without "something much stronger," such as

allegations of a link between the protected activity and the adverse action or a pattern of retaliation following protected conduct. *Mokhtar v. Kerry*, 83 F. Supp. 3d 49, 81 (D.D.C. 2015); *see also Buggs v. Powell*, 293 F. Supp. 2d 135, 149 (D.D.C. 2003). Here, Plaintiff fails to allege this stronger showing. According to her own allegations, DOE, through its office of General Counsel, responded to her concerns about the prevalence of Native American stereotypes in the workplace with a legal guidance issued on June 7, 2013. Compl. ¶ 28. Although Plaintiff was dissatisfied with this response and continued to pursue the issue through communication with other agencies and officials outside of DOE, this response makes clear that DOE's response to Plaintiff's oppositional activity was not retaliation but attention to, and legal analysis of, the issue presented.

For the next two years, a time period during which she received "positive performance reviews" and continued her rapid advance towards becoming a GS-15, Compl. ¶ 13, Plaintiff alleges no retaliatory actions.[6] Instead, she alleges that in July 2015 she was permanently offered the position of "Strategic Initiatives and Policy Advisor," which directly reported to Director Harris and "expanded" her duties to "lead the origination and development of policy initiatives to further the ED mission." *Id*. ¶ 12. Thus, Plaintiff fails to plead any facts that show that her job reassignment, although occurring over two years after her alleged protected activity, was nevertheless motivated by retaliatory animus. Given Plaintiff's continued career advancement following the protected activity, and the more than two-year period during which Plaintiff does not allege that DOE took any retaliatory action or expressed any retaliatory animus, any inference that her March 8, 2013 letter (or May 21, 2013 follow-up email) was the but-for cause of her December 2015 job reassignment is not supported. *See Payne*, 722 F.3d at 354 (finding that

[6] In fact, she does not allege a single instance of retaliatory action until October 26, 2015, twenty-nine months after her alleged protected activity on May 21, 2013.

showing of protected activity followed, eight months later, by termination insufficient because "[t]he fact that one event precedes another does not in itself evidence causation"); *Mokhtar*, 83 F. Supp. 3d at 81 (finding no causal connection where alleged retaliatory event occurred twelve years after protected activity and the plaintiff failed to show any "link or retaliatory pattern" between the two events).

As Plaintiff's Complaint fails to allege a causal link between any protected activity and any adverse employment action, her retaliation claims should be dismissed with prejudice.

CONCLUSION

Plaintiff asks this Court to be the first to conclude that support within the workplace for a local professional sports franchise constitutes a hostile work environment. Plaintiff cannot show that such support constitutes intentional discrimination or that such support, as a matter of law, constitutes an objectively severe or pervasive work environment. Nor can Plaintiff plausibly allege claims for retaliation. The vast majority of conduct that Plaintiff alleges constitutes retaliation occurred well over two years after her alleged protected activity. And the alleged retaliatory conduct that occurred closer in time to protected activity is not materially adverse as a matter of law. Accordingly, for the foregoing reasons, the Court should dismiss with prejudice Plaintiff's Complaint.

Dated: March 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 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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