04-0860-cv

To be Argued By:
WILLIAM M. BROWN, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-0860-cv

LORETTA DIBRINO,
Plaintiff-Appellant,

-vs-

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE DEFENDANT-APPELLEE

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on January 9, 2004. On January 26, 2004, DiBrino filed a timely notice of appeal pursuant to Fed.R.App.P. 4(a)(1)(B). This Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Did the district court correctly grant summary judgment for the defendant on the basis of its conclusion that plaintiff DiBrino failed to establish that her change in shift constituted an adverse employment action?

II. Did the district court correctly grant summary judgment for the government on the basis of its conclusion that there was no genuine issue of material fact regarding the lack of causal connection between plaintiff DiBrino's termination from employment in 2002 and her filing of an EEO complaint in 1997?

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PRELIMINARY STATEMENT

The plaintiff-appellant, Loretta DiBrino, appeals from a grant of summary judgment against her with respect to her claims of retaliation arising from her employment as a medical clerk for the United States Department of Veterans Affairs in Connecticut. The district court evaluated each of DiBrino's claims and concluded that DiBrino failed to present any genuine issues of material fact. Because the district court correctly concluded that no

genuine issues remained for trial, this Court should affirm the grant of summary judgment.

STATEMENT OF THE CASE

This is a civil appeal from an order granting summary judgment by the United States District Court for the District of Connecticut (Janet C. Hall, J.). The district court rejected employment discrimination claims against the defendant-appellee Anthony J. Principi, Secretary of Veterans Affairs.[1]

On June 24, 2002, DiBrino filed her amended complaint in the district court alleging disability, race, and sex discrimination; and retaliation in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (hereinafter "Title VII"). DiBrino's claims arise from her prior employment with the Department of Veterans Affairs ("DVA"). Joint Appendix ("JA") at 20-25.

On March 3, 2003, the government moved for summary judgment pursuant to Fed. R. Civ. P. 56, seeking judgment as to the entire amended complaint. JA 46.

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[1] The Civil Rights Act requires that a discrimination complaint name as defendant "the head of the department, agency, or unit, as appropriate." 42 U.S.C. § 2000e-16(c). Because Anthony Principi is sued in his official capacity and for ease of reference, this brief refers to the defendant-appellant simply as "the government."

On January 5, 2004, the district court granted the government's motion in its entirety. JA 399-421. DiBrino has not challenged the court's ruling on her claims concerning disability, race, and sex discrimination in this appeal, nor did she oppose the government's motion for summary judgment as to these claims. DiBrino only challenges the district court's dismissal of her retaliation claim. *See* Brief of Plaintiff-Appellant ("Pl. Br.") at 10.

Final judgment for the government entered on January 9, 2004. JA 422. DiBrino filed a timely notice of appeal on January 26, 2004. JA 423.

STATEMENT OF FACTS

A. Factual Allegations

According to the allegations set forth in the evidentiary record,[2] DiBrino began her employment as a medical clerk at the Department of Veterans Affairs facility in West Haven, Connecticut, in 1993. During this period of time she suffered from a low back injury. She served as a medical clerk at the West Haven facility until her termination from employment in 2002. JA 399.

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[2] For the purpose of deciding the government's motion for summary judgment, the district court accepted the plaintiff's version of all disputed facts. JA 399, n.1. This section of the brief sets forth these allegations followed by the district court's resolution of each of DiBrino's claims, most of which have not been challenged in this appeal.

1. Allegations Regarding the Use of a Cane

On June 4, 1997, DiBrino, at the direction of her physician, Dr. Beverly Greenspan, requested that she be allowed to use a cane at work and that she not be required to lift or carry more than 15 pounds. JA 400. DiBrino's supervisor, Kathleen Yuckienuz, told DiBrino that she could not use a cane at work unless she had a doctor's note. *Id*. DiBrino contacted Dr. Greenspan and, about one hour later, Dr. Greenspan sent an e-mail to Yuckienuz explaining that she had prescribed a cane for DiBrino, and that "plaintiff's gait was normal in the clinic and I feel that she is physically able to do clerical work including walking from one part of the hospital to another carrying charts, but she should not lift more than 15 lbs. because of her chronic back problems." JA 401. DiBrino then called Yuckienuz who told DiBrino that she had received Dr. Greenspan's note, and then she gave DiBrino her work assignment for that day. *Id*. DiBrino used the cane some at work that day and was never told after that date that she could not use the cane. *Id*. DiBrino chose not to use the cane after that date because she wanted further clarification from Yuckienuz first but was "afraid to bring it up." *Id*., n.3.

DiBrino filed an Equal Employment Opportunity ("EEO") complaint as a result of this incident. JA 168, 402. DiBrino claimed that as a result, her shift assignment was changed and she was "assigned to alternating shifts during the same week" whereas "no other ward clerk was automatically assigned to this schedule." JA 121, 402-03. In addition, DiBrino alleged that she was subjected to

intense supervision and micro-management after she filed the complaint.[3] *Id*.

2. Allegations Regarding Co-Worker Harassment

Around June 10, 1999, more than two years after the cane incident, DiBrino began to believe that she was being stalked and harassed by a co-worker, Michael Oliverio, a Nursing Assistant/Escort. JA 403. DiBrino believed that Oliverio would follow her as she walked to her car after work and would sometimes trail her in his car after she had left work. *Id.* DiBrino claims that Oliverio harassed her because she discovered he was hiding alcohol in a closet at work and he was trying to intimidate her to keep silent. *Id*. DiBrino made several reports concerning Oliverio's behavior to the nursing staff, her union representatives, hospital security, and the West Haven police. *Id*.

In July 2000, the nursing staff took various steps designed to remedy the situation and minimize contact between DiBrino and Oliverio. JA 403-04. DiBrino alleged in her amended complaint, however, that the staff failed to adequately address her dispute with Oliverio in

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[3] These allegations of retaliation were not raised before the EEOC or in DiBrino's amended complaint. Rather, they were raised for the first time in Plaintiff's Opposition Memorandum in response to the government's summary judgment motion. JA 120-133. Nevertheless, the district court addressed these claims on the merits even though they were not properly pled. JA 410-11.

retaliation for her previous disability-related EEO complaint, i.e., the cane incident. JA 22.

3. Allegations Regarding Termination

DiBrino was terminated from employment effective May 3, 2002, for failure to follow proper leave- requesting procedures, failure to follow a direct order by a supervisor, and failure to provide administratively acceptable documentation to support her extended period of absence. On March 8, 2002, DiBrino was given 30 days written notice of the Department's intent to terminate her employment, and DiBrino never responded. JA 407. At the time of her termination, DiBrino had been absent without leave (AWOL) for almost one year. JA 419. DiBrino claimed her termination from employment was in retaliation for the filing of her EEO complaint regarding the cane incident in June 1997. JA 23.

However, DiBrino stopped reporting to work after September 21, 2000, without any authorization or approved leave. JA 404. The only documentation provided by plaintiff before she stopped reporting to work was a note from her psychiatrist, Dr. Burton Austen, recommending that she "immediately go out on a medical leave from the hospital" due to anxiety and depression. JA 112, 404.

Retroactively, DiBrino was permitted to exhaust her sick leave and her leave under the Family Medical Leave Act. JA 405-07. Nevertheless, at the time of her termination in May 2002, she had been absent without leave for approximately one year. JA 407.

4. Allegations of Retaliation

The district court found that DiBrino's amended complaint and summary judgment opposition set forth several allegations of retaliation based upon DiBrino's filing of an EEO complaint in 1997 regarding the cane incident discussed above. DiBrino alleged that she was (1) harassed by her supervisors, i.e., that she was monitored more closely or micro-managed, (2) that her supervisors discriminated against her with regard to working conditions, (3) that her complaints regarding Oliverio were not satisfactorily resolved, (4) that her supervisors did not help her process her leave requests before she stopped reporting to work in September 2000, and (5) that she was ultimately terminated from employment. JA 409-10.

Regarding the supervisor harassment allegations, the district court found DiBrino's supporting facts to be "sparse, essentially limited to [a co-worker's] statement under oath without any additional specifics." JA 410. The statement alleged that DiBrino's supervisors monitored her telephone calls, her whereabouts, and her computer use. *Id*. The district court also noted that DiBrino's allegations of supervisor harassment pre-dated her EEO complaint in 1997 and were based on an unrelated incident for which DiBrino claimed she was being unfairly blamed. *Id*.

DiBrino's allegation of retaliation concerning "working conditions," initially raised in DiBrino's opposition to the government's summary judgment motion, consisted solely of DiBrino's claim that she was assigned to "alternating shifts during the same week . . . although no other ward clerk was automatically assigned to this schedule, and that

this continued until April 2000." JA 411. DiBrino provided no supporting documentation nor any corroborating material for this claim except her own affidavit containing the same conclusory allegations. JA 411-12.

DiBrino's claim that her supervisors intentionally failed to assist her with requesting leave of absence during September 2000 was also not presented in DiBrino's complaint. Rather, it was raised for the first time in plaintiff's Local Rule 56(c)(2) statement in response to the government's motion. JA 416 n.4. Regardless, the district court examined the claim and found that it lacked merit. JA 416-18.

B. The District Court Ruling

The district court granted the government's summary judgment motion as to DiBrino's claims of race discrimination, sex discrimination, and failure to accommodate DiBrino's disability (i.e., the cane incident in June 1997) in the absence of any opposition by the plaintiff. The government requested summary judgment on all of these claims, yet the plaintiff's opposition only addressed certain retaliation claims. JA 420-21. Therefore, the district court concluded that the plaintiff conceded the government's motion as to these claims. Moreover, the court noted that this conclusion "is supported by the court's review of the record, in which the plaintiff fails to produce evidence to support any of these claims, as amply detailed in the defendant's motion for summary judgment and reply." JA 421. DiBrino has not challenged this finding on appeal.

Regarding DiBrino's retaliation claims, as discussed above, the district court found there to be five separate allegations: (1) supervisor harassment by close monitoring or micro-management, (2) a retaliatory shift change, (3) failure to address the dispute with DiBrino's co-worker, Michael Oliverio, (4) a failure to assist in processing DiBrino's leave request, and (5) termination from employment. JA 410. As described more fully below, the district court found that DiBrino failed to present any genuine issues of material fact with respect to these claims to preclude the government's summary judgment motion. JA 420.

On appeal, DiBrino only challenges the district court's finding that the alleged shift change was not an adverse employment action, and that DiBrino failed to present sufficient facts to support a rational inference of a causal connection between her termination in 2002 and her EEO complaint nearly five years earlier in 1997. *See* Brief of Plaintiff-Appellant. The district court's findings dismissing the balance of the retaliation claims listed above are unchallenged on appeal.

1. Supervisor Harassment

After noting that DiBrino's supporting facts were "sparse," and assuming the claim of micro-management could be linked to the 1997 EEO complaint concerning the cane incident, the district court found that micro-management or "excessive scrutiny," without other negative consequences, is not an adverse employment action. JA 410-11. DiBrino alleged nothing more than excessive scrutiny. There were no other allegations of

harassment the likes of which this Court found actionable in *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426 (2d Cir. 1999), nor were there any allegations of lost benefits, *see Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). Accordingly, this claim failed. DiBrino has not challenged the dismissal of this claim on appeal. [4]

2. Failure to Resolve Co-Worker Dispute

Similarly, in rejecting the assertion that DiBrino's supervisors failed to address her alleged dispute with a co-worker, the district court stated:

> Even accepting as true DiBrino's allegations that the [co-worker] harassment and stalking continued until she went on leave in September 2001, uncontroverted evidence demonstrates that the defendant made several attempts to respond to her claim . . . . DiBrino does not present any evidence linking the defendant's response to the complaints to her prior disability complaints. Nor is there circumstantial evidence that connects the defendant's actions with respect to the alleged harassment to the plaintiff's EEO complaint.

JA 413-14.

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[4] *See also Honey v. County of Rockland*, 200 F. Supp.2d 311, 320-21 (S.D.N.Y. 2002) (citing *Bennett v. Watson Wyatt & Co.*, 136 F. Supp.2d 236, 248 (S.D.N.Y. 2001) (excessive scrutiny resulting in reprimands did not constitute adverse employment action absent any other negative results)).

The district court noted that the EEO complaint was filed in 1997, whereas the alleged stalking and harassment did not begin until approximately two years later during June 1999. The court found this intervening time too long to support an inference of a required causal connection. JA 415 (citing *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 555 n.5 (2d Cir. 2001) (citing *Castro v. Local 1199*, 964 F. Supp. 719, 728 (S.D.N.Y. 1997) (one year between EEO complaint and termination is too long to show causal connection))).

Accordingly, the district found there to be insufficient evidence to support a prima facie case of retaliation on this claim, JA 416, and DiBrino has not challenged this finding here.

3. Failure to Assist with Leave Request

As for the claim that DiBrino's supervisors failed to assist her with the forms necessary to request a leave of absence, the district court stated:

> DiBrino has not presented any evidence to support a finding that the defendant took action in the form of "intentionally fail[ing] to assist her with [her] in processing her leave request for authorized absence . . . in retaliation for the complaints she had filed from 1997-the fall of 2000." There is no evidence that the defendant failed to assist with her requests, let alone that it was "materially adverse" and linked to her EEO complaints. Instead, DiBrino again presents only unsupported allegations.

JA 417 (citation omitted).

In fact, the district court specifically found, based in part on its review of documents submitted by DiBrino, that several steps were taken along the way to assist DiBrino despite the fact that she had failed to comply with proper administrative leave procedures. For example, although initially in a period of unauthorized absence beginning in September 2000, DiBrino was permitted to exhaust her sick leave "to minimize the adverse affect to [her] salary." JA 417. DiBrino was also advised to submit a Family and Medical Leave Act form in order to receive leave without pay, she was provided additional time to file the necessary paperwork to avoid possible adverse action, and she was educated on the procedure designed to "reduce paperwork for [her]." JA 417-18. Finally, DiBrino was not terminated from employment until she had been AWOL for almost one year. JA 418.

For these reasons, the district court also dismissed this claim for failure to present a prima facie case of retaliation. *Id.* DiBrino has not challenged this finding on appeal.

4. The Shift Change

Regarding the alleged retaliatory "shift change," the district court found that the unsupported allegations by counsel for Ms. DiBrino were wholly insufficient:

> The court does not find that DiBrino's alleged shift change was "materially adverse." DiBrino presents only conclusory allegations; no evidence from which the court could infer that this was

> unduly burdensome; no evidence of the schedules of other employees; and no evidence as to the effect on her and her work. She does not claim that the change was a demotion; was accompanied by a change in salary; entailed diminished responsibilities; or portended any other meaning that would make it "materially adverse." While such a change might affect schedule regularity, and night shifts are presumably more difficult because of sleep patterns, DiBrino does not present any evidence on these or any other effects. Moreover, "inconvenience," even if it is significant, is not always "materially adverse" with respect to a retaliation claim. As a result of the considerations mentioned above, the shift assignment is insufficient to support a prima facie case of retaliation.

JA 413 (citation omitted).

Moreover, the district court noted that the "shift change" allegations were improperly preserved in the first instance, were not set forth in the plaintiff's amended complaint, and appeared for the first time in response to the government's motion for summary judgment:

> DiBrino also alleges for the first time in her Opposition Memorandum that, after her initial complaint, her supervisor changed her work schedule, "assigning her to alternating shifts during the same week . . . although no other ward clerk was automatically assigned to this schedule, and that this continued until April 2000." She does not

> attach any exhibits or other corroborating material, except an affidavit containing the same conclusory statement, to support these generalized allegations.
>
> Even if the shift change were properly pled and further substantiated, it would not constitute a materially adverse employment action.

JA 411-12 (citations omitted).

In sum, the district court concluded that Ms. DiBrino's allegations of a retaliatory "shift change" were factually unsupported and legally insufficient. JA 413.

5. The Termination from Employment

As an initial matter, the district court found that DiBrino presented no direct evidence of retaliatory animus with respect to her termination from employment in May 2002. JA 419. DiBrino has not disputed that finding on appeal. Accordingly, to establish a prima facie case, DiBrino was required to come forth with circumstantial evidence of a causal connection between the termination and her EEO complaint filed in 1997, nearly five years earlier. *See Gordon v. New York City Bd. of Educ.*, 232 F. 3d 111, 117 (2d Cir. 2000).

In such "circumstantial cases," courts have required the protected activity and the adverse employment action to be "close in time." JA 419. The district court simply found there to be insufficient facts to support a causal connection, especially given the nearly five-year time gap between the EEO complaint and the termination, and the lack of any

corroborating evidence to support DiBrino's claim. *Id.* Accordingly, the court granted summary judgment on the termination claim. [5]

[5] The district court also granted judgment in favor of the government on DiBrino's claim that her termination was partly in retaliation for the filing of her district court complaint, in the absence of any opposition to the government's summary judgment motion. The court interpreted the lack of opposition as a concession to the government's motion on this claim and noted that, even if pursued by DiBrino, the claim would have failed on the merits. JA 420 n.5. This finding has not been challenged on appeal.

SUMMARY OF ARGUMENT

The district court correctly concluded that plaintiff DiBrino's allegations regarding her shift change were not properly pled, having been raised for the first time in her memorandum in opposition to the government's summary judgment motion. Moreover, the district court properly concluded that the plaintiff's bare allegation that she had been placed on "alternating shifts during the same week" did not suffice to demonstrate an adverse employment action, in the absence of any supporting allegations or evidence of concretely adverse consequences.

The district court also correctly concluded that DiBrino failed to raise a genuine issue of material fact with respect to her termination from employment in the absence of any direct or circumstantial evidence linking the termination to her EEO complaint five years earlier. In light of this evidentiary void, the district court properly granted summary judgment for the defendant.

ARGUMENT

I. The District Court Properly Granted Summary Judgment for the Defendant

A. Governing Law and Standard of Review

1. Summary Judgment

This Court reviews *de novo* a district court's grant of summary judgment. *See Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004); *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986).

When ruling on a motion for summary judgment, the district court must "construe the facts in the light most favorable to the moving party, and must resolve all ambiguities and draw all reasonable inferences against the movant." *See R.H. Donnelley, Corp.*, 368 F. 3d at 126 (quoting *Dallas Aerospace*, 352 F.3d at 780). "It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases." *Feingold v. New York*, 366 F.3d 138, 149 (2d Cir. 2004) (quoting *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d

456, 466 (2d Cir. 2001)). Nevertheless, this Court has cautioned that "we affirm a grant of summary judgment in favor of an employer sparingly because 'careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination.'" *Feingold*, 366 F.3d at 149 (quoting *Mandell v. County of Suffolk*, 316 F.3d 368, 377 (2d Cir. 2003) (internal quotation marks omitted)).

Where a defendant contests the bare allegations of a complaint, the plaintiff bears the burden of setting forth specific facts sufficient to establish the need for a trial. "If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" *Powell v. Nat'l Bd. of Med. Examiners*, 364 F.3d 79, 84 (2d Cir. 2004) (quoting *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993)).

"[T]he existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant." *Powell*, 364 F.3d at 84. Accordingly, "'[c]onclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact.'" *Shannon v. NYC Transit Auth.*, 332 F.3d 95, 99 (2d Cir. 2003) (quoting *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998)).

This Court may affirm summary judgment in a Title VII case "on any ground with support in the record, even

if it was not the ground relied on by the District Court." *Palmer v. Occidental Chemical Corp.,* 356 F.3d 235, 236 (2d Cir. 2004) (citing *Headley v. Tilghman*, 53 F.3d 472, 476 (2d Cir. 1995)); *Abdu-Brisson*, 239 F.3d at 466 ("[I]t is axiomatic that an appellate court may affirm the judgment of the district court on any ground fairly supported by the record.") (citing *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 63 (2d Cir.1997)).

2. Retaliation Claims

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, prohibits discrimination against all federal employees "based on race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-16(a). Such claims of discrimination are subject to the familiar burden-shifting test set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993).

First, a plaintiff bears the initial burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. The plaintiff must show (1) that he was a member of a protected group; (2) that he was otherwise qualified for his position or promotion; (3) that he suffered an "adverse employment action"; and (4) that the employment action gave rise to an inference of discrimination based on his protected status. *Feingold*, 366 F.3d at 152.

In addition, Title VII proscribes retaliating against an employee for having alleged discriminatory conduct. *See Sanders v. New York City Human Resources Admin.*, 361 F.3d 749, 755 (2d Cir. 2004) (citing 42 U.S.C. §§ 2000e-2(a), 2000e-3(a)). "Title VII is violated when 'a retaliatory motive plays a part in adverse employment actions toward an employee, whether or not it was the sole cause.'" *Terry v. Ashcroft*, 336 F.3d 128, 140-41 (2d Cir. 2003) (quoting *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir. 1993)).

In this Circuit, "[w]e define an adverse employment action as a 'materially adverse change' in the terms and conditions of employment." *Sanders*, 361 F.3d at 755 (citing *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999)). "To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. Examples of such a change include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id*. (internal citations and quotation marks omitted).

In sum, in order to make out a *prima facie* case of retaliation, an employee must show " '[1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action.'" *Feingold*, 366 F.3d at 156 (quoting *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759,

769 (2d Cir. 1998))(internal quotation marks omitted); *Terry*, 336 F.3d at 141 (same). A claim of retaliation under Title VII is otherwise evaluated under the same *McDonnell Douglas* burden-shifting rules as set forth above for a substantive discrimination claim. *See Sanders,* 361 F.3d at 755; *Terry*, 336 F.3d at 141.[6]

B. Discussion

1. The District Court Correctly Concluded That DiBrino Failed to Show That Her Change in Shift Constituted an Adverse Employment Action

As an initial matter, the district court correctly concluded that DiBrino failed to properly plead and preserve a claim of a retaliatory shift-change in her complaint. JA 412. The defendant did not raise the issue of her shift change until her memorandum in opposition to the government's motion for summary judgment. This alone would have been sufficient for the district court to reject this particular claim. *See* Fed. R. Civ. P. 56(c) ("The judgment sought shall be rendered forthwith if the *pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits*, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.") (emphasis added); *Mauro v. Southern New England Telecommunications, Inc.*, 208 F.3d 384, 386 n.1

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[6] The standard is the same for a retaliation claim under the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. *See Treglia v. Town of Manlius*, 313 F. 3d 713, 719 (2d Cir. 2002)

(2d Cir. 2000) (affirming grant of summary judgment for defendant employer in age-discrimination action, including with respect to claim first raised in papers opposing summary judgment, *inter alia* where defendant never moved to amend complaint).[7]

The district court was also correct in its finding that the shift-change allegation, even if it had been properly pled, was nevertheless completely unsupported and did not amount to an adverse employment action. *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (holding that delay in re-assignment of teacher to another school did not constitute materially adverse employment action, since it did not work a "materially significant disadvantage"); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) (although discrimination laws prohibit more than termination or deprivation of wages and

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[7] *Accord Speer v. Rand McNally & Co.*, 123 F.3d 658, 665 (3d Cir. 1997) (affirming district court's grant of summary judgment for defendant employer in Title VII case, and denial of plaintiff's motion to amend complaint; "A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." (quoting *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996)); *Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir.1990) (holding that allegations not contained in amended complaint were not properly before district court or court of appeals); *cf. Martinez v. Potter*, 347 F.3d 1208, 1212 (10th Cir. 2003) (permitting, in theory, new allegations appearing in opposition to summary judgment motion as a request to file an amended complaint, but holding that defendant's failure to seek to file such an amended complaint was indicative of fact that it was not, in fact, amended).

benefits, "not every unpleasant matter short of [discharge or demotion] creates a cause of action") (citation and internal quotation marks omitted).[8]

At best, viewing DiBrino's allegations in a most favorable light, DiBrino's shift change was a mere inconvenience. There was no loss of pay or benefits, no demotion or change in title, no change in material responsibilities, or any other negative consequences whatsoever. "Typically, without an accompanying loss of pay or other material changes in working conditions, shift changes do not constitute adverse employment action." *Booker v. Federal Reserve Bank of New York*, 2003 WL 1213148 (S.D.N.Y., Mar. 17, 2003) at *11 (citing *Richardson*, at 446); *see also Sanders*, 361 F.3d at 755.

Certain courts have acknowledged that "a shift change, without more, is not an adverse employment action." *Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 769 (5th Cir. 2001); *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 728 (7th Cir. 2001) (in Title VII, an employer's decision to change employee's working hours "certainly does not rise to the level of an adverse employment action"). Even in

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[8] *Wanamaker* and *Galabya* involved retaliation claims under the ADEA, however, the same standard is applied. *See Galabya*, at 640, n. 2, "*Richardson* is a Title VII case, but it is applicable here because both the ADEA and Title VII prohibit discrimination with respect to the 'compensation, terms, conditions, or privileges of employment . . . *see also Austin v. Ford Models, Inc.*, 149 F. 3d 148, 152 (2d Cir. 1998)(noting that ADEA and Title VII claims are analyzed under the same legal framework)."

those cases where courts have left open the possibility that a change to a night shift might, in theory, constitute an adverse employment action, the plaintiff has put forward specific *evidence* establishing in a concrete manner how that change was actually detrimental. *See, e.g., Freedman v. MCI Telecommunications Corp.*, 255 F.3d 840, 844 (D.C. Cir. 2001) (affirming summary judgment for employer in Title VII action, but declining to resolve question of whether transfer to night shift might constitute adverse employment action, in light of plaintiff's allegation that change "interfered with his education" and evidence that night shift entailed higher wages, possibly demonstrating that it was undesirable assignment); *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 787 (3d Cir. 1998) (leaving open possibility that employee's re-assignment to later shift might be adverse employment action, where plaintiff offered *evidence* in the form of affidavits from co-workers that plaintiff's original shift was viewed as "highly desirable benefit," that later shifts were regarded as "punishment shifts" assigned only to workers that the employer intended to punish, and that plaintiff was required to work every Saturday evening).

In the district court, DiBrino never alleged any detriment to her due to the shift change, either in her amended complaint or her opposition to the government's summary judgment motion. Indeed, her proposed amended complaint never even mentioned the shift change at all. JA 20-24. In her affidavit in opposition to summary judgment, DiBrino merely characterized the rotating shift as "inconvenient and demanding" without any further elaboration. JA 164.

On appeal in the present case, for the first time, DiBrino appears to assert that the shift change allegations did rise to the level of an adverse employment action due to the "consequent effect on such a basic necessity as sleep." Pl. Br. at 8. However, as the district court correctly stated, "While such a change might affect schedule regularity, and night shifts are presumably more difficult because of sleep patterns, DiBrino does not present any *evidence* on these or any other effects." JA 413 (emphasis added).

In sum, there is no basis to disturb the district court's conclusion that the belatedly raised shift-assignment allegations failed to support a *prima facie* case of retaliation.

2. The District Court Correctly Concluded That There Was No Genuine Issue of Material Fact Concerning the Lack of Causal Connection Between DiBrino's Termination in 2002 and Her Filing of an EEO Complaint in 1997

The district court properly found, and DiBrino does not challenge, that she presented no direct evidence of any retaliatory animus with respect to her termination from employment. JA 419. Accordingly, to establish a *prima facie* case, DiBrino was required to come forth with circumstantial evidence of a causal connection between the termination and her EEO complaint. *Id.*; *see Gordon v. New York City Bd. of Educ.*, 232 F. 3d 111, 117 (2d Cir. 2000). To show such a connection, a retaliatory action generally must follow closely in time the protected

activity. *See Feingold*, 366 F.3d at 156-57 (collecting cases).

The district court was correct in its conclusion that DiBrino's unsupported allegations surrounding her termination in 2002 were plainly insufficient to raise an inference of a causal connection to her EEO complaint some five years earlier in 1997, as the events were simply too far removed in time. As stated by the district court:

> In such circumstantial cases, courts typically require that the activity and alleged adverse action be close in time. While the Second Circuit has not "drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship," here, the facts here do not support such [a] connection.

JA 419 (citations omitted).

Given the passage of approximately five years between the EEO complaint and the termination, combined with (1) the lack of any direct or even circumstantial evidence linking the two events or any other retaliatory motivation whatsoever, and (2) the fact that DiBrino had been AWOL for approximately one year before her termination, there can be no rational inference of any causal relationship and no genuine issues of material fact to preclude summary judgment. *See, e.g., Mandell v. County of Suffolk*, 316 F. 3d 368, 384 (2d Cir. 2003) (stating that "to provide an independent basis for an inference of causation, temporal proximity must be significantly greater" than a period of years, and noting that if an employer chooses to terminate

an employee based upon some activity, it makes "logical sense" that they will do it soon after the event; *Morris v. Landau*, 196 F. 3d 102, 113-14 (2d Cir. 1999) (two-year gap between employee's discharge from employment and protected speech was too long to support an inference of a causal connection absent other evidence of retaliatory motivation)).

Counsel for DiBrino concedes that "the time that elapsed between the initial EEO complaint and the ultimate termination is significant." Pl. Br. at 11-12. Counsel then cites *Gordon v. New York City Bd. of Educ.*, 232 F. 3d 111, 117 (2d Cir. 2000), to support the assertion that "the two events are not so remote, given the facts of this case, that they can be said to be unrelated as a matter of law." *Id.* at 12. Counsel claims that "intervening acts" which occurred after the filing of the 1997 EEO complaint -- i.e., the shift change, the alleged supervisor harassment, the failure to address the co-worker dispute, and the failure to assist with DiBrino's leave request -- serve to "fill in any temporal gaps" between the EEO complaint and the termination. *Id.*

First, *Gordon* in no way supports counsel's novel argument, which is presented for the first time on appeal. *Gordon* clearly states, as the district court properly noted in this case, that this Court has "consistently held that proof of causation can be shown either: (1) indirectly, by showing that the protected activity was *followed closely* by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff

by the defendant." *Gordon*, 232 F. 3d at 117 (emphasis added). Events that occur five years apart, as in this case, cannot be said to "follow[] closely."

Moreover, the *Gordon* Court did not speak of "temporal gaps" between events, much less how such gaps can be filled to save a Title VII claim. Rather, the "causal connection" issue at stake in *Gordon* was whether the defendant's agents accused of retaliation were aware of the plaintiff's previous protected activity, not whether too much time had elapsed between events. *Id*.

Furthermore, as set forth above, the district court addressed the merits of each of the so-called "intervening acts" and found them each to be factually unsupported and legally insufficient to support a *prima facie* case of retaliation. With the sole exception of the shift change, DiBrino has failed to contest these findings by the district court.

In sum, DiBrino provides no legitimate grounds to dispute the district court's holding that she failed to present sufficient evidence of a causal connection between her termination from employment in 2002 and her previous filing of an EEO complaint nearly five years earlier in 1997, to survive the government's motion for summary judgment. The record clearly establishes that DiBrino's allegations of retaliatory termination are fatally deficient. Accordingly, the district court's decision granting summary judgment was correct.

CONCLUSION

For the foregoing reasons, the judgment of the district court for the defendant-appellee should be affirmed.

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Respectfully submitted,

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