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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

February 24, 2016

LINDA CHELLOUF, Complainant, v. INTER AMERICAN UNIVERSITY OF PUERTO RICO, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 15B00002

FINAL DECISION AND ORDER

I. INTRODUCTION

Linda Chellouf filed a complaint alleging that the Inter American University of Puerto Rico (IAUPR or the university) retaliated against her by firing her from a faculty position in the department of fine arts at its San German campus on November 4, 2013, because she opposed the university's discriminatory recruitment policies and practices. IAUPR filed an answer denying the material allegations and pleading various affirmative defenses. The matter arises under the antiretaliation provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a)(5) (2012).

Prehearing processes have been completed. Presently pending and in need of resolution is the university's motion for summary decision, to which Chellouf filed a timely response in opposition.

II. BACKGROUND INFORMATION

IAUPR is a private nonprofit university system in Puerto Rico that includes nine separate campuses located in Bayamon, Guayama, Arecibo, Aguadilla, Barranquitas, Fajardo, San Juan, Ponce, and San German. Academic programs are offered in eleven academic units.[1] IAUPR

[1] The university also has three professional schools, the School of Optometry, the Faculty of Law, and the School of Aeronautics.

enrolls more than 40,000 students, and employs approximately 5,000 people. The president of the university is Manuel J. Fernos Lopez-Cepero (Fernos). At all times pertinent to this matter, Agnes Mojica was the chancellor[2] for the San German campus, the director of human resources was Evelyn Torres, and the dean was Nydia Alvarado. The director of the department of fine arts for the San German campus was Samuel Rosado.

Linda Chellouf is a graduate of the Eastman School of Music, and holds a Doctor of Musical Arts (DMA) degree in classical guitar. Chellouf is a French national and a lawful permanent resident of the United States. At the time of the events at issue in this case, however, Chellouf was a temporary nonimmigrant worker holding an H-1B visa. Chellouf began her academic career at IAUPR when she accepted a temporary appointment for the academic year 2006-07 as an instructor in the music program in the department of fine arts at IAUPR's San German campus. In accordance with university procedures, the initial contract period was from August 16, 2006 to July 31, 2007 (the first temporary contract). In June of 2007, Chellouf was offered a temporary appointment as an assistant professor[3] for the upcoming academic year, which she accepted by signing a contract for the period August 1, 2007 through July 31, 2008 (the second temporary contract). A substantial increase in her monthly salary accompanied the change of status from instructor to assistant professor. In July of the following year, Chellouf was offered and accepted another temporary appointment as an assistant professor[4] for the period August 1, 2008 through July 31, 2009 (the third temporary contract).

In July 2009, Chellouf was offered and accepted a probationary appointment as an associate professor for the period August 1, 2009 through July 31, 2010 (the first probationary contract). A substantial increase in Chellouf's monthly salary accompanied the change of status from assistant to associate professor, and from a temporary to a probationary appointment. In July 2010, Chellouf was again offered and again accepted a probationary appointment as an associate professor for the period August 1, 2010 through July 31, 2011 (the second probationary contract). In July 2011, Chellouf accepted the university's offer of a probationary appointment as an associate professor for the period August 1, 2011 to July 31, 2012 (the third probationary contract). A modest increase in her monthly salary was included. In July 2012, Chellouf was

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[2] Mojica's title is given in Spanish as "rectora." Some of the documents translate the term as "chancellor," and others as "rector."

[3] The English translation of the contract says "associate professor," but the original Spanish version says "catedratica auxiliar" (assistant professor), not "catedratica asociada" (associate professor). The Merriam-Webster Spanish-English Dictionary (1st ed. 2003) confirms that the correct translation of "auxiliar" is assistant.

[4] Again, the English translation says associate professor, but the original Spanish says "auxiliar," not "asociada."

offered and accepted a contract on the same terms for the period August 1, 2012 through July 31, 2013 (the fourth probationary contract). The record reflects that Chellouf's job performance was highly regarded by her department director; Rosado completed an evaluation for her in February 2013 in which he rated Chellouf's performance for the period 2007-2013 at the highest level in all but one of the sixteen categories evaluated. He also commented that Chellouf's appointment was a great asset for the department.

On August 1, 2013, IAUPR sent Chellouf a letter offering her another probationary appointment on the same terms for the period August 1, 2013 through July 31, 2014, but this time Chellouf did not accept the offer nor did she sign a contract for the upcoming academic year. Chellouf testified in her deposition that she did not sign the contract because she had applied for a permanent contract and a promotion, and the terms offered to her in the proffered contract on August 1, 2013, "did not correspond to the tenure application that I had made." Ex. 15 at 54.

Chellouf was advised in a letter dated August 12, 2013, from chancellor Mojica that the recommendation of the San German campus regarding the evaluation of the sixth year of her tenure track had been approved by president Fernos, and that she could therefore complete the process toward tenure during the academic year 2013-2014. Chellouf was one of several faculty members who received similar "sixth-year" letters. Chellouf had previously been advised in a letter from Mojica, dated July 19, 2013, that her application for promotion from associate to full professor had been denied for fiscal reasons. Again, she was one of several faculty members who received similar letters.

Although there was no employment contract in effect after July 31, 2013, Chellouf nevertheless continued to meet her teaching responsibilities until October 16, 2013, at which time department director Rosado and HR director Torres came to her classroom and handed Chellouf a letter signed by chancellor Mojica stating in pertinent part that following the recommendations of the university's office of legal counsel, IAUPR understood that by not signing the proffered employment contract, Chellouf had voluntarily resigned. The letter asked for the return of all university property, including Chellouf's identification card, office keys, and parking permit. It said further that Chellouf's wages as of October 16, 2013, would be liquidated as soon as possible once the property was returned. IAUPR contends that Chellouf abandoned her employment, and that the university was justified in treating such abandonment as a voluntary resignation.

A more formal termination letter signed by chancellor Mojica thereafter advised Chellouf that "[a]fter having consulted with the Office of Legal Counsel of the Inter American University of Puerto Rico, we inform you that effective today November 4, 2013, we terminate your employment with our Institution." Ex. E. This letter reiterated the information in the letter of October 16, and also advised Chellouf to return all university property and to pick up her own belongings in room 203 in the Good Year (sic) building within five business days. The letter said further that the university would pay Chellouf's transportation to France and liquidate any

existing wages once that was done, and requested that Chellouf arrange the process of dealing with the property with HR director Torres. IAUPR paid back wages to Chellouf through November 4, 2013.

Chellouf filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on or about March 10, 2014. The charge alleged that the university violated Department of Labor (DOL) regulations,[5] and also discriminated against individuals protected by § 1324b by advertising the position in a local paper rather than in a national professional journal likely to bring responses from qualified U.S. workers.[6] OSC subsequently sent Chellouf a letter, dated July 16, 2014, advising her that she had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within ninety days of her receipt of the letter. Chellouf filed her complaint with this office on or about October 7, 2014.

The gravamen of Chellouf's complaint is that she was retaliated against for opposing the university's recruitment practices for foreign faculty. Chellouf's prehearing statement says that she worked with a student visa from 2006 to 2008, that IAUPR filed an H-1B petition for her for 2008-2011, and that the university renewed the H-1B process for 2011-2014. Chellouf's renewed visa was valid until May 14, 2014. Early in 2013, IAUPR sought to initiate the labor certification process on Chellouf's behalf, a precondition for filing a permanent residency petition for Chellouf based on her employment. That process, however, was never completed.

Chellouf objected to the methodology selected by the university and declined to meet with the lawyer handling the matter. She testified in her deposition that after she was presented with a draft of the labor certification application (ETA Form 9089) the university had prepared on her behalf, she sent an email to attorney Alicia Figueroa on May 14, 2013, expressing her concerns that IAUPR was not following the proper procedures. *See* Ex. 18. Chellouf also testified that in 2012 she told the dean, Nydia Alvarado, that the university should advertise faculty positions in

[5] The regulation cited was 20 C.F.R. § 656.1, promulgated pursuant to 8 U.S.C. § 1182(a)(5)(A)(i). It provides that two determinations must be made by DOL before an employment based immigrant visa may be issued: 1) that there are not sufficient equally qualified persons in the United States to perform the job, and 2) that the employment will not adversely affect the wages and working conditions of similarly employed workers in the United States. *See generally United States v. Sourovova*, 8 OCAHO no. 1020, 283, 290 (1998).

[6] As Chellouf is doubtless aware, most people born in Puerto Rico are citizens of the United States. *See United States v. Marcel Watch Corp.*, 1 OCAHO no. 143, 988, 1003-04 (1990). Chellouf's concerns about advertising the position in a national market accordingly do not appear to stem from any perceived lack of U.S. citizens residing in Puerto Rico, but rather from the perception that persons having the necessary educational qualifications would best be found elsewhere.

a professional journal, not just a local newspaper of general circulation. The email of May 14, 2013, indicates that Chellouf corrected some misstatements in the application and posed specific questions, including why an advertisement was not posted in a national professional journal. The email did not, however, include the specific allegation later made in Chellouf's OSC charge, that the local newspaper was unlikely to bring responses from qualified U.S. workers.

IAUPR's response to interrogatory no. 11 of Chellouf's second set of interrogatories reflects that the university's recruitment efforts included internal posting, placement of a job order with the DOL, print advertisements published in El Nuevo Dia for two consecutive Sundays, posting on the Universia Puerto Rico web page, and advertisements in both the Workforce Development Administration Job Fair and the IAUPR web page. The response to interrogatory no. 9 reflects that no one was selected for the position because the individuals who applied did not have the required educational background.

III. STANDARDS APPLIED

It is an unfair immigration-related employment practice for an employer "to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." 8 U.S.C. § 1324b(a)(5). In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and other federal remedial statutes prohibiting employment discrimination. *See, e.g.*, *Cruz v. Able Serv. Contractors, Inc.*, 6 OCAHO no. 837, 144, 154-55 (1996).[7]

Pursuant to that body of law, the familiar burden-shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) is applied to retaliation claims, just as it is to other claims of discrimination. *See Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 7 (2013); *Planadeball v. Wyndham Vacation Resorts, Inc.*, 793 F.3d 169, 175 (1st Cir. 2015). A prima facie case of retaliation is established by presenting evidence that: 1) an

[7] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

individual engaged in conduct protected by § 1324b, 2) the employer was aware of the individual's protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse action. *See Breda*, 10 OCAHO no. 1202 at 8 (citing *Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009)); *cf. Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 19 (1st Cir. 2006) (treating the first two elements together as one). Whether or not such awareness is set out as a separate element, there must be proof that the decisionmaker knew of the protected conduct at the time the decision was made before an inference of causation may arise. *See Pomales v. Celulares Telefonica, Inc.*, 447 F.3d 79, 85 (1st Cir. 2006). Various types of circumstantial evidence can operate to show retaliation, such as differential treatment, statistics, temporal proximity of the adverse action to the protected activity, and comments by an employer that intimate a retaliatory mindset. *See Mesnick v. General Electric Co*., 950 F.2d 816, 828 (1st Cir. 1991).

The linchpin of a retaliation claim is the causal connection; essential to that link is evidence sufficient to raise an inference that the protected activity was the cause of the adverse action. *Martinez v. Superior Linen*, 10 OCAHO no. 1180, 7 (2013). The paradigmatic circumstantial evidence giving rise to an inference of retaliation is temporal proximity between the protected conduct and the adverse action. Where an adverse employment action "follows hard on the heels" of the protected conduct, the short lapse of time is strongly suggestive of retaliation. *Noviello v. City of Boston*, 398 F.3d 76, 86 (1st Cir. 2005). Generally speaking, however, the greater the temporal gap, the more attenuated the inference. *See, e.g., Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001) (noting that an adverse action occurring twenty months after the protected conduct "suggests, by itself, no causality at all").

Establishing a prima facie case shifts the burden of going forward to the employer, who must set forth a legitimate, nondiscriminatory reason for the challenged employment action. *De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 7 (2013); *Collazo v. Bristol-Myers Squibb Mfg., Inc*., 617 F.3d 39, 46 (1st Cir. 2010). The employer's burden is one of production only; the burden of persuasion remains at all times on the employee. *See, e.g., Mesnick*, 950 F.2d at 823. If the employer satisfies the burden of production, the burden of going forward shifts back to the employee, who then must show that the proffered reason is actually a pretext for discrimination. *Id*.

Pretext is shown by proof that an employer's explanation is unworthy of credence. *Acevedo-Parrilla v. Novartis Ex-Lax, Inc.*, 696 F.3d 128, 141 (1st Cir. 2012). Circumstantial evidence suggestive of pretext may include an employer's evolving explanations that are vague, shifting, inconsistent, or mutually contradictory. *United States v. Estopy and Bortoni*, 11 OCAHO no. 1252, 7-8 (2015) (citing *Vieques Air Link, Inc. v. DOL*, 437 F.3d 102, 110 (1st Cir. 2006)). As observed in *Gomez-Gonzalez v. Rural Opportunities, Inc*., 626 F.3d 654, 662-63 (1st Cir. 2010), "[p]retext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did

not act for the asserted non-discriminatory reasons." (quoting *Morgan v. Hilti, Inc*., 108 F.3d 1319, 1323 (10th Cir. 1997)).

To qualify as protected conduct for purposes of § 1324b(a)(5), the employee's conduct must implicate some right or privilege specifically secured under § 1324b, or a proceeding under that section. *See, e.g., Cavazos v. Wanxiang Am. Corp.*, 10 OCAHO no. 1138, 1-2 (2011); *Arres v. IMI Cornelius Remcor, Inc.*, 333 F.3d 812, 813-14 (7th Cir. 2003) (observing that § 1324b(a)(5) does not provide a remedy for individuals who filed a charge or complaint about violations of immigration law rather than about discrimination); *Palacio v. Seaside Custom Harvesting*, 4 OCAHO no. 675, 744, 754-56 (1994) (no cause of action under § 1324b(a)(5) where employee complained to legacy INS that employer was not complying with § 1324a).

IV. THE POSITIONS OF THE PARTIES

A. The University's Motion

IAUPR's motion contends initially that Chellouf cannot make out a prima facie case of retaliation because she did not engage in any conduct that is protected by 8 U.S.C. § 1324b prior to her termination. First, the university points out that the email Chellouf sent to IAUPR's attorney on May 14, 2013, questioned the accuracy of some of the contents of the draft labor certification application, but made no mention of discrimination or of filing charges of any kind. Second, IAUPR says Chellouf did not even identify the person she believes responsible for her discharge, nor did she point to evidence that the unidentified responsible individual had knowledge of any protected conduct on Chellouf's part. The university argues that absent evidence that Chellouf ever made a complaint of discrimination, there is no factual basis from which an inference may be drawn that a causal relation exists between her email in May 2013 and her subsequent termination five months later.

The university says, moreover, that even had Chellouf presented a prima facie case, IAUPR proffered legitimate nondiscriminatory reasons for its actions and there is no evidence suggesting that its explanations are pretexts. First, the university says that because Chellouf failed to follow university rules requiring the employee's signature on an employment contract, IAUPR's conclusion that she abandoned her job was justified. The university points out that each of the successive contracts offered to Chellouf over the years included a term providing that "this appointment proposal will be invalid unless you return it to the University duly signed within fifteen days of the date of this communication." Chellouf had promptly signed all the previous contracts, but never signed the proffered contract of August 1, 2013, which contained the same fifteen-day validity qualification. Evelyn Torres, the HR director for the San German campus, made efforts thereafter to get Chellouf to come to HR office and sign the contract, but Chellouf never did.

IAUPR says that contrary to Chellouf's contention that she was entitled to a permanent position, Chellouf did not have sufficient creditable service to qualify for tenure, and her application was premature because she was not eligible until the following year. IAUPR acknowledged that Chellouf had also applied for a change in rank to full professor, but says the promotion was denied on July 19, 2013, for fiscal reasons, just as were the promotions requested by other similarly situated applicants. The university says Chellouf was treated no differently from other members of the faculty. Finally, IAUPR says Chellouf pointed to no evidence that the explanations it provided for its actions were pretextual.

B. Chellouf's Opposition to the Motion

Chellouf denied vehemently that she ever abandoned her employment at IAUPR; she said she was locked out on October 16, 2013, and that the university had no legitimate reason for terminating her. Chellouf argues that, contrary to IAUPR's contentions, she already had seven years of service to the university when she applied for tenure and was eligible for both tenure and promotion. She says that IAUPR nevertheless ignored her tenure application and never gave her an answer. She says IAUPR did treat her differently from other professors who were not granted tenure because their letters were dated June 20, 2013, while hers was dated August 12, 2013. She says she was also treated differently from other professors who were denied promotion because their denial letters were dated June 7, 2013, while her denial letter was dated June 19, 2013.

Chellouf points out that not signing an employment contract does not appear among the list of causes for dismissal in the university rules. In her view, she was entitled to a tenured appointment and her dismissal was wholly unjustified. She also says that by interrupting the payment of her salary by direct deposits, the university sought to pressure her into a one-year contract in retaliation for asserting her rights under § 1324b. Chellouf says that when she expressed her opposition to the university's recruitment practices in her email to Alicia Figueroa, she sent copies of the email to both chancellor Mojica and president Fernos, so both were aware of her protected conduct.[8]

Chellouf argues that advertising the position in two consecutive Sunday issues of a local Spanish-speaking newspaper, El Nuevo Dia, did not afford qualified U.S. citizens an opportunity to apply for the position. She said there are not enough qualified U.S. applicants in Puerto Rico because the local job market is "known to suffer from a lack of highly qualified U.S. workers." Chellouf Opposition at 12. According to Chellouf, IAUPR took five specific actions in reprisal for her protected activity: not responding to her tenure application, denying her a promotion to

[8] The Declaration of Manuel J. Fernos Lopez-Cepero states that the declarant has no personal knowledge of the events in question, and although he is listed as a recipient of copies of various communications, he always referred such communications to staff for handling.

full professor, withholding her salary, terminating her employment, and retaining her personal belongings. She says her belongings were not returned until May 1, 2015.

V. EVIDENCE CONSIDERED

The university's motion was accompanied by exhibits consisting of 1) the declaration of Manuel J. Fernos Lopez-Cepero (2 pp.); 2) employment contract offer dated August 15, 2006 (2 pp.); 3) employment contract offer dated June 22, 2007 (2 pp.); 4) employment contract offer dated July 3, 2008 (2 pp.); 5) employment contract offer dated July 2, 2009 (2 pp.); 6) employment contract offer dated July 20, 2010 (2 pp.); 7) employment contract offer dated July 13, 2011 (2 pp.); 8) employment contract offer dated July 2, 2012 (2 pp.); 9) employment contract offer dated August 1, 2013 (2 pp.); 10) the deposition of Linda Chellouf dated April 22, 2015 (74 pp.); 11) letter to Linda Chellouf from Agnes Mojica dated October 16, 2013 (2 pp.); 12) letter to Linda Chellouf from Agnes Mojica dated July 19, 2013 (2 pp.); 13a through 13e) letters to various faculty members from Agnes Mojica dated June 7, 2013 (10 pp.); 14) supplemental answers to discovery dated June 4, 2015 (4 pp.); 15) the deposition of Agnes Mojica Comas dated May 27, 2015 and deposition exhibits 1-4 (98 pp.); 16) letter to Linda Chellouf from Agnes Mojica dated August 12, 2013 (2pp.); 17a through 17f) letters to various faculty members from Agnes Mojica dated June 20, 2013 (12 pp.); and 18) email from Linda Chellouf to Alicia Figueroa dated May 14, 2013.

Chellouf's opposition brief was accompanied by exhibits consisting of A) declaration of Linda Chellouf dated August 31, 2015; B) an email dated August 19, 2013, from Linda Chellouf to Chancellor Mojica; C) Pay Stub summary for 2013; D) answers to Chellouf's second requests for admission (15 pp.); E) a letter to Chellouf from Chancellor Mojica dated November 4, 2013 (2 pp.); F) Chellouf's personnel file (237 pp.); G-1) H-1B Narrative dated November 6, 2013 (5 pp.); G-2) letter to President Fernos from the Department of Labor dated November 22, 2013 (4 pp.); H) email from Chellouf to Dean Alvarado dated August 8, 2013; I) email from Chellouf to Chancellor Mojica dated August 1, 2013; J) Faculty Handbook (168 pp.); K) letter dated August 28, 2009, from Professor Rosado to Dr. Alvarado (2 pp.); L) letter dated January 28, 2010, from Chancellor Mojica to Chellouf (2 pp.); M) Evaluation by Department Director (12 pp.); N) IAUPR's answers to Chellouf's second set of interrogatories (10 pp.); O) Informative Motion dated May 11, 2015 (2 pp.); P) Normative Document G-014-99 (6 pp.); Q) letter from Chellouf to President Fernos dated May 28, 2013; R) email from Chellouf to President Fernos dated July 19, 2013; S) a letter from President Fernos to Chellouf dated September 21, 2009, transmitting a letter from Sheila Velez to President Fernos dated September 14, 2009 (6 pp.); T) a letter from Evelyn Torres to Chellouf dated September 3, 2013 (2 pp.); U) 1940 Statement on Principles of Academic Freedom and Tenure (7 pp,); V) a notice of placement of job order (2 pp.); and the certification of the translator respecting translations of some of the documents from Spanish to English.

VI. DISCUSSION AND ANALYSIS

It is beyond cavil that Chellouf engaged in statutorily protected conduct when she filed her charge with OSC on March 10, 2014. While her assertion that IAUPR violated DOL regulations does not implicate § 1324b, her charge expressly refers to discriminatory policies and practices and to §1324b. Whether her email of May 14, 2013, can be so characterized, however, is problematical because, as IAUPR points out, the email makes no mention either of employment discrimination or of § 1324b. The email refers to inaccuracies in the draft labor certification form prepared on her behalf, and asks several questions. Chellouf concludes her email with a statement and a question: "University Norm G-014-99 which details the policy on green card sponsorship for foreign professors requires that a national advertisement be posted in a U.S.-professional journal. Why hasn't such process been followed?" Ex. 18. It is not self-evident that this statement and question raise any issues involving employment discrimination, or that they would suffice to put the recipient on notice that such issues are implicated.

Assuming arguendo for purposes of this motion that Chellouf could establish a prima facie case, IAUPR proffered nondiscriminatory reasons for its actions, thereby shifting the burden back to Chellouf to produce or point to evidence that the university's explanations are pretextual. While Chellouf is not obligated at this stage to prove definitively that IAUPR's explanations are false, she is required at minimum to offer evidence sufficient to create a factual issue as to their legitimacy. *Barone v. Superior Washer*, 10 OCAHO no. 1176, 7 (2013); *see also Mariani-Colon v. Dep't of Homeland Sec. ex rel. Chertoff*, 511 F.3d 216, 223 (1st Cir. 2007) (to survive summary judgment the employee must produce sufficient evidence to create a factual issue as to whether the proffered reason is a pretext and the real reason involves a prohibited motive).

Chellouf's Claimed Entitlement to Tenure and Promotion

Chellouf's response to IAUPR's motion for summary decision makes the rather remarkable assertion that "the nature of the *consummated appointment* starting on August 1, 2013 was *permanent*." Opposition at 14 (emphasis added). She also states that on November 5, 2013, "Complainant was dismissed *from a tenured appointment* for no legitimate reason." *Id*. (emphasis added). These assertions are totally at odds with the evidence, and with Chellouf's own contention that she never got an answer to her tenure application. There was no *consummated appointment* starting on August 1, 2013, and Chellouf was never dismissed from a *tenured* appointment. As the record makes crystal clear, Chellouf never obtained a tenured or permanent appointment, and in fact had no legal relationship with IAUPR at all after July 31, 2013. Any suggestion that Chellouf somehow obtained a tenured appointment can find its basis only in wishful thinking.

While Chellouf contends that she never got an answer to her application for tenure, moreover, it is more accurate to say that Chellouf was dissatisfied with the answer she received. She wanted

a "yes" or "no" answer, but what she actually got was a letter stating that her application was premature, and that she could complete the process during the upcoming 2013-2014 academic year. But because Chellouf never signed an employment contract for the upcoming year, the offer made to her on August 1, 2013, became invalid by its own terms after fifteen days, and at that point she no longer had a legal relationship with IAUPR. Chellouf points to no theory under which she could have maintained a continuing employment relationship with IAUPR after July 31, 2013, in the absence of an actual award of tenure or an employment agreement of some kind.

Chellouf points out correctly that she had already completed seven full years of service to IAUPR at the time she applied for tenure, and says she is entitled to tenure for that reason. What she does not point out or acknowledge, however, is that not all of a faculty member's service to the university is credited toward tenure. The Faculty Handbook expressly states that all time served under a probationary appointment is so credited, *see* Ex. J at 66, and in Chellouf's case, she completed four years of her service under probationary appointments.

The Handbook provides further, however, that service under a temporary appointment is not necessarily credited toward promotion or tenure, and up to a maximum of three years credit *may* be granted for temporary appointments. Ex. J at 65. The vice president for academic and student affairs and systemic planning, upon recommendation from the department director and intervening academic officers, decides whether temporary appointments may be credited, and, if so, how much of such time will be credited. *Id.* The record reflects that when Chellouf entered her first probationary contract, the decision was made to award two years of credit for her service in temporary appointments. In August 2009, department director Rosado had recommended that three years be credited, but in January 2010 president Fernos approved only two years.

Achieving tenure takes seven full years from the start of probation, and credit for service in temporary status reduces the time it takes to reach that goal. The process was explained to Chellouf at length in the deposition of Agnes Mojica. *See* Ex. 15 at 27-40. During the last semester of the sixth probationary year, the evaluation of a faculty member for tenure starts. Procedures call for the department director to initiate the evaluation process for a recommendation as to whether the faculty member should be granted tenure in his or her seventh year. The final evaluation is done in the seventh probationary year, and tenure is awarded at the end of that year.[9] Chellouf had reached her sixth year with two temporary years credited, plus the four probationary years she actually served. Samuel Rosado duly initiated the process for Chellouf in the second semester of her sixth year, and prepared a summative evaluation for the period 2007-2013.

[9] Mojica explained that the process requires that successive recommendations proceed through a number of channels including the departmental level, the dean of academic affairs, the chancellor's office, the campus committee, the vice president and the president. Ex. 15 at 27.

Chellouf said in her deposition that when she received the letter of August 12, 2013, informing her about her sixth probationary year, this was the first she had heard about the sixth year. After that, she had a conversation with department director Rosado, who told her it was the practice of the university to evaluate the faculty member in the sixth year of the probationary period. Chellouf said she was not satisfied with his answer. An email letter from Agnes Mojica to Chellouf advises Chellouf that the department director and the dean of studies had explained to her the procedures in the Manual (evidently referring to the Faculty Handbook) regarding the sixth year, and says that if Chellouf still did not understand, she should "please contact my office for an appointment so I can explain the Manual and the letter received by all the professors submitted for the sixth year." Ex. 15, attachment 4.[10] There is no indication that Chellouf ever responded to this invitation. Contrary to Chellouf's assertion, she was not entitled to a tenured appointment on August 1, 2013.

Neither was she, or any other faculty member, automatically entitled to a promotion upon request. The Faculty Handbook expressly provides that promotion in rank is not automatic, even when a candidate meets the minimum requirements, but is subject to the availability of resources. Ex. J at 69-70. Several professors in addition to Chellouf were denied promotions for 2013-2014 for fiscal reasons. Apart from the two-week difference in the dates of the letters denying their applications for promotion, Chellouf did not point to evidence that she was treated any differently than other professors who were denied promotions for the 2013-2014 academic year.

The promotion process, moreover, like the tenure process, is a multi-step and multi-level procedure. For Chellouf to say that she applied for a promotion and tenure and Agnes Mojica rejected her applications vastly oversimplifies the way in which these decisions are actually made by the university. In the case of a promotion, the procedure involves passage through a hierarchy of administrative offices culminating with the president, who makes the final decision. Specific criteria to be assessed are set out in the Handbook, including six areas of service: teaching experience, teaching effectiveness, service to the institution, service to the community, research and creative work, professional growth and development, and specific criteria in each area. Chellouf did not address those criteria, nor did she identify any documentation that accompanied her application to support her accomplishments or offer comparative evidence of what documentation was provided to IAUPR in support of the applications of other candidates. No evidence establishes which, if any, of the other applicants for promotion were similarly situated to Chellouf with respect to their years of service, performance evaluations, date of application, or in any other respect. Chellouf failed to demonstrate any entitlement to a promotion and did not point to any similarly situated professor who obtained a promotion.

[10] No date appears on the email itself, but Mojica's testimony reflects that the date was August 19, 2013. *See* Ex. 15 at 79.

Alleged Ancillary Consequences of Chellouf's Termination

Chellouf says her salary was withheld in the fall of 2013, and that the university retained her personal possessions for an unduly long time before returning them, and that both these actions were taken in retaliation for her protected conduct. It is doubtful that these ancillary matters would rise to the level of materially adverse or tangible employment actions as defined in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (a tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").

While Chellouf says her salary was withheld, moreover, it is more accurate to say that the direct deposit of her salary was interrupted and converted to payments by check. Chellouf characterizes this procedure as an effort to coerce her into signing a one-year contract in retaliation for her email of May 2013. Agnes Mojica testified in her deposition that HR authorized the interruption of Chellouf's direct deposit, and that this was probably done in an effort to get Chellouf to come to the office and sign the contract for the ensuing academic year. During discovery Chellouf asked IAUPR to admit that it had withheld her salary. IAUPR denied the request and stated,

> Complainant's salary was not withheld. Since Ms. Chellouf had not showed up to sign the employment contract for the fall semester, as she had done during each and every year before, the UIAPR (sic) changed the method of payment from direct deposit to payment by check until Ms. Chellouf determined if she was to execute the employment contract. The checks were issued on time and were available for pick up by Ms. Chellouf.

Ex. D at 6.

The extended controversy over who was responsible for the delay in returning Chellouf's possessions is not well-documented. It is evident that Chellouf did not pick up these materials within five days of the November 4, 2013, letter as requested. Throughout the discovery process the parties continued to argue about who would prepare an inventory of the materials, and who bear the expense of transporting them. Deteriorating relations between the parties led to something of a standoff, but Chellouf acknowledged that the materials were eventually returned to her.

Chellouf's theory is that Agnes Mojica was on notice of her protected activity, and that Mojica was the decisionmaker responsible for all the adverse actions taken against her. Mojica was certainly the messenger who delivered the news to Chellouf that she was no longer employed at IAUPR. Mojica's testimony, however, is that when Chellouf refused to sign the contract for the

upcoming year, the concern was ultimately brought up to the university's central level that there was a professor who refused to sign a contract. Mojica said she referred the matter to the vice president for academic affairs, after which system-wide HR and the legal division recommended treating the refusal as a voluntary resignation. IAUPR's answer to interrogatory 14 of Chellouf's second set of interrogatories says more specifically that the university's legal division, headed by attorney Lorraine Juarbe, advised Mojica that Chellouf should be notified that her relationship with IAUPR had ended. Mojica simply implemented that advice.

Conclusion

Chellouf's ultimate burden in this action is to point to evidence providing a reason to believe that but for her email to Alicia Figueroa in May 2013, she would have received a tenured appointment and a promotion, her salary would not have been interrupted, and the return of her personal property would not have been delayed. *See Hajiani v. ESHA USA, Inc*., 10 OCAHO no. 1212, 6 (2014) (citing *Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 578 (1999); *cf. Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (observing that employee making a retaliation claim must establish that protected conduct is the but/for cause of the adverse action).

The evidence does not support this proposition. To begin with, the adverse events in the fall of 2013 did not follow sufficiently "hard on the heels" of Chellouf's email in May to raise an inference of retaliation based on temporal proximity. *See Noviello*, 398 F.3d at 86. As observed in *Calero-Cerezo v. U.S. Dep't of Justice*, temporal proximity must be "very close" for the inference to arise, and intervals of three and four months have been held insufficient for this purpose. 355 F.3d 6, 25 (1st Cir. 2004) (internal citations omitted). More importantly, the denial of tenure and promotion can hardly be characterized as adverse or retaliatory where there is no entitlement to tenure or promotion in the first place, and similarly situated professors were similarly treated. Chellouf points to no objective evidence that would support the claimed causal connection, undermine the legitimacy of the university's explanations, or suggest a cover-up for retaliation. Where an employee offers little more than conclusory allegations, improbable inferences, and unsupported speculation, summary resolution is the appropriate result. *See Medina-Munoz v. R.J. Reynolds Tobacco Co*., 896 F.2d 5, 8 (1st Cir. 1990).

It is abundantly clear that the but/for cause of all the adverse consequences in this case was Chellouf's unwillingness to accept and sign the employment contract that was offered to her on August 1, 2013. When asked at her deposition whether Chellouf would still be working for the university had she signed the contract, Mojica expressed the opinion that Chellouf would have gone on to her seventh year and tenure. Mojica said that, assuming positive recommendations, she herself would "of course" have recommended Chellouf for tenure. Ex. 15 at 79. There is no reason to believe that others in the chain of command would not have done the same.

There are no winners in this case. Chellouf has lost a fine professional position at which from all reports she excelled. The university has lost a valued faculty member for whom it appears IAUPR has had great difficulty finding a capable replacement. Condolences are in order for both parties.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. The Inter American University of Puerto Rico is a private nonprofit university system in Puerto Rico that includes nine separate campuses located in Bayamon, Guayama, Arecibo, Aguadilla, Barranquitas, Fajardo, San Juan, Ponce, and San German.

2. Linda Chellouf is a French national and a lawful permanent resident of the United States.

3. At the time of the events at issue in this proceeding, Linda Chellouf was working in the United States as a temporary nonimmigrant with an H-1B visa.

4. At the time of the events at issue in this proceeding, the chancellor for the San German campus of the Inter American University of Puerto Rico was Agnes Mojica, the director of human resources was Evelyn Torres, the dean was Nydia Alvarado, and the director of the department of fine arts was Samuel Rosado.

5. Linda Chellouf was offered and accepted a temporary appointment as an instructor in the music program in the department of fine arts at Inter American University of Puerto Rico's San German campus for the period from August 16, 2006 through July 31, 2007.

6. Linda Chellouf and the Inter American University of Puerto Rico entered a series of annual contracts covering the periods August 1, 2007 through July 31, 2008, August 1, 2008 through July 31, 2009, August 1, 2009 through July 31, 2010, August 1, 2010 through July 31, 2011, August 1, 2011 through July 31, 2012, and August 1, 2012 through July 31, 2013.

7. Linda Chellouf's job performance was at all relevant times highly regarded by the Inter American University of Puerto Rico.

8. Early in 2013 the Inter American University of Puerto Rico sought to initiate the labor certification process on behalf of Linda Chellouf.

9. Linda Chellouf had concerns that the Inter American University of Puerto Rico was not following the proper procedures with respect to the labor certification process.

10. On May 14, 2013, Linda Chellouf sent an email to Alicia Figueroa, the attorney who drafted the labor certification application, noting some errors and expressing concerns.

11. On or about August 1, 2013, the Inter American University of Puerto Rico offered Linda Chellouf a probationary appointment as an associate professor in the department of fine arts at its San German campus for the period from August 1, 2013 through July 31, 2014.

12. Linda Chellouf declined to sign a probationary contract proffered to her by the Inter American University of Puerto Rico for employment during the period from August 1, 2013 through July 31, 2014.

13. Linda Chellouf did not agree to the terms of a probationary contract offered to her by the Inter American University of Puerto Rico for the period August 1, 2013 through July 31, 2014, because she believed she was entitled to a promotion to full professor and a permanent contract instead of a probationary contract.

14. Although Linda Chellouf had no employment contract with the Inter American University of Puerto Rico after July 31, 2013, she continued to teach her students through October 16, 2013.

15. Agnes Mojica brought it to the attention of the vice president for academic affairs at the central level of the Inter American University of Puerto Rico that the San German campus had a professor who refused to sign a contract.

16. The Inter American University of Puerto Rico's system-wide Human Resources and the legal division advised Agnes Mojica that a member of the teaching staff not signing the contract meant a voluntary separation from the position.

17. Samuel Rosado and Evelyn Torres came to Linda Chellouf's classroom on October 16, 2013, and handed Linda Chellouf a letter signed by Agnes Mojica stating that by not signing the proffered contract Chellouf had voluntarily resigned her employment with the Inter American University of Puerto Rico.

18. The Inter American University of Puerto Rico sent Linda Chellouf a letter signed by Agnes Mojica and dated November 4, 2013, advising Linda Chellouf that the Inter American University of Puerto Rico was terminating her employment effective that same day.

19. Linda Chellouf filed a charge against the Inter American University of Puerto Rico with the Office of Special Counsel for Unfair Immigration-Related Employment Practices on or about March 10, 2014.

20. The charge Linda Chellouf filed with the Office of Special Counsel for Unfair Immigration-Related Employment Practices alleged that the Inter American University of Puerto Rico

violated Department of Labor (DOL) regulations and also discriminated against individuals protected by § 1324b by not advertising the position in a professional journal likely to bring responses from qualified U.S. workers.

21. The Office of Special Counsel for Unfair Immigration-Related Employment Practices sent Linda Chellouf a letter dated July 16, 2014, advising her that she had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within ninety days of her receipt of the letter.

22. Chellouf filed a complaint with the Office of the Chief Administrative Hearing Officer on or about October 7, 2014.

B. Conclusions of Law

1. Linda Chellouf is an individual within the meaning of 8 U.S.C. § 1324b(a)(5).

2. The Inter American University of Puerto Rico is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

3. Linda Chellouf filed a timely charge of discrimination with the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

4. All conditions precedent to the institution of this proceeding have been satisfied.

5. The burden-shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) is applied to retaliation claims, just as it is to other claims of discrimination. *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 7 (2013); *Planadeball v. Wyndham Vacation Resorts, Inc.*, 793 F.3d 169, 175 (1st Cir. 2015).

6. An individual may establish a prima facie case of retaliation by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b, 2) the employer was aware of the individual's protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse action. *Breda v. Kindrid Braintree Hosp., LLC*, 10 OCAHO no. 1202, 8 (2013).

7. An employee's prima facie case shifts the burden of going forward to the employer, who must set forth a legitimate, nondiscriminatory reason for the challenged employment action. *De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 7 (2013); *Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 46 (1st Cir. 2010).

8. If the employer satisfies the burden of production, the burden of going forward shifts back to the employee, who then must show that the proffered reason is actually a pretext for discrimination. *Mesnick v. General Electric Co.*, 950 F.2d 816, 823 (1st Cir. 1991).

9. Pretext may be shown by proof that an employer's explanation is unworthy of credence. *Acevedo-Parrilla v. Novartis Ex-Lax, Inc.*, 696 F.3d 128, 141 (1st Cir. 2012).

10. Assuming arguendo that Linda Chellouf established a prima facie case of retaliation, the Inter American University of Puerto Rico proffered a nondiscriminatory reason for its actions, thereby shifting the burden back to Chellouf to produce or point to evidence that the university's explanation is pretextual.

11. An employee making a claim of retaliation claim must establish that statutorily protected conduct is the but/for cause of the adverse action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

12. To overcome a motion for summary judgment, an employee must produce sufficient evidence to create a factual issue as to whether the employer's explanation is a pretext and the real reason was a prohibited motive. *Mariani-Colon v. Dep't of Homeland Sec. ex rel. Chertoff*, 511 F.3d 216, 223 (1st Cir. 2007))

13. Linda Chellouf pointed to no objective evidence sufficient to create a factual issue as to the legitimacy of the explanation proffered by the Inter American University of Puerto Rico.

14. The evidence reflects that the but/for cause of any adverse employment action affecting Linda Chellouf was Linda Chellouf's refusal to enter an employment contract with the Inter American University of Puerto Rico in August 2013.

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

The Inter American University of Puerto Rico's motion for summary decision is granted, and the complaint is dismissed. All other pending motions and requests are denied.

SO ORDERED.

Dated and entered this 24th day of February, 2016.

_____

Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.