UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GILDA YAZZIE, **Plaintiff,** **v.** **NATIONAL ORGANIZATION FOR WOMEN *et al.*,** **Defendants.**	**Case No. 1:19-cv-03845-RDM**

DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Defendants National Organization for Women ("NOW" or "Organization"), Toni Van Pelt, Beth Corbin and Cynthia Drabek (collectively, "Defendants"), through counsel, file their Reply in Further Support of their Motion for Summary Judgment.

I. INTRODUCTION

Plaintiff Gilda Yazzie's ("Ms. Yazzie") wholly fails to show that her claims should survive summary judgment. In a desperate attempt to save her claims of discrimination and retaliation, Ms. Yazzie relies on facts that are either inconsistent with or contrary to her interrogatory responses and/or deposition testimony. The Court should abide by the sham affidavit rule and disregard those facts. Moreover, Plaintiff's Opposition is riddled with factual inaccuracies, mischaracterizations of the deposition testimony, and misinterpretations of case law. Ms. Yazzie also relies heavily on hearsay, conclusory assertions and conjecture. These shenanigans are an attempt to distract the Court from the fact that the NOW National Board of Directors ("National Board") voted to remove Ms. Yazzie as Vice President. Ms. Yazzie's allegations of discrimination are focused on Ms. Van Pelt. It, however, was not Ms. Van Pelt who made the decision which led to the termination of Ms. Yazzie's employment. Moreover, the evidence shows that Ms. Van Pelt and Ms. Yazzie simply did not get along. For these reasons alone, the Court should grant Defendants' Motion.

Defendants are entitled to summary judgment on Ms. Yazzie's claims of race discrimination, hostile work environment based on race, and retaliation under Title VII of the Civil Rights Act of 1964 (Title VII) and Section 1981, and common law defamation, even if the Court decides to consider Defendants' Motion on the merits, for the following reasons:

(1) Ms. Yazzie has failed to provide admissible evidence that during the relevant time period NOW employed at least 15 employees which is the prerequisite for coverage under Title VII;

(2) Even if Title VII applied and the Court construes properly disputed material facts in favor of Ms. Yazzie, no jury could infer from record evidence that a motivating factor in the National Board's decision to remove her as Vice-President was her race (Native American/Navajo);

(3) Even if Title VII was applicable and the Court construes properly disputed material facts in favor of Ms. Yazzie, no jury could not infer that "but for" any opposition to discrimination the National Board would not have voted to remove Ms. Yazzie as Vice President;

(4) Construing any properly disputed material facts in favor of Ms. Yazzie, for purposes of a Section 1981 claim, a jury could not infer that "but for" her race the National Board would not have voted to remove her as Vice-President;

(5) Construing any properly disputed material facts in favor of Ms. Yazzie, for purposes of a claim, a Section 1981 retaliation claim, no jury could infer that a motivating factor in the National Board's decision to remove her as Vice-President was opposition to discrimination, which finding is necessary for a discrimination claim;

(6) Construing properly disputed material facts in favor of Ms. Yazzie, no jury could infer that Ms. Yazzie was subjected to a hostile work environment because of her race;

(7) by failing to respond to Defendants' argument for dismissal of Ms. Yazzie's defamation claim, Plaintiff concedes that she cannot state a claim for common law defamation.

There simply are no triable issues presented by the record. Ms. Yazzie utterly fails to address any of the issues or present any genuine issues of material fact. For these reasons, and those set forth in Defendants' opening brief, NOW, Ms. Van Pelt, Ms. Corbin and Ms. Drabek are entitled to summary judgment on all of Plaintiff's counts.

II. ARGUMENT

A. Plaintiff's Declaration Should Be Largely Excluded for being a Sham Affidavit.

Defendant NOW has met its initial burden of demonstrating the absence of a genuine dispute as to any material fact. In her Opposition, Ms. Yazzie attempts to create issues of fact by relying on entirely new allegations in Plaintiff's post-deposition declaration ("Yazzie Decl.").[1] *See generally* Dkt. 33-4. Indeed, Ms. Yazzie's own self-serving, self-contradicting opinions, absent anything more, are insufficient to defeat NOW's motion. *Holcomb v. Powell*, 433 F.3d 889, 899 (D.C. Cir. 2006) (rejecting "purely conclusory" allegations of discriminatory animus at summary judgment"); *Burke v. Gould*, 286 F.3d 513, 520 (D.C. Cir. 2002) (Bare allegations of discrimination are insufficient to defeat a properly supported motion for summary judgment). Ms. Yazzie relies primarily on declarations from her and a former NOW employee and a former Board member in an attempt to create disputed material facts.

Under the sham affidavit doctrine, "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition testimony) without explaining the contradiction or attempting to resolve the disparity." *Cleveland v. Policy Mgmt. Sys.*

[1] Plaintiff also attached declarations of Emily Imhoff and Cheryl Wapes'a-Mayes – both declarations contain hearsay and conjecture.

Corp., 526 U.S. 795, 806 (1999); *Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214, 1218 n.3 (10th Cir. 2014).

Allowing a party to submit contradictory evidence to avoid summary judgment would, "'greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.'" *Id*. (quoting *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984), *see also U.S. EEOC v. Greyhound* Lines, 554 F.Supp.3d 739, 756 (D.Md. 2021); *Dormu v. District of Columbia*, 795 F. Supp. 2d 7, 17 (D.D.C. 2011) (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986).

While application of the sham affidavit rule at the summary judgment stage must be limited to situations involving contradictions of facts to avoid infringing upon the province of the fact finder, the rule should be applied where a plaintiff has clearly contradicted a statement of material fact to create a genuine issue. *Webster v. ACB Receivables Mgmt*., 15 F. Supp. 3d 619, 630 (D.Md. 2014). Application of the sham affidavit doctrine is invoked when the deponent has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, yet then that party attempts to create a material issue with an affidavit that contradicts the previous clear testimony without explanation. *See Pyramid Sec. Ltd. v. IB Resolution, Inc*., 924 F.2d 1114, 1123 (D.C. Cir. 1991) (recognizing principle that a party " may not create a material issue of fact simply by contradicting its prior sworn testimony"). Plaintiffs may not erase sworn statements from the records with later filed affidavits or testimony. *Lilian Reetz v. Hampton J. Jackson, M.D., et al.,* 176 F.R.D. 412, 415 (D.D.C. 1997).

Plaintiff's recollection of an alleged altercation with Ms. Van Pelt in the office on January 29, 2018 has changed dramatically since her deposition just months ago. For example, instead of being in Ms. Yazzie's office alone when the alleged incident occurred, Plaintiff's declaration states that she was in the office of Linda Berg, a NOW employee, with Ms. Berg. Ms. Yazzie was asked

in her deposition in detail about the alleged incident, but she never described Ms. Van Pelt throwing papers at her. *Compare* Dkt. 33-1 (Yazzie Decl. ¶ 13) *and* Ex. A(Yazzie Dep. 45-47). When asked to describe what Ms. Van Pelt said during the altercation, Ms. Yazzie testified in her deposition that she said that she was going to "get" her and called her a "POC," but said that she "can't really speak to what she said." Dkt. 30-6 at 4-6 (Yazzie Dep. 57:2-59:19)[2]. Additionally, Plaintiff testified that Ms. Van Pelt spoke to her in a "very stern low voice" in her deposition and then in her declaration alleged that Ms. Van Pelt was "yelling." *Compare* Ex. A(Yazzie Dep. 57:14-58:3) *and* Dkt. 33-1 at 7 (Yazzie Decl. ¶ 13).

There are other examples of embellishment throughout the Opposition. Although in her deposition Ms. Yazzie testified that she was aware that at some point her Paychex access had been cutoff, Plaintiff suddenly in her declaration specifically recollects that this happened on March 23, 2018, publicly in a meeting with staffers regarding payroll. *Compare* Ex. A(Yazzie Dep. 100:19-101:1); and Dkt. 33-1 at 9 (Yazzie Decl. ¶ 20.

That Ms. Yazzie's declaration should be disregarded is further evident by her statements regarding the unauthorized advance to Sparkle Barrett. In her declaration, Ms. Yazzie states that she "did not even know it existed." Dkt. 33-1 at 6 (Yazzie Decl. ¶ 11). In discovery, emails between the accounting firm and Ms. Van Pelt that documented conversations with Ms. Yazzie regarding the advance were produced. Dkt. 30-3 at 152-55. Ms. Yazzie makes no effort in her declaration to discredit the accountants' contemporaneous recollection by showing bias against Native Americans.

When a plaintiff introduces a new fact for the first time in an affidavit in response to a motion for summary judgment such that a reasonable factfinder would find it internally

[2] Notably, Ms. Yazzie's contemporaneous report of this incident to the staff and National Board made no mention of Ms. Van Pelt saying "POC." Dkt. 33-1 at 8(Yazzie Decl. ¶¶ 15-16, Exs. A and B).

inconsistent and implausible, then that fact may be disregarded and will not defeat defendant's motion for summary judgment. *Church v. Md.*, 180 F.Supp.2d 708, 733 (D.Md. 2002). In *Church*, the court granted the defendant's motion for summary judgment despite the plaintiff introducing new facts in her affidavit alleging an adverse employment action. *Id.* at 743, 752.

Here, the new facts, which Ms. Yazzie asserts in her declaration, should be disregarded because a reasonable factfinder could find them internally inconsistent. Like the plaintiff in *Church* who raised new allegations in her affidavit at the summary judgment phase, Ms. Yazzie crafted her declaration in a way to best fit her needs at the summary judgment phase – including new allegations for the first time.

For the first time in both her opposition and declaration, Ms. Yazzie references a meeting in 2017 that she was forced to preside over because Ms. Van Pelt was out of the office as evidence of discrimination. Dkt. 33 at 10; Dkt. 33-1 at 4 (Yazzie Decl. ¶ 5). Aside from this alleged incident being immaterial to whether the National Board voted to remove Ms. Yazzie for a discriminatory or retaliation reason or a hostile workplace, there is nothing in the record evidence to corroborate Plaintiff's assertion that this meeting occurred. Ms. Yazzie also makes conclusory allegations about Ms. Van Pelt locking her out of her email. At this point in the litigation, after the close of discovery, if there was any evidence that would have supported these assertations, Ms. Yazzie would have uncovered it. Ms. Yazzie had the opportunity to ask Ms. Van Pelt about the email lock outs and had the opportunity to depose the IT provider if she found it necessary. Ms. Yazzie did not. Ms. Yazzie cannot now make allegations that are against the weight of the record evidence.

In addition to contradicting herself repeatedly, Plaintiff's opposition is riddled with misstatements of facts that are clear in the record. For example, Ms. Yazzie alleges that Ms. Van Pelt "unilaterally removed Plaintiff from the Paychex electronic payroll system." Dkt. Nos. 33-1

at 9 (Yazzie Decl. ¶ 20); 33-3 at 4. As was meticulously detailed in the evidence set forth in discovery and in Defendants' prior brief, the NOW Audit Committee, a subset of the National Board decided to remove Ms. Yazzie from the Paychex system and all financial transactions after a meeting with the auditors. Dkt. 30-3 at 135-36. Perhaps the most glaring new assertion of facts deals with the financial irregularities that ultimately led to Ms. Yazzie being removed from her position by the National Board. Ms. Yazzie states that "the supposed financial irregularities [that were the grounds for her suggested resignation in 2018] had to do with the fact that the organization was months behind in providing a budget for the Board." Dkt. 33-1 at 10 (Yazzie Decl. ¶ 24) However, as the record clearly shows, the independent auditor's report demonstrated mismanagement, misstatements due to error or fraud, and highlighted incidents of the Vice President being twice reimbursed for the same purchases, issuing petty cash checks to herself, and not abiding by the NOW policy of having two signatures on reimbursements. Dkt. 30-3 at 130-34, 137-39. Ms. Yazzie points to no admissible evidence that would call into doubt the findings of the independent auditor.

B. Plaintiff Did Not Adduce Sufficient Evidence to Prove that NOW is a Covered Employer Under Title VII.

Ms. Yazzie cannot state a claim of discrimination, retaliation or hostile work environment against NOW under Title VII because NOW is not a "covered employer," subject to Title VII. Ms. Yazzie relies on a list of 22 individuals whom she recalls were working for NOW at some point during her tenure as Vice President from August 1, 2017 thru May 6, 2019. *See* Dkt. 33-1 at 18-21 (Yazzie Decl. ¶ 43)[3]. However, Ms. Yazzie points to no evidence in the record regarding the actual period of time during which these individuals were employed. Ms. Yazzie has no deposition

[3] Ms. Yazzie submits a declaration from Emily Imhoff to corroborate her recollection of who worked for NOW for a two week period in July 2017. Dkt. No 33-1 at 39 (Declaration of Emily Imhoff, ¶ 5).

testimony, declarations or other record evidence from which a reasonable jury could infer that more than 14 people were on the payroll *at the same time* during the relevant time period for 20 or more weeks for any year in which Ms. Yazzie was employed, as is required for an employer to be covered under Title VII.

Under Title VII, to be a covered employer, NOW had to have employed 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year when the alleged discriminatory act occurred. 42 U.S.C. § 2000e(b). Although both Ms. Yazzie's declaration and Ms. Imhoff's declarations list more than 15 people, neither listed the dates of employment for these individuals. Defendant NOW produced the payroll records of employees during the entire time in question – proving unquestionably that it never employed 15 or more employees during any of the 20 or more weeks of the time period relevant to Ms. Yazzie's Title VII claim. Failure to refer to these records is tantamount to an admission that NOW is not a covered employer for purposes of Title VII.

Ms. Yazzie bears the burden of proving the number of employees, including the duration of their employment, "with some element of precision." *Norman v. Levy*, 767 F. Supp. 1441, 1449 (N.D. Ill. 1991). Ms. Yazzie's narrative explanations of employees who worked at NOW without any parameters of time frame does not satisfy this burden, especially against Defendant NOW's payroll records. Ms. Yazzie has no admissible evidence to undermine the authenticity or integrity of the payroll ledgers. Thus, the Court must find as a matter of law that NOW is not a "covered employer" under Title VII and dismiss Plaintiff's First, Second and Third Claims for Relief.

1. Even if NOW could be considered a Title VII employer, Ms. Yazzie has not, and cannot create a genuine dispute that a motivating factor in the decision to remove her was her race.

Even if NOW is an employer subject to Title VII, Ms. Yazzie failed to prove that the National Board removed her from the position as Vice President because of her race. Ms. Yazzie

contends that she has "evidence of racial bias," Dkt. 33 at 25, but fails to connect any of the treatment that she alleges to be unpleasant back to her race. Ms. Yazzie erroneously contends that she has direct evidence of race discrimination. *Id*. "Direct evidence" of discrimination is a statement by decisionmaker involved in the employment decision at issue that explicitly mentions race as a factor in the decision-making process. *Ayissi–Etoh* v. *Fannie Mae*, 712 F.3d 572, 576–77 (D.C. Cir. 2013) (holding that the employer's reference to the employee's status as a "young black man" while contemplating his promotion was direct evidence of discrimination). Ms. Yazzie states that Ms. Van Pelt in January 2018 allegedly referred to her as "P.O.C." and threatened to remove her from office. *Id*. Even if true, which Defendant NOW vehemently denies, there is no evidentiary basis for inferring that Ms. Van Pelt made the decision to discharge Ms. Yazzie or take any other adverse employment action. Rather, the record shows the National Board voted to remove Ms. Yazzie, and that resulted in her discharge. Accordingly, the *McDonnell Douglas* framework applies, and Ms. Yazzie has failed to provide an evidentiary basis for inferring the legitimate reason for her removal was a pretext for race discrimination.

Even construing any disputed evidence in the record in Ms. Yazzie's favor, the only adverse employment action is the National Board's vote to remove Ms. Yazzie as Vice President. Ms. Yazzie also attempts to argue that in addition to discharge she experienced the adverse employment actions of demotion and suspension. Other than Ms. Yazzie's self-serving statements, she provides no evidentiary support for an inference that she was demoted. *Walker v. WMATA*, 102 F.Supp.2d 24, 29 (D.D.C.2000) ("An employment decision does not rise to the level of an actionable adverse action ... unless there is a tangible change in the duties or working conditions constituting a material employment disadvantage." (citation omitted))"). Further, as the Court of Appeals said in *Forkkio v. Powell*, "[p]urely subjective injuries, such as dissatisfaction with a

reassignment or public humiliation or loss of reputation are not adverse actions." 306 F.3d 1127, 1130-31 (D.C. Cir. 2002).Ms. Yazzie contends that the changing of the functions of the Vice President role to focus primarily on field work with no office, no budget, no administrative support, no interaction with NOW Office staff and close, more stringent supervision"[4] was a demotion, and thus an adverse employment action. Dkt. 33 at 15, 28. Even if true, it is undisputed that the National Board (not Ms. Van Pelt) made the decision to create the field role, and there is no evidentiary basis for inferring the decision was an adverse employment action and discrimination. Ms. Yazzie also contends that being under the supervision of the Vice President Oversight Committee in the field role is an adverse employment action. Dkt. 33 at 29. Ms. Yazzie has provided no evidence that being subject to the supervision of the Vice President Oversight Committee exposed her to removal, reduction in grade or withholding of a pay increase. The record is clear that the Vice President Oversight Committee was created to assist Ms. Yazzie in improving her job performance. Dkt. 30-2 at 13-14. As the Court of Appeals held in *Taylor v. Small* absent any claim that the plaintiff suffered any adverse effects, placing the plaintiff on a performance improvement plan is not an adverse action. 350 F.3d 1286, 1293 (D.C. Cir. 2003).

Ms. Yazzie contends that she was in essence suspended when she was allegedly removed from the workplace from May 21, 2018 through June 10, 2018. *Id*.[5] Ms. Yazzie erroneously relies on case authority that finds in certain circumstances lengthy suspensions qualify as adverse employment actions. *See Richardson v. Petasis*, 160 F Supp. 3d 88, 117-18 (D.DC. 2015). Other

[4] Unlike the plaintiff in *Czekalski v. Peter*, there is no evidence to support an inference that Ms. Yazzie's supervisory and programmatic responsibilities were significantly diminished, or that she previously had a budget. 475 F.3d 360, 364 (D.C. Cir. 2007)(Plaintiff testified that she previously oversaw 260 federal employees, approximately 700 contract employees, over fifty separate programs, and an annual budget of approximately $400 million while after the reassignment she testified that she supervised fewer than ten employees and worked primarily on just one program with little to no budget of its own.).

[5] Despite contending that she was suspended, Ms. Yazzie admits that she was paid throughout this period, and continued to perform her duties, including attending meetings and researching topics. Dkt. 33-1 at 11. Ms. Yazzie does not explain how she otherwise was unable to "fully" perform her duties.

than Ms. Yazzie's self-serving statement, there is no evidentiary basis for inferring the National Board (or Ms. Van Pelt) suspended Plaintiff. There is no record evidence that Ms. Yazzie was relieved from performing any job duties for NOW at any time. Even if true, there is no evidentiary basis for inferring, the purported suspension occurred because of Ms. Yazzie's race.

Ms. Yazzie attempts to argue a discriminatory motive by saying that her job duties were assigned to a "nom (sic) member of the protected class." Dkt. 33 at 25. While such evidence may be enough to establish a *prima facie* case, it is not sufficient for a plaintiff to prevail where the employer has come forward with a legitimate nondiscriminatory reason for an adverse employment action. Ms. Yazzie needs admissible evidence that the reason given for the National Board's vote to remove her was a pretext for race discrimination. Ms. Yazzie has none.

Ms. Yazzie argues in part that evidence of race discrimination is that she was "tokenized" and given the title of Vice President but none of the responsibilities. Dkt. 33 at 24, 26. Ms. Yazzie erroneously relies on *Velez v. QVC, Inc.*. 227 F. Supp. 2d 384, 408 (E.D. Pa. 2002) in support of the proposition that tokenism is evidence of discrimination. The holding in *Velez* is clear that "the mere act of being hired as a 'token' alone does not constitute an adverse employment action." *Velez*, 227 F. Supp. 2d at 408. More importantly, federal courts have found that "Title VII does not provide a cause of action for tokenism for the beneficiary of that tokenism." *See, e.g., Manning v. Southwestern Bell Mobile Sys.*, Civ. A. No. 90-6838, 1992 WL 170552, *5 (N.D. Ill. Jul. 16, 1992).

In an attempt to prove discriminatory motive, Ms. Yazzie relies on purported "me too" evidence from current NOW President Christian Nunes and cites to the prior disciplinary actions of Sparkle Barrett and Brittany Oliver. It is well-settled that perceived discrimination against one person does not equate to discrimination against all under-represented groups. Comparator

evidence is of value only if the individuals are similarly situated to the plaintiff in terms of relevant characterizations. *See Waterhouse v. District of Columbia*, 298 F.3d 989, 995-96 (D.C. Cir. 2015). When considering the admissibility of "me too" evidence, courts in this District frequently assess: (1) whether the same decisionmakers were involved; (2) whether the witness and the plaintiff were treated in a similar manner; (3) whether the witness and the plaintiff were otherwise similarly situated; and (4) whether such past discriminatory behavior by the employer is close in time to the events at issue in this case. *Elion v. Jackson*, 544 F. Supp. 2d 1, 9 (D.D.C. 2008); *Barnett v. PA Consulting Grp. Inc.,* 35 F. Supp. 3d 11, 22 (D.D.C. 2014).

While Ms. Nunes and Ms. Yazzie both occupied the Vice President position at one point, Ms. Nunes identifies as African American while Ms. Yazzie identifies as Native American. They are not the same race, and thus, not similarly situated. Similarly, Ms. Yazzie refers to the firings of Ms. Barrett and Ms. Oliver – both of whom are African American and neither of whom occupied the Vice President role.[6]

Ms. Yazzie simply has failed to prove that her race was a factor, let alone a motivating factor, in her eventual removal by the National Board. Indisputably, Ms. Yazzie and Ms. Van Pelt did not work together well. However, without a discriminatory motive, favoritism, even if demonstrated, is not actionable under Title VII. *Nyunt v. Tomlinson*, 543 F. Supp. 2d 25, 40 (D.D.C. 2008).

2. Even if Title VII is applicable, Ms. Yazzie has failed to create a genuine dispute that Ms. Yazzie was not subjected to a hostile work environment because of her race.

[6] Ms. Van Pelt testified there were legitimate reasons for both terminations. In the case of Ms. Barrett, she was discharged for dereliction of duty, including missing payroll, and taking money from NOW. Deposition of Toni Van Pelt (Van Pelt Dep.), attached hereto as Ex. B, at 196:11-13. Ms. Oliver was discharged for not performing her job. *Id.* at 232:1-6, 242:14-21. Ms. Yazzie has no record evidence that these reasons are a pretext for discrimination based on any protected category. Regardless, these discharges are not material to Plaintiff's claims.

Ms. Yazzie has failed to prove that she was subjected to a hostile work environment because of her race. Rather, her hostile work environment claim is a recasting of her now dismissed claim of assault and battery. As was briefed thoroughly in Defendants' opening brief, a plaintiff needs to demonstrate that the alleged harassment "was based on plaintiff's membership in a protected class, and that [plaintiff's] employer knew or should have known of the harassment and failed to take any remedial action." *Rattigan v. Gonzales*, 503 F. Supp.2d 56, 78 (D.D.C. 2007). Ms. Yazzie has not presented a legally sufficient evidentiary basis for a reasonable jury to find for her on a material element of her hostile work environment claim. Notably, Ms. Yazzie does not dispute that an independent investigator found there was not a hostile work environment based on anyone's race at NOW. *Compare* Dkt. 30-1 at 8 (SUMF ¶ 61("insufficient evidence to claim [Ms. Van Pelt] is a racist.")).

Ms. Yazzie focuses her argument on the hostile work environment issues around one incident on January 29, 2018.[7] *See* Dkt. 33 at 19, 21-22. Although Ms. Yazzie generously supplements her recollection of that incident in her declaration, she still has failed to connect the incident to her race, as is required to sustain a Title VII claim. The allegation that yelling, accompanied with assault and battery, should amount to a hostile work environment given the totality of the circumstances is a flawed one. Ms. Yazzie alleges that the nature of the January 29th incident is compounded by the yelling consisting of an ethnic epithet (claiming she said "POC"[8]) and a threat to the employee's job. *Id*. at 22. Furthermore, Ms. Yazzie's declaration directly contradicts her deposition testimony where she referenced Ms. Van Pelt speaking to her in a low tone. *Compare* Ex, A(Yazzie Dep. 57:14-58:3) *and* Dkt. 33-1 at 7 (Yazzie Decl. ¶ 13). Ms.

[7] This court previously dismissed Ms. Yazzie's counts of assault and battery.
[8] Plaintiff cites to no holding, much less dicta, in which the use of "POC" has been determined to be a racial slur frequently directed at Native Americans, much less any other minority group member. Plaintiff also does not contend that "POC" is considered racially derogatory in the Native American community.

Yazzie's deposition testimony did not include that Ms. Van Pelt yelled a racial slur or threatened her position. Even if Ms. Van Pelt did raise her voice, there is clear case law holding that "yelling" in and of itself may not form the basis for a hostile work environment claim. *Knight v. Mabus*, 134 F. Supp. 3d 348, 356 (D.D.C. 2015) (the court held that one occasion of yelling is insufficiently pervasive or severe to support a hostile work environment claim.).

Ms. Yazzie also alleges that being required to continue working with Ms. Van Pelt after the alleged incident should be considered an aggravating factor in a hostile work environment consideration. By her own admission, Ms. Yazzie believed that the Vice President Oversight Committee was "supposed to be a bumper between [herself] and Toni so Toni would not continue to discriminate against [her] and also be violent towards [her]." Dkt. 30-6 at 30(Yazzie Dep. 125:2-12). Accordingly, Ms. Yazzie concedes that the National Board made an effort to improve the working relationship between Ms. Van Pelt and herself by establishing the Vice President Oversight Committee.[9]

Again, Ms. Yazzie alleges that she was "tokenized," and that this led to humiliation. As was previously discussed, "the mere act of being hired as a 'token' (even if true) alone does not constitute an adverse employment action." *Yelez*, 227 F. Supp. 2d at 408.

The alleged conduct here did not have nearly the level of frequency or severity as cases where courts have found there to be a hostile work environment. Additionally, Ms. Yazzie has not produced any evidence that the alleged discomfort she felt was tied directly to conduct based on her race. Accordingly, this Court should find that there was no hostile work environment based on race.

[9] Ms. Yazzie's declaration omits the fact that the National Board created a new role for the Vice President in furtherance of minimizing the interactions between Ms. Van Pelt and Plaintiff.

3. Even if Title VII were applicable, Plaintiff did not prove an adverse employment action was tied to any protected activity.

Ms. Yazzie argues that she engaged in "protected activity" based on multiple incidents, including a January 29, 2018 e-mail to the staff about a "hostile work place," a January 29, 2018 letter to the staff (Dkt. 33-1 at 23) and National Board about being "harass[ed] (Dkt. 33-1 at 25), complaints of discrimination on her behalf by past and present staff members[10], and her November 13 and 19, 2018 e-mails to Nancy Campbell Mead regarding Brittany Oliver and Sparkle Barrett (Dkt. Nos. 33-1 at 33, 35). Dkt. 33 at 29-30. Ms. Yazzie also contends that she suffered retaliatory adverse employment actions when she was allegedly demoted in June 2018[11], suspended from duty in May and June 2018,[12] locked out of her office in May 2018, asked to resign in May 2018, removed from a public role in November 2018 and discharged on May 6, 2019. *Id.* at 27, 30.

Even if Ms. Yazzie's complaints of mistreatment constitute protected activity, which NOW vehemently denies, she has failed to show a causal connection between any protected activity and any materially adverse employment action. While Ms. Yazzie did present her concerns regarding her ability to work with Ms. Van Pelt to the National Board and the Audit Committee, there is no evidence in the record that the National Board was aware that Plaintiff allegedly believed Ms. Van Pelt was treating her differently because she was American Indian, Navajo or Diné American. Other than her self-serving assertions and the conjecture of Cheryl Wapes'a-Mayes, Ms. Yazzie has no evidence to show "but for" any protected activity the National Board would not have voted to remove her as Vice President. Ms. Yazzie rests on temporal proximity, but a lapse of more than three months is generally too long to support an inference of retaliation. *Hamilton v. Geithner*, 666

[10] Ms. Yazzie cites to no case authority that oppositional behavior by coworkers can be construed as Plaintiff engaging in protected activity.
[11] *See supra* at 10.
[12] *See supra* at 10.

F.3d. 1344, 1357-58 (D.C. Cir. 2012) (delay of more than three months is generally too long to support inference of retaliation). Here, the last alleged protected activity was in November 2018, which is more than 5 months prior to the National Board's vote to remove Ms. Yazzie as Vice President in May 2019.

Moreover, Ms. Yazzie focuses on the actions of Ms. Van Pelt (Dkt. 33 at 31) when she did not make the decision to remove her as Vice President. As the record indisputably shows, it was the National Board's decision to change Ms. Yazzie's job duties and remove her in accordance with NOW's by-laws.. Accordingly, there is no evidence in the record that would create a genuine issue of material fact as to whether the legitimate, non-retaliatory reason for an adverse employment action which the National Board took was a pretext for retaliation. Therefore, Defendant NOW is entitled to summary judgment as a matter of law.

C. The Court Should Enter Judgement as a Matter of Law on Plaintiff's Fourth, Fifth and Sixth Claims For Relief Under Section 1981.

1. Ms. Yazzie has failed to establish that she would not have been terminated "but-for" unlawful racial considerations.[13]

Other than conjecture and conclusory assertions, Ms. Yazzie has no evidence to prove that "but for" her race, she would not have suffered the loss of a legally protected right under Section 1981. *Comcast Corp. v. Nat'l Assoc. of African Am.-Owned Media*, 140 S.Ct. 1009, 1019 (2020). In her opposition, Ms. Yazzie conveniently disregards the independent auditor's report that found several instances of financial mismanagement, the several double reimbursed expense checks, and Ms. Yazzie failing to follow NOW expense policy. *See* Dkt. 30-1 at 4-5. Notably, Ms. Yazzie does not dispute the independent auditor's findings or recommendations. *See* Dkt. 33-3 at 4-7.

[13] Ms. Yazzie ignores the legal standard set forth in *Comcast Corp.* for proving race discrimination under Section 1981.

While Ms. Yazzie failed to fully address this claim in her opposition, there is enough uncontroverted evidence in the record that proves that there is no genuine issue of material fact that Ms. Yazzie was not adequately performing her role as Vice President. Ms. Yazzie has no admissible evidence to undermine the integrity of the independent auditor's report and show it was motivated by racial discrimination. Even ignoring the independent auditor's report that recommended removing Ms. Yazzie from all financial duties, Ms. Yazzie would have been removed by the National Board for her lack of cooperation with the Vice President Oversight Committee, and her consistently failing to complete tasks that were assigned to her. The National Board, pursuant to the by-laws, removed Ms. Yazzie for numerous business-related reasons including: (1) demonstrating opposition to NOW's philosophy, (2) refusing to pay sums owed to NOW, and (3) failing to complete her tasks. Dkt. 30-1at 8-9. Ms. Yazzie does not dispute that these were the reasons that the National Board voted to remove her as Vice President. *See generally* Dkt. 33-3; Dkt. 33-4.[14] Other than conclusory assertions and conjecture, Ms. Yazzie has no evidence that these financial irregularities and deficiencies in her performance of the duties of the Vice President are fabricated and a pretext for discrimination based on race.

There is no evidentiary basis for inferring that Ms. Yazzie's claim that she was prevented from performing her role of Vice President had anything to do with her race. The National Board's vote for the removal of Ms. Yazzie as an officer was only centered around business decisions. Dkt. 30-1 at No. 8-9. Ms. Yazzie has adduced no admissible evidence that is contrary to that assertion. *See generally* Dkt. 33-3.

2. Ms. Yazzie failed to provide a evidentiary basis for a jury to infer a retaliatory motivation for any purported adverse employment action.

[14] The only facts which Ms. Yazzie attempts to dispute are: 4, 7-8, 18, 24, 27-30, 32-36, 40-41. Dkt. 33-3.

Ms. Yazzie's Opposition relies solely on temporal proximity to establish retaliation. Dkt. 33 at 31. Ms. Yazzie's retaliation claim fails because she has not demonstrated, and cannot demonstrate, that she experienced an adverse action because of her purported protected activities of complaining about Ms. Van Pelt or e-mailing Ms. Mead regarding Ms. Barrett and Ms. Oliver. Dkt. 33 at 29-30. As has been discussed above, and extensively documented and is undisputed, the National Board had legitimate non-retaliatory reasons for its employment decisions. There is no dispute that the National Board voted for the termination of Ms. Yazzie's employment only after it received reports of her failure to meet the National Board's expectations of her performance and financial improprieties. Dkt. 30-1 at 8-9. Because no reasonable jury reviewing the undisputed evidence in this record could find "protected activity" was the cause of her removal as Vice President by the National Board or any other adverse action, summary judgment on her Section 1981 retaliation claim is appropriate and must be dismissed.

3. Ms. Yazzie cannot establish that she was subjected to discriminatory intimidation, ridicule, or insult sufficiently pervasive to alter the conditions of her employment and create a hostile work environment.

To prevail on a hostile work environment claim under Section 1981, "a plaintiff must show that [her] employer subjected [her] to discriminatory intimidation, ridicule, and insult that [wa]s sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (internal citations and quotations omitted). Whether a workplace is actionably hostile is both a subjective and objective analysis – "[t]he victim must subjectively perceive the environment to be abusive, and the complained about conduct must be so severe or pervasive that it objectively creates a hostile or abusive work environment." *Toomer v. Mattis*, 266 F. Supp. 3d 184, 193 (D.D.C. 2017). Importantly, to succeed with a hostile environment claim, a plaintiff must show

that the alleged harassment occurred because of the plaintiff's protected trait (race). *Peters v. District of Columbia*, 873 F. Supp. 2d 158, 189 (D.D.C. 2012).

Other than Ms. Yazzie's feelings, she has neither adduced nor demonstrated any evidence supporting a claim that she was subject to insult or intimidation as is necessary to demonstrate a sufficiently pervasive pattern of hostile conduct. In fact, quite the opposite is true.

The National Board modified Ms. Yazzie's duties in an effort to make her more successful as an officer. The National Board enabled Ms. Yazzie to work off-site and assigned new field duties for which it felt she could perform well. Although Ms. Yazzie's declaration includes more animated racial comments, Ms. Yazzie testified during her deposition to only one purportedly derogatory comment connected to race which Ms. Van Pelt allegedly made against her, calling her a "POC". Dkt. 30-6 at 42-43(Yazzie Dep. 170:20-171:9)[15]. Ms. Yazzie testified that neither Ms. Corbin nor Ms. Drabek ever made a derogatory comment about her race to her.[16] *Id.* (Yazzie Dep. 171:14-172:7). Ms. Yazzie simply has not created a genuine dispute of material fact regarding her claim that she was subjected to a hostile work environment because of her race in violation of Section 1981. Therefore, Defendant NOW is entitled to summary judgment as a matter of law.

D. The Court Must Dismiss Plaintiff's Ninth Claim for Relief for Defamation.

Ms. Yazzie did not refute Defendants' argument that the Court should dismiss her common law claim of defamation. Moreover, as demonstrated in Defendants' opening brief, Ms. Yazzie conceded at her deposition that there was no publication of defamatory statements about her. Summary judgment is warranted if the plaintiff has failed to "present affirmative evidence … to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 424, 255 (1986); *see also Taylor v. City of New York*, 269 F. Supp. 2d 68, 75 (E.D.N.Y. 2003),

[15] *See supra* n.8.
[16] Ms. Yazzie has not alleged that her race was the subject of comment by any other Board member.

order clarified, No. 01-CV-5750 (ILG), 2003 WL 21781941 (E.D.N.Y. July 29, 2003) ("Federal courts may deem a claim abandoned when a party moves for summary judgment on one ground and the party opposing summary judgment fails to address the argument in any way.")[17] Therefore, Defendants are entitled to summary judgment as a matter of law.

III. CONCLUSION

Ms. Yazzie has failed to satisfy her burden of proving that NOW has employed at least 15 people during 20 or more weeks of her employment. Further, Ms. Yazzie's declaration and the declarations of third parties full of hearsay and conclusory assertions are not sufficient to create an evidentiary basis for a jury to infer that the National Board's legitimate business reason was pretext for discrimination or retaliation. Rather, the record indisputably shows that Ms. Yazzie was not able to meet the expectations of her office even after the National Board made significant efforts to help her become successful. In not addressing the claims of defamation, Ms. Yazzie has conceded that the defamation claim must fail.

For the foregoing reasons, NOW, Toni Van Pelt, Cynthia Drabek, and Beth Corbin respectfully request that the Court grant their Motion for Summary Judgment, enter judgment in their favor, and grant Defendants such other and further relief as the Court deems appropriate.

[17] In the 2016 case *Winston & Strawn, LLP v. McLean*, the D.C. Circuit held that a motion for summary judgment cannot be deemed 'conceded' for want of opposition. 843 F.3d 503 (D.C. Cir. 2016). That decision is inapposite here. Unlike in *Winston & Strawn*, Ms. Yazzie timely filed an opposition, but the opposition failed to address the defamation charges.

Dated: June 21, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 21, 2022, a copy of the foregoing and attachments was filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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