Circuit Court for Montgomery County
Case No. 438270V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2641

September Term, 2018

BETTY POOL-NALIKKA

v.

MONTGOMERY COUNTY BOARD OF EDUCATION

Shaw Geter,
Wells,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: February 7, 2020

On May 16, 2018, Betty Pool-Nalikka, appellant, filed a complaint against her employer, appellee, the Montgomery County Board of Education ("the Board") in the Circuit Court for Montgomery County alleging employment discrimination based on race and national origin, as well as claims of retaliation. After discovery was completed, the Board moved for summary judgment. Pool-Nalikka responded. Although neither party requested a hearing on the motion, the circuit court allowed both sides to argue their positions on the record after a pre-trial conference. Immediately after argument, in an oral ruling from the bench, the court granted the Board's motion for summary judgment.

Pool-Nalikka appeals and presents six questions for our review, which we have condensed and rephrased:[1]

1. Did the circuit court properly grant summary judgment on Pool-Nalikka's race and national origin-based employment discrimination claim? (Questions 1 through 4)

2. Did the circuit court fail to rule on Pool-Nalikka's retaliation and hostile work environment claims? (Questions 5 and 6).

[1] In her brief, Pool-Nalikka presented six questions:

1. Did the circuit court apply the proper standard for a motion for summary judgment?
2. Did the circuit court err when it overlooked evidence of comparators provided in the record?
3. Did the lower court err at law when it excluded numerous inconsistencies and contradictions in the Appellee Board of Education's evidence?
4. Whether the court erred when it overlooked evidence of disparate treatment presented by Pool-Nalikka?
5. Did the circuit court err when it failed to make a ruling on Pool-Nalikka's retaliation claim?
6. Did the circuit court err when it overlooked Pool-Nalikka's hostile work environment claim?

We conclude that Pool-Nalikka did not make an ostensible case of discrimination based on race or national origin. Further, the record supports the conclusion that the court addressed the issues of retaliation and hostile work environment, even though Pool-Nalikka failed to properly plead the last allegation. Accordingly, for the reasons we explain, we affirm the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Betty Pool-Nalikka is originally from Uganda and immigrated to the United States when she was 18. She began employment with the Board as an Interim Instructional Services ("IIS") teacher around 2006. IIS instructors "manage[ ] the educational program for students who are too ill to go to school" due to physical and/or mental health issues, as well as discipline-related reasons. IIS also oversees the educational progress for students who are home-schooled. Every year, IIS provides instruction for between 700 and 900 students who are enrolled in any Montgomery County Public School ("MCPS") from Grade K through 12, in addition to those students placed by MCPS in a nonpublic school.[2] Pool-Nalikka maintains that until around 2014, she was regularly assigned three to four students in the IIS program despite not being a certified teacher in the State of Maryland.[3]

On July 1, 2014, Ann Taylor became supervisor of the IIS program. In her new position, Ms. Taylor supervised approximately 400 to 500 part-time teachers, including

[2] Interim Instructional Services, *Frequently Asked Questions*, MONTGOMERY COUNTY PUBLIC SCHOOLS, https://bit.ly/2NpwuTL (last visited Jan. 8, 2020).

[3] At her deposition, Pool-Nalikka was unable to verify exactly how many students she taught through IIS between 2006 and 2018.

Pool-Nalikka, who provide teaching services in the students' homes or through web conferencing. Taylor also oversaw several case managers who "deal directly with parents" and "are directly responsible for assigning IIS teachers to particular students." In her deposition testimony, Taylor explained that case managers "make hiring decisions based on qualifications and strength of [the teachers'] educational delivery to students." Taylor, in her role as supervisor, testified that, generally, she does not become involved in the selection or assignment process of IIS teachers. She is, however, occasionally the contact person if a teacher has concerns about their assignments or lack thereof.

Prior to 2014, before Taylor became the IIS supervisor, IIS would assign teachers to students by directly contacting individual teachers whom case managers believed would "be a good fit" for the student, "particularly with regard to their respective locations." In Taylor's view, this process was not transparent and led to "a lot of people who were not working and a handful of people who were working a ton of hours." According to her, she was made head of IIS to rectify this situation.

"[T]o increase the number of certified teachers, expand the online options, and make sure that the schools saw the program as . . . an authentic, legitimate educational experience," Taylor testified that she, in conjunction with the Board, worked to make the hiring process "more transparent" by advertising jobs and ensuring "everybody on our list could know what opportunities are out there and have a fair and equal chance to apply to them." According to Taylor, IIS then reviews the pool of applicants to select the most qualified teacher for that position. Certified teachers are considered before non-certified

teachers. If there are no certified applicants, "and the student is a special needs student," IIS then "look[s] to anyone else who has worked with a special needs student." IIS instructional specialists do not have access to IIS teachers' personnel files, which would include any disciplinary action, and therefore do not use such criteria when reviewing applicants for available IIS positions.

Pool-Nalikka alleged that she became the target of race and national origin-based discrimination soon after Taylor became IIS supervisor.[4] Specifically, Pool-Nalikka's allegations fall within two categories: (1) that Taylor denied her IIS assignments, "access to Google products," and proper reimbursement for mileage and training sessions because she is an African-American from Uganda; and (2) Pool-Nalikka was subject to "unjustified" disciplinary "write-ups" and that she was "wrongly charged . . . with insubordination without any reasonable justification or basis."

The Board denied that Taylor had disciplined Pool-Nalikka in any manner. According to Taylor's testimony, the "write-ups" of which Pool-Nalikka complained were, in fact, confidential "conference summaries" of conversations that Taylor had with Pool-Nalikka to help her become a better instructor. Taylor testified that if she had disciplined Pool-Nalikka, any documentation in the latter's personnel file would clearly state that

[4] Her amended complaint listed six counts: Count I: National Origin Discrimination; Count II: Race Discrimination; Count III: Retaliation; Count IV: Violation of the Montgomery County Human Rights Ordinance, Code section 27-19(c) (National Origin); Count V: Violation of the Montgomery County Human Rights Ordinance, Code section 27-19(c) (Race Discrimination); Count VI: Retaliation in Violation of the Montgomery County Human Rights Ordinance, Code section 27-19(c).

disciplinary action had been taken and would take the form of something akin to a letter of reprimand.

As to Pool-Nalikka's race-based claims, the Board maintained that she was not denied teaching assignments because of her race or national origin, but because (1) she was not a certified teacher, (2) she had limited herself to a specific geographic region, and (3) she turned down job offers outside her preferred area. Further, of the teaching positions Pool-Nalikka claimed that Taylor denied her, more than half were filled by non-Caucasian teachers, all but two of whom were certified experienced teachers, and some had advanced degrees and college-level teaching credentials.

Taylor testified that she did not deny Pool-Nalikka access to any Google-based resources. Taylor explained that Pool-Nalikka felt slighted because she was not among the first instructors to use a Google-based teaching application ("app"). After the app's "roll-out," Pool-Nalikka was able to use the app like any other teacher.

Finally, as for reimbursement, Pool-Nalikka felt that she was entitled to a mileage reimbursement for each trip to a student's home or school. In her deposition testimony, Taylor related that MCPS policy is that IIS teachers are not reimbursed for mileage that is considered the teacher's "commute." Reimbursement would only occur "if they work between two MCPS work locations, not from their own home to their first location."

Based on this testimony and additional information adduced during discovery, the Board moved for summary judgment. In response, Pool-Nalikka asserted that each of her claims were valid, that there was sufficient evidence to show that she was denied teaching

positions that were given to less-than-qualified Caucasians, that she was, generally, being treated unequally, and that she was being punished for making a complaint.

At the hearing on the motion for summary judgment, the motions judge wasted no time focusing on the central issue, namely, whether Pool-Nalikka could make out an apparent case that the Board (read Taylor) discriminated against her based on her race or national origin.

> THE COURT (to Pool-Nalikka's counsel): But where is the evidence in the case that these positions that you say your client was otherwise qualified for went to persons not of a protected class? Where is there a material, where is there either the evidence of that, or where, how do we, how do you even generate a question of fact? I'm not sure I saw that?

After an extended discussion with Pool-Nalikka's counsel focusing on the judge's questions, the judge said:

> THE COURT: I agree it's clear, but respectfully I think it's probably not, it's clear, but not in your client's favor.
>
> I have read everything. I have considered the matter, and largely for the reasons set forth by the County Board, I'm going to grant the motion for summary judgment.
>
> In addition, there's been no genuine issue of material fact that's been generated as to, under any test that I could apply, including that discussed recently by the Court of Special Appeals in *Valderama* [sic], as to race, national origin, or retaliation.[5]
>
> And in the absence of legally sufficient evidence to generate a question of fact to go to the jury, whether I view it under 2-501 or 2-519, the motion is granted. Summary judgment is granted. Thank you, folks. Good luck to you.

This appeal followed.

[5] The court meant *Lockheed Martin Corporation v. Balderrama*, 227 Md. App. 476 (2016).

DISCUSSION

Pool-Nalikka asks this Court to vacate the circuit court's grant of summary judgment on her employment discrimination and retaliation claims. We review the circuit court's entry of summary judgment "to determine whether any genuine issue of material fact exists and whether the party is entitled to judgment as a matter of law." *Dobkin v. Univ. of Baltimore School of Law*, 210 Md. App. 580, 590 (2013) (internal citation omitted). We thus grant no deference to the motions court. *Muse-Ariyoh v. Board of Educ. of Prince George's Cty.*, 235 Md. App. 221, 235 (2017), *cert. denied*, 457 Md. 680 (2018). In reviewing a grant of summary judgment, we examine the facts in the light most favorable to the non-moving party. *Id.* (internal citation omitted). It necessarily follows that the non-moving party "must present admissible evidence upon which the jury could reasonably find for the plaintiff." *Id.* (internal citation and quotations omitted).

While employment discrimination cases are subject to the least deferential standard, special caution must be taken when considering an entry of summary judgment in such cases because "motive is often the critical issue." *Id.* at 236 (citing *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 958-59 (4th Cir. 1996)). However, "summary judgment disposition remains appropriate if the plaintiff cannot prevail as a matter of law." *Id.* This requires that the plaintiff "present legally sufficient direct or circumstantial evidence to establish that the facts are susceptible to more than one permissible inference." *Dobkin*, 210 Md. App. at 591 (internal citation omitted). "Legally sufficient means that the injured party cannot sustain its burden by offering a mere scintilla of evidence,

amounting to no more than surmise, possibility, or conjecture." *Id*. (internal citations and quotations omitted).

Pool-Nalikka's first allegation is that Taylor, IIS, and the Board discriminated against her by not selecting her as an IIS teacher despite her qualifications. She maintains that teaching assignments went to Caucasian comparators without justification from Taylor, IIS, or the Board. Pool-Nalikka further avers that the circuit court failed to consider circumstantial evidence that Taylor and IIS treated her comparators more favorably due to racial and national origin discrimination. Although the Board provided evidence that rebutted her claims, Pool-Nalikka maintains that the circuit court overlooked "numerous inconsistencies and contradictions" the Board made in response to her attempt to prove a prima facie case of discrimination**.**

Allegations of Racial Discrimination in Hiring

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to fail or refuse to hire an individual on the basis of that individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. It is equally unlawful for an employer to discriminate against an employee or job applicant because the individual has opposed an unlawful employment practice:

> **(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization

> to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Pub. L. 88-352, Title VII, § 704, July 2, 1964, 78 Stat. 257; Pub. L. 92-261, § 8(c), Mar. 24, 1972, 86 Stat. 109. *Accord* 42 U.S.C. § 2000e-3. Maryland Code, (2009, Repl. Vol. 2019), State Government Article ("S.G.") §§ 20-606(a) and (f) contain nearly identical provisions to their federal counterparts. The relevant provisions state:

> (a) An employer may not:
>
> (1) fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of:
>
> (i) the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment.
>
> ***
>
> (f) An employer may not discriminate or retaliate against any of its employees or applicants for employment, an employment agency may not discriminate against any individual, and a labor organization may not discriminate or retaliate against any member or applicant for membership because the individual has:
>
> (1) opposed any practice prohibited by this subtitle; or
>
> (2) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subtitle.

S.G. §§ 20-606(a)(1)(i) and (f)(1)-(2). Because of the similarity between state and federal law, Maryland courts usually will defer to the "federal criteria and seek guidance from

Federal Title VII decisions in determining a violation of the analogous State and county provisions." *Muse-Ariyoh*, 235 Md. App. at 242 (internal citations omitted).

To show that race was a factor in an employer's hiring decision, the complainant must provide either direct or circumstantial evidence of discrimination. *Dobkin*, 210 Md. App. at 591-92 (citing *Williams v. Maryland Dept. of Human Resources*, 136 Md. App. 153, 163 (2000)). Direct evidence "consists of statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision." *Id.* at 592 (internal citations omitted). Pool-Nalikka concedes that there is no direct evidence of discrimination.

Where there is no direct evidence of racial discrimination, we undertake the four-step analysis that the Supreme Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). There, the Court reasoned that "the complainant in a Title VII must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." *Id*. at 802. The complainant's prima facie case must show that (i) she belongs to a racial minority; (ii) she applied and was qualified for a job for which the employer was seeking applicants; (iii) despite her qualifications, she was rejected; and (iv) after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id*.; *see McNairn v. Sullivan*, 929 F.2d 974, 977-78 (4th Cir. 1991); *Lockheed Martin Corp. v. Balderrama*, 227 Md. App. 476, 504 (2016); *Dobkin*, *supra*, 210 Md. App. at 592.

However, the Supreme Court recognized that the facts necessary to establish a prima facie case will vary, as the facts required from one respondent may not be necessary or sufficient to establish the prima facie case for another. *McDonnell Douglas*, 411 U.S. at 802 n. 13. In this respect, we have reasoned that the "various formulations of the prima facie factors . . . share a common nucleus of thought," being that "a prima facie case is established when a member of a protected group is [not hired] under circumstances which, if unexplained, would support an inference that the decision to [not hire] was based upon a consideration of impermissible factors." *Dobkin*, 210 Md. App. at 593 (citing *Levitz Furniture Corp. v. Prince George's Cty.*, 72 Md. App. 103, 112 (1987) (internal quotations omitted)) (alterations in original).According to Pool-Nalikka, she has met her burden. She argues that she has provided enough evidence to establish a prima facie case of discrimination and retaliation.

Prong One: Is Pool-Nalikka a Member of a Racial Minority?

As previously noted, Pool-Nalikka is a self-described African-American who was born and raised in Uganda before emigrating to the United States when she was 18 years old. We agree that she satisfies the first element of the *McDonnell Douglas* test by belonging to a racial minority. However, we conclude that Pool-Nalikka cannot meet her burden as to the other three elements of the test.

Prong Two: Was Pool-Nalikka Among Qualified Applicants But Passed Over?

As to the second prong of *McDonnell Douglas*, it is questionable, at best, that Pool-Nalikka was qualified for teaching posts when her credentials are compared to the other

applicants. According to the Board's hiring procedures, certified applicants are considered first. Pool-Nalikka concedes that she is not certified and therefore would not be one of the first applicants considered during the hiring process. Of the 34 positions to which Pool-Nalikka applied but was not selected, all but four went to certified applicants. In fact, of the certified applicants, two were college professors, one possessed a PhD in mathematics, ten had special education experience, and sixteen were certified classroom teachers with prior classroom experience. At the time, Pool-Nalikka possessed none of these qualifications. We conclude, therefore, that Pool-Nalikka did not meet her burden of showing that she was qualified for the requested positions as to the successful *certified* applicants.

As to the remaining three non-certified applicants, neither party presented evidence as to their qualifications. Without any information on these applicants, we cannot speculate as to whether Pool-Nalikka was more or less qualified than the chosen applicants. We therefore end our analysis of the second element. However, it is important to note that all three of the selected non-certified applicants are self-identified as Black/African American.

Prongs Three and Four Considered

Because we conclude that Pool-Nalikka was not qualified for the positions to which she applied, we need not perform an analysis as to the third and fourth elements; namely, that despite her qualifications, the Board still rejected her application; and that after her rejection, the position remained open, and the Board continued to seek applicants from persons of complainant's qualifications. We conclude that the circuit court did not err in

granting the Board's motion for summary judgment, considering Pool-Nalikka could not meet her burden of establishing a prima facie case of discrimination based on race or national origin.

Assuming, purely for the sake of argument, that Pool-Nalikka was indeed qualified in relation to her three non-certified comparators and met her burden for the first three *McDonnell Douglas* factors, we shall discuss the fourth element, since Pool-Nalikka focused on this issue in her brief. Specifically, Pool-Nalikka avers that IIS continued to advertise teaching assignments well after the office informed her that the vacancy was filled. However, as we will discuss, the Board provided non-discriminatory reasons for its alleged failure to timely remove job postings.

Once the complainant successfully establishes her prima facie case, the burden then "shifts to the employer to assert a 'legitimate, non-discriminatory reason' for its failure to hire the complainant." *Dobkin*, 210 Md. App. at 593 (citing *Giant of Maryland, LLC v. Taylor*, 188 Md. App. 1, 26 (2009) ("*Giant I*"), *rev'd on other grounds*, 423 Md. 628 (2011)). "What [the Court] means by a legitimate reason is not that a reason makes sense, but a reason that does not deny equal protection." *Ball v. Martin*, 108 Md. App. 435, 453-54 (1996) (emphasis and internal quotation marks omitted). "[A]lthough the presumption favoring the [applicant]" disappears once the employer provides a non-discriminatory reason for its decision not to hire the complainant, the factors of the complainant's prima facie case "remain relevant evidence on the ultimate question of unlawful discrimination." *Dobkin*, 210 Md. App. At 594 (quoting *McGarry v. Pielech*, 47 A.3d 271, 281 (R.I. 2012)).

According to Taylor, the "very small" IIS office is responsible for "physically entering all the information about the jobs in the database, hiring people, resolving parent concerns and checking on services all the time." Given the high number of demands presented to such few individuals, "sometimes, . . . the job could be up for a month – 14 days to a month even though [IIS has] filled the position because [IIS staff] didn't take the time to close the requisition." IIS' failure to remove any listings to which Pool-Nalikka inquired but, in reality, were already filled, in our view, is a result of an under-staffed office working to implement a new program, not of any racial or national origin animus.

The Board also gave several non-discriminatory reasons for its decision not to select Pool-Nalikka for certain teaching posts. As has been explained, Pool-Nalikka was not chosen for certain assignments based on her lack of qualifications when compared to other applicants. When one looks at the racial make-up of the non-certified teachers chosen for the positions (her true comparators), all were African-American. In fact, out of the 26 teaching opportunities to which Pool-Nalikka applied, over half (15 positions) were awarded to non-Caucasian teachers. Moreover, as the Board points out, Pool-Nalikka actively limited her geographic availability to three Montgomery County locations – Poolesville, Germantown, and Gaithersburg. When those locations were unavailable, Taylor testified that she reached out to Pool-Nalikka to inform her of teaching opportunities in Potomac and Bethesda, which Pool-Nalikka rejected because they fell outside of her "preferred jurisdiction." We conclude that Pool-Nalikka's decision to limit herself geographically to certain teaching posts, combined with the Board's stated objective to hire

more highly qualified teachers, limited the number of teaching positions for which Pool-Nalikka was not only eligible, but competitive.

Because the Board articulated non-discriminatory reasons for its decision not to select Pool-Nalikka for several teaching posts, under the *McDonnell Douglas* test the burden would then shift back to Pool-Nalikka "to present admissible evidence from which a trier of fact reasonably could find that [explanation] was a pretext and that [the Board]'s rejection was, in fact, due to [Pool-Nalikka]'s race or national origin." *Muse-Ariyoh*, 235 Md. App. at 246. Even if the court accepts the employer's non-discriminatory explanation, "the complainant may still demonstrate that the employer's explanations were pretextual and that discrimination was the underlying motive for not being hired." *Nerenberg v. RICA of Southern Maryland*, 131 Md. App. 646, 662 (2013). Pretext may be established by a showing "that the employer favored similarly situated applicants who were not members of a protected class, but disfavored [the complainant].". *Giant I*, 188 Md. App. at 26.

Ultimately, in order for a complainant to survive summary judgment, she "must offer sufficient evidence to counter the employer's rationale, and establish that there was a 'reasonable probability, rather than a mere possibility, that [the] employer discriminated against her.'" *Nerenberg*, 131 Md. App. at 674 (quoting *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 298 (4th Cir. 1998)). The complainant, then, "cannot seek to expose" the employer's rationale "as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to it. *The former would not create a 'genuine' dispute, the latter would fail to be material*." *Muse-*

Ariyoh, 235 Md. App. at 247 (citing *Hux v. City of Newport News*, 451 F.3d 311, 315 (4th Cir. 2006); *Holland v. Washington Homes, Inc.*, 487 F.3d 208 (4th Cir. 2007)) (emphasis added).

Pool-Nalikka maintains that the Board's non-discriminatory explanations are rife with contradictions and inconsistencies. She rejects the Board's negative assessment of her professionalism, borne out by several complaints from parents against her, and, instead, relies on an affidavit by the mother of one special needs student who commended Pool-Nalikka as a "superb performer" who provided "very helpful" instruction for her son. However, despite Pool-Nalikka's efforts to advance a pretextual claim, she falls short.

Taylor testified that prior to her arrival at IIS in 2014, Pool-Nalikka was the subject of "a variety of complaints from 2010 to 2014." And, according to Pool-Nalikka's personnel records, Taylor noted that Pool-Nalikka "did not have stellar performance reviews." Further, Pool-Nalikka herself admitted in her deposition that her behavior with some students was inappropriate and unprofessional. Evidence presented at the deposition revealed that Pool-Nalikka shared the substance of her discrimination suit with a minor student, MY. The child's mother, CY, upon hearing from Pool-Nalikka that she was allegedly not getting reimbursement for mileage, offered to give Pool-Nalikka payments for mileage. Although Pool-Nalikka admitted that she knew accepting cash payments from parents was against MCPS policy, Pool-Nalikka reported CY's proposal to MCPS, apparently in the hopes of ratifying this unorthodox arrangement. MCPS declined to do so.

In another instance, Pool-Nalikka told the mother of another student that she should not be "too quick" to send the child back to school, because MCPS was paying Pool-Nalikka to teach the child. At her deposition, Pool-Nalikka admitted that this conversation did occur. She further admitted that she called the child's academic performance "weak," which enraged the child's mother who was "angry, distraught [and] offended" by Pool-Nalikka's conduct. Other instances of Pool-Nalikka's lack of insight and insensitivity to students and their parents were brought to light at her deposition.

To us, these facts underscore that Pool-Nalikka did not have a "stellar" reputation among the IIS instructors. Although Pool-Nalikka offers the statement of one parent who felt that Pool-Nalikka was a good fit for her child, the record establishes that the Board's race neutral reason for passing over Pool-Nalikka for teaching assignments was not a cover hiding racial animus, but one solidly based on Pool-Nalikka's lack of credentials and reputation as a teacher who more than once exhibited poor judgment. Even if Pool-Nalikka could establish an ostensible case of discrimination based on race or national origin, and we stress that she has not, in addition to being an uncertified teacher without classroom experience or advanced training, limiting herself to a certain geographic area of Montgomery County, and having serious lapses in judgment, we determine that, if properly challenged, the Board would have met its burden demonstrating that its rationale for not hiring Pool-Nalikka for certain IIS teaching posts was grounded in valid, race-neutral reasons.

Alleged Retaliation

In Count 3 of Pool-Nalikka's first amended complaint she alleges that the Board retaliated against her "for opposing discrimination or participating in protected activity." Green Appendix at 41-42. The four-factor *McDonnell Douglas* discrimination test also applies to claims of discrimination based on retaliation, albeit with slightly modified elements. *Balderrama*, 227 Md. App. at 503-04; *Edgewood Management Corp. v. Jackson*, 212 Md. App. 177, 199-200 (2013). To succeed on a retaliation claim based on circumstantial evidence, Pool-Nalikka must establish a prima facie case that (i) she engaged in a protected activity; (ii) the employer took an adverse employment action against her; and (iii) the adverse employment action was causally connected to the protected activity. *Muse-Ariyoh*, 235 Md. App. at 900 (citations omitted). As with a racial discrimination claim, once the employee has established a prima facie case, the burden then shifts to the employer to provide non-discriminatory reasons for its actions. *Balderrama*, 227 Md. App. at 503-04.

"An employee's complaint about an employer's allegedly discriminatory conduct, whether through formal or informal grievance procedures, constitutes a protected oppositional activity" as long as the employee can demonstrate that she had a "good faith, subjective, and objectively reasonable belief that the employer engaged in discriminatory conduct." *Id.* at 506 (internal citations omitted). However, "not every complaint about discrimination or unfairness . . . qualifies as protected activity." *Id*. at 507. The complaint "must allege discrimination connected to a protected class." *Id*. (internal citations omitted).

First Prong: **When did Pool-Nalikka Oppose Discrimination or Engage in Protected Activity?**

It is difficult to pin down exactly when Pool-Nalikka claims she officially challenged the Board's allegedly discriminatory activities. In her deposition testimony, she testified that she reported what she felt was Taylor's discriminatory conduct to Gregory Bell, MCPS Supervisor of Diversity Initiatives Office of School Support on December 2, 2015. Green Extract at 78. Her testimony revealed that she previously made a complaint to MCPS Human Resources employee, "Mr. Grundy," who allegedly called her a "troublemaker." She explained that this comment made her uncomfortable, so she took her complaint to Bell. Id. She also explained that she "had talked to HR, [she] had talked to Compliance, and [she] had gone to the union," before she saw Bell, but Pool-Nalikka does not say when she had these conversations.

The record is further clouded when Pool-Nalikka included in her extract an email she sent to "Robert B. Grundy" dated "December 12, 2016 2:09 PM," in which she says, "Thank you for the opportunity of meeting with you and for sharing with me the alleged conduct that was made against me by my supervisor Ann Taylor."[6] This email seems to refer to a complaint that Taylor made against Pool-Nalikka, rather than one she made against Taylor.

This said, we conclude that Pool-Nalikka's deposition testimony is a more accurate reconstruction of what transpired as it is the most detailed. This means that late in 2015,

[6] More confusing still, is that in the table of contents of Pool-Nalikka's record extract, this email is dated as "December 12, 2014."

when she complained about Taylor to various parties, including MCPS and her union, Pool-Nalikka participated in protected activity. Thus, the clock started for the purposes of determining whether retaliation occurred after December 2015.

Second Prong: Did the Board to Take Adverse Action Against Pool-Nalikka?

In her amended complaint, Pool-Nalikka lists as retaliation all of the same acts that animated her discrimination claims. Specifically, in paragraph 93 she states:

> Defendants adverse actions to give unjustified negative performance reviews, failure to hire, harassment and hostile work environment, false charges and accusations, write-ups and heavy handed disciplinary actions, workplace sabotage, assignments to unfavorable locations, punitive scheduling practices, harassing conduct, work related threats, reprimands, denial of job benefits, failure to reimburse, unreasonable punitive scrutiny **were retaliation** for Plaintiff opposing discrimination or participating in protected activity to challenge discrimination because of Plaintiff's national origin from Uganda and race as African American in violation of Md. Code Ann., State Gov't § 20-601, et seq.

(emphasis supplied). Compare this paragraph with paragraph 81 of Count One, which alleges discrimination based on national origin and paragraph 87 of Count Two, which alleges race-based discrimination. All three paragraphs use identical language. The significance is that under the *McDonnell Douglas* test, the employer's retaliatory action must come after the employee makes a race-based complaint. This would then eliminate the first "write-up" that Taylor gave Pool-Nalikka in September 2014. But that would leave the write up of November 2016, involving student BB, and the write up of March 2018, involving student NG, as well as some of Taylor's actions after December 2015.

In her complaint and in her deposition testimony, Pool-Nalikka does not substantiate the broad allegations of "heavy handed disciplinary actions," "denial of job benefits," or

"unreasonable punitive scrutiny." Further, taking the testimony in the most favorable light to her, we found nothing in the record that suggested that Pool-Nalikka was ever "assigned to unfavorable locations." Indeed, as shall be discussed, MCPS honored Pool-Nalikka's desire to only be assigned to "the Poolesville, Germantown, Gaithersburg area" close to where she lived in Boyds. Based on her deposition testimony, Pool-Nalikka's allegations of retaliatory conduct blend and shift with her other claims.

Even considering Pool-Nalikka's evidence in the light most favorable to her, these accusations cannot be considered adverse actions as required under the second *McDonnell Douglas* prong. As has been discussed, the claims that Pool-Nalikka re-characterizes in Count Three as "retaliation" are the same four broad areas she alleges for discrimination based on race or national origin: the write ups, denial of reimbursement, denial of access to Google apps, and denial of teaching assignments. Even if we were to assume that each of the allegations occurred after December 2015, we conclude that Pool-Nalikka cannot prove that any of these actions were retaliatory.

First, the BB write-up of November 2016. This incident chiefly involved Pool-Nalikka's interaction with BB's mother, MB. BB, a high school student, was being treated for a form of cancer at the start of the 2016 semester, which is why he was placed in the IIS program. After he recovered, MB wanted the boy to go back to school. Pool-Nalikka admitted that she told MB not to send the child back to school, as MCPS was paying her to tutor BB. MB was offended at this comment and complained to Taylor. Pool-Nalikka also admitted that because of the disagreement with MB, Taylor told her not to go back to

the Bs' home or contact the Bs, but Pool-Nalikka did so anyway. Taylor then reassigned Pool-Nalikka, leading Taylor to issue what Pool-Nalikka termed a "write-up."

Second, the NC write-up of March 2018 concerned student NC's parents' request that someone other than Pool-Nalikka be assigned to tutor their daughter.[7] Apparently, according to Stacy Lang, an IIS instructional specialist, NC suffered from anxiety and NC's parents felt that Pool-Nalikka's teaching style was making NC more anxious, and they requested a different tutor. Although Pool-Nalikka did not believe it, the parents wrote an email to Taylor explaining why they wanted to change tutors.

Despite Pool-Nalikka's insistence that Taylor unilaterally reassigned Pool-Nalikka over the parents' objection, the evidence strongly suggests that the parents requested a change in tutors based on Pool-Nalikka's behavior. In fact, aside from her own insistence that Taylor instigated these changes, there is a dearth of evidence to suggest that Taylor did anything punitive or retaliatory to Pool-Nalikka. The write-ups that Pool-Nalikka insists were retaliatory were, the evidence shows, a record of conversations that Taylor had with Pool-Nalikka regarding each of these incidents, including the September 2014 incident with student MY and her mother, CY. It seems that because Pool-Nalikka did not like her judgment questioned and was urged to change her behavior, she felt the write-ups were punitive.

[7] NC is sometimes referenced as "NG." In either case the record is clear that the student is the same.

In fact, the evidence suggests that Taylor behaved professionally and tried to help Pool-Nalikka secure IIS teaching posts. For example, Pool-Nalikka admitted that Taylor would offer her teaching positions that were not yet posted. Yet, Pool-Nalikka saw this seeming mark of favor as contrary to the transparency that Taylor was supposed to ensure. For Pool-Nalikka, this "almost preferential treatment" was merely proof "that not all assignments are posted." It is undisputed that Pool-Nalikka wanted only to work in the area near her home in Boyds, specifically, the Germantown, Gaithersburg, Poolesville area. After complaining about not getting enough teaching hours, Taylor offered Pool-Nalikka "two positions in Bethesda." Instead, Pool-Nalikka was offended, as the position "was so far away and did not take into consideration the mileage, I didn't think that was very fair to me."

Alleged Denial of Reimbursement

Pool-Nalikka contends that Taylor and IIS improperly denied her reimbursement for training classes in which she participated and for mileage incurred during the workday. In one instance, however, she concedes that she was told at the beginning of the class that she was not going to be reimbursed, because the class was strictly for health teachers and not IIS instructors. She also acknowledges that this health training opportunity was not put on by IIS, but, rather, was handled by a different department altogether. When asked, Pool-Nalikka had "no clue" if any individuals who attended the training session who were not health teachers were reimbursed.

Appellant refers to a second incident in which she was not reimbursed for a science or mathematics training session held by the IIS office.[8] Here, she alleges that she was denied reimbursement while other Caucasian teachers were promptly reimbursed. Pool-Nalikka states that she "had to make several calls" over the course of two months for IIS to reimburse her. However, she presents no evidence as to the timeline of payment as to the other attendees, nor does she present any evidence that Caucasian attendees were reimbursed quickly due to their race, or, conversely, that she was not reimbursed as quickly due to her race or ethnic origin. While a frustrating situation, the surrounding circumstances do not point towards retaliation, adverse action, or racial or national origin bias on behalf of the Board. According to the Board, the reason Pool-Nalikka was not quickly reimbursed for her attendance at this class was due to a system error. Pool-Nalikka was listed in the Board's system as a "substitute teacher" rather than an "IIS teacher." This error resulted in the system failing to reimburse Pool-Nalikka because only IIS teachers can take and receive reimbursement from IIS courses.

Appellant also points to IIS' failure to reimburse mileage costs she incurred during her commute to students' homes. While it is IIS policy that IIS instructors are only reimbursed for mileage between the "home" school and the student's home, Pool-Nalikka contends that this policy was broadened only for Caucasian comparators on numerous occasions. In her view, it was Taylor who personally rejected Pool-Nalikka's requests for

[8] During her deposition, Ms. Pool-Nalikka could not recall whether the incident to which she refers relates to a math or a science training session.

reimbursement. However, nothing in the record indicates that IIS incorrectly refused to reimburse Pool-Nalikka for mileage incurred during her position as IIS instructor.

It is MCPS policy to reimburse IIS teachers for any mileage incurred between the home school, for example, Poolesville High, and the teaching site, *i.e.* the Poolesville student's home, or for any commute between two MCPS work locations. It is not policy, however, to reimburse teachers for any mileage from the teacher's home to a student's house or to one of the MCPS schools, as this is considered a "commute." As Taylor explained it, Pool-Nalikka sought reimbursement for "mileage from her home to a student's house, and then from a student's house back to her home. I [Taylor] assumed that [Pool-Nalikka] may not have known the policy, and I [Taylor] just wanted to remind her of it." It was in this context that Taylor individually met with Pool-Nalikka to reapprise her on the office's reimbursement policies, although Pool-Nalikka characterized this instance, and a similar one shortly thereafter, as a "disciplinary action." As for Pool-Nalikka's claim that Caucasian comparators were improperly reimbursed to her detriment, nothing in the record substantiates this claim. Nor does the record present a genuine question of material fact as to Taylor's acceptance or denial of any IIS instructor's mileage reimbursement. In this regard, Pool-Nalikka's claims of prejudicial reimbursement (or lack thereof) are unfounded.

Alleged Google Application Access

According to Pool-Nalikka, Taylor and IIS denied her access to various Google apps, which hindered her ability to teach students, as a method of retaliation/adverse

employment action. She alleges that while other teachers had access to "Google Chrome" and "Google Docs," she herself did not, and the situation required multiple complaints to Taylor to be resolved. Of those teachers Pool-Nalikka alleges were granted access, two, she claims, are Caucasian comparators. Moreover, because IIS and Taylor "refused" to grant her access to these programs, Pool-Nalikka maintains that she was forced to withdraw from a teaching position. Given evidence to the contrary, we see the situation differently.

As a preliminary matter, Google Chrome is a common and widely-used web browser that is free to use by the public and is available across multiple operating systems.[9] It is therefore difficult to ascertain how the Board could have refused Pool-Nalikka access to this platform. As to who has access to Google Docs, Taylor stated that she "[does not] have any control over who gets Google Docs. That is by position." According to Taylor, Google Docs was introduced as a "slow roll out," first to full-time faculty members, then to substitute teachers and IIS instructors. In this context, teachers were granted access to the Google programs according to their position (full-time, substitute, IIS instructor, etc.). Taylor also testified that given the large number of substitute and IIS teachers employed by the school district, the department responsible for the roll out "couldn't do it all at once. It was over time." Taylor further stated that security was a major concern in the program's implementation:

> Because there are hundreds and hundreds of IIS teachers and probably many more substitutes, having access to secure Google docs allows one to access all assessments, . . . all math tests in the county, for example. And there was a concern about the security of those tests if they were given to people who

[9] Google, GOOGLE CHROME, https://tinyurl.com/6mvtcq (last visited Jan. 22, 2020).

> only substitute teach one day here and there. I made the argument that in some cases, like in [MY] [Pool-Nalikka's student], our teachers are with this kid the entire year, and they need the same level of access as the classroom teacher to the technology. These decisions are made outside of the Office of Curriculum and Instruction.

Then, as of April 2016, the County slowly began to add teachers to Google accounts, acknowledging that there were IT issues, and advised teachers to contact Taylor should they wish to be added to the account. It is in this context, then, that Pool-Nalikka was given access to the Google apps, as Taylor requested the county director for technology and instruction to "partially give some teachers access."

Yet, Taylor indicated that Pool-Nalikka's role, in truth, did not require the use of Google Docs in her own capacity. She clarified that Google Docs was to be used by the student himself, "to access all of his homework computer modules to do in advance of her [Pool-Nalikka] sessions with him. Her [Pool-Nalikka] role is to make sure that he understood. . . but her role wasn't to interact with these modules." In fact, despite this misunderstanding, teachers delivered to Pool-Nalikka "electronic files of what [the teachers] shared with [the student], and [the teachers] sent those to [Pool-Nalikka] by email so that she would have the same documents."

In light of this evidence, it appears to us that Pool-Nalikka's limited access to Google apps, at first, was purposely narrow in nature due to her position as a substitute teacher/IIS instructor, to the program's slow roll out to substitute and IIS faculty, and to the role IIS intended for its instructors to fulfill during the teaching process. There is no evidence that Pool-Nalikka's access, or lack thereof, to Google apps was a result of any

retaliation on behalf of Taylor, IIS, or the Board. Rather, it seems that the Board, through Taylor and other faculty members, made exceptions for Pool-Nalikka in order to include her in various activities that would otherwise be unavailable to somebody of her position.

Moreover, there is no evidence that Pool-Nalikka was denied access due to her race or national origin, as she claims. The two Caucasian teachers to whom she refers and who were given early access to the Google program roll out were members of the IIS Teacher's Union group; one of whom was the leader of the group. Pool-Nalikka was not a member of this group. The two teachers were asked to provide "feedback on the online modules in order to get the teacher voice and weigh in on whether or not they supported this direction of online classes taught in this way." In our view, these teachers were not given preferential treatment due to their race, but rather due to their unique positions within the union group. Without evidence to the contrary, and based on the evidence presented, we cannot conclude that Taylor, IIS, or the Board prevented Pool-Nalikka from accessing Google apps as an act of retaliation, adverse action, or racial or national origin bias.

We have discussed Pool-Nalikka's misunderstanding of when she could properly be reimbursed for mileage. Likewise, we have talked about Pool-Nalikka's delayed access to Google apps and the fact that she was able to use them with her students. Taking all of this into consideration, we find the record does not support Pool-Nalikka's claim that the Board or its agents took retaliatory measures against her after she made a race-based discrimination complaint.

Alleged Disparate Treatment

Pool-Nalikka further contends that she was subject to disparate treatment during her employment with MCPS based on her race and national origin. Under the *McDonnell Douglas* test for a disparate treatment claim, an employee must establish her prima facie case by showing "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class." *Goode v. Cent. Virginia Legal Aid Soc'y, Inc.*, 807 F.3d 619, 626 (4th Cir. 2015) (citing *McDonnell Douglas Corp.*, *supra*, 411 U.S. at 802). Pool-Nalikka claims that prior to Ms. Taylor's accession to her role as IIS supervisor, she "always got positive feedback about her performance from former supervisors indicating that [her performance] was stellar." She alleges that during this time period, she regularly had three or four students assigned to her. Only after Taylor assumed her role as supervisor did Pool-Nalikka begin to receive "write-ups" as a result of her alleged unprofessional conduct, while simultaneously seeing a steady decline in teaching assignments. However, the record does not support Pool-Nalikka's contentions.

In her deposition, Ms. Taylor testified that "there were a variety of complaints from 2010 to 2014 that [she saw] directly in [IIS'] communication log." From the records Taylor reviewed, Pool-Nalikka did not have "stellar performance reviews." During her deposition, Pool-Nalikka conceded that parents have complained of her behavior at least four or five times and at least three parents have requested that she be replaced with a new teacher. Frankly, the evidence in the record objectively demonstrates a consistent stream of negative student and parental feedback between 2015 and 2018. The record is devoid,

however, of any employment or professional evaluations prior to the commencement of Ms. Taylor's tenure as supervisor in 2014. Given this evidence, together with the testimony, we cannot conclude that Pool-Nalikka fulfilled her burden of proving her satisfactory job performance or, alternatively, a pretextual basis for the Board's actions.

As to the third and fourth elements of the *McDonnell Douglas* test, we have explained above that Pool-Nalikka did not suffer any adverse employment action from the Board, IIS, or Taylor, nor did she face different treatment from similarly-situated employees outside of the protected class as a result of racial or national origin animus. Even if Pool-Nalikka met her burden of presenting sufficient evidence for her prima facie case, we have also outlined in previous sections that the Board presented legitimate, non-discriminatory reasons for its actions. Further, because Pool-Nalikka cannot rebut the Board's explanations as mere pretext, we ultimately perceive no error in the circuit court's entry of summary judgment.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.