IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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YULING YAN,

OPINION AND ORDER

Plaintiff,

05-C-16-C

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, and NEIL DUFFIE

Defendant.

- -

Yuling Yan relocated from Japan to Wisconsin believing she would be offered a tenure track assistant professor position at the University of Wisconsin in Madison. Shortly after her arrival in Madison in 1999, Yan realized that her visiting professor position in the Department of Mechanical Engineering was not what she expected and encountered difficulties in converting her status from visiting professor to tenure track professor. In this civil action for monetary relief, Yan contends that the University of Wisconsin and Professor Neil Duffie violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § § 2000e-2000e-17, Title IX of the Education Amendments of 1972, 20 U.S.C. § § 1681-1688, and 42 U.S.C. § 1983 when they refused to offer her a tenure track position. Jurisdiction

is present. 28 U.S.C. § 1331.

This case is before the court on defendants' motion for summary judgment. Defendants' motion will be granted because plaintiff has not adduced any evidence from which a reasonable jury could infer that defendants failed to offer her more favorable employment terms or failed to offer her a tenure track position because of her gender, race, or national origin.

This opinion and order addresses all three purported violations of law set forth in plaintiff's complaint (Title VII, Title IX and 42 U.S.C. § 1983). In their briefs, plaintiff and defendants discussed plaintiff's claims under Title VII, § 1983 and § 1981. Because plaintiff did not invoke § 1981 in her complaint I have not addressed it in this opinion. Also, defendants failed to address plaintiff's Title IX claim in their brief in support of their motion and plaintiff did not discuss it in her brief in opposition to the motion. In their reply brief, defendants acknowledged that they had omitted Title IX from their initial brief. Ordinarily, failure to raise an issue in their initial brief would bar defendants from pursuing it. In this case, however, I will address plaintiff's Title IX claim because the same legal analysis applies to Title VII and Title IX and because the undisputed facts indicate that defendants are entitled to summary judgment with respect to the claim.

Along with their motion for summary judgment, defendants filed a motion to strike portions of plaintiff's affidavit. I do not need to rule on defendants' motion, because the

disputed portions of the affidavit have no effect on the resolution of defendants' motion for summary judgment.

In determining the material and undisputed facts, I disregarded those proposed findings of fact and responses that constituted legal conclusions, were argumentative or irrelevant, were not supported by the cited evidence or were not supported by citations specific enough to alert the court to the source for the proposal. From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Yuling Yan is an Asian female of Chinese national origin. She is a professor at the University of Hawaii at Manoa, Hawaii. Plaintiff has an extensive educational and professional background in the field of engineering. She obtained a bachelors degree in mechanics and a masters degree in structural dynamics from the Nanjing Institute of Technology in China. In 1991, she obtained her doctoral degree at Keio University in Japan and was a post-doctoral researcher at McGill University in Canada. From 1993 to 1996, plaintiff worked as a research associate at the Max Planck Institute for Biochemistry in Germany. In 1997, she became a tenured associate professor at the University of the Ryukyus in Japan, where she taught undergraduate and graduate students and supervised the

work of graduate students who assisted in her research.

Defendant Board of Regents of the University of Wisconsin System is the governing body of the University of Wisconsin.

Defendant Neil Duffie is a professor in the College of Engineering at the University of Wisconsin in Madison. He became chair of the College's Department of Mechanical Engineering at the beginning of the 1999-2000 academic year.

B. Plaintiff's Initial Contacts with the University of Wisconsin

In 1998, the Department of Physiology at the University of Wisconsin Medical School began efforts to hire plaintiff's husband Gerard Marriott for a tenure track faculty position. At that time, Dr. Marriott lived and worked in Germany; plaintiff lived and worked in Japan. Plaintiff and her husband wanted to move to a city where they could both have fulfilling research positions.

The University of Wisconsin has a Dual Career Couple Program that provides funding to departments to find employment for talented spouses of candidates being hired by the university. One source of funding for this program is the Strategic Hiring Fund, which is administered by the provost's office. The Strategic Hiring Fund provides one-third of the spouse's salary for three years. Thereafter, the unit that hired the spouse is solely responsible for the salary.

Plaintiff was interested in joining the Mechanical Engineering Department at the University of Wisconsin. On April 2, 1998, she submitted a letter of inquiry and her curriculum vitae to Kenneth Ragland, then chairperson of the department. In late 1998, Rick Moss, chairperson of the Department of Physiology, contacted Ragland to tell him about his department's desire to hire plaintiff's husband and to inquire whether the mechanical engineering department could find a position for plaintiff. Ragland agreed to present the matter to his department's Executive Committee.

The Executive Committee is composed of tenured staff from the mechanical engineering department. The chairperson of the department carries out the mandates of the Executive Committee. The Executive Committee cannot delegate authority to make recommendations on probationary faculty appointments or authority to make recommendations on retention or non-retention of probationary faculty to a subcommittee or to the chairperson. The Executive Committee makes all faculty hiring recommendations in the department; the dean of the College of Engineering makes all final hiring decisions.

Ragland presented the issue of hiring plaintiff to the Executive Committee. The committee knew that plaintiff was a prospective employee under the Dual Career Couple Program. At that time, plaintiff had published 14 papers in scholarly journals or conference proceedings and had six research publications submitted to or in press at conferences or academic journals. The Executive Committee invited plaintiff to present a seminar to the

department so that her skills could be assessed. The presentation was scheduled for December 16, 1998.

Because of delays in obtaining her visa, plaintiff arrived in Madison on December 15. The seminar and interviews began the morning after plaintiff arrived from Japan, after an 18-hour flight. She was physically exhausted and suffering from jet lag.

When the Executive Committee met on January 21, 1999, to discuss the seminar and whether to offer plaintiff a tenure track position, several members expressed concern about the poor quality of her presentation. They thought plaintiff had not come across as an effective presenter. Ragland and others thought she might have difficulty teaching undergraduates, which is required of newly hired tenure track faculty. Some members of the Executive Committee were opposed to hiring plaintiff for a tenure track position because of her poor performance in the seminar, which was not up to the department's standards of teaching ability.

At the University of Wisconsin, new professors are ordinarily hired as tenure track assistant professors. A tenured professorship is desirable because it can be terminated only for cause. The Executive Committee decided to offer plaintiff a visiting assistant professor appointment instead of a tenure track position.

Ragland sent plaintiff an email on January 26, 1999, informing her that the Executive Committee had decided to offer her a full-time visiting assistant professor position

for a period of two years beginning in the fall of 1999. Ragland stated further that

> At the end of this period (or perhaps earlier) you can compete for an Assistant Professor position if it is advertised. We will expect you to teach and do research during this time and the Department will help you get started in this.

In plaintiff's email response to Ragland, she acknowledged that her seminar was poor. She wrote the following:

> I will accept the arrangement but I ask for the opportunity to have the faculty review my research and teaching evaluations after my first year. I realize that no guarantee can be made of an opening at this stage but I would like to convince the department at an early stage that I am qualified to join their ranks.

On January 29, Ragland wrote another email to plaintiff, stating that "we will review your situation by the end of the first year."

Ragland sent plaintiff a letter dated March 4, 1999, formalizing and further detailing the offer:

> For the fall semester, we would like you to teach ME 240, Dynamics. You are expected to be involved with research activities in the controls/mechatronics/robotus areas with Professors Ferrier, Lorenz, and Duffie.

The offer did not include start-up funds for research or offer laboratory space.

On March 29, 1999, Ragland sent plaintiff another email in which he stated that her salary would be reduced by $10,000 because he had received word from the dean's office that the salary originally offered was too high in comparison to recently hired tenure track

faculty. The next day, Ragland sent plaintiff a letter formalizing the revised offer. Besides changing the salary, Ragland asked plaintiff in the revised offer to teach different courses.

In an email dated April 6, 1999, plaintiff accepted the revised offer but told Ragland that she and her husband were somewhat bothered by the changes made to her offer after her husband had already signed his contract with the medical school.

In a letter to Provost John Wiley dated April 14, 1999, Ragland requested funding from the Strategic Hiring Fund to pay part of plaintiff's salary. Ragland wrote:

> She has the potential to help meet our teaching needs in various areas including dynamics and controls. However, we feel that she needs to demonstrate her teaching ability in our system and to establish herself here without the tenure clock running . . . before being considered for an Assistant Professor position.

In a follow up letter to Wiley dated May 19, 1999, Ragland wrote:

> The expectation is that Professor Yan will move into a tenure track position. There will be open positions because Mechanical Engineering will experience 5-8 retirements in the next three years, and also one assistant professor is leaving.

Ragland retired on June 30, 1999. Defendant Duffie replaced him as chairperson of the Department of Mechanical Engineering and moved into his office. Prior to becoming chairperson, defendant Duffie had not been involved in negotiating plaintiff's employment. His only role in hiring plaintiff was to vote in the Executive Committee as to whether to offer her a visiting assistant professor position. Defendant Duffie thought plaintiff's seminar

presentation in December 1998 was one of the worst he had ever heard.

C. Plaintiff Joins the Mechanical Engineering Department

Plaintiff began working in the department in August 1999. Plaintiff was assigned to defendant Duffie's former office, which she shared with department member Louie Sather. Office assignments were made by defendant Duffie. No other non-retired professors were required to share an office. Defendant Duffie left some of his belongings in plaintiff's new office and only one bookshelf and one cabinet were available for her belongings. Plaintiff's name was not put on her office door, although the names of every other faculty member and all teaching staff were put on their doors, including new professors who had started working in the department during the two years plaintiff was there as well as persons who were non-tenure track instructors.

Plaintiff taught ME 240 and ME 446 her first semester at the university. No research or services responsibilities were assigned to her upon her arrival. Plaintiff's student evaluations at the end of her first semester indicated that she needed to improve her teaching. Her original job offer had indicated she would teach only ME 240. Plaintiff found that preparing to teach two different courses consumed a great deal of her time.

By letter dated December 7, 1999, defendant Duffie informed plaintiff that the Executive Committee had granted her the right to vote in department committee meetings

for the duration of her appointment. Visiting professors are rarely granted the right to vote on departmental matters. Plaintiff was the only visiting professor in department at the time.

Plaintiff taught two courses in her second semester at the university. Her student evaluations at the end of that semester indicated that she needed to improve her teaching.

All faculty in the department are expected to teach two courses each semester. The only exception to this is that newly hired tenure track faculty teach one course each semester in their first two years in order to have time to write grant requests and initiate their research.

In the spring of 2000, plaintiff was anxious to proceed with her own research projects on hyper-redundant manipulators and their applications in robotics. She wanted to prove to the Executive Committee that she could pursue a strong and independent research program. She asked defendant Duffie for laboratory space, equipment and graduate students so that she could continue the research she had begun in Japan. Around this time, plaintiff had a meeting with defendant Duffie and two other professors from the department. In that meeting, she was told she could recruit graduate students during the upcoming "Visiting Wisconsin Week." When the schedule for that week was distributed, plaintiff learned that she had not been assigned to meet any graduate students. Without her robotics equipment and without graduate assistants, plaintiff pursued her research by conducting computer simulations and doing theoretical research.

Also in the spring of 2000, plaintiff grew increasingly concerned about her future in the department. She wanted to be voted in as a tenure track assistant professor as soon as possible. She addressed this with various professors in the department, but no one brought the matter up for a vote in the Executive Committee. At the meeting with defendant Duffie and two other professors, plaintiff asked when and how she might be put onto the tenure track but received no answer.

On April 4, 2000, plaintiff sent an email to defendant Duffie, stating in part:

> 1. The contract I signed with the department contained the provision that following a period in which I was to demonstrate my teaching and research capabilities, I could apply for a tenure-track faculty position. The main purpose of this "trial period" was to prove to certain faculty that I am qualified to apply for a tenure-track faculty position at the UW. . . . [a]fter having an opportunity to review and compare the qualifications of interviewees for this year's tenure track positions with my record, I believe that I am in fact more qualified than most of these candidates. It is now my opinion that the pre-condition imposed on my position is unprecedented and blatantly unfair . . . I am asking the executive committee to remove this condition.
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> 2. . . . I have to teach more courses than any other new faculty member. Since spousal hires in other departments are not faced with the same heavy teaching load I assume that ME has set unique conditions for my employment. ... I would ask to be relieved of teaching duties for this fall semester so that I can concentrate my efforts on research and grant writing;
>
> 3. I continue to request the opportunity to recruit students. In this light I will be co-submitting a research grant with my husband for a June 1 deadline. I need the approval of the department for my participation in this grant application.

Defendant Duffie met with plaintiff on April 10, 2000 and agreed to work on

approving her as a principal investigator so she could initiate research projects and providing funding so she could hire a graduate student. Defendant Duffie told plaintiff that the Executive Committee would have to discuss her claims of unfair and unfavorable employment conditions and her request to be relieved of teaching for the fall semester. Plaintiff asked that this happen but it did not. Subsequently, plaintiff met with Linda Greene, Associate Vice Chancellor for Faculty and Staff Programs, about her perceptions of unfair employment conditions in the department. Greene spoke with Paul Peercy, Dean of the College of Engineering, who attempted to address plaintiff's concerns.

On May 3, 2000, plaintiff met with Peercy. She told him that her contract had been altered to her detriment after she and her husband had accepted their offers, that she was being overloaded with teaching duties and denied the resources necessary to get her research going and that the Executive Committee had ignored her requests for a discussion of her appointment for a tenure track position. Plaintiff sent Peercy an email on May 17:

> In my opinion the following issues should be addressed: (1), why I was singled out for unfair treatment, (2), who was (were) responsible for the changes made to my contract, (3), can I be assured that the department has stamped out these discriminatory work practices. . . . My concerns of unfair working practice were also relayed to Prof. Duffie in my letter of complaint of April 4th 2000.

Peercy wrote plaintiff a letter dated May 25, 2000. He arranged for a salary increase for plaintiff for the 2000-2001 academic year and for summer salary for 2000 and 2001.

Also, he arranged for plaintiff to teach just one course in the 2000-2001 academic year in the semester of her choice and he promised partial funding for a research assistant. He wrote:

> Please let me know as soon as possible if these actions are acceptable to you. I believe that they restore the full measure of the opportunity that you had in mind when you accepted the position of Visiting Assisting Professor. If used to advantage, there is no reason that you cannot be in a position to compete effectively for any tenure-track positions that come open in the Mechanical Engineering Department.

The letter did not give plaintiff any of the laboratory space she needed to conduct an effective experimental research program in robotics. Plaintiff wrote Peercy back on June 29, 2000, asking that he arrange an Executive Committee vote on changing her status from visiting professor to tenure track professor.

On August 8, 2000, plaintiff still had not heard back from Peercy, so she wrote him again to inform him that three graduate students wanted to work under her and that she needed to tell them whether she could take them on.

On August 11, 2000, plaintiff met with Peercy, Associate Dean Corradini and defendant Duffie. When she asked about her future in the department at the end of her two year contract, no one responded. She requested laboratory space and research resources and asked the Executive Committee to vote on her tenure track appointment.

By August 25, 2000, she still had not heard from Peercy regarding her research

resources, so she told the three graduate students she would not be able to work with them.

On August 31, plaintiff wrote another letter to Peercy, which read in part:

> I also worry that by staying in this department I will be the subject of further unfair treatment and continue to face a discriminatory environment. I have already relayed to you that the stress associated with the department's unfair treatment is having deleterious effects on my health and I worry that being further exposed to unfair conditions will aggravate this condition. For these reasons, I will resign from my position within this academic year and take steps to reestablish my academic career out of Wisconsin.

Peercy replied in a letter dated September 22, 2000: "I received your letter dated August 31, 2000, and I accept your resignation, effective August 26, 2001." He listed some of the benefits that would be available to her during her remaining year as visiting assistant professor, such as laboratory space and matching funds for governmental research awards.

At this point, plaintiff's husband spoke with Professor Farrell, who worked in the mechanical engineering department. Farrell told him that he could raise plaintiff's case in a meeting of the Executive Committee, but could not guarantee the result. Also, Farrell sent an email to two colleagues in the department in which he stated:

> I do not understand why we have not had a discussion of her 'case' in an executive committee meeting and asked the executive committee to come to some consensus on whether she should be offered a tenure track position. Do you know why that hasn't happened?

One of the recipients of that email was Professor Uicker, who replied:

> Personally, I believe that we SHOULD have Yuling's case brought to the Executive Committee. However, I have requested Neil to do this all last

semester with no success.

In March 2001, plaintiff, her husband, Peercy and Casey Nagy, a representative of the chancellor's office, held a meeting at which Nagy suggested that plaintiff move to a different department within the University of Wisconsin. Peercy arranged for plaintiff to meet with the chairman of the Department of Biomedical Engineering. After a series of meetings and interviews, plaintiff was offered and accepted a non-tenure track associate scientist position, half-time in Biomedical Engineering and half-time in Medical Physics. She began working in that position in November 2001.

Plaintiff resigned from the associate scientist position on August 7, 2002, and accepted her current tenure track faculty position at the University of Hawaii.

D. Other Professors

In May 1999, the department of mechanical engineering made an offer to Elizabeth Smith, a Caucasian female of U.S. national origin, for a position as tenure track assistant professor, with many of the benefits available to tenure track professors, such as a start-up package for research and a summer salary. In June 1999, the department made a similar offer to Joel Hetrick, a Caucasian male of U.S. national origin.

In February 2000, the department offered a tenure track assistant professor position to Lih-Sheng Turng, a male of Taiwanese national origin. In May 2000, the department

made a similar offer to Yuri Shkel, a Caucasian male of Russian national origin. At the time the offer was made, Shkel had been a research associate and a faculty assistant instructor (a non-tenure track position) at the University of Wisconsin since 1995. Shkel presented a seminar in support of his application for an assistant professor position, which the Executive Committee thought was poor. Elizabeth Smith, Joel Hetrick, Li-Sheng Turng, and Yuri M. Shkel applied and competed for tenure track positions and were hired as tenure track professors. None of these professors came to the department as a spousal hire and none were hired as visiting professors. If plaintiff had been given a tenure track assistant professor appointment, she probably would have been given the benefits typically given to new tenure track professors, including a reduced teaching load and access to laboratory space. Also, she would have been required to do research and encouraged to pursue it vigorously in order to build a record of publications worthy of tenure within her allotted probationary period.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); O'Neal v. City of Chicago, 392 F.3d 909, 910 (7th Cir. 2004). In ruling on a motion for summary judgment, the court must construe the evidence, resolve factual disputes and draw inferences

in the light most favorable to the non-movant. Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 480 (7th Cir. 2002). If the non-moving party fails to make a sufficient showing on an essential element of her case, the moving party is entitled to judgment as a matter of law. Lewis v. Holsum of Fort Wayne, Inc., 278 F.3d 706, 709 (7th Cir. 2002).

B. Standards under Title VII, Title IX, and § 1983

Plaintiff brings her discrimination and retaliation claims under the equal protection clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § § 2000e-2000e-17, Title IX of the Education Amendments of 1972, 20 U.S.C. § § 1681-1688, and 42 U.S.C. § 1983. The Fourteenth Amendment prohibits states from denying any person the equal protection of the laws. Title VII prohibits employers from discriminating against employees or applicants on the basis of race, sex, religion or national origin. Alexander v. Wisconsin Dept. of Health and Family Services, 263 F.3d 673, 681-82 (7th Cir. 2001). "Under Title VII, it is unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Wyninger v. New Venture Gear, Inc., 361 F.3d 965, 978 (7th Cir. 2004). Similarly, the Supreme Court has held that a defendant may be held liable under § 1983 for violating the Fourteenth Amendment if

discriminatory animus was a "motivating factor" in the challenged decision. Hunter v. Underwood, 471 U.S. 222, 225 (1985); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270 (1977). Title IX prohibits employees of educational institutions that receive federal funding from discriminating against co-workers on the basis of sex. North Haven Board of Education v. Bell, 456 U.S. 512 (1982) (holding that Title IX covers employees as well as students).

Liability under Title VII and Title IX is based on agency principles; under § 1983, liability is predicated upon personal fault. Compare Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754 (1998) with Hildebrandt v. Illinois Department of Natural Resources, 347 F.3d 1014, 1039 (7th Cir. 2003). As plaintiff's former employer, defendant Board of Regents of the University of Wisconsin System is the proper defendant for plaintiff's Title VII and Title IX claims. 42 U.S.C. § 2000e(b); Mateu-Anderegg v. School District of Whitefish Bay, 304 F.3d 618, 623 (7th Cir. 2002). However, plaintiff may not sue state entities for damages under § 1983. Williams v. Wisconsin, 336 F.3d 576, 580 (7th Cir. 2003) ("a state is not a 'person' subject to a damages action under § 1983"). With respect to her § 1983 claim, plaintiff may obtain damages from defendant Duffie if she can show that he was personally involved in the illegal conduct. Kelly v. Municipal Courts of Marion County, Indiana, 97 F.3d 902, 908-09 (7th Cir. 1996).

Title IX of the Education Amendments of 1972, 42 U.S.C. § § 1681-1688, prohibits

sex discrimination but does not apply to other forms of discrimination. Plaintiff cannot pursue claims for sex discrimination under § 1983 and Title IX because "the availability of a Title IX claim precludes the pursuit of a § 1983 claim." Waid v. Merril Area Public Schools, 91 F.3d 857, 862 (7th Cir. 1996). Therefore, since plaintiff has chosen to bring a Title IX claim, her § 1983 claim must be limited to discrimination based on race and ethnicity.

C. Exhaustion of Administrative Remedies

Before bringing a lawsuit in federal court, a plaintiff alleging a Title VII violation must file a claim with the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5. Under § 704 of Title VII, the proper limitations period is 180 days from the alleged retaliatory termination of her employment. Wisconsin is one of many states that have entered into a work sharing agreement with the EEOC in which both the state and federal agencies treat a complaint filed with one agency as cross-filed with the other and the state agency waives its right to exclusive jurisdiction over the initial processing of a complaint. Under 29 C.F.R. § 1601.74(a), n.12, filing with the Wisconsin Personnel Commission extends the time for filing all charges covering employment practices of the state of Wisconsin to 300 days, (except those charges alleging retaliation under § 704 of Title VII, in which case the limitations period is 180 days from the alleged retaliatory termination of

employment).

Plaintiff filed an administrative charge with the Wisconsin Personnel Commission on August 21, 2001. Thus, her Title VII discrimination claims can be based only on events that occurred within 300 days of that filing date, which is October 25, 2000. Discrimination claims relating to incidents that occurred prior to October 25, 2000 cannot be considered for Title VII remedies in the present lawsuit. As for her allegations of retaliation under Title VII, plaintiff can pursue only claims that occurred within 180 days of that filing date, which means claims dating back to February 25, 2000. Retaliation claims relating to incidents that occurred prior to February 25, 2000 cannot be considered.

D. Discrimination Claims

Plaintiff contends that she was discriminated against because of her sex, race and national origin in two ways: (1) the terms and conditions of her employment, and (2) the department's failure to consider her for a tenure track position. To establish liability, plaintiff must demonstrate that her sex, race, or national origin was a motivating factor in defendants' decisions regarding her employment. Venters v. City of Delphi, 123 F.3d 956, 973 n.7 (7th Cir. 1997) (Title VII); Hunter v. Underwood, 471 U.S. 222, 225 (1985) (42 U.S.C. § 1983). Although defendant Board of Regents is the proper defendant under Title VII, its liability is premised on defendant Duffie's actions because he was the primary

decision maker.

The standard for imposing liability on a defendant is essentially the same with respect to § 1983, Title VII, and Title IX. Williams v. Seniff, 342 F.3d 774 (7th Cir. 2003) ("Our cases make clear that the same standards for proving intentional discrimination apply to Title VII and § 1983 equal protection."); Malacara v. City of Madison, 224 F.3d 727, 729 (7th Cir. 2000) (using same framework to analyze claims under § 1983 and Title VII); Lipset v. University of Puerto Rico, 864 F.2d 881, 896-97 (1st Cir. 1988) (holding that standards governing employment discrimination claims under Title VII and Title IX are the same).

A plaintiff can meet her burden of proving intentional discrimination using either the direct or the indirect method of proof. Under the direct method, plaintiff must present direct evidence (an acknowledgment of discriminatory intent by defendant), Gusewelle v. City of Wood River, 374 F.3d 569, 574 (7th Cir. 2004), or construct a "convincing mosaic" of circumstantial evidence that provides the basis for drawing an inference of intentional discrimination, Cerutti v. BASF Corp., 349 F.3d 1055, 1061 (7th Cir. 2003). Direct evidence essentially "requires an admission by the decision-maker that his actions were based upon the prohibited animus." Id. Plaintiff does not suggest that defendant Duffie admitted to having discriminated against her on the basis of her gender, race or national origin and nothing in the factual record indicates that he made such an admission.

In the absence of direct evidence, a plaintiff may rely on the decision maker's remarks or behavior that more ambiguously supports an inference of discrimination. Troupe v. May Department Stores Co., 20 F.3d 734, 736 (7th Cir. 1994). The Court of Appeals for the Seventh Circuit has identified three different types of circumstantial evidence that may show intentional discrimination. Id. "The first consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group and other bits and pieces from which an inference of discriminatory intent might be drawn." Id. The second type of evidence is that which shows the systematically better treatment of employees similarly situated to the plaintiff other than in the forbidden characteristic. Id. The third type of evidence is that which shows the plaintiff was qualified for the job but was "passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination." Id. Regardless of the form it takes, circumstantial evidence must "point directly to a discriminatory reason for the employer's action." Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 939 (7th Cir. 2003).

Plaintiff did not submit any admissible facts that would fall under the first type of circumstantial evidence. Plaintiff submitted inadmissible evidence in support of her contention that the mechanical engineering department was generally hostile towards women. Even if the evidence were admissible it would not strengthen plaintiff's claims of

discrimination, because "conclusory allegations of generalized [ ] bias do not establish discriminatory intent." Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986) (plaintiffs unable to point to single instance in which one of officers evaluating them had evidenced racial animosity towards them personally).

Plaintiff failed to show that similarly situated employees were treated better than she was. There was no way plaintiff could have done this, because there were no similarly situated employees, as discussed more fully below. Finally, plaintiff failed to show that she was passed over for a less qualified applicant. Plaintiff attempts to show this by comparing her curriculum vitae to those of the four applicants who were hired by the department as tenure track faculty between 1999 and 2001. Two of those applicants were hired shortly after plaintiff received her offer and the other two were hired during the course of plaintiff's employment in the department. Plaintiff asserts that she was more qualified than the other applicants and points out that she had published more than any of them. Plaintiff's self-serving assertions as to her qualifications and the qualifications of others will not defeat a motion for summary judgment. James v. Sheahan, 137 F.3d 1003, 1007 (7th Cir. 1998).

Moreover, in comparing herself to these other applicants, what plaintiff fails to recognize is that when defendants offered her the visiting professor position, they made it clear to her that their main reason for not offering her a tenure track position was their lack of confidence in her ability to teach engineering courses in English. Defendants' explanation

is perfectly plausible and does not appear to be pretext for discrimination. Moreover, of the four professors who were hired into the tenure track, one was a woman and one was Asian, supporting defendants' position that they were not discriminating on the basis of gender, race or national origin in their hiring decisions.

Defendant Duffie maintains that he did not consider plaintiff for a tenure track position during the two years she worked in the department because she never submitted an application for a tenure track position. The undisputed facts clearly indicate that plaintiff made her desire for a tenure track position widely known throughout the department and upper level administration at the university. Defendant Duffie's position that plaintiff should have submitted a formal application is not convincing. Nonetheless, his position does not appear to be pretext for discrimination on the basis of gender, race or national origin. What the factual record suggests is that during plaintiff's two years in the department, defendant Duffie did not change his mind regarding the quality of her teaching. It may be the case that defendant Duffie was wrong in his evaluation of plaintiff's skills, given that other colleagues were seemingly supportive of her. However, nothing in the undisputed facts suggests that defendant Duffie refused to bring up plaintitff's status with the Executive Committee because she is a woman or because she is Chinese.

The Court of Appeals for the Seventh Circuit has held repeatedly that a plaintiff cannot prove an employer's discriminatory intent by adducing evidence that its decision was

"mistaken, ill considered or foolish." Jordan v. Summers, 205 F.3d 337, 343 (7th Cir. 2000); see also Grayson v. O'Neill, 308 F.3d 808, 820 (7th Cir. 2002) ("[W]e are not concerned with the correctness or desirability of reasons offered for employment decisions."); Grube v. Lau Industries, 257 F.3d 723, 730 (7th Cir. 2001) ("A pretext for discrimination means more than an unusual act; it means something worse than a business error."); Kulumani v. Blue Cross Blue Shield Association, 224 F.3d 681, 685 (7th Cir. 2000) (pretext "means a dishonest explanation, a lie rather than an oddity or an error"); Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 979 (7th Cir. 2000) ("Title VII is not a 'good cause' statute."); Vitug v. Multistate Tax Commission, 88 F.3d 506, 515 (7th Cir. 1996) (evidence that employment interview process was subjective and unreliable does not support Title VII discrimination claim). Plaintiff adduced no evidence of remarks by defendants that would show discriminatory attitudes or support an inference of discrimination.

The indirect method of proving unlawful discrimination involves the burden-shifting scheme established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To survive summary judgment under McDonnell Douglas, plaintiff has the initial burden to establish a prima facie case of discrimination. Hong v. Children's Memorial Hospital, 993 F.2d 1257, 1261 (7th Cir. 1993). If plaintiff makes out a prima facie case, she is entitled to "a presumption that the employer unlawfully discriminated against the employee." EEOC v. Our Lady of the Resurrection Medical Center, 77 F.3d 145, 148 (7th Cir. 1996) (quoting

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993)). Once plaintiff has met this burden, defendant has the burden of rebutting the presumption by coming forward with a legitimate nondiscriminatory reason for the employment actions. McDonnell Douglas, 411 U.S. at 802. If defendant satisfies this standard, plaintiff must then demonstrate that there is a genuine issue of material fact whether the defendant's stated reason for plaintiff's termination is pretextual. Hudson v. Chicago Transit Authority, 375 F.3d 552, 561 (7th Cir. 2004). "Although the burden of production shifts under [the indirect] method, 'the burden of persuasion rests at all times on the plaintiff.'" Haywood v. Lucent Technologies, Inc., 323 F.3d 524, 531 (7th Cir. 2003) (quoting Klein v. Trustees of Indiana Univ., 766 F.2d 275, 280 (7th Cir. 1985)). Defendants are entitled to summary judgment unless plaintiff introduces evidence from which a reasonable jury could conclude that the non-discriminatory reason put forth by defendants is a lie. Shager v. Upjohn Company, 913 F.2d 398, 401 (7th Cir. 1990).

In order to make out a prima facie case, plaintiff must show that (1) she is a member of a protected class; (2) she was meeting her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) similarly situated employees not in the protected class were treated more favorably. Haywood, 323 F.3d at 530 (citing McDonnell Douglas, 411 U.S. at 802).

Plaintiff is a member of two protected classes because she is an Asian female.

However, plaintiff has not introduced sufficient facts to support a conclusion that the second, third and fourth requirements of a prima facie case are met.

Plaintiff failed to establish that her performance was meeting her employer's legitimate expectations. According to the undisputed facts, the Executive Committee made it clear to plaintiff through Ragland that it was not willing to offer her a tenure track position initially primarily because of concerns regarding her ability to teach classes in English. Nothing in the record indicates that plaintiff met defendant Duffie's expectations during her time in the department. He commented that her presentation was one of the worse he had ever heard. Plaintiff has not adduced any evidence to suggest that he thought she improved during the two years she was a visiting professor. Plaintiff argues that she was meeting the university's legitimate expectations because her student evaluations in her second semester earned almost the same score as a tenured professor's student evaluations. That alone is not sufficient for the court to infer that defendant Duffie was unreasonable in his assessment of her teaching or language skills. Although other professors may have shown support for plaintiff by speaking with defendant Duffie on her behalf, plaintiff did not provide relevant and convincing evidence that the unanimous opinion, or even majority opinion, in the department was that she was qualified for a tenure track position. Even the professors who were allegedly on her side failed to bring up her case at Executive Committee meetings, although they had the discretion to do so. No uncontested facts support a finding that

plaintiff was meeting her employer's legitimate expectations.

The third requirement for a prima facie case is an adverse employment action. The Court of Appeals for the Seventh Circuit has defined an adverse employment action as a "materially adverse change in the terms and conditions of employment [that is] more disruptive than a mere inconvenience or an alteration of job responsibilities." Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993). The definition of adverse employment action is liberal, but it does have its limits. Daryl L. Johnson v. Cambridge Industries, Inc., 325 F.3d 892 (7th Cir. 2003). Not every employer decision will qualify. Herrnreiter v. Chicago Housing Authority, 315 F. 3d 742, 744 (7th Cir. 2002). A reduction in an employee's compensation or fringe benefits is an adverse employment action. Simpson v. Borg-Warner Automotive, Inc., 196 F.3d 873, 876 (7th Cir. 1999); Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996). Another example is a lateral transfer that involves no financial loss, but "significantly reduces the employee's career prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted." Herrnreiter, 315 F. 3d at 744. When employers change an employee's work conditions "in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment" — the classic case being that of the employee whose desk is moved into a closet — the employee suffers an adverse employment action. Id.

Plaintiff alleges that she suffered four adverse employment actions. However, none of the actions she identified actually amount to adverse employment actions. Plaintiff alleges that she had a high teaching load that left no time for research. Plaintiff's original offer provided that she would teach two sections of the same course. Her revised offer indicated that she would teach two different courses. Although this change created more preparation work for plaintiff, the load was no different from what many other professors in the department had to carry. Plaintiff was not entitled to the lighter teaching benefits afforded to newly hired tenure track faculty because she was not hired for a tenure track position. Teaching two courses might not have been how plaintiff thought she would be spending her time in the department, but doing that was not inconsistent with what other faculty members were doing. Asking her to do that does not amount to an adverse employment action.

The second adverse employment action that plaintiff identifies is that she was not provided with adequate resources to conduct her research program. This cannot be an adverse employment action because plaintiff was never promised such a thing. She inferred she would get this but was never told she would. Ragland made it clear to her that the department wanted her to focus on improving her teaching skills. It should not have come as a surprise to plaintiff that she was not awarded an extensive start-up package for research.

Third, plaintiff contends that the department's failure to give her a private office with

her name on the door was an adverse employment action. This does not amount to a significantly negative environment. Clearly, that shared office was not reserved for the least desirable faculty members; it had belonged to defendant Duffie, who was selected as department chair. If the office lacked proper lighting or temperature control and defendant had refused to move her, plaintiff might have a valid claim. Not even the fact that defendant Duffie's belongings remained in that office creates a degrading or unsafe environment. Plaintiff also makes much of the fact that her name was not written on a plaque outside her office door. That kind of deficiency in an office hardly rises to the level of an adverse employment action.

Finally, plaintiff alleges that defendant's failure to review her for the tenure track was an adverse employment action. It was not. It is sufficient to say that tenure track was not a promise that was taken away. It was a possibility that did not materialize.

The last requirement of a prima facie case is for plaintiff to show that defendants gave more favorable treatment to others similarly situated to her, who were not in the protected class. It is plaintiff's burden to show comparable circumstances in order to support an inference of discriminatory intent. Haywood v. Lucent Technologies, Inc., 323 F.3d 524, 530 (7th Cir. 2003) (noting that plaintiff failed to point to evidence "showing that the other two [white] employees had a comparable set of failings, and thus no inference [could] be drawn" that plaintiff was discriminated against because of her race). To meet her burden

of showing that the individuals identified by plaintiff were similarly situated, plaintiff must show that they are "directly comparable to her in all material respects." Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002); see also Bogren v. Minnesota, 236 F.3d 399, 404 (8th Cir. 2000) (probationary state trooper not similarly situated to non-probationary state trooper); McKenna v. Weinberger, 729 F.2d 783, 789 (D.C. Cir. 1984) (female probationary employee not similarly situated to male permanent employee).

Plaintiff compares herself to four tenure track assistant professors who were hired by the department between 1999 and 2001. Her comparison does not help her establish a prima facie case, because these four professors were different from her in some material respects. Plaintiff was a spousal hire and English was not her native language. To provide a meaningful comparison, plaintiff would have had to identify another spousal hire who was not a native English speaker (and who was not an Asian female). Plaintiff submitted an application for a tenure track position in April 1998. It was not until late 1998, after the chair of the Department of Physiology called Ragland, that he introduced the possibility of plaintiff as a spousal hire to the Executive Committee. From the inception of their analysis of plaintiff's candidacy, the members of the Executive Committee considered her application as a spousal hire. The four tenure track assistant professors applied for tenure track positions and were not spousal hires. The department decided to offer those four applicants tenure track positions, demonstrating its strong interest in those candidates and the belief

that they would each be a good long-term fit in the department. On the other hand, the Executive Committee acted on plaintiff's application only at the request of the medical school and decided to offer her a visiting professor position on the basis of its assessment of her teaching skills. The commitments a university takes on with respect to a tenure track hire and a visiting professor hire are distinct. The fact that those two categories of professors are treated differently is not indicative of discrimination.

Plaintiff has failed to present a prima facie case of discrimination. But even if I assume that she could establish her prima facie case before a jury, plaintiff has failed to introduce evidence to create a material dispute regarding pretext. Nothing in the record indicates that the conditions of plaintiff's employment or the department's failure to offer her a tenure track position were related to her gender, race, or national origin.

Because plaintiff has not met her burden of showing unlawful discrimination under any of the three methods, defendant's motion for summary judgement will be granted as to plaintiff's discrimination claims.

E. Retaliation

Plaintiff alleges that defendants violated her right to be free from discrimination under Title VII and Title IX by retaliating against her for engaging in protected employment activities. I observe that borrowing from Title VII is common when gauging Title IX claims

related to opportunities for educational employment. Doe v. University of Illinois, 138 F.3d 653, 665 (7th Cir. 1998).

A plaintiff may establish a claim of retaliation under the direct or indirect methods of proof. To prove retaliation under the direct method, a plaintiff must show that (1) she engaged in an activity protected by Title VII; (2) she suffered an adverse employment action at the hands of her employer; and (3) a causal connection exists between the activity and the adverse action. Moser v. Indiana Department of Corrections, 406 F.3d 895, 903 (7th Cir. 2005).

Under the indirect method, plaintiff has the initial burden to present a prima facie case of retaliation by showing that (1) she engaged in a statutorily protected activity; (2) she suffered a materially adverse employment action; (3) she performed according to defendant's legitimate expectations; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity. Id. "If the plaintiff establishes the prima facie case, the burden shifts to the employer to present evidence of a non-discriminatory reason for its employment action. If the employer meets its burden, the burden shifts back to the plaintiff to demonstrate that the employer's reason is pretextual." Id., at 904 (citing Sitar v. Indiana Dept. of Transp., 344 F.3d 720, 728 (7th Cir. 2003)).

The first requirement under either method is that plaintiff must have engaged in an activity protected by Title VII. Under Title VII, a protected activity is an employee's

opposition to any employer practice that is made unlawful by Title VII, or the employee's participation in "an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). Plaintiff does not identify any protected activity. She does not contend that she participated in any investigation, proceeding or hearing or that she opposed an unlawful employment practice. Plaintiff did speak with several professors in the department as well as Peercy and Vice Chancellor Greene about her discontent and disappointment over her lack of benefits and the department's failure to give her a tenure track position, but nothing in the record shows that in those letters and conversations she ever characterized the situation as gender or racial discrimination.

In a letter to defendant Duffie dated April 4, 2000, plaintiff said "It is now my opinion that the pre-condition imposed on my position is unprecedented and blatantly unfair." In an email to Peercy dated May 17, 2000, plaintiff used the following phrases: "I was singled out for unfair treatment," "can I be assured that the department has stamped out these discriminatory work practices," and "my concerns of unfair working practice." In another letter to Peercy, dated August 31, 2000, she wrote: "I also worry that by staying in this department I will be the subject of further unfair treatment and continue to face a discriminatory environment." This is not sufficient evidence that plaintiff engaged in opposition to an unlawful employer practice. What is unfair is not necessarily illegal. Not even what is discriminatory is necessarily illegal. "Title VII

protects an employee from 'retaliation for complaining about the types of discrimination it prohibits,'" but not from retaliation for any other kind of employee complaint. Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1066 (7th Cir. 2003) (quoting Miller v. American Family Mutual Insurance Co., 203 F.3d 997, 1007 (7th Cir. 2000)). Vague phrases such as "discriminatory work practices" do not make it clear what exactly plaintiff was referring to. Many of plaintiff's proposed facts offer comparisons between her and the tenure track faculty. A rational trier of fact could easily conclude that when she complained about "discriminatory work practices" she was referring to differences in the treatment of tenure track versus non-tenure track faculty, rather than differences in the treatment of women and men or Asians and non-Asians.

The only explicit opposition action mentioned in the record was plaintiff's filing with the EEOC, but that happened only after plaintiff had already left the mechanical engineering department. Plaintiff's lack of engagement in a protected activity, coupled with the finding that she did not suffer an adverse employment action, means that plaintiff fails to prove retaliation under the direct method.

Plaintiff also fails to prove retaliation under the indirect method. Besides failing to prove the first requirement, as discussed above, plaintiff also fails to prove the second, third and fourth requirements, as explained in part D above.

Because plaintiff has not met her burden of showing retaliation under either the

direct or indirect method, defendants' motion for summary judgement will be granted as to plaintiff's retaliation claim.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Neil Duffie and the Board of Regents of the University of Wisconsin System is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 12th day of September, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge