

22-792-cv

Carr v. New York City Transit Authority

**United States Court of Appeals
for the Second Circuit**

August Term 2022

No. 22-792-cv

JENNIFER BERKELEY CARR,
Plaintiff-Appellant,

v.

NEW YORK CITY TRANSIT AUTHORITY,
MARVA BROWN, AND DAVID CHAN,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

ARGUED: MAY 18, 2023
DECIDED: AUGUST 7, 2023

Before: POOLER, PARKER, AND NATHAN, *Circuit Judges*.

Plaintiff-Appellant Jennifer Berkeley Carr appeals from a judgment of the United States District Court for the Southern District of New York (Broderick, J.) dismissing her claims of age, race, and gender discrimination and retaliation under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

On appeal Carr asserts that the district court applied an incorrect legal standard to her retaliation claim and that it erroneously concluded that she had failed to demonstrate that Defendants-Appellees' race neutral explanations for not selecting her for two internal promotions were pretextual. First, we hold that Carr has not demonstrated that Defendants-Appellees' explanations for her non-promotions were pretextual. Second, we hold that although the district court applied an incorrect standard to her retaliatory hostile work environment claim, Carr has nevertheless failed to make out a *prima facie* case of retaliation and did not demonstrate that her employer's non-retaliatory explanations were pretextual. We therefore **AFFIRM** the judgment of the district court.

GREGORY G. SMITH, (Janet J. Lennon, *on the brief*), Law Office of Gregory Smith, Brooklyn, NY, *for Plaintiff-Appellant*.

MARIEL A. THOMPSON, Executive Agency Counsel New York City Transit Authority, New York, NY, *for Defendants-Appellees*.

1 PARKER, *Circuit Judge*:

2 Jennifer Berkeley Carr appeals from a judgment of the United
3 States District Court for the Southern District of New York (Broderick,
4 J.). The district court granted the motion of the New York City Transit
5 Authority, Marva Brown, and David Chan (collectively, “NYCTA”) for
6 summary judgment and dismissed Carr’s claims of age, race, and
7 gender discrimination and retaliation under the Age Discrimination
8 in Employment Act (“ADEA”), 29 U.S.C. § 621 *et seq.*, Title VII of the
9 Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights
10 Act of 1866, 42 U.S.C. § 1981.

11 On appeal, Carr contends that the district court applied an
12 incorrect legal standard to her retaliation claim and that it erroneously
13 concluded that she had failed to demonstrate that the NYCTA’s race
14 neutral explanations for its failure to promote her were pretextual.
15 First, we hold that Carr has not demonstrated that the NYCTA’s
16 explanations for her two non-promotions were pretextual. Next, we
17 conclude that although the district court applied an incorrect
18 standard to her retaliatory hostile work environment claim, Carr has
19 nevertheless failed to make out a *prima facie* case of retaliation or
20 demonstrate that the NYCTA’s explanations for its actions were
21 pretextual. We therefore **AFFIRM** the judgment of the district court.

22 23 BACKGROUND

24 Carr, an “African-American female of Caribbean descent” born
25 in 1955, worked for the New York City Transit Authority (the “Transit
26 Authority”) from 2000 to 2022. Joint App’x at 1103 ¶ 4. Carr holds a
27 bachelor’s degree in economics and a master’s degree in public
28 administration. During the relevant period, Carr worked as a director
29 in the Transit Authority’s Capital Programs Department with the title
30 Director of Telecommunications and Systems, Capital Programs.

1 Capital Programs was led by Appellee Marva Brown, also an
2 “African-American female of Caribbean descent.” Joint App’x at 1104
3 ¶ 5. In 2013 and 2014, Carr applied for two senior director positions
4 in the department, but after an application process Brown ultimately
5 selected a younger non-Black man to fill each role. The application
6 process for both positions included an interview with a panel of three
7 Transit Authority employees. The first promotion that Carr applied
8 for was to the position of Senior Director, Program Management and
9 Oversight. That promotion went to Joseph DiLorenzo, a white man in
10 his early 50s who had worked at the Transit Authority since 1989 and
11 had a technical background in architecture. The second promotion
12 that she applied for was to the position of Senior Director, Program
13 Management & Analysis. That promotion was given to David Chan.
14 Chan, a 55-year-old Asian man, had worked at the Transit Authority
15 since 1987 and had a background in electrical engineering and
16 business administration.

17 Carr does not allege that either man promoted was unqualified.
18 It is uncontested that both men had worked at the Transit Authority
19 longer than Carr and had technical backgrounds that Carr lacked.
20 What is more, one of the interviewers for the second promotion
21 testified that Chan interviewed particularly well, and that Carr was
22 openly hostile toward Brown in her interview. After receiving the
23 promotion, Chan became Carr’s supervisor.

24 In September 2014, after failing to receive the two promotions
25 she had sought, Carr filed a complaint with the Transit Authority’s
26 Equal Employment Opportunity Office. In May 2015, she filed a
27 Charge of Discrimination with the United States Equal Employment
28 Opportunity Commission. After receiving a right-to-sue letter, Carr
29 initiated this lawsuit in December 2016. In her amended complaint,
30 she alleged that the NYCTA discriminated against her on the basis of

1 her age, gender, and race by denying her the promotions and that it
 2 discriminated against her by creating a hostile work environment
 3 based on her age.¹ 29 U.S.C. § 621 *et seq.*; 42 U.S.C. § 2000e-2; 42 U.S.C.
 4 § 1981. Carr also alleged that the NYCTA violated the ADEA, Title
 5 VII, and Section 1981 by creating a hostile work environment in
 6 retaliation for her complaints of discrimination. 29 U.S.C. § 626 *et seq.*;
 7 42 U.S.C. § 2000e-3; 42 U.S.C. § 1981.

8 Carr alleges that after she began to report discrimination in
 9 September 2014, her relationships with her supervisors and her
 10 performance evaluations deteriorated, which she attributes to
 11 retaliation. Among other things, Carr asserts that Chan was
 12 disrespectful and hostile to her in emails; that Chan assigned her
 13 increased job responsibilities including responsibility for Elevator
 14 and Escalator Communications, compiling a new Employee Training
 15 Manual, and completing various other reports; that Chan threatened
 16 to cancel her vacation time if she did not complete her projects; and
 17 that analysts who worked under her were removed.

18 Despite these conflicts, Carr received “Good” performance
 19 reviews in 2014 and 2015, a decline from her previous “Excellent”
 20 ratings, but a rating that did not affect her compensation or position.
 21 In both her 2016 and 2017 annual reviews, however, Carr received a
 22 “Needs Improvement” rating that prevented her from receiving a
 23 wage increase. Carr retired in 2022. She contends that her
 24 mistreatment, including the increased workload and the negative
 25 evaluations, was in retaliation to her complaints of discrimination. In

¹ Carr does not challenge the dismissal of her standalone claim for a hostile work environment under the ADEA. We therefore do not address that claim. *See Jackson v. Fed. Express*, 766 F.3d 189, 194–95 (2d Cir. 2014). To the extent Carr also intended to challenge the denial of her motion for Judge Vernon S. Broderick’s recusal, she waived this issue by failing to brief it. *Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009).

1 contrast, Chan contended in summary judgment proceedings that
2 Carr was treated like any other employee and that the negative
3 evaluations were appropriate because of problems with the
4 completeness and timeliness of her work.

5 The NYCTA moved for summary judgment and the district
6 court granted it. The district court first held that although Carr had
7 made out a prima facie case of a discriminatory non-promotion, she
8 had failed to demonstrate that the reasons the NYCTA provided for
9 promoting DiLorenzo and Chan were pretextual. *Carr v. N.Y.C.*
10 *Transit Auth.*, No. 16-cv-9957 (VSB), 2022 WL 824367, at *9–12
11 (S.D.N.Y. Mar. 18, 2022). The district court noted that Carr had failed
12 to identify any inconsistencies in the hiring criteria and concluded
13 that she had relied on “speculation alone” to support her
14 discrimination claim. *Id.* at *12 (quotation marks omitted).

15 The district court then analyzed Carr’s retaliation claims and
16 found that she had not made out a prima facie case because she failed
17 to provide admissible evidence tending to show the alleged
18 retaliatory actions, such as the “Needs Improvement” performance
19 reviews, were caused by her complaints of discrimination or that the
20 retaliation against her was “sufficiently severe or pervasive to alter
21 the conditions of [her] employment” and therefore she could not
22 make out a prima facie case for a retaliatory hostile work
23 environment. *Id.* at *14–15 (quotation marks omitted).

24 Finally, the district court concluded that, even assuming that
25 Carr had made out a prima facie case, she had failed to demonstrate
26 that the NYCTA’s legitimate, non-discriminatory reasons for the
27 alleged retaliatory actions were pretextual. *Id.* at *15. The district court
28 concluded that “[t]here is ample record evidence to support
29 Defendants’ stated belief that Plaintiff was not doing her job
30 adequately and was unpleasant and difficult to work with, thus

warranting the negative performance reviews” and that Carr had put forward no evidence of pretext. *Id.* Accordingly, the district court granted the NYCTA’s motion for summary judgment. Carr then appealed to this Court.

DISCUSSION

We review the district court’s grant of summary judgment de novo. *See Rasmy v. Marriott Int’l, Inc.*, 952 F.3d 379, 386 (2d Cir. 2020). “In evaluating such motions, the district court must resolve any doubts and ambiguities and draw all reasonable inferences in favor of the nonmoving party.” *Id.* “Summary judgment is required if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Covington Specialty Ins. Co. v. Indian Lookout Country Club, Inc.*, 62 F.4th 748, 752 (2d Cir. 2023) (internal quotation marks omitted).

I. Discrimination Claims

Carr asserts that age, race, and gender discrimination motivated the decision not to select her for senior director positions. Discrimination claims under Title VII, the ADEA, and Section 1981 are analyzed under the *McDonnell Douglas* burden-shifting framework. *See Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 129 (2d Cir. 2012); *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2012). Under this familiar framework, “once a plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employer’s action against the employee. If the employer does so, then the burden shifts back to the employee to show that the employer’s articulated reason is pretext for discrimination.” *Truitt v. Salisbury Bank & Tr. Co.*, 52 F.4th 80, 86–87 (2d Cir. 2022) (cleaned up).

1 The plaintiff bears “the ultimate burden of persuading the court that
2 she has been the victim of intentional discrimination.” *Tex. Dep’t of*
3 *Cnty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981).

4 The district court concluded, and the parties do not dispute,
5 that Carr established a prima facie case of discrimination on the basis
6 of race, sex, and age and that the defendants proffered a non-
7 discriminatory reason for not promoting her – that the two younger
8 men who Brown hired instead of Carr had worked at the Transit
9 Authority longer, had technical backgrounds she lacked, and
10 interviewed better. *See Carr*, 2022 WL 824367, at *9–10. The dispute is
11 over the third step: pretext.

12 As proof of pretext, Carr points to perceived inconsistencies in
13 the hiring criteria and changes to the hiring process, such as that the
14 original job descriptions did not specify a technical background was
15 required and the panel of interviewers changed between the first and
16 second openings she applied for. The district court concluded that no
17 reasonable juror could find that the reasons the NYCTA provided for
18 selecting the other candidates for promotions were pretextual. The
19 district court observed that there was nothing inconsistent about the
20 NYCTA’s explanations for why DiLorenzo and Chan were promoted
21 over Carr. *Id.* at *12.

22 We agree. The NYCTA adduced evidence that DiLorenzo or
23 Chan were equally, if not more, qualified for the positions than Carr,
24 and there is no allegation that any impermissible promotion criteria
25 were used. *See Burdine*, 450 U.S. at 259 (“[T]he employer has discretion
26 to choose among equally qualified candidates, provided the decision
27 is not based upon unlawful criteria.”). While “entirely ignor[ing]”
28 explicit hiring criteria or an “unprecedented” departure from an
29 employer’s established hiring practice can show pretext, Carr’s
30 allegations regarding minor variations in the hiring process and the

1 emphasis on the other candidates' technical backgrounds are not the
 2 sorts of "departures from procedural regularity" that could allow a
 3 jury to infer pretext. *Stern v. Trs. of Columbia Univ.*, 131 F.3d 305, 310,
 4 314 (2d Cir. 1997) (quotation omitted). Where, as here, "an employer's
 5 explanation, offered in clear and specific terms, is reasonably
 6 attributable to an honest . . . evaluation of qualifications, no inference
 7 of discrimination can be drawn." *Byrnie v. Town of Cromwell, Bd. of*
 8 *Educ.*, 243 F.3d 93, 105 (2d Cir. 2001) (cleaned up). We therefore affirm
 9 the district court's grant of summary judgment on Carr's
 10 discrimination claim.

11

12 **II. Retaliation Claims**

13 Carr also claims that she was retaliated against for complaining
 14 that Brown's promotion decisions were discriminatory. Although
 15 retaliation claims under Title VII are governed by 42 U.S.C. § 2000e-3,
 16 rather than § 2000e-2, which governs discrimination claims, the
 17 *McDonnell Douglas* framework applies to retaliation claims, whether
 18 brought under the ADEA, Title VII, or Section 1981. *See Davis-Garett*
 19 *v. Urb. Outfitters, Inc.*, 921 F.3d 30, 42–43 (2d Cir. 2019); *Hicks v. Baines*,
 20 593 F.3d 159, 164 (2d Cir. 2010). The specific requirements for a prima
 21 facie case of retaliation were set forth in *Burlington Northern & Santa*
 22 *Fe Railway Company v. White*, 548 U.S. 53 (2006) ("*Burlington*
 23 *Northern*"). *See* p. 13 *infra*. As in the discrimination context, a
 24 defendant may rebut a prima facie showing of retaliation by
 25 providing a legitimate, non-retaliatory reason for the allegedly
 26 retaliatory action. *See Chen v. City Univ. of N.Y.*, 805 F.3d 59, 70 (2d Cir.
 27 2015). Then "the presumption of retaliation dissipates, and the
 28 plaintiff must prove that the desire to retaliate was the but-for cause
 29 of the challenged employment action." *Id.* (cleaned up).

1 In *Burlington Northern*, the Supreme Court considered the level
2 of harm required to establish a claim of retaliation. The Court held
3 that no matter the theory of retaliation, to satisfy the third element of
4 the prima facie case a plaintiff need only show that the employer's
5 retaliatory actions, considered either singularly or in the aggregate,
6 were "materially adverse." *Id.* at 68. Given that standard, we hold that
7 no reasonable juror could conclude that Carr has suffered material
8 adverse retaliatory actions.

9 In *Burlington Northern*, a railroad employee, White, claimed
10 that she was retaliated against after successfully raising gender
11 discrimination concerns. *Burlington Northern*, 548 U.S. at 58. The
12 alleged retaliation consisted of, among other things, White's
13 reassignment from forklift duty to "track laborer tasks," which were
14 more arduous. *Id.* The Supreme Court granted certiorari to resolve a
15 circuit split regarding "whether the challenged action has to be
16 employment or workplace related and about how harmful that action
17 must be to constitute retaliation." *Id.* at 60–61.

18 *Burlington Northern* focused on the difference between two
19 sections of Title VII: its antidiscrimination provision, 42 U.S.C. §
20 2000e-2, and its antiretaliation provision, 42 U.S.C. § 2000e-3. Title
21 VII's antidiscrimination provision makes it unlawful for an employer
22 "to fail or refuse to hire or to discharge any individual, or otherwise
23 to discriminate against any individual with respect to his
24 compensation, terms, conditions, or privileges of employment,
25 because of such individual's race, color, religion, sex, or national
26 origin." 42 U.S.C. § 2000e-2(a)(1). The antiretaliation provision bars
27 actions that "discriminate against" an employee "because he has
28 made a charge, testified, assisted, or participated in any manner in an
29 investigation, proceeding, or hearing under this subchapter." 42
30 U.S.C. § 2000e-3(a). The Court noted that Title VII's antiretaliation

1 provision prohibits discrimination more broadly than its substantive
2 antidiscrimination provision, which prohibits only actions affecting
3 certain enumerated aspects of employment, and, consequently, held
4 that the two provisions were not coterminous and should be
5 interpreted differently. *Burlington Northern*, 548 U.S. at 62–63 (citing
6 42 U.S.C. § 2000e-2(a)). The Court went on to hold that “[t]he scope of
7 the antiretaliation provision extends beyond workplace-related or
8 employment-related retaliatory acts and harm.” *Id.* at 67.

9 The Court then defined the level of harm necessary for an
10 alleged retaliatory action to support a prima facie case of retaliation.
11 It held that “a plaintiff must show that a reasonable employee would
12 have found the challenged action materially adverse, which in this
13 context means it well might have dissuaded a reasonable worker from
14 making or supporting a charge of discrimination.” *Id.* at 68 (internal
15 quotation marks omitted). The Court rejected the reasoning of some
16 circuits, which required that a retaliation plaintiff show a “materially
17 adverse change in the terms and conditions of employment,” just like
18 in the substantive discrimination context. *Id.* at 60 (internal quotation
19 marks omitted). However, the Court emphasized that to be
20 “materially adverse,” an action must cause more than “trivial harms”
21 because “[a]n employee’s decision to report discriminatory behavior
22 cannot immunize that employee from those petty slights or minor
23 annoyances that often take place at work and that all employees
24 experience.” *Id.* at 68. Harms such as these were not actionable, it held,
25 because they would not deter reasonable employees from making
26 complaints of discrimination. *Id.* Applying this holding to the
27 retaliation alleged by White, the Court held that her reassignment was
28 a materially adverse action. *Id.* at 70–71.

29 As mentioned above, *Burlington Northern* stands for the
30 proposition that the definition of “adverse action” in the Title VII

1 antiretaliation context is broader than in the antidiscrimination
2 context. Consequently, there are adverse actions that would suffice to
3 make out a prima facie case for retaliation because they are
4 “materially adverse” but would be insufficient to make out a prima
5 facie case for discrimination because they did not alter the terms and
6 conditions of employment. *Burlington Northern* therefore left us with
7 a single standard that applies to all retaliation claims: a plaintiff need
8 only show that the retaliatory actions she was subjected to were
9 materially adverse, meaning that the actions “well might have
10 dissuaded a reasonable worker from making or supporting a charge
11 of discrimination.” *Id.* at 68.

12 Following *Burlington Northern*, this Court noted that “the harm
13 element of a retaliation claim is not to be analyzed in the same way as
14 the harm from an alleged substantive act of discrimination,” *Davis-*
15 *Garett*, 921 F.3d at 43, and that “[p]rior decisions of this Circuit that
16 limit unlawful retaliation to actions that affect the terms and
17 conditions of employment, no longer represent the state of the law,”
18 *Hicks*, 593 F.3d at 165 (internal citations omitted). Recently, the Fourth
19 Circuit correctly applied *Burlington Northern* to a retaliatory hostile
20 work environment claim in *Laurent-Workman v. Wormuth*, 54 F.4th 201
21 (4th Cir. 2022). It held that to make out a prima facie case of a
22 retaliatory hostile work environment, a plaintiff must allege that the
23 retaliatory actions would “dissuade a reasonable worker from
24 making or supporting a charge of discrimination.” *Laurent-Workman*,
25 54 F.4th at 218 (quoting *Burlington Northern*, 548 U.S. at 68). It then
26 concluded that “the consistent (even if not constant) conduct Laurent-
27 Workman alleges plausibly qualifies as materially adverse” and that
28 she “has adequately pled that a reasonable employee may have been
29 dissuaded from following through with her complaints.” *Id.* We find
30 this decision persuasive because it follows the standard set forth in

1 *Burlington Northern* and aligns the standard for retaliatory hostile
2 work environment claims with the broader retaliation standard.

3 Applying *Burlington Northern*'s unified standard, we hold that
4 to satisfy the third element of a prima facie retaliation case, a plaintiff
5 need only show that the allegedly retaliatory actions, taken either
6 singularly or in the aggregate, were "materially adverse." A claim of
7 "retaliatory hostile work environment" must therefore be treated
8 identically to a claim that an employer took multiple retaliatory
9 actions that were, in the aggregate, "materially adverse."

10 Accordingly, we hold that to establish a prima facie case of
11 retaliation, a plaintiff must demonstrate that (1) she engaged in
12 protected activity, (2) the defendant was aware of that activity, (3) she
13 was subjected to a retaliatory action, or a series of retaliatory actions,
14 that were materially adverse, and (4) there was a causal connection
15 between the protected activity and the materially adverse action or
16 actions.² As we have noted, under *Burlington Northern*, a "materially
17 adverse" action is one that "well might have dissuaded a reasonable
18 worker from making or supporting a charge of discrimination." 548
19 U.S. at 68 (quotation marks omitted).

20 On appeal, Carr primarily argues that she was subjected to a
21 retaliatory hostile work environment, and that the district court erred
22 by using the incorrect standard in concluding that the NYCTA's
23 treatment of her, in the aggregate, was not materially adverse. The
24 NYCTA counters that Carr must make the same showing as she
25 would to make out a prima facie case in a discriminatory hostile work
26 environment claim, *i.e.*, that she must show the retaliatory actions
27 were sufficiently severe and pervasive that they altered the terms and

² Although it is not relevant to this case, this definition acknowledges *Burlington Northern*'s holding that one can be retaliated against by actions taken outside of the workplace. 548 U.S. at 67.

1 conditions of her employment. *See Williams v. N.Y. City Hous. Auth.*,
2 61 F.4th 55, 68–69 (2d Cir. 2023) (setting out the standard in a
3 discriminatory hostile work environment case). The district court
4 appeared to accept the NYCTA’s argument and applied the
5 standalone hostile work environment standard to Carr’s claim. *Carr*,
6 2022 WL 824367, at *14. As explained above, we disagree.

7 Although the NYCTA’s test for a retaliatory hostile work
8 environment was not fully consistent with *Burlington Northern*, we
9 nevertheless conclude that Carr failed to make out a prima facie case
10 because the allegedly retaliatory actions were not materially adverse.
11 Carr argues that her diminishing performance ratings, not having
12 analysts reporting directly to her, being assigned additional projects,
13 and Chan’s hostile tone in emails, together constitute unlawful
14 retaliation. However, the alleged retaliatory actions were the result of
15 generally applicable workplace policies and Carr has not adduced
16 evidence that these policies were applied to her and not others. We
17 have held that absent allegations of more direct hostile conduct, a
18 reasonable employee would not be dissuaded from taking protected
19 action simply because they are subject to the same policies as other
20 employees. *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556,
21 568, 570-71 (2d Cir. 2011). We conclude that these complaints, even
22 when taken in the aggregate, would not dissuade a reasonable
23 employee from lodging a complaint and therefore, they were not
24 materially adverse.

1 Our Court,³ and district courts in this Circuit,⁴ have on occasion
 2 failed to apply the *Burlington Northern* standard faithfully. As noted,
 3 when analyzing a retaliation claim, the sole inquiry regarding the

³ *Duplan v. City of New York*, 888 F.3d 612, 627 (2d Cir. 2018) (applying, without analysis, the “severe and pervasive” standard from a discriminatory hostile work environment claim to a retaliatory hostile work environment claim).

⁴ Compare *Stevenson v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, No. 1:21-cv-355 (GWC), 2022 WL 179768, at *6 (W.D.N.Y. Jan. 20, 2022) (“alleging a retaliatory hostile environment is an *alternative* way to establish that element of a retaliation claim. . . . Here, Plaintiffs have alleged multiple acts . . . that, when considered together, plausibly indicate a retaliatory hostile environment that constitutes adverse employment action.”) (internal quotation marks omitted), with *Bacchus v. N.Y. City Dep’t of Educ.*, 137 F. Supp. 3d 214, 244 (E.D.N.Y. 2015) (“To establish a claim for retaliatory hostile work environment, a plaintiff must satisfy the same standard that is applied generally to hostile work environment claims regarding the severity of the alleged conduct.”) (quotation marks omitted), *Villar v. City of New York*, 135 F. Supp. 3d 105, 137 (S.D.N.Y. 2015) (“To establish that a retaliatory hostile work environment constitutes a materially adverse change that might dissuade a reasonable worker from reporting activity prohibited by Title VII, a plaintiff must satisfy the same standard that governs hostile workplace claims by showing that the incidents of harassment following complaints were sufficiently continuous and concerted to have altered the conditions of his employment.”), *Senior v. Conn. Workers’ Comp. Comm’n, Third Dist.*, No. 3:17-cv-1205 (JBA), 2018 WL 4288643, at *4 (D. Conn. Sept. 7, 2018) (“To establish that a retaliatory hostile work environment constitutes a materially adverse change that might dissuade a reasonable worker from reporting activity prohibited by Title VII, a plaintiff must satisfy the same standard that governs hostile workplace claims”), and *Colton v. N.Y. Div. of State Police*, No. 5:14-cv-00801 (TJM), 2017 WL 5508911, at *13 (N.D.N.Y. Feb. 8, 2017) (“If a plaintiff shows a causal connection between the protected activity and the adverse conduct, the same ‘severe or pervasive’ standard [as applies in a gender-based hostile work environment claim] applies to a retaliatory hostile work environment claim.”) (quotation marks omitted).

1 third element of the prima facie case is whether the allegedly
2 retaliatory actions were materially adverse. Even if a plaintiff labels
3 her retaliation claim as a “retaliatory hostile work environment”
4 claim, courts should not consider whether the allegedly retaliatory
5 actions meet the higher “severe and pervasive” standard. All that is
6 relevant is whether the actions, taken in the aggregate, are materially
7 adverse and would dissuade a reasonable employee from making a
8 complaint of discrimination.

9 To be sure, Carr’s “Needs Improvement” performance reviews
10 in 2016 and 2017, which made her ineligible for raises, constitute
11 materially adverse actions on their own. But even assuming *arguendo*
12 that Carr could establish that her complaints of discrimination caused
13 the poor performance evaluations, the district court correctly
14 concluded that Carr’s claim would fail at the third step of the
15 *McDonnell Douglas* burden-shifting framework because she cannot
16 establish pretext. *Carr*, 2022 WL 824367, at *15.

17 The NYCTA’s evidence supporting summary judgment
18 established that Carr received negative performance evaluations
19 because she was not adequately or timely completing her duties and
20 had become increasingly challenging to work with. Carr has not
21 rebutted this showing with evidence demonstrating that the reasons
22 the NYCTA provided for the poor performance reviews were
23 pretextual. Instead, she argues that the performance reviews must
24 have been retaliatory due to their temporal proximity to her
25 complaints. But she offers nothing more to establish causation and we
26 have been clear that temporal proximity “alone is insufficient to
27 defeat summary judgment at the pretext stage.” *Kwan v. Andalex Grp.*
28 *LLC*, 737 F.3d 834, 847 (2d Cir. 2013). Absent other evidence, no
29 factfinder could reasonably determine that Carr’s protected activities

1 were the but-for cause of her negative evaluations. We therefore
2 affirm the district court's grant of summary judgment on this claim.

3

4

III. Conclusion

5

6

For the foregoing reasons, we **AFFIRM** the judgment of the
district court.