

March 2017

Panel: Age Discrimination Issues in Higher Education - Handout: Barnabas v. Board of Trustees of U of DC

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Barnabas v. Board of Trustees of University of District of..., 686 F.Supp.2d 95 (2010)

255 Ed. Law Rep. 795

686 F.Supp.2d 95
United States District Court,
District of Columbia.

Essica BARNABAS, Plaintiff,

v.

The BOARD OF TRUSTEES OF the UNIVERSITY
OF the DISTRICT OF COLUMBIA, Defendant.

Civil Action No. 07-02207 (JDB).

March 1, 2010.

Synopsis

Background: Former University of the District of Columbia professor, who was over 65 years old, brought action under Age Discrimination in Employment Act (ADEA) against university, alleging that university discriminated against her on basis of her age and retaliated against her after she filed charge of discrimination with Equal Employment Opportunity Commission (EEOC). University moved for summary judgment.

Holdings: The District Court, John D. Bates, J., held that:

[1] Lilly Ledbetter Fair Pay Act did not revive professor's late-filed discrimination claim arising from her non-promotion to full-time professor position;

[2] professor failed to show that university's proffered reason for not hiring her to fill vacancies for full-time positions was unworthy of credence;

[3] professor's allegation that university hired younger individuals to fill full-time positions was not enough to survive summary judgment;

[4] fact issue precluded summary judgment as to retaliation claim; and

[5] fact that professor's schedule was uncharacteristically reduced following her protected activity necessarily could support inference of mere knowledge on part of university of such activity.

Motion for summary judgment granted in part and denied in part.

West Headnotes (19)

[1] **Civil Rights**
Age discrimination
Civil Rights
Retaliation claims

District court would consider former university employee's claims for discrimination and retaliation under Age Discrimination in Employment Act (ADEA) under burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

[2] **Civil Rights**
Age discrimination
Civil Rights
Retaliation claims

Under *McDonnell Douglas* burden-shifting framework for analyzing claims under Age Discrimination in Employment Act (ADEA), a plaintiff must first establish prima facie case of discrimination or retaliation by preponderance of evidence. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

[3] **Civil Rights**
Practices prohibited or required in general; elements

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To show prima facie case of discrimination under **Age Discrimination** in Employment Act (ADEA), a plaintiff must show that (1) she is member of a protected class, (2) she suffered adverse employment action, and (3) unfavorable action gives rise to inference of discrimination. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[1 Cases that cite this headnote](#)

[4]

Civil Rights

⚙️Practices prohibited or required in general; elements

Prima facie case of retaliation under **Age Discrimination** in Employment Act (ADEA) requires a plaintiff to establish (1) that he engaged in statutorily protected activity, (2) that he suffered materially adverse action by his employer, and (3) that causal link connects the two. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[1 Cases that cite this headnote](#)

[5]

Civil Rights

⚙️Age discrimination

Civil Rights

⚙️Retaliation claims

Under *McDonnell Douglas* burden-shifting framework for analyzing claims under **Age Discrimination** in Employment Act (ADEA) once a plaintiff establishes prima facie case of discrimination or retaliation, burden shifts to the defendant to articulate legitimate, non-discriminatory or non-retaliatory explanation for its actions. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

[6]

Federal Civil Procedure

⚙️Employees and Employment Discrimination, Actions Involving

In asserting legitimate, non-discriminatory or non-retaliatory explanation for an adverse employment action, an employer seeking summary judgment on **Age Discrimination** in Employment Act (ADEA) claim need not persuade district court that it was actually motivated by proffered reasons; it is sufficient if employer's evidence raises genuine issue of fact as to whether it discriminated against the plaintiff. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

[7]

Civil Rights

⚙️Age discrimination

Civil Rights

⚙️Retaliation claims

If an employer offers legitimate, non-discriminatory or non-retaliatory reason for its adverse employment actions, district court need not, and should not, decide whether the plaintiff actually made out prima facie case of discrimination or retaliation under **Age Discrimination** in Employment Act (ADEA) under *McDonnell Douglas*; rather, sole inquiry becomes whether employee produced sufficient evidence for reasonable jury to find that employee on prohibited basis, or, in other words, *McDonnell Douglas* burden-shifting framework essentially disappears and only remaining issue is whether employer discriminated or retaliated against employee. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

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employee to sustain **Age Discrimination** in Employment Act (ADEA) claim in district court. **Age Discrimination** in Employment Act of 1967, § 7(d)(1), 29 U.S.C.A. § 626(d)(1).

[8] **Federal Civil Procedure**

🔑 Employees and Employment Discrimination, Actions Involving

In evaluating whether a plaintiff may overcome summary judgment on **Age Discrimination** in Employment Act (ADEA) retaliation claim, district court reviews each of three relevant categories of evidence, namely, prima facie, pretext, and any other, to determine whether they either separately or in combination provide sufficient evidence for reasonable jury to infer retaliation. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

1 Cases that cite this headnote

Cases that cite this headnote

[11] **Civil Rights**

🔑 Continuing violations; serial, ongoing, or related acts

Failure of University of the District of Columbia to promote adjunct **professor**, who was over 65 years old, to full-time **professor** position was not discriminatory compensation decision or other practice within meaning of Lilly Ledbetter Fair Pay Act, and thus Act did not revive **professor's** late-filed discrimination claims under **Age Discrimination** in Employment Act (ADEA) arising from her non-promotion. **Age Discrimination** in Employment Act of 1967, § 7(d)(1, 3), 29 U.S.C.A. § 626(d)(1, 3).

2 Cases that cite this headnote

[9] **Civil Rights**

🔑 Exhaustion of Administrative Remedies Before Resort to Courts

An individual who wishes to challenge employment practice under the **Age Discrimination** in Employment Act (ADEA) must first file charge with Equal Employment Opportunity Commission (EEOC). **Age Discrimination** in Employment Act of 1967, § 7(d)(1), 29 U.S.C.A. § 626(d)(1).

Cases that cite this headnote

[12] **Civil Rights**

🔑 Education, employment in **Civil Rights**
🔑 Motive or intent; pretext

Former adjunct **professor** at University of the District of Columbia, who was over 65 years old, failed to show that discriminatory reason likely motivated university's decision not to hire her as full-time **professor**, or that university's legitimate, non-discriminatory reason for not hiring **professor** for full-time positions, namely, that **professor** did not formally apply for positions, was unworthy of credence, in light of fact that employee had written multiple letters to university expressing her interest in any regular full-time professional vacancy, as required to sustain discrimination claim under **Age**

[10] **Civil Rights**

🔑 Deferral to state agencies; time

In District of Columbia, where there is local anti-discrimination agency, Equal Employment Opportunity Commission (EEOC) charge must be filed within 300 days of occurrence of allegedly unlawful practice in order for an

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Discrimination in Employment Act (ADEA); there was no evidence that university typically considered “standing applications” for employment, or that university told **professor** that she need not submit application in order to be considered for any available vacancies. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

[13]

Civil Rights

🔑Education, employment in

Allegation of former adjunct **professor** at University of the District of Columbia that university hired younger individuals to fill full-time **professor** positions, without more, was not enough to survive summary judgment on her **Age Discrimination** in Employment Act (ADEA) claim based on her non-selection for full-time positions. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

[14]

Federal Civil Procedure

🔑Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether legitimate, non-retaliatory reason of University of the District of Columbia for reducing workload of adjunct **professor**, who filed **age discrimination** complaint Equal Employment Opportunity Commission (EEOC) complaint, namely, that **professor** claimed that she could not work because of medical problems, was pretext for retaliation, precluding summary judgment as to **professor's** retaliation claim against university under **Age Discrimination** in Employment Act (ADEA). **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

[15]

Federal Civil Procedure

🔑Employees and Employment Discrimination, Actions Involving

Evidence that university's non-retaliatory explanation for its reduction of courseload of adjunct **professor**, who filed **age discrimination** complaint with Equal Employment Opportunity Commission (EEOC), was mere pretext could itself allow **professor** to overcome summary judgment on her **Age Discrimination** in Employment Act (ADEA) retaliation claim against university. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

[16]

Civil Rights

🔑Causal connection; temporal proximity

Seven-month delay between protected activity and an adverse employment action generally does not suggest any causal connection between the two, as required to sustain **Age Discrimination** in Employment Act (ADEA) retaliation claim. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[1 Cases that cite this headnote](#)

[17]

Civil Rights

🔑Causal connection; temporal proximity

Especially where a defendant retaliates at first opportunity that is presented, a plaintiff will not be foreclosed from making out prima facie case of retaliation under **Age Discrimination** in

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Employment Act (ADEA) despite substantial gap in time. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[2 Cases that cite this headnote](#)

[18] **Federal Civil Procedure**

🔑 [Employees and Employment Discrimination, Actions Involving](#)

Fact that schedule of adjunct **professor** at University of the District of Columbia was uncharacteristically reduced following her protected activity, which was evidence that supported inference of retaliatory motive, necessarily could support inference of mere knowledge on part of university of such activity, as required to survive summary judgment on **Age Discrimination** in Employment Act (ADEA) retaliation claim. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

[19] **Federal Civil Procedure**

🔑 [Employees and Employment Discrimination, Actions Involving](#)

To survive summary judgment on **Age Discrimination** in Employment Act (ADEA) retaliation claim, a plaintiff need not provide direct evidence that his supervisors knew of his protected activity; he need only offer circumstantial evidence that could reasonably support inference that they did. **Age Discrimination** in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[Cases that cite this headnote](#)

Attorneys and Law Firms

*98 [David Raphael Levinson](#), Levinson Law Office, Washington, DC, for Plaintiff.

Heather R. Skeeles-Shiner, Zuberi Bakari Williams, Office of the Attorney General *99 for the District of Columbia, Washington, DC, for Defendant.

MEMORANDUM OPINION

[JOHN D. BATES](#), District Judge.

Plaintiff Essica Barnabas alleges that her former employer, the University of the District of Columbia (“the University” or “UDC”), discriminated against her on the basis of her age and retaliated against her after she filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”). Currently before the Court is UDC’s motion for summary judgment. For the reasons set forth below, the Court will grant in part and deny in part UDC’s motion.

BACKGROUND

Essica Barnabas was born October 10, 1935. Def.’s Mot. for Summ. J. (“Def.’s Mot.”) [Docket Entry 34], Exhibit 2 (Deposition of Essica Barnabas (“Barnabas Depo.”)), 7:20–22. She received her Ph.D in biology from Howard University in 1972. *See id.*, Exhibit 7 (Barnabas Curriculum Vitae) 3. From 1974 until 2006, Barnabas taught in UDC’s Department of Biological and Environmental Sciences. *See* Second Am. Compl. ¶ 3. In 1997, Barnabas was working as an Associate **Professor** when she lost her job as the result of a university-wide workforce reduction. *See* Barnabas Depo. at 25:21–26:7. The University immediately rehired Barnabas, but only as an adjunct **professor** teaching on a semester-to-semester basis. *See id.* 35:13–36:6.

Barnabas was eager to return to her previous position as a full-time **professor**. Accordingly, between 2000 and 2003, Barnabas wrote numerous letters to Dr. Freddie Dixon, the chair of UDC’s Biological and Environmental

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Sciences Department, as well as to other UDC administrators. In these letters, Barnabas asked that she be promoted to a full-time professor, and requested that she be appointed to specific teaching vacancies that were then, or soon to be, available. *See* Pl.'s Opp'n to Def.'s Mot. [Docket Entry 37], Exhibit 2 (letters from Barnabas to various UDC officials). She was unsuccessful.

In 2004, a professor vacancy opened in UDC's Biological and Environmental Sciences Department ("the Department"). It called for applicants with a "Ph.D in Molecular Biology, Biochemistry, Immunology, or related areas with post-doctoral training in Cancer or Cancer-related research areas." Def.'s Mot., Exhibit 4 (Barnabas EEOC packet, Letter from William Penn) 2. Barnabas applied for this vacancy, but the University instead filled the position with a thirty-three year-old man. *See* Barnabas Depo. at 68:18–70:12; Def.'s Mot., Exhibit 5 (Def.'s Resp. to Pl.'s Doc. Request), at 33.

In May 2005, UDC advertised two full-time Assistant Professor positions in the Department, each listed under vacancy number 04–38. Def.'s Mot., Exhibit 1 (Def.'s Answers to Pl.'s Interrog. ("Def.'s Answers")), No. 10–11. The Department hired a forty-five year-old woman to fill the first position in August 2005, and soon withdrew the second position because the department lacked funding to fill it. Def.'s Mot., Exhibit 1 (Def.'s Supp. Answers to Pl.'s Interrog.), No. 11. Barnabas submitted an application for this position in February 2006, but the second vacancy had already been withdrawn. *See id.*

UDC officials announced another full-time Assistant Professor position in the Department in November 2005, listed under vacancy number 05–74. Def.'s Answers at No. 10. Barnabas did not formally apply for this position, Barnabas Depo. at 85:1–17, and the department filled the spot with a forty-nine year-old woman in *100 August 2006. *See* Def.'s Answers at No. 10; Def.'s Mot., Exhibit 5 (Def.'s Resp. to Pl.'s Doc. Request), 33.

Between 1997 and 2006, Barnabas taught no fewer than two courses per semester as an adjunct professor. *See* Def.'s Mot., Exhibit 3 (Pl.'s Answers to Def.'s Interrog. ("Pl.'s Answers")), No. 5. In the fall semester of 2006, however, the University offered Barnabas only one course to teach. *See* Barnabas Depo. at 95:17–20. And in the spring semester of 2007 Barnabas was also offered only one course. *Id.* at 96:18–97:2. Barnabas could not teach this class, however, because of health concerns with

commuting in icy weather and the demands of caring for her sister. *See id.* at 97:3–99:12. Barnabas has not taught since then because of health problems. *See id.* at 104:10–05:5; 107:16–17.

In January 2006, Barnabas filed a complaint with the EEOC. In her complaint, she alleged that UDC engaged in age discrimination when it failed to select her for the 2004 vacancy. *See* Def.'s Mot., Exhibit 4 (Barnabas EEOC Packet, Complaint). Barnabas amended her EEOC charge in November 2006 to list an additional claim of age discrimination, and to allege that UDC reduced her workload and compensation in the fall semester of 2006 in retaliation for her filing an EEOC complaint. *Id.* (Barnabas EEOC Packet, Am. Complaint). After the EEOC declined to prosecute her case, Barnabas brought suit in this court, alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634. UDC has now moved for summary judgment on all of Barnabas's claims.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party may successfully support its motion by identifying those portions of "the pleadings, the discovery and disclosure materials on file, and any affidavits" which it believes demonstrate the absence of a genuine issue of material fact. Fed.R.Civ.P. 56(c)(2); *see also Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of its position. *Id.* at 252, 106 S.Ct. 2505. By pointing to the absence of evidence proffered by the

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non-moving party, a moving party may succeed on summary judgment. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson*, 477 U.S. at 249–50, 106 S.Ct. 2505 (citations omitted). Summary judgment is appropriate if the non-movant fails to offer “evidence on which the jury could reasonably find for the [non-movant].” *Id.* at 252, 106 S.Ct. 2505.

DISCUSSION

I. *McDonnell Douglas Framework*

[1] [2] [3] [4] The Court considers Barnabas’s claims for discrimination and retaliation *101 under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See *Hall v. Giant Food, Inc.*, 175 F.3d 1074, 1077 (D.C.Cir.1999) (applying *McDonnell Douglas* to ADEA claims). Under this framework, a plaintiff must first establish a prima facie case of discrimination or retaliation by a preponderance of the evidence. *Id.* To show a prima facie case of discrimination, a plaintiff must show that “(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination.” *Stella v. Mineta*, 284 F.3d 135, 145 (D.C.Cir.2002) (citing *Brown v. Brody*, 199 F.3d 446, 452 (D.C.Cir.1999)). A prima facie case of retaliation, similarly, requires a plaintiff to establish “(1) that he engaged in statutorily protected activity; (2) that he suffered a materially adverse action by his employer; and (3) that a causal link connects the two.” *Wiley v. Glassman*, 511 F.3d 151, 155 (D.C.Cir.2007).

[5] [6] Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory or - retaliatory explanation for its actions. See *Smith v. Dist. of Columbia*, 430 F.3d 450, 455 (D.C.Cir.2005). In asserting a legitimate, nondiscriminatory or -retaliatory explanation, an employer “need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.” *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (citation omitted).

[7] [8] If a defendant offers a legitimate, non-discriminatory or - retaliatory reason for its actions, “the district court need not—and should not—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*.” *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C.Cir.2008). Rather, the sole inquiry becomes “whether the plaintiff produced sufficient evidence for a reasonable jury to find that the employer’s asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the plaintiff on a prohibited basis.” *Adeyemi v. Dist. of Columbia*, 525 F.3d 1222, 1226 (D.C.Cir.2008). In other words, the *McDonnell Douglas* burden-shifting framework essentially disappears and the only remaining issue is whether the employer discriminated or retaliated against the employee. See *Jones v. Bernanke*, 557 F.3d 670, 678 (D.C.Cir.2009) (applying this approach to ADEA claims). In evaluating whether the plaintiff may overcome summary judgment, “the court reviews each of the three relevant categories of evidence—prima facie, pretext, and any other—to determine whether they ‘either separately or in combination’ provide sufficient evidence for a reasonable jury to infer retaliation.” *Id.* at 679 (quoting *Waterhouse v. Dist. of Columbia*, 298 F.3d 989, 996 (D.C.Cir.2002)).

II. **Age Discrimination Claims**

Barnabas alleges that UDC discriminated against her by failing to select her for any of three full-time positions.¹ The Court takes each in turn.

*102 A. *2004 Vacancy*²

Barnabas alleges that UDC discriminated against her when it filled the full-time position she applied for in 2004 with a much younger individual. UDC responds that this claim should be dismissed because Barnabas failed to file a timely complaint with the EEOC. See Pl.’s Mot. at 14–15.

[9] [10] “An individual who wishes to challenge an employment practice under the ADEA must first file a charge with the EEOC.” *Faison v. Dist. Columbia*, 664 F.Supp.2d 59, 64 (D.D.C.2009); see 29 U.S.C. § 626(d)(1). “In the District of Columbia, where there is a local anti-discrimination agency, this charge must be filed within 300 days of the occurrence of the allegedly

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unlawful practice.” *Faison*, 664 F.Supp.2d at 64.

Barnabas concedes that she failed to adhere to these statutory requirements for her allegation concerning the 2004 vacancy: her EEOC complaint was filed well over 300 days after she was denied the position. *See* Def.’s Opp’n at 4. Instead, she contends that the Lilly Ledbetter Fair Pay Act of 2009, [Pub.L. No. 111–2, 123 Stat. 5 \(2009\)](#), revives her claim. The Lilly Ledbetter Act, as incorporated into the ADEA, states that “an unlawful practice occurs, with respect to discrimination in compensation in violation of [the ADEA], when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice.” [29 U.S.C. § 626\(d\)\(3\)](#). According to Barnabas, the University’s decision not to grant her the 2004 position was a “discriminatory compensation decision or other practice” that still affected her salary at the time she filed her 2006 EEOC complaint. *See* Def.’s Opp’n at 4–5. Thus, she argues, her EEOC charge was timely filed.

Barnabas’s argument is foreclosed by the D.C. Circuit’s recent decision in [Schuler v. PricewaterhouseCoopers, LLP](#), 595 F.3d 370 (D.C.Cir.2010). In that case, the plaintiff argued that his employer’s failure to promote him was a discriminatory compensation decision or other practice under the Lilly Ledbetter Act. According to him, because his salary still suffered from the continued effects of his employer’s failure to promote him, the Act rendered timely his otherwise late-filed discrimination claims. The D.C. Circuit rejected this contention, holding that “the decision whether to promote an employee to a higher paying position is not a ‘compensation decision or other practice’ within the meaning of that phrase in the” Lilly Ledbetter Act. *Id.* at 375. The Lilly Ledbetter Act therefore “d[id] not revive [plaintiff’s] claims under the ADEA.” *Id.*

^[11] Hence, UDC’s failure to promote Barnabas to a full-time **professor** position was not a discriminatory compensation decision or other practice. The Lilly Ledbetter Act does not revive Barnabas’s late-filed allegations concerning the 2004 vacancy, and she has thus failed to timely exhaust her administrative remedies with respect to this allegation.³

B. Vacancy 04–38

^[12] Barnabas next alleges that UDC unlawfully failed to hire her as an Assistant *103 **Professor** for vacancy number 04–38. UDC offers a legitimate, non-discriminatory explanation for its decision: Barnabas did not formally apply for this vacancy until February 2006, months after the University had already filled the position. *See* Def.’s Answers at No. 11.⁴ Therefore, “the only question is whether the employee’s evidence creates a material dispute on the ultimate issue of [discrimination] ‘either directly by [showing] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.’ ” *Jones*, 557 F.3d at 678 (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)) (second alteration in original).

Barnabas concedes that she did not formally apply for the 04–38 vacancy until months after UDC filled the position. She argues, however, that when this position was posted she had “multiple outstanding applications pending with [UDC] for any regular full time professorial vacancy.” Pl.’s Opp’n at 3. She points to eleven letters she wrote to various UDC officials between 2000 and 2003. *See id.*, Exhibit 2. In these letters, Barnabas expressed her strong desire to be reappointed to a full-time position, and requested that she be awarded specific teaching vacancies. *See id.*

These letters—written before vacancy number 04–38 was posted—may indicate that Barnabas wished to be appointed to any available full-time position. But nothing in the record discredits UDC’s claim that it did not consider Barnabas for the vacancy because she never formally applied for it. *See Brady*, 520 F.3d at 496; *Fischbach v. Dist. of Columbia Dep’t of Corr.*, 86 F.3d 1180, 1183 (D.C.Cir.1996) (“Once the employer has articulated a non-discriminatory explanation for its action ... the issue is not the correctness or desirability of the reasons offered but whether the employer honestly believes in the reasons it offers.” (internal quotation marks and alterations omitted)). There is no evidence that the University typically considers “standing applications” for employment, or that UDC told Barnabas that she need not submit an application in order to be considered for any available **professor** vacancies. Indeed, UDC’s evidence—irrefuted on this point—indicates that only individuals who formally applied were considered for this position. *See* Def.’s Answers at No. 11 (“The Plaintiff’s resume and application had not been received by the

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Office of Human Resources and therefore was not submitted for the first screening.”); *id.* at No. 14 (“The Plaintiff was ineligible to be considered at the time of [the] appointment because she had not submitted her application for consideration at that time.”). Thus, nothing suggests that the University’s explanation for its decision not to hire Barnabas is false.

^[13] Moreover, Barnabas has failed to identify evidence to support her allegations of discriminatory intent. She has not argued, for example, that she was more qualified than the individual hired for this vacancy—herself forty-five years-old. Nor has she suggested that UDC only interviewed young applicants for the position. Indeed, at her deposition Barnabas denied having “any interactions with anyone at UDC that made [her] feel that [she was] being discriminated against based on [her] age.” Barnabas Depo. at 115:8–22. Thus, Barnabas’s charge of discrimination rests *104 only on the fact that UDC hired a younger individual to fill the position. Without more, this is not enough to survive summary judgment. *See Dunaway v. Int’l Bhd. of Teamsters*, 310 F.3d 758, 767 (D.C.Cir.2002) (“[Defendants’] decision to replace [plaintiff] with a younger woman is insufficient for a jury to conclude that she ‘lost out because of [her] age ...’ [Plaintiff] proffered no other evidence that she was terminated because of her age ...” (citations omitted) (quoting *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996))).⁵

C. Vacancy 05–74

Finally, Barnabas suggests that UDC unlawfully failed to hire her as an Assistant **Professor** for vacancy number 05–74. UDC offers a legitimate, non-discriminatory explanation for this decision as well: Barnabas never applied for the position. *See* Barnabas Depo. at 85:1–17.⁶ Accordingly, the Court turns to the “only question” remaining: “whether the employee’s evidence creates a material dispute on the ultimate issue of [discrimination].” *Jones*, 557 F.3d at 678.

As with vacancy number 04–38, Barnabas’s argument rests on the assumption that she had a standing employment application pending when this position was listed. But once again, the record lacks any evidence from which a reasonable jury could conclude that UDC discriminated against Barnabas by not awarding her this position. There is no evidence that the University did not honestly and reasonably believe that it was Barnabas’s

failure to apply for this job that removed her from consideration. *See Fischbach*, 86 F.3d at 1183. And there is nothing—save only for the fact that a younger individual was hired—to suggest that discrimination motivated the University’s decision. Without more, Barnabas’s claim cannot survive summary judgment. *See Dunaway*, 310 F.3d at 767.

In sum, no reasonable jury could conclude that UDC intentionally discriminated against Barnabas on the basis of her age. The Court will thus grant UDC summary judgment as to all of Barnabas’s allegations of **age discrimination**.⁷

III. Retaliation Claim

^[14] Barnabas has also alleged that UDC retaliated against her by reducing her teaching load for the fall semester of 2006 after she filed a discrimination complaint with the EEOC in January 2006. *See* Second Am. Compl. ¶ 19. UDC offers a legitimate, non-retaliatory explanation for its decision to reduce her teaching load—namely, that Barnabas’s “schedule was not reduced until she reported that she was unable to work because of medical problems.” Def.’s Answers to Pl.’s Interrog. at No. 15.⁸ Thus, the question once again becomes “whether the employee’s *105 evidence creates a material dispute on the ultimate issue of retaliation.” *Jones*, 557 F.3d at 678. In analyzing this issue, the Court considers “each of the three relevant categories of evidence—prima facie, pretext, and any other—to determine whether they ‘either separately or in combination’ provide sufficient evidence for a reasonable jury to infer retaliation.” *Id.* at 679 (quoting *Waterhouse*, 298 F.3d at 996).

Here, Barnabas has provided evidence that UDC’s explanation for its decision to reduce her schedule is false. UDC contends that Barnabas’s schedule was only reduced after she claimed to the University that she could not work. But UDC does not identify any instance where Barnabas “reported that she was unable to work because of medical problems” before the fall 2006 semester. And Barnabas stated at her deposition that it was in January 2007—months after her teaching load was reduced—that she first informed her department chair that she would have trouble commuting in the icy weather conditions, in part due to health concerns. Barnabas Depo. at 97:3–99:9. Taken in the light most favorable to Barnabas, then, the evidence directly contradicts UDC’s non-retaliatory explanation for its reduction of Barnabas’s schedule, and

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a reasonable jury could infer that the University's explanation is mere pretext.

[15] Evidence that UDC's non-retaliatory explanation for its actions is mere pretext may itself allow Barnabas to overcome summary judgment. See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (trier of fact may "infer the ultimate fact of [retaliation] from the falsity of the employer's explanation"); *Jones*, 557 F.3d at 679 ("[T]hough evidence of pretext is not *per se* sufficient to permit an inference of [retaliation], it [u]sually ... will be enough to get a plaintiff's claim to a jury." (internal quotation marks and citations omitted)). Here, though, there is further evidence of a temporal proximity between Barnabas's filing of an EEOC complaint and the University's decision to reduce her teaching load.

[16] [17] [18] [19] Barnabas filed her EEOC complaint in late January 2006, and the University reduced her teaching load in August of that year.⁹ Generally, an approximately seven-month delay between protected activity and an adverse employment action does not suggest any causal connection between the two. See *Buggs v. Powell*, 293 F.Supp.2d 135, 149 (D.D.C.2003) (seven-month gap "is not, by itself, sufficient to establish an inference of discrimination"). But "[e]specially where a defendant retaliates at the first opportunity that is presented, a plaintiff will not be foreclosed from making out a prima facie case despite a substantial gap in time." *Pardo-Kronemann v. Jackson*, 541 F.Supp.2d 210, 218 (D.D.C.2008). Here, the University has not disputed Barnabas's assertion that fall 2006 was the first opportunity for it to reduce her teaching load following

Footnotes

- 1 Barnabas also suggests that UDC discriminated against her by failing to hire her for other full-time positions. See Pl.'s Opp'n at 4. She has offered no evidence or argument as to those other allegedly discriminatory acts, however.
- 2 The record does not identify the vacancy number for this position.
- 3 In light of this conclusion that Barnabas's claims were not timely filed with the EEOC, the Court need not address UDC's argument that Barnabas was not qualified for the position.
- 4 UDC initially sought to hire two professors for this vacancy, but ultimately withdrew the funding for the second position. *Id.* Barnabas does not contend that UDC's decision not to hire a second professor for this vacancy was discriminatory.
- 5 Because it concludes that Barnabas has not shown any evidence of discrimination, the Court need not address UDC's argument, made for the first time in its reply brief, that Barnabas failed to timely exhaust her administrative remedies with respect to this vacancy. See Pl.'s Reply in Supp. of its Mot. [Docket Entry 38] ("Pl.'s Reply") at 3.

her protected activity. And this reduction in Barnabas's schedule is conspicuous: *106 she had taught at least two courses in every semester from 1997 until fall 2006. See Pl.'s Answers at No. 5.¹⁰ A reasonable jury could infer that this sudden change in a previously-consistent schedule, issued at the first opportunity the University had to reduce Barnabas's teaching load after she filed an EEOC complaint, was the result of retaliation.¹¹

Because Barnabas has provided evidence that UDC's non-retaliatory explanation for its decision to reduce her schedule was false, and because a temporal proximity exists between Barnabas's protected activity and the University's adverse employment action, a reasonable jury could find that the University reduced Barnabas's teaching load in retaliation for her filing an EEOC complaint. Accordingly, the Court will deny summary judgment on Barnabas's fall 2006 retaliation claim.¹²

CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part UDC's motion for summary judgment. A separate Order accompanies this Memorandum Opinion.

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- 6 In its reply brief, UDC states that Barnabas did in fact apply for vacancy number 05–74. See Pl.’s Reply at 4 n. 2. This appears to be in error, as Barnabas herself concedes that she did not apply for the position. See Barnabas Depo. at 85:1–17.
- 7 Barnabas’s complaint alleges that UDC’s “policy and practice in defining and in filling regular full time **professor** vacancies in its Department of Biological and Environmental Sciences is based upon age.” Amend. Compl. ¶ 16. There is nothing in the record to support this allegation, and in any event Barnabas appears to have abandoned it.
- 8 UDC also asserts in its motion for summary judgment that Barnabas’s reduced teaching load was “a function of the University’s limited need for her to teach during that time period.” Def.’s Mot. at 23. This explanation, offered without citation, cannot supply an additional non-retaliatory explanation, as the record lacks any evidence of the University’s teaching needs. See *Burdine*, 450 U.S. at 255 n. 9, 101 S.Ct. 1089 (“An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden [to provide a legitimate, non-retaliatory explanation] merely through an answer to the complaint or by argument of counsel.”).
- 9 The record is silent as to when UDC decided to reduce Barnabas’s teaching load. Accordingly, the Court assumes that August 2006—the start of the fall semester, see Barnabas Depo. 103:8–9—is the relevant date for this inquiry.
- 10 UDC claims that there is no evidence that individuals with control over Barnabas’s schedule were even aware of her protected activity. See Def.’s Mot. at 22; see also *Jones*, 557 F.3d at 679 (“We agree that Jones’s supervisors could not have retaliated against him unless they had knowledge of his protected activity.”). But to survive summary judgment, a plaintiff “needn’t provide direct evidence that his supervisors knew of his protected activity; he need only offer circumstantial evidence that could reasonably support an inference that they did.” *Jones*, 557 F.3d at 679. Here, UDC has offered no evidence that her supervisors did not know of plaintiff’s protected activity. And the fact that Barnabas’s schedule was uncharacteristically reduced following her protected activity—evidence that supports an inference of retaliatory motive—“necessarily can support an inference of mere knowledge.” See *id.*
- 11 In a response to one of UDC’s interrogatories, Barnabas states that “[Department Chair Dr. Freddie] Dixon’s relationship with Barnabas changed from supportive to hostile ... in particular after Barnabas raised, through her attorney, claims of **age discrimination** in 2005, and filed EEOC charges in January 2006. Dixon then avoided direct communication with Barnabas and channeled communications with Barnabas through Dixon’s secretary.” Pl.’s Answers at No. 3. In her deposition taken less than a week later, however, Barnabas stated that these changes in her relationship with Dixon took place in 2002. See Barnabas Depo. at 111:19–14:13. And Barnabas further clarified that Dixon never told her that all communications with her needed to go through Dixon’s secretary. Barnabas Depo. at 113:14–17. In light of these contradictions, which the parties do not address, in resolving this motion the Court has not considered Barnabas’s suggestion in her interrogatory response that Dixon’s attitude towards her changed after she filed her EEOC complaint.
- 12 The Court will also deny summary judgment on Barnabas’s claim that UDC retaliated against her by assigning her only one course in spring 2007. See Pl.’s Opp’n at 7. UDC contends that Barnabas failed to bring this allegation before the EEOC, see Def.’s Mot. at 14, 23, but this alleged retaliation is merely a continuation of the alleged unlawful behavior Barnabas identified in her amended EEOC complaint. Given the Court’s conclusion that the University’s reduction of Barnabas’s courseload in fall 2006 may have been retaliatory, it cannot conclude as a matter of law that the continued reduction in her courseload the following semester was not also unlawful. The Court does, however, grant summary judgment as to any claim that the University retaliated against Barnabas by not awarding her any courses to teach in summer 2007. See Amend. Compl. ¶ 12. Barnabas concedes that in summer 2007 “her disabilities developed so as to prevent her from seeking or accepting any further work.” Pl.’s Opp’n at 7; see also Barnabas Depo. at 104:10–105:5.

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