UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Basilia Silverio, Plaintiff, –v– United Block Association, Inc., et al., Defendants.	13-cv-5001 (AJN) MEMORANDUM & ORDER

ALISON J. NATHAN, District Judge:

Plaintiff Basilia Silverio ("Silverio") brings this action against Defendants United Block Association, Inc. ("UBA"), UBA Executive Director Kwame Insaidoo ("Insaidoo"), and Dr. Modi Essoka ("Essoka") for failure to pay wages and retaliatory discharge under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. and New York Labor Law ("NYLL") §§ 191(1)(d), 215. The Defendants now move for summary judgment on all of Silverio's claims. *See* Dkt. No. 20. For the reasons below, Defendants' motion is GRANTED.

I. BACKGROUND

The United Block Association is a non-profit corporation that operates a small number of senior citizen day centers in Manhattan, specifically in or around the neighborhood of Harlem. Mars Decl., Ex. 2 at 9:12-16; 59:11 ("Insaidoo Deposition"). It receives all, or nearly all, of its funding through contracts with the New York Department for the Aging ("DFTA"), an agency of the City of New York. *Id.* at 59:12-23.

In 1994, the UBA hired Plaintiff as one of its senior center directors. Umansky Decl., Ex. A ¶ 2 ("Silverio Declaration"). Specifically, she was assigned to be the Director of UBA's Manhattanville Riverside Senior Center ("Manhattanville"). Mars Decl., Ex. 5 at 14:12-19

("Silverio Deposition"). It was at this time that Ms. Silverio was first asked about her academic credentials and whether she possessed a bachelor's degree. *Id.* at 82:2-8. Later, in March 1999, UBA circulated a memorandum to senior employees reminding them that they were required to "meet the minimum entry academic requirements" for their positions. Mars Decl., Ex. 9 at 1. Ms. Silverio responded to this memorandum by providing UBA with a number of training certificates for skills and abilities relevant to her position at the Manhattanville center, as well as her college transcript, demonstrating that she had acquired a number of credits, but not a degree, at Lehman College. Mars Decl., Ex. 10; Silverio Dep. at 67:7–69:24.

Beginning in May 2011, Plaintiff ceased receiving compensation for her work at the Manhattanville center. Silverio Decl. ¶ 3. On July 15, 2011, the Plaintiff and other UBA employees received a letter from the organization's management explaining that their contract with the DFTA had expired and that, as a result, they lacked the funds necessary to meet payroll. *Id.* ¶ 4; Silverio Dep. at 134:14–135:16; Insaidoo Dep. at 103:2-14. The letter explained that employees had the option of either leaving the UBA and applying for unemployment benefits or remaining with the organization without the assurance of getting paid. Mars Decl., Ex. 3. UBA contends that the delay in funding was due in part to DFTA's development of more rigorous standards for awarding public contracts to senior centers. Silverio Dep. at 70:6–72:4, 80:14–82:8; Insaidoo Dep. at 120:18–121:24.

On July 25, 2011, still without having been paid for over a month, Silverio filed a complaint with the New York State Department of Labor ("NYSDOL"). Silverio Decl. ¶ 7. Ms. Silverio believes that her employers learned of her complaint, shortly after it was filed, from her assistant, Delcia Caba, who informed Mr. Insaidoo that Ms. Silverio was in the process of filing a complaint. Silverio Decl. ¶ 7. By mid-August 2011 the UBA had received a renewed contract

with the DFTA and all of their employees, including Silverio, were fully paid their missing back wages. Insaidoo Dep. at 114:25–116:21; Silverio Dep. at 160:25–161:18. Accordingly, Ms. Silverio's NYSDOL complaint was closed. Silverio Dep. at 160:25–161:18

Around the time Ms. Silverio first filed her complaint with the NYSDOL, the UBA issued a memorandum to all its senior employees explaining that, in order to maintain prequalification status with the DFTA, it was reviewing the academic qualifications of all its senior employees. Mars. Decl., Ex. 6. The memorandum further explained that for directors, the position held by Ms. Silverio, the minimum academic qualification was a bachelor's degree. *Id.* While the memorandum is dated July 21, 2011, the Plaintiff alleges that she did not in fact receive it until *after* she had filed her complaint. Silverio Decl. ¶ 9. Regardless of the exact timing, the Plaintiff was aware from discussions and meetings within UBA that the DFTA was becoming increasingly insistent that prequalified agencies only hire employees with the requisite academic qualifications for working at senior centers. Silverio Dep. at 71:18-23, 70:23–71:1.

Ms. Silverio alleges that on September 6, 2011, Mr. Insaidoo and Dr. Essoka called her into a meeting during which they stated that she would be terminated unless she demonstrated that she had obtained a bachelor's degree. Silverio Decl. ¶ 12. In response to this request, Ms. Silverio again submitted a number of certificates demonstrating her participation in training relevant to her position. Mars Decl., Ex. 11. She also submitted an updated transcript from Lehman College, demonstrating that she had earned a handful of additional credits, with above-average grades, in 2001 and 2002 in courses relevant to senior care. *Id.*

On October 28, 2011, Dr. Essoka sent Ms. Silverio a letter thanking her for submitting her academic materials, but explaining that they were incomplete. *Id.* He requested that they meet on November 2, 2011 in order for Ms. Silverio to "clarify" the information she had

provided. *Id.* After the meeting, Dr. Essoka sent another letter to Ms. Silverio explaining that, because she only had 56 college credits and had not completed her degree, she was unqualified for her current position or "any other higher position in UBA." Mars Decl., Ex. 12. The letter further stated that Ms. Silverio would be allowed to maintain her position if she went back to school for the spring 2012 semester and demonstrated a commitment to finishing her degree. *Id.* Short of this, Dr. Essoka explained, her employment would be terminated. *Id.* Ms. Silverio looked into returning to Lehman College, but ultimately did not reenroll. Silverio Dep. 77:23-78:16.

Approximately nine months later, on July 2, 2012, Ms. Silverio was promoted from Director of the Manhattanville center to Hispanic Programs Specialist for all four centers run by UBA. Insaidoo Decl. at 141:13–142:1. Her annual salary was increased from $43,000/annum to $46,000/annum. Silverio Dep. at 78:17-25, 117:16-18. This was a new position that was created to cater to the rising number of Hispanic seniors living in or near Harlem. Insaidoo Dep. at 53:11-24. According to the Plaintiff, at the time she accepted the new position, the "Duties and Responsibilities" for the position did not explicitly list any qualifications or academic requirements. Silverio Decl. ¶ 15. Furthermore, she states that at no point during the time she held this position did the Defendants ask her to return to school or obtain a bachelor's degree. *Id.* ¶ 17.[1]

On March 22, 2013, over nine months since receiving her promotion to Hispanic Programs Specialist and nearly eighteen months since filing her NYSDOL complaint, Ms. Silverio was fired by the UBA. The parties do not dispute that she was not discharged for performance related reasons. Insaidoo Dep. 74:7-18. Rather, she was told that she was being

[1] After Plaintiff's eventual dismissal from this position, she was replaced by an individual holding a bachelor's degree. Insaidoo Dep. at 56:24–57:5; Mars Decl., Ex. 22.

terminated because she had failed to obtain a bachelor's degree or enroll back in college and also because the management had learned that she was actively seeking employment elsewhere. Insaidoo Dep. 159:12-20; Mars Decl., Exs. 23-24.

After being terminated by the organization, Ms. Silverio applied for unemployment benefits, which the UBA did not challenge. Mars. Decl., Ex. 26; Silverio Dep. at 176:14-25. When asked on the benefits form whether she was terminated for violating any company rule, Ms. Silverio checked "No." Mars Decl., Ex. 26. According to the Defendants, Ms. Silverio was reimbursed for all her unused vacation days. Insaidoo Dep. 171:3-9; Mars Decl., Ex. 25. Ms. Silverio then filed this action on July 18, 2013. *See* Dkt. No. 1.

II. LEGAL STANDARD

To prevail on a summary judgment motion, the moving party generally must demonstrate that "'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'" *Anyanwu v. City of New York,* No. 10 Civ. 8498, 2013 WL 5193990, at *1 (S.D.N.Y. Sept. 16, 2013) (quoting Fed. R. Civ. P. 56(a); *Nabisco, Inc. v. Warner—Lambert Co.*, 220 F.3d 43, 45 (2d Cir. 2000)). When the burden of proof at trial would fall on the non-moving party, however, the moving party may meet its burden by "point [ing] to a lack of evidence ... on an essential element" of the non-moving party's claim. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009). There is a genuine issue of material fact if a reasonable jury could decide in the non-moving party's favor. *Nabisco,* 220 F.3d at 45. The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford,*

361 F.3d 113, 122 (2d Cir.2004) (internal quotation marks omitted); *accord Anderson v. Liberty Lobby Inc.,* 477 U.S. 242 (1986).

To survive a summary judgment motion, the non-moving party "must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Brown v. Eli Lilly & Co.,* 654 F.3d 347, 358 (2d Cir. 2011) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)). In doing so, the non-moving party "'must do more than simply show that there is some metaphysical doubt as to the material facts' and 'may not rely on conclusory allegations or unsubstantiated speculation.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *FDIC v. Great Am. Ins. Co.,* 607 F.3d 288, 292 (2d Cir. 2010)).

While the Second Circuit has explained that "an extra measure of caution is merited" in fact-intensive employment disputes, which oftentimes suffer from a paucity of direct evidence regarding retaliatory intent, it has nonetheless consistently reaffirmed that "summary judgment may be appropriate even in the fact-intensive context" of discrimination and retaliation cases. *See Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001) (citations removed) (affirming summary judgment for defendant on discrimination and retaliation claims).

III. DISCUSSION

a. Legal Principles

Demonstrating a *prima facie* case of retaliation under the FLSA requires a Plaintiff to show (1) participation in protected activity known to the Defendant; (2) an employment action disadvantaging the Plaintiff; and (3) a causal connection between the protected activity and the adverse employment action. *See Mullins v. City of New York*, 626 F.3d 47, 53 (2d Cir. 2010); *accord McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). An employment action disadvantages an employee if "it well might have 'dissuaded a reasonable worker from making

or supporting [similar] charge[s]....'" *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006) (citations omitted). A causal connection between an adverse action and a plaintiff's protected activity may be established either "(1) indirectly, by showing that the protective activity was followed closely by discriminatory intent . . . or (2) directly, through evidence of retaliatory animus directed against the Plaintiff by the defendant." *Gordon v. New York City Bd. Of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000). While such a temporal connection is useful in demonstrating causality, the Second Circuit has "not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship." *Gorman-Bakos v. Cornell Co-op Extension of Schenectady Cnty.*, 252 F.3d 545, 554 (2d Cir. 2001).

Once the plaintiff establishes a prima facie case of FLSA retaliation, the burden shifts to the defendant to articulate a "legitimate, non-discriminatory reason for the employment action." *Weinstock v. Columbia Univ.,* 224 F.3d 33, 42 (2d Cir.2000) (citation omitted). If the defendant meets this burden, the plaintiff must produce "sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the defendant were false, and that more likely than not discrimination was the real reason for the employment action." *Id.*

For purposes of demonstrating a prima facie retaliation claim under the NYLL, the elements are identical to the three pronged test required by the FLSA. *See Salazar v. Bowne Realty Associates, L.L.C.*, 796 F. Supp. 2d 378, 384 (E.D.N.Y. 2011) (comparing *Mullins v. City of New York*, 626 F.3d 47 (2d Cir.2010)) (FLSA) and *Higueros v. New York State Catholic Health Plan, Inc.*, 526 F.Supp.2d 342, 347 (E.D.N.Y.2007) (NYLL)).[2]

[2] Although the Defendants acknowledge that "[f]or all intents and purposes the *prima facie* analysis for retaliation claims under Section 215 [of the NYLL] overlaps with the three pronged standard established for retaliation claims under the FLSA," *see* Defs.' Mem. at 18, they nonetheless argue that the Plaintiff is capable of meeting the first requirement under the NYLL, but not the FLSA, on the theory that Ms. Silverio's complaint to the NYSDOL was

For purposes of the present motion, the Court assumes that Ms. Silverio's filing of a complaint with the NYSDOL for non-payment of wages and her ultimate termination as an employee of UBA in March 2013 fulfill, respectively, the first and second prongs of a *prima facie* retaliation claim under the FLSA and NYLL.[3] However, the Defendants' motion must nonetheless be granted because the Plaintiff has failed to demonstrate a genuine dispute of material fact regarding a causal relationship between her July 2011 complaint and her March 2013 dismissal.

b. Plaintiff Is Unable to Demonstrate Causality Under Either the FLSA or the NYLL

The lengthy period of time at issue here – the eighteen month span between the filing of her complaint with the NYSDOL on July 25, 2011 and her termination from UBA on March 23, 2013 –precludes the Plaintiff from demonstrating causality "indirectly, by showing that the protective activity was followed closely by discriminatory intent." *Gordon*, 232 F.3d at 117. "[W]ithin this Circuit, a lapse of more than two months between the protected activity and the adverse employment action generally suffices to sever any inferred causal relationship." *Dunn v. City Univ. of New York*, 11-cv-8210 (PAE), 2012 WL 5511607, at *5 (S.D.N.Y. Nov. 14, 2012). *See also Murray v. Visiting Nurse Servs. of N.Y.*, 528 F. Supp. 2d 257, 275 (S.D.N.Y. 2007) (collecting cases and concluding that "district courts within the Second Circuit have consistently

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not related to rights regulated by the FLSA including, *inter alia*, minimum and overtime wages. *Id.* The Court need not decide this issue.

[3] The Defendants acknowledge that her administrative complaint satisfies the protected activity prong of New York Labor Law Section 215. *See* Defs.' Mem. at 18. Neither party disputes that Plaintiff's termination constitutes a materially adverse employment action under either the FLSA or NYLL. *See, e.g.*, *Raspardo v. Carlone*, 770 F.3d 97, 126 (2d Cir. 2014) (noting that termination is an adverse employment action).

held that the passage of two to three months between the protected activity and the adverse employment action does not allow for an inference of causation.").

In an attempt to downplay the long temporal gap between the filing of the NYSDOL complaint and her termination, the Plaintiff rails off a stream of cases purporting to show that courts routinely infer causal connections between actions taken eighteen months after the employee engaged in protected activity. Plaintiff's argument is undermined by the fact that all of the cases listed, except two, describe a time gap of six to eleven months between the protected activity and the adverse action, a miss as good as a mile compared to the eighteen months at issue here. *See* Pl.'s Opp. at 10-12.

The one case cited by Plaintiffs that would be inclusive of an eighteen month gap, *Batyreva v. New York City Dep't of Educ.*, 07-cv 4544 (PAC) (DF), 2008 WL 4344583, at *14 (S.D.N.Y. Sept. 18, 2008), is easily distinguished.[4] In that case, a Russian-born public high school teacher in the Bronx filed a complaint with the State Division of Human Rights ("SDHR") alleging that she was discriminated against on account of her Russian origins. *Id.* at *3. She alleged that she began suffering adverse consequences nearly immediately after being employed, including through receipt of negative evaluations and unreasonable course schedules. However, the plaintiff was collaterally estopped from pursuing these alleged instances of discrimination and retaliation in her federal case because she had already raised them in an Article 78 hearing in the Supreme Court of the State of New York, New York County. *Id.* at *5.

[4] The other case cited by Plaintiff relating to a time gap greater than eleven months is *McKenzie v. Nicholson*, 08-cv-0773 (JFB) (AKT), 2009 WL 179253 (E.D.N.Y. Jan. 26, 2009). That decision, which discussed a thirteen month gap in time, held that "an adverse action could be retaliatory in nature despite a significant time lapse if the *employer took action at the first opportunity to do so.*" *Id.* at *5 n.5. But plainly March 2013 was not the first opportunity the Defendants had to fire Ms. Silverio. Even if, *arguendo*, their inquiries regarding her academic qualifications were pretextual, the Defendants laid the groundwork for firing Ms. Silverio as early as September 2011 when Dr. Essoka first stated that Ms. Silverio's failure to obtain a bachelor's degree threatened her employment. *See* Silverio Dep. 72:15–74:25.

The Court permitted her, however, to pursue claims relating to instances of retaliation and discrimination that occurred *after* she filed her Article 78 claim, approximately two years after she first filed a complaint with the SDHR. The court reasoned that:

> "[A]lthough more than two years passed between Plaintiff's complaint to the SDHR and the alleged discrimination during fall 2006, Plaintiff has plausibly alleged that the events are causally connected, to the extent that she is required to plead such a connection at this stage of the case. While standing alone, the "temporal proximity" between the events might be insufficient to permit an inference of causal connection . . . Plaintiff also alleges that the time lapse was due to the complexity of the various procedural requirements that Defendant had to comply with in order to terminate her []. In addition, construing the complaint liberally, as the Court must [for *pro se* litigants]. . . Plaintiff alleges that the protected activity in which she engaged was not limited to a single complaint to the SDHR, but also included other complaints alleging discrimination, such as her appeal to the DOE Chancellor's Office and Article 78 petition to the New York State Supreme Court. These complaints were filed within four to six months of the commencement of the alleged retaliation, which is significantly closer in temporal proximity. Accordingly, at the motion-to-dismiss stage, Plaintiff has sufficiently alleged a plausible claim of retaliation for the period after May 31, 2006."

Id. at *14-15 (internal citations omitted).

The instant case differs in every single regard from the situation in *Batyreva*. First, the court in *Bayreva* allowed the Plaintiff to proceed in spite of the two-year gap because she adduced a plausible reason for the passage of so much time, namely the bureaucratic quagmire necessary to pursue termination. Plaintiff here has provided no such explanation. Second, the litigant in *Batyreva* proceeded *pro se*, which required the court to construe her pleadings liberally. Third, the plaintiff pointed to numerous "complaints" that were more temporally proximate to her alleged discriminatory and retaliatory harms. Fourth, the plaintiff was only required to a state a claim sufficient to survive a motion to dismiss. While these considerations may in some instances extend the span of time over which a temporal connection may be inferred, not a single one of them is present here.

Plaintiff's next tack is to contend that "where, as here, a long-time employee suffers an adverse employment action after making a protected complaint, causation can also be presumed." Pl.'s Reply 11. This is unsupported. Rather, the Plaintiff's argument confuses the fact that long-time employees are sometimes involved in employment disputes with the groundless legal conclusion that long-time employees are entitled to the presumption that their dismissal is the result of discriminatory or retaliatory animus. Plaintiff cites two cases for this principle, neither of which support her argument. In *Do Yea Kim v. 167 Nail Plaza*, 05-cv-8560 (GBD), 2008 WL 2676598 (S.D.N.Y. July 7, 2008) the court upheld a jury verdict for a sixteen year employee of a nail salon who "testified that defendants fired her after she asserted her right to meal breaks under New York State law." *Id.* at *2. Nothing in that opinion suggested the length of employment was relevant to establishing retaliatory intent. Rather, such details served as relevant background information in determining whether the jury's damages award was appropriate.

Plaintiff's other case is only marginally more useful. In that case, a longtime employee lost his position of Safety Coordinator, a job he had held for thirteen years, and was demoted, subjecting him to supervision by a junior employee. *See DeAngelo v. Entenmann's, Inc.*, 06-cv-1712 (BMC) (ARL) 2007 WL 4378159, at *3 (E.D.N.Y. Dec. 12, 2007). The Court concluded a reasonable jury could find that this demotion was the result of retaliatory animus due to the fact that the Plaintiff had worked that particular shift "for many years." *Id.* at *4. Read most generously to Silverio, the case stands for the proposition that an employee's length of employment may provide additional context to a change in employment status. But while Ms. Silverio also held her position as Director at the Manhattanville center "for many years," her change in position was not a demotion subjecting her to greater levels of supervision, but was in

fact a promotion complete with greater job responsibilities and a bigger paycheck. Moreover, she voiced no objection to the new role. Silverio Dep. 118:17-18. Regardless, nothing in *DeAngelo* suggests that longtime employees are entitled to "presumptions" not afforded other employees. *See also Padob v. Entex Info. Serv.*, 960 F. Supp. 806, 814 (S.D.N.Y. 1997) ("The length of Plaintiff's employment provides no evidence that her discharge was in retaliation for filing a charge of discrimination.").

While the Plaintiff is not entitled to any inference or presumption of causality, the long gap of time between her NYSDOL complaint and her termination is not dispositive of the case. This Circuit has acknowledged that the length of time between the retaliatory action and the protected activity cannot be treated as talismanic, *see Gorman-Bakos*, 252 F.3d at 554, and that a Plaintiff may prove causality "directly, through evidence of retaliatory animus directed against the Plaintiff by the defendant." *Gordon*, 232 F.3d at 117. Here, however, the Plaintiff has failed to provide such evidence.

The only facts put forward by the Plaintiff as direct evidence of retaliatory animus are statements allegedly made by Defendants Insaidoo and Essoka during the September 6, 2011 meeting with Plaintiff to discuss her credentials and the March 23, 2013 meeting at which Plaintiff was terminated. The sum total of Plaintiff's deposition testimony on this issue is that "They [Insaidoo and Essoka] were very angry when I went to the Labor Department," Silverio Dep. at 91:21-22 and also that at one of the meetings in the autumn 2011 she "was asked why [she went] to the Unemployment [NYSDOL] when nobody else went." *Id.* at 85:7-9. Additionally, in a declaration attached to her opposition to the motion for summary judgment, the Plaintiff asserts that at each meeting the Defendants angrily questioned her loyalty to the agency and made reference to her NYSDOL complaint. Silverio Decl. ¶¶ 13, 19.

Examining these facts through a lens most favorable to the non-moving party, it is nonetheless clear that no reasonable jury could conclude on these facts alone that the Plaintiff was terminated as a result of her NYSDOL complaint. First, very little weight can be attached to the earlier remarks, given how far removed they were from the Plaintiff's ultimate termination. *See, e.g.*, *Johnson v. Strive E. Harlem Employment Grp.*, 990 F. Supp. 2d 435, 449 (S.D.N.Y. 2014) (noting that negative remarks from a supervisor are more probative of retaliatory intent when made close in time to adverse action); *Marro v. Nicholson*, 06-cv-6644 (JFB) (ARL), 2008 WL 699506, at *9 (E.D.N.Y. Mar. 12, 2008) (noting that negative remarks made years before adverse action "cannot constitute direct evidence of retaliatory animus").

The remarks allegedly made by Mr. Insaidoo and Dr. Essoka at the March 23, 2013 meeting deserve greater regard both because they were made contemporaneously with Ms. Silverio's termination and came from supervising employees.[5] *See Messer v. Bd. of Educ. of City of New York*, 01-cv-6129 (JFB) (CLP), 2007 WL 136027, at *14 (E.D.N.Y. Jan. 16, 2007) ("Verbal comments may constitute direct evidence of discrimination when made by a decision-maker in the adverse employment action, and where there is a close nexus between the comments and the action.") (citing *Rose v. N.Y. City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001)). But these alleged remarks alone are insufficient. First, they appear to have generally related to her loyalty to the agency, referring to her frequent and vocal desire to leave UBA. Specifically, Ms. Silverio had threatened to leave UBA two weeks before her termination; and it

[5] The Defendants ask the Court not to consider any of the remarks described in Ms. Silverio's declaration because they are self-serving and contradictory to her deposition testimony. Although a party may not manufacture material facts through the submission of an affidavit or declaration on summary judgment that is contradicted by other evidence, *see, e .g.*, *Scott v. Harris*, 550 U.S. 372 (2007); *Bickerstaff v. Vassar College*, 196 F.3d 435, 455 (2d Cir.1999), nothing in Ms. Silverio's deposition contradicts her declaration. Although it is conspicuous that Ms. Silverio did not directly raise these remarks in her deposition testimony, their absence does not necessarily render the declaration contradictory. *See United States v. Any And All Funds on Deposit In Account No. 12671905, Held In The Name of Landlocked Shipping Co. At Wells Fargo Brokerage Servs., LLC, All Interest And other Proceeds Traceable Thereto*, 09-cv-3481 (HB), 2010 WL 3185688, at *6 n.6 (S.D.N.Y. Aug. 10, 2010).

is this announcement, more than anything, that appears to have dictated the timing of when she was fired.

Second, and more importantly, the Plaintiff's proffered evidence on this point pales compared to the lengthy period of time during which Defendants could have, but elected not to, fire the Plaintiff. Courts are willing to overlook such gaps, but only where the Plaintiff has offered some sort of an explanation for the delay. For instance, in *Madera v. Metro. Life Ins. Co.*, the court was willing to overlook "a significant time gap between the protected activity and the adverse action" but only where the "pattern of plaintiff's treatment leading up" to the adverse action served to bridge the time gap in question. 99-cv-4005 (MBM), 2002 WL 1453827, at *7 (S.D.N.Y. July 3, 2002). In that case, the bridge took the form of a supervisor continuously making negative remarks over the course of the time gap and explicitly threatening the plaintiff for engaging in protected activity. *Id.* Comparatively, here, the Plaintiff provides no facts to provide context to the unexplained delay in the Defendants' putative plan to retaliate against her. The only established facts from this period of time are that Ms. Silverio considered going back to Lehman College, but did not, Silverio Dep. 77:23-78:16, and that she was promoted and given a raise. Silverio Dep. at 78:17-25, 117:16-18. When the new position proved challenging and Ms. Silverio had difficulty traveling to all four senior centers per day, the Defendants accommodated her by requiring her to only visit two per day and providing her with a travel stipend. Insaidoo Dep. 53:25–56:23. These facts do not conclusively prove anything, but they stand in stark contrast to the paucity of information put forward by the Plaintiff.

Similarly, courts within this Circuit have been willing to look past a significant passage of time when the defendant took advantage of the first available opportunity to retaliate. *See, e.g.*, *McKenzie*, 2009 WL 179253, at *5 n.5 (thirteen month period between protected activity

and adverse action was sufficient to suggest causation where "the employer took action at the first opportunity to do so.") (citing *Grant v. Bethlehem Steel Corp.*, 622 F.3d 43, 45–46 (2d Cir.1980)). However, in this case, the grounds for firing the Plaintiff were laid as early as September 2011, when Dr. Essoka first stated that Ms. Silverio's failure to obtain a bachelor's degree threatened her employment. *See* Silverio Dep. 72:15–74:25. *Compare Quinby v. WestLB AG*, 04-cv-7406 (WHP), 2007 WL 1153994, at *13–14 (issue of material fact on causation element of retaliation claim despite eight month temporal gap where employer might have waited until first opportunity presented itself to retaliate) *with Kilpatrick v. King*, 499 F.3d 759, 768 (8th Cir. 2007) ("Under [Plaintiff's] theory, the defendants instead . . . waited eight uneventful months, then finally exercised the opportunity to retaliate that had been fully available to them for a year-and-a-half. This theory is unreasonable, particularly in light of the fact that [Plaintiff] presented no evidence that his case was singled out for special treatment . . .").

Plaintiff's inability to explain why the Defendants waited so long to terminate her severely undermines her already scant evidence of retaliatory animus. Accordingly, she is unable to demonstrate a causal connection between her termination and her NYSDOL complaint, either through an inferred temporal connection or the presentation of direct evidence. She has therefore failed to make out a *prima facie* case of retaliation.

c. Plaintiff Cannot Rebut the Defendants' Non-Pretextual Reasons for her Dismissal

Even if, *arguendo*, Plaintiff had presented a *prima facie* case of retaliation, the Defendants' motion for summary judgment would still have to be granted because they have presented "legitimate, non-discriminatory reason[s] for the employment action." *Weinstock,* 224 F.3d at 42. Specifically, the termination memo given to Ms. Silverio explained that she was

being terminated because "1. Your continuous unhappiness and unstable intentions are unsettling and distractive to the agency. Working with seniors requires committed loyal and stable employees. 2. You have failed to meet the minimum educational requirements requested from you since you were hired. Our continuous encouragement and support for you to fulfill these needed qualifications have gone unheard." Mars Decl., Ex. 23. The memo also explained that the timing of the termination was triggered by her most recent announcement that she was looking to leave UBA and obtain other employment, one of numerous instances in which the Plaintiff threatened to leave UBA. *Id.* Plaintiff has raised no genuine dispute that these reasons were false and that, more likely than not, retaliation was the real reason for her dismissal. *See Weinstock*, 224 F.3d at 42 ("[P]laintiff must produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proferred by the defendant were false, and that more likely than not [retaliation] was the real reason for the employment action.") (internal quotations removed). *See also Jowers v. Family Dollar Stores, Inc.*, 455 F. App'x 100, 102 (2d Cir. 2012) (same).

Ms. Silverio does not dispute the first proffered reason: that she was vocally dissatisfied with her job and often threatened to leave. In fact, her deposition testimony is confirmatory of this. Silverio Dep. 168:24-169:2 (expressing dissatisfaction and intention to leave in 2013), 171:14-25 (stating that she was unhappy in 2003, interviewed for another job, and would have left if she had received it), 172:3-7 (noting that she was often unhappy throughout her 19 years at UBA and was often looking to leave). Indeed, Ms. Silverio goes on to explain that, after she informed Mr. Insaidoo in March 2013 that she wanted to leave UBA and was exploring other job opportunities, two weeks passed before she was terminated. *Id.* at 175:23–176:5. During this

time, neither of the individual Defendants made any negative or retaliatory remarks about her desire to leave. *Id.*

Similarly, Plaintiff offers no evidence to discredit the Defendants' second proffered reason and, again, her testimony in many instances reinforces the legitimacy of this ground for dismissal. First, on July 21, 2011, the Defendants circulated a memo to all senior UBA staff explaining that that DFTA was increasingly structuring New York senior centers to be "Innovative" and "Neighborhood" style centers. Mars Decl., Ex. 9. The memorandum explained that UBA, which at that time was without funds due to the failure to renew a contract with the DFTA, was prequalified to apply to service these kinds of senior centers. *Id.* In order to maintain this prequalification, and thus the ability to bid on the variety of centers to which DFTA was increasingly directing funding, UBA wanted to ensure that all of its employees had the requisite academic qualifications required by the DFTA. *Id.* For its directors, this meant a bachelor's degree. *Id.* Mr. Insaidoo testified that he presented the bachelor's degree of the other three Directors to the DFTA as part of the prequalification process. Insaidoo Dep. at 153:20–154:25.

In her testimony, Ms. Silverio acknowledged that the DFTA was increasingly converting its centers into Innovative or Neighborhood style centers. Silverio Dep. at 71:4-12. She also stated that this change began "many years ago," *id.* at 71:18-23, and that it was "mentioned in different meetings . . . that the agency was applying for Innovative Neighborhood Senior Centers." *Id.* at 70:23–71:1. She acknowledged that UBA only became prequalified to bid on these centers in 2011, which is confirmatory of Mr. Insaidoo's testimony that UBA only became qualified in June 2011. *Id.* at 71:24–72:4; Insaidoo Dep. at 121:8-15.

Critically, Ms. Silverio also acknowledged that qualification for bidding on these centers required directors to have a bachelor's degree, Silverio Dep. at 71:13-14, and also that "some agencies didn't qualify, or were not approved by DFTA for it." *Id.* at 71:21-23. Finally, when asked if she'd seen a memorandum similar to the July 21, 2011 one before, she responded, "I think so," due to the fact that the issue had been raised at multiple meetings. *Id.* at 70:23-24. In other words, before she filed her NYSDOL complaint on July 25, 2011, the Plaintiff was aware that UBA's sole source of funding, the DFTA, was increasingly allocating its funds to programs that required agency employees to have bachelor's degrees, and, moreover, she knew that some agencies had failed to qualify for the "Neighborhood" and "Innovation" center funds. Although she failed to mention it during her deposition, the Plaintiff contends in a declaration attached to her opposition brief that she did not receive the July 21, 2011 memorandum until after she'd made her complaint on July 25, 2011. Silverio Decl. ¶ 9. Whether or not this is true, her deposition testimony makes clear that she was aware of DFTA's funding allocation decisions, its impact on UBA, and the importance of all employees having the requisite qualifications in order to ensure access to funding. Indeed, her deposition testimony demonstrates that she was long aware that DFTA's own regulations required senior staff to have a bachelor's degree. Silverio Dep. at 192:21–193:3.

Subsequent to the July 21, 2011 memorandum, Plaintiff was informed on September 6, 2011 that she would be terminated unless she presented adequate credentials. Silverio Decl. ¶ 12. On September 16, 2011, Dr. Essoka sent Ms. Silverio a letter explaining that DFTA was asking for the resumes of all key staff members and that if she did not immediately present adequate credentials, she would be terminated or asked to resign. Mars Decl. Ex. 7. At some point between then and October 28, 2011, Ms. Silverio presented her credentials, including her

college transcript and training certificates, to Dr. Essoka and Mr. Insaidoo. Silverio Dep. at 82:18-25. Ms. Silverio subsequently met with Dr. Essoka and Mr. Insaidoo on November 2, 2011. Mars Decl., Ex. 12; Silverio Dep. A memorandum summarizing that meeting explained that because she did not possess a bachelor's degree, she was unqualified for her current position "and any other higher position in UBA." Mars Decl., Ex. 12. However, it also explained that if Ms. Silverio returned to school and submitted her grades to the agency at the end of the spring 2012 semester, she would be allowed to continue working at UBA. *Id.* Otherwise she would be terminated. *Id.*

Ms. Silverio argues that her ultimate termination on these grounds was pre-textual because, upon being promoted to Hispanic Program Specialist on July 1, 2012, no one informed her that her new job required a bachelor's degree. But this argument fails to raise a genuine dispute of material fact for several reasons. First, Dr. Essoka's November 2, 2011 memorandum explicitly stated that she was not academically qualified for her current position or "any other higher position in UBA." Second, Ms. Silverio knew that DFTA funding requirements mandated that senior level employees possess bachelor's degrees. Third, Plaintiff has raised no facts to suggest she was unfairly singled out in this regard. The July 21, 2011 request was made to all employees, all of whom presented adequate credentials. Mars Decl., Ex. 24; Insaidoo Decl. 153:20–154:25, 164:23-168:8.

Finally, although the timeframe is not entirely clear, in the wake of the November 2011 meeting, Ms. Silverio took several concrete steps that indicated to UBA a willingness on her part to return to school. Ms. Silverio acknowledges that, following the meeting with Mr. Insaidoo and Dr. Essoka, she wrote a letter to the Lehman College board of directors seeking readmission, *see* Silverio Dep. 76:19-15, and met repeatedly with a counselor from Lehman College to discuss

her options. *See id.* 73:23–78:12. Mr. Insaidoo testified that, at the time UBA gave Ms. Silverio the promotion to Hispanic Program Specialist, he was aware of the fact that Ms. Silverio had unsuccessfully tried to return to school for the Spring 2012 semester. *See* Insaidoo Dep. 155:22–156:3. When asked why she was not terminated in light of the November 2011 warning, Mr. Insaidoo responded that they were willing to give her more time and, further, that they had hoped the promotion to Hispanic Program Specialist would encourage her to complete her degree. *See* Insaidoo Dep. 155:22–156:3. This is entirely consistent with the theory that her ultimate termination was non-prextual, as Defendants elected to forego firing her at this juncture in the continued hope that she would carry through on her promise to finish her degree.

In sum, Ms. Silverio has not raised a genuine dispute that the reasons put forward by the Defendants are pretextual.

d. Plaintiff's Claims of Failure to Make Timely Payment of Wages

Plaintiff's complaint also raises claims for failure to make timely payment of wages under the FLSA and NYLL, relating to the period of time during which UBA failed to pay her for her work as a Director at the Manhattanville center. These claims are dismissed for failing to state a claim.[6] There is no dispute that Plaintiff was paid the entirety of her back wages once UBA had reestablished DFTA funding. Insaidoo Dep. at 114:25–116:19; Silverio Dep. at 159:24–160:14. After receiving these owed wages, Ms. Silverio voluntarily withdrew her complaint from the NYSDOL. *Id.* Accordingly, the Plaintiff cannot state a claim for failure to pay wages.

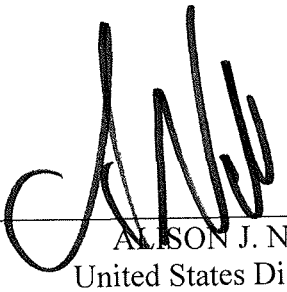
IV. CONCLUSION

[6] It is worth noting that in her opposition the Plaintiff makes no attempt to defend these claims against the Defendants' motion. *See generally* Pl.'s Opp.

For the aforementioned reasons, the Defendants' motion for summary judgment is GRANTED. This resolves Dkt. No. 20.

SO ORDERED.

Dated: January 14, 2015
New York, New York



ALISON J. NATHAN
United States District Judge

The Clerk of Court is directed to close this case. Any pending motions are moot.