

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

KAREN L. KIMMEL,)

Plaintiff,)

v.)

GALLAUDET UNIVERSITY,)

Defendant.)

Case No. 1:07-cv-00797 (RWR)

DEFENDANT’S MOTION TO DISMISS

Defendant Gallaudet University (“Gallaudet” or “Defendant”), by and through counsel, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, hereby moves this Honorable Court for an Order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the Complaint for failure to state a claim upon which relief may be granted for the reasons stated in the accompanying Memorandum of Law in support of this motion.

WHEREFORE, Defendant respectfully requests that the Complaint be dismissed with prejudice in its entirety, that Defendant be awarded the costs incurred as a result of this lawsuit, and that Defendant be awarded such further relief as this Honorable Court deems just and proper.

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**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS**

Defendant Gallaudet University (“Gallaudet” or “Defendant”), by and through counsel, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, hereby submits this Memorandum of Law in support of its Motion to Dismiss.

FACTUAL BACKGROUND

As alleged in the Complaint, Gallaudet is the premiere institution of higher education for the deaf in the United States. Complaint (“Comp.”) at ¶ 6. Plaintiff is the Dean of the College of Liberal Arts, Sciences, and Technologies at Gallaudet, as well as a tenured Associate Professor in the Department of English at Gallaudet. *Id.* at ¶ 5.

The Complaint alleges that plaintiff overrode the dismissal decision of a faculty governance committee that dismisses students and reappointed an African-American student who had been dismissed from Gallaudet after receiving poor grades in mathematics. *Id.* at ¶ 19. Plaintiff alleges that she had complained that this student was dismissed “before undergoing learning disability testing” and that she believed that this student was being discriminated against based on his race and disability, “owing, in part, to his preferred mode of communication.” *Id.*

It is also alleged in the Complaint that in or about January or February 2006, plaintiff

expressed her concerns about a policy utilized by the Mathematics Department “that weighted final examinations such that a student who had received passing marks on all other coursework could still fail the entire course if he or she failed the final examination.” *Id.* at ¶ 20. Plaintiff alleges in her Complaint that she “believed that this policy, and specific actions taken by the Mathematics Department on the basis of this policy, discriminated against students, including African-American and developmental students, who were learning disabled, lacked sufficient math preparation because they are deaf, and possessed a range of communications skills from no signing to [American Sign Language], and therefore did not do well on high-stakes examinations, particularly in the context of mathematics.” *Id.* Plaintiff alleges that she was supporting a “fairer policy regarding the weight of mathematics examinations, in order to prevent discrimination against developmental, African-American, or other students.” *Id.* at ¶ 21.

It is further alleged in the Complaint that plaintiff “open[ly] supported” former Gallaudet President Jane Fernandes. *Id.* at ¶ 17-18. Plaintiff alleges that Ms. Fernandes was removed from her position because she was “not Deaf enough.” *Id.* at ¶ 15. As alleged in the Complaint, “not Deaf enough” is a phrase used in a cultural debate on the Gallaudet campus, which “has its roots in the social structure” *Id.* at ¶ 9. Because of her support of Ms. Fernandes, Plaintiff claims that she is being harassed, discriminated against and/or retaliated against for being “not Deaf enough.” *Id.* at 18.

The Complaint also alleges that the Washington Post published an article titled, “A Conflict on Integrity Surfaces,” on November 9, 2006. Plaintiff asserts that she is falsely accused in that article “by unnamed colleagues, speaking on behalf of Gallaudet, of having coerced professors into changing grades.” *Id.* at 21. Plaintiff also asserts that she was again alleged to have been involved in grade-changing in an NCAA report prepared by Gallaudet. *Id.*

at ¶ 25.

It is alleged that plaintiff's job responsibilities were reduced in or around November 2006. *Id.* at ¶ 23. Specifically, plaintiff alleges that she was "recently excluded from several important personnel decisions," and that she was excluded from the Recruitment, Enrollment, and Retention Team. *Id.* at ¶¶ 23-24.

Finally, it is alleged that plaintiff received a "smaller than usual" 3% merit pay increase, "despite normally receiving a 6% merit pay increase." *Id.* at ¶ 26.

SUMMARY OF ARGUMENT

Plaintiff's Complaint must be dismissed for failure to state a claim. As to her First Cause of Action, retaliation pursuant to Title VI of the Civil Rights Act of 1964, there is no private right of action to bring a retaliation claim based on opposition to policies having a disparate impact based on race, color, or national origin. Thus, the First Cause of Action must be dismissed as a matter of law.

As to her Second Cause of Action, retaliation pursuant to the District of Columbia Human Rights Act, plaintiff cannot establish that she engaged in a protected activity nor that she suffered adverse employment actions. Even if she could establish the first two elements of her *prima facie* case, she cannot establish a causal connection between the purported protected activity and the purported adverse employment action. Thus, the Second Cause of Action must be dismissed as a matter of law.

As to her Third Cause of Action, discrimination due to disability pursuant to the District of Columbia Human Rights Act, plaintiff does not allege that she is being discriminated on the basis of a disability but instead, because she is considered "not Deaf enough." As plaintiff concedes, such nomenclature is grounded on a cultural and social debate, not a physical

condition. Even if plaintiff could establish that being “not Deaf enough” is a physical condition constituting a disability under the District of Columbia Human Rights Act, she cannot establish that she suffered an adverse employment action nor a causal connection between her purported disability and the purported adverse employment action. Thus, the Third Cause of Action must be dismissed as a matter of law.

As to her Fourth Cause of Action, hostile work environment pursuant to the District of Columbia Human Rights Act, plaintiff cannot establish that she was subjected to harassment because of a disability. As plaintiff concedes, being considered “not Deaf enough” does not refer to a physical condition but is a term used in a cultural and social debate on the Gallaudet campus. Thus, the Fourth Cause of Action must be dismissed as a matter of law.

As to her Fifth Cause of Action, intentional infliction of emotional distress, employer-employee conflicts do not, as a matter of law, rise to the level of outrageous conduct. Thus, the Fifth Cause of Action must be dismissed as a matter of law.

As to her Sixth Cause of Action, tortious interference with prospective business relations, Gallaudet cannot, as a matter of law, tortiously interfere with its own business relations with plaintiff. In addition, plaintiff cannot establish that Gallaudet tortiously interfered with any prospective business relations because she has not identified any specific expectancy. Thus, the Sixth Cause of Action must be dismissed as a matter of law.

Finally, as to her Seventh Cause of Action, breach of contract, plaintiff cannot establish that there was a contract, express or implied, based on Gallaudet’s nondiscrimination policy. Consequently, she cannot establish that there was a breach of a nonexistent contract. Thus, the Seventh Cause of Action must be dismissed as a matter of law.

ARGUMENT

I. STANDARD OF REVIEW

A court may grant a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) if it the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The facts alleged in the Complaint must be treated as true and the plaintiff must be given the benefit of all reasonable inferences that can be derived from the facts. *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006). However, the Court “need not ... accept inferences that are unsupported by the facts set forth in the complaint ... [or] legal conclusions cast in the form of factual allegations.” *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007) (citations omitted). In its review, the Court may only consider the facts alleged in the Complaint, documents attached to or incorporated into the Complaint, and matters of which the court may take judicial notice. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-625 (D.C. Cir. 1997).

II. PLAINTIFF DOES NOT HAVE A PRIVATE RIGHT OF ACTION TO BRING A RETALIATION CLAIM BASED ON OPPOSITION TO DISPARATE IMPACT POLICIES.

Plaintiff claims that Gallaudet retaliated against her for opposing Gallaudet “policies and practices that are unlawful under Title VI insofar as they discriminate against students based on race, color, or national origin in programs and activities that receive federal financial assistance.” Comp. at ¶ 31-32. *See also* Comp. at ¶¶ 19-20. Plaintiff does not allege that Gallaudet intentionally discriminated against any student. Rather, it is clear that her Title VI retaliation claim is based on her opposition to the application of a neutral policy that allegedly has a disparate impact on African-American students. As explained below, the Supreme Court has held that plaintiff does not have a private right of action to bring a lawsuit asserting retaliation

under Title VI based on opposition to a disparate impact policy.

A. Title VI Only Confers A Private Right Of Action For Claims Of Intentional Discrimination And Does Not Prohibit Activities That Have A Disparate Impact Based On Race.

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. As held by the Supreme Court, Section 601 only prohibits intentional discrimination and there is a private right of action to enforce a right protected by Section 601. *Alexander v. Sandoval*, 532 U.S. 275, 280-281 (2001) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 272, 287 (1978)), and *Guardians Assn v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 610-611 (1983). In *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71 (D.D.C. 2003), this Court held that Section 601 also prohibits retaliation for opposing a right protected by Section 601. *Id.* at 83 (citing and quoting *Peters v. Jenney*, 327 F.3d 307, 316-317 (4th Cir. 2003)).

The Supreme Court made clear in *Sandoval*, however, that Section 601 does not prohibit activities or policies that have a disparate impact based on race, color or national origin. *Sandoval*, 532 U.S. at 281. Instead, such proscriptions are found in the regulations promulgated by a federal department or agency.

B. There Is No Private Right Of Action For Retaliation Claims Based On Rights Created By Regulations Promulgated Pursuant To Section 602.

Pursuant to Section 602 of Title VI,¹ federal agencies that provide financial assistance are authorized to promulgate regulations “proscrib[ing] activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.” *Sandoval*, 532 U.S. at 281. In accordance with this authority, the Department of Education (“DOE”) has promulgated its own regulations, which are found at 34 C.F.R. Part 100. Provisions relevant to this matter include 34 C.F.R. § 100.3(b)(2), which prohibits Federal financial funds recipients from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin” In addition, 34 C.F.R. § 100.7(e) provides:

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Action *or this part*

Assuming that agency regulations prohibiting activities that have a disparate impact based on race are valid, the Supreme Court concluded that it “is clear that the disparate-impact regulations do not simply apply § 601 -- since they indeed forbid conduct that § 601 permits -- and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce those regulations” promulgated under Section 602. *Id.* at 285, 293. Accordingly, as recognized by this Court, the “Supreme Court held that Title VI does not display

¹ Section 602 of Title VI provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity ... is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability....

42 U.S.C. § 2000d-1.

an intent to create a ‘freestanding private right of action to enforce regulations promulgated under § 602.’ *Chandamuri*, 274 F. Supp. 2d at 82 (citing *Sandoval*, 532 U.S. at 293).

C. DOE Regulations Prohibiting Retaliation For Opposing Activities Or Policies Having A Disparate Impact May Not Be Enforced Via A Private Right Of Action.

The Fourth Circuit Court of Appeals reviewed DOE’s retaliation regulations at issue in this case, 34 C.F.R. § 100.7(e), in *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003). It separated the two clauses in this provision. First, the prohibition on retaliation “for the purpose of interfering with any right or privilege *secured by section 601 of the Act.*” 34 C.F.R. § 100.7(e) (emphasis added). The Fourth Circuit concluded that this clause of the retaliation regulation was a “valid interpretation of § 601” because it “targets retaliatory action actually intended to bring about a violation of § 601’s core prohibition on intentional racial discrimination,” and therefore “enforceable via an implied private right of action.” *Id.* at 318-19.

The second part of the retaliatory regulation prohibits retaliation “for the purpose of interfering with any right to privilege *secured by ... this part.*” 34 C.F.R. § 100.7(e) (emphasis added). The Fourth Circuit concluded that this clause “encompasses every right or privilege created by Part 100 [regulations promulgated under Section 602] ... [which] include[s] the right to be free of unintentional disparate impact practices.” *Peters*, 327 F.3d at 319. Accordingly, it concluded that retaliation claims based on opposition to disparate impact claims could not be enforced via a Section 601 private right of action. *Id.* at 319.

Thus, following *Sandoval*, the Fourth Circuit held that the retaliation regulations codified at 34 C.F.R. § 100.7(e) may not be enforced “via the § 601 private right of action ...” to the extent that the regulations “forbid retaliation for opposing disparate impact practices not actionable under § 601.” *Peters*, 329 F.2d at 319. The Fourth Circuit’s analysis is consistent with this Court’s conclusion that “no private right of action exists to enforce a regulation

promulgated under § 602 that is not also a failure to comply with § 601.” *Chandamuri*, 274 F. Supp. 2d at 82.

D. Plaintiff’s Title VI Claim Must Be Dismissed As A Matter Of Law Because She Does Not Have A Private Right Of Action.

It is clear from the allegations made in the Complaint that plaintiff’s Title VI retaliation claim is based on opposition to a neutral policy that allegedly has a disparate impact on African-American students. *See* Comp. at ¶¶ 11, 12, 19, 20, 31, 32. She does not allege that Gallaudet intentionally discriminated against any specific student. *See* Complaint *passim*. Consequently, she has “plead[ed] [her]self out of court.” *Chandamuri*, 274 F. Supp. 2d at 84. Because activities having a disparate impact are permitted under Section 601 and are only prohibited by DOE’s regulations, specifically 34 C.F.R. § 100.3(b)(2), plaintiff does not have a private right of action to enforce the DOE’s regulation prohibiting retaliation for “any right or privilege secured by ... this part.” 34 C.F.R. § 100.7(e); *Chandamuri*, 274 F. Supp. 2d at 82. Consequently, plaintiff’s retaliation claim under Title VI must be dismissed as a matter of law.

III. PLAINTIFF CANNOT ESTABLISH A RETALIATION CLAIM UNDER THE DISTRICT OF COLUMBIA HUMAN RIGHTS ACT.

To establish a claim of retaliation under the District of Columbia’s Human Rights Act (“DCHRA”), plaintiff must be able to establish the following: (1) that she engaged in a statutorily protected activity, encouraged another person to exercise a right protected by the DCHRA, or opposed a practice made unlawful by the DCHRA; (2) that Gallaudet took an adverse action; and (3) that there was a causal connection between the statutorily protected activity and the adverse action. *Ginger v. District of Columbia*, 477 F. Supp. 2d 41, 51 (D.D.C. 2007); *Lemmons v. Georgetown Univ. Hosp.*, 431 F. Supp. 2d 76, 91 (D.D.C. 2006). As held by the Supreme Court, “the anti-retaliation provision protects an individual not from all retaliation,

but from retaliation that produces an injury or harm.” *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2414 (2006). As shown below, because plaintiff cannot establish any of the elements of her retaliation claim, it must be dismissed as a matter of law.

A. Plaintiff Cannot Establish That She Engaged In A Statutorily Protected Activity, Encouraged Another Person To Exercise A Right Protected By DCHRA, Or Opposed A Practice Made Unlawful By DCHRA.

To constitute a “protected activity” for purposes of a retaliation claim under DCHRA, the activity must “involve[] opposing alleged discriminatory treatment by the employer or participating in legal efforts against the alleged treatment.” *Lemmons*, 431 F. Supp. 2d at 91 (quoting *Coleman v. Potomac Elec. Power Co.*, 422 F. Supp. 2d 209, 212 (D.D.C. 2006)). The “‘alleged discriminatory treatment,’ however, cannot be generic; rather, the plaintiff must be opposing an employment practice made unlawful by [DCHRA].” *Id.* at 91-92 (citing *Broderick v. Donaldson*, 437 F.3d 1226, 1232 (D.C. Cir. 2005)). To that end, the plaintiff “must demonstrate that she had alleged harassment or discrimination based on . . . some . . . category protected by the DCHRA . . . before the retaliatory conduct occurred.” *Id.* at 92. The DCHRA prohibits discrimination on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identities or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation. D.C. Code § 2-1402.11(a).

In this case, plaintiff alleges that she engaged in statutorily protected activities by (1) “aiding and encouraging Jane Fernandes” and (2) “exposing discrimination against African-American and developmental students.” Comp. at ¶¶ 35-36. As explained below, the activities were not based on a category protected by DCHRA and thus, plaintiff has not engaged in a protected activity.

1. “Aiding and encouraging Jane Fernandes” is not a protected activity.

For purposes of this motion, the factual allegations contained in the Complaint are construed in the light most favorable to plaintiff. In that regard, plaintiff goes to great lengths to explain what she refers to as “Deaf Culture” and the genesis of the term “not Deaf enough.” *See* Comp. at ¶ 9. Plaintiff alleges that the word “deaf” with a capital “D” “signifies a culture rather than the physical condition of hearing loss.” *Id.* She alleges that being “not Deaf enough” means that the individual does not subscribe to the “tribal nature” of “Deaf Culture,” which supports the use of American Sign Language (“ASL”) only and views “Deaf people” as an oppressed minority while “rejecting the notion of deafness as a disability.” *Id.* Plaintiff further alleges that “one of the chief complaints of the protestors regarding Dr Fernandes was that she was ‘not Deaf enough,’” and that Dr. Fernandes was removed from her position as President of Gallaudet because she was “not Deaf enough.” *Id.* at ¶ 14. Plaintiff also alleges that she supported “the policies of diversity and openness that Dr. Fernandes would have implemented as President,” which she describes as “a climate of diversity and tolerance that would accommodate both Deaf and deaf students, as well as minorities who are not proficient in [American Sign Language], and those who embrace technology as a means to integrate more fully into the outside world (e.g., through use of cochlear implants).” Comp. at ¶ 14. She further alleges that “Dr. Fernandes’ beliefs in openness and diversity were viewed by Deaf Culture advocates as a threat to Deaf Culture.” *Id.*

In making these allegations, plaintiff is asking this Court to conclude that being “not Deaf enough” is a protected status under the DCHRA. However, plaintiff’s own allegations demonstrate that providing protected status on the basis of being “not Deaf enough” would be inappropriate. First, plaintiff alleges that being “not Deaf enough” is a cultural phenomenon

rather than physical condition. Accordingly, being “not Deaf enough” cannot be a disability, which is defined as a “physical or mental impairment.” D.C. Code § 2-1401.02(5A). This conclusion is consistent with plaintiff’s allegation that those who subscribe to the belief that an individual is “not Deaf enough” “rejects the notion of deafness as a disability.”

Second, the diversity and openness policies advocated by Dr. Fernandes and supported by plaintiff are not based on a protected status. Rather, as plaintiff alleges, she supported policies favoring different modes of communication on campus based on the needs of students who may not be proficient in ASL (*i.e.*, using ASL and voice as alleged in paragraph 19) and policies that encouraged and facilitated the use of technology to integrate deaf people into the “outside world.” Comp. at ¶ 14. In other words, Dr. Fernandes’ policies were not based on hearing as a disability, but based on her belief that students’ needs should dictate the mode of communication used in the academic setting and that technology should be embraced.

Consequently, because being “not Deaf enough” is not a disability and the policies supported by plaintiff were not based on a disability, and because plaintiff has not alleged that she took the purported protected activity on any other protected basis, plaintiff did not engage in a protected activity under the DCHRA. Thus, her retaliation claim fails based on this activity.

2. Plaintiff did not engage in a protected activity when she questioned a policy applied by the Mathematics Department.

Plaintiff alleges that she engaged in a protected activity “by aiding students affected by a discriminatory policy of the Mathematics Department, the use of which had resulted in discrimination by Gallaudet on the basis of race and disability.” Comp. at ¶ 36. As explained by plaintiff, the policy that she expressed concerns about the weight given to final examinations “such that a student who had received passing marks on all other coursework could still fail the entire course if he or she failed the final examination.” Comp. at ¶ 20. Plaintiff claims that this

policy “discriminated against students ... who were learning disabled, lacked sufficient math preparation because they are deaf, and possessed a range of communication skills from no signing to ASL, and therefore did not do well on high-stakes examinations, particularly in the context of mathematics.” *Id.* The deaf, learning disabled student adversely affected by this policy “includ[ed] African-American and developmental students.” *Id.*

By her own pleading, plaintiff’s concern about the policy implemented by the Mathematics Department was not grounded on the application of such policy to African-American students only, but to all learning disabled student who did not have sufficient math preparation and who used a range of communication skills. For instance, when she reinstated a student (who happened to be African-American) who had been dismissed from Gallaudet for poor grades in mathematics, she claims that his performance improved because he was “given the opportunity to work with a faculty member whose sign communication matched his preferred method of communication (using sign *and* voice as opposed to signing only).” Comp. at ¶ 19 (emphasis in original). Aiding students who may be adversely affected by a facially neutral policy because of the student’s communication skills and learning abilities does not constitute a protected activity under the DCHRA. Such attributes are not protected under the DCHRA. Thus, plaintiff’s efforts on behalf of learning disabled student who use a range of communication skills are not protected activity. Accordingly, her retaliation claim based on this activity fails.

In summary, plaintiff was not engaged in a protected activity when she supported Dr. Ferandes or when she expressed concerns about a Mathematics Department policy, and thus, her retaliation claim fails.

B. Plaintiff Cannot Establish An Adverse Action.

Even if plaintiff could establish that she engaged in statutorily protected activities, her retaliation claim fails because she cannot establish that “a reasonable employee would have found the challenged actions in this case to be ‘materially adverse,’ meaning it ‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Ginger*, 477 F. Supp. 2d at 51 (quoting *Burlington Northern & Santa Fe Ry.*, 126 S. Ct. at 2415) (quotations omitted). To that end, plaintiff makes a very general assertion that she suffered “materially adverse actions” that “varied, but were such that they would dissuade a reasonable employee from making or supporting a charge of discrimination.” Comp. at ¶ 37. In other parts of her Complaint, plaintiff alleges that that her job responsibilities were reduced because she was excluded from “several important personnel decisions,” that she was excluded from the Recruitment, Enrollment and Retention Team, that her desire to volunteer for the Academic Rigor Working Team was ignored, that she received a less than expected merit pay increase, and Gallaudet retaliated against her because the Washington Post published an article that included a discussion about her alleged role with respect to an allegation about grade changing,. Comp. at ¶¶ 21, 23, 24, 26. As shown below, none of these personnel actions rise to the level of materially adverse action.

1. Plaintiff cannot establish that an exclusion from personnel decisions was a “materially adverse action.”

In this case, plaintiff does not allege that her job responsibilities were significantly diminished, that she was demoted, that she was given a less distinguished title, or that she lost pay or benefits. Plaintiff also does not claim that her ability to make all personnel decisions was revoked or otherwise taken away. Instead, she claims that a reasonable person would be dissuaded from making or supporting a change of discrimination if that person were excluded

from several personnel decisions. Comp. at ¶ 37. Plaintiff has not alleged that she has been injured or harmed in any way because she was not able to participate in these “several important personnel decisions.” Consequently, they do not constitute a materially adverse action. *See Valles-Hall v. Center for Nonprofit Advancement*, 2007 U.S. Dist. LEXIS 22046, at *101 (D.D.C. Mar. 12, 2007) (holding that threat of termination that was not carried out did not produce an injury or harm and thus was not a materially adverse action) (attached hereto as Exhibit 1).

2. Plaintiff cannot establish that she suffered a “materially adverse action” because she was excluded from committees.

Plaintiff further claims that she suffered a “materially adverse action” because she was excluded from one committee and her “desire to participate” on another committee were “largely ignored.” Comp. at ¶ 24. Again, Plaintiff has not alleged that she has been injured or harmed in any way because she was not able to participate in these committees. Consequently, they do not constitute a materially adverse action. *See Valles-Hall*, 2007 U.S. Dist. LEXIS 22046, at *101.

3. Plaintiff did not suffer an adverse employment action because she received a less than expected merit pay increase.

Plaintiff claims that she “normally receiv[es] a 6% merit pay increase,” but that she “was recently informed” that she would only receive a “smaller than usual” 3% merit pay increase. Comp. at ¶ 26. This Court has noted that “it is not necessarily self-evident that providing an individual with an added benefit (a raise) that [falls] below their expectations is an ‘adverse action’” *Johnson v. Joo*, 2006 U.S. Dist. LEXIS 13022, at *71 (D.D.C. Mar. 12, 2006) (attached hereto as Exhibit 2).

In any event, while plaintiff may have expected a 6% increase, she has not alleged that she was entitled to 6% increase. She does not point to a contract that guarantees that she was

entitled to a 6% increase or any other source that would demonstrate her entitlement to a 6% increase. In addition, plaintiff has not alleged that her pay increase was treated any differently than other employees.

Accordingly, because plaintiff was not injured or harm by receiving a 3% increase instead of a 6% increase based solely on her unilateral expectation, the 3% pay increase is not a materially adverse action. *See Valles-Hall*, 2007 U.S. Dist. LEXIS 22046, at *101.

4. Plaintiff cannot establish that the Washington Post article was a “materially adverse action.”

Finally, plaintiff alleges that the Washington Post article referenced in her Complaint contained falsehoods, defamatory statements, and false accusations regarding her efforts to “question[] the use of a policy that she believed was discriminating against students” Comp. at ¶ 21. Again, plaintiff does not claim any injury or harm as a result of this article. Consequently, the article is not a materially adverse action. *See Valles-Hall*, 2007 U.S. Dist. LEXIS 22046, at *101.

C. Plaintiff Cannot Establish Causation.

Assuming for purposes of this motion that plaintiff was able to establish the first two elements of her retaliation claim, it would still fail because she would not be able to establish causation. To that end, plaintiff relies primarily on the “timeline of events” to establish causation. Comp. at ¶ 38. As held by this Court, to “qualify as a causal connection, the temporal proximity between the employer’s knowledge of the protected activity and the adverse personnel action must be ‘very close.’” *Ginger*, 477 F. Supp. 2d at 53 (quoting *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001), which held that a 3 or 4-month lapse between a protected activity and an adverse action is insufficient to establish a causal connection).

To establish her retaliation claim, plaintiff relies on purported protected activities that

occurred in the fall of 2005 (*see* Comp. at ¶ 19), January or February 2006 (*see* Comp. at ¶ 20), and October 2006 (*see* Comp. at ¶ 17). The alleged adverse actions occurred in November 2006 (*see* Comp. at ¶¶ 21, 23) and January 2007 (*see* Comp. at ¶ 24).

As a matter of law, too much time has passed to infer a causal connection between plaintiff's efforts to aid the students (which occurred in 2005 and January or February 2006) and the purported adverse actions (which occurred in November 2006 and January 2007). Thus, plaintiff cannot establish her retaliation claim based on the activities related to her concern about the Mathematics Department policy by relying solely on the timeline of events. Plaintiff has not offered any other reasons to infer causation (*see* Comp. at ¶38); thus, her retaliation claim based on her efforts to aid the students fails.

Similarly, too much time has passed as a matter of law between plaintiff's support of Dr. Fernandes in October 2006 and her purported exclusion from two committees in January 2007. Plaintiff has not offered anything other than the timeline of events to establish causation. Accordingly, she cannot establish that she was retaliated against in January 2007 for events that occurred in October 2006.

Finally, there is no basis for inferring or concluding that there is a causal connection between plaintiff's aid and support of Dr. Fernandes in October 2006 and the Washington Post article and her alleged exclusion from several personnel decisions in November 2007. Plaintiff has not alleged grounds to infer that Gallaudet was involved in any way in the publication of that article. She also has not alleged any grounds to infer that Gallaudet sanctioned or approved any statements made to the Washington Post reporter by the unidentified staff members referenced in the article. Similarly, plaintiff has not alleged any grounds to infer that the decision to exclude her from several personnel decisions was in any way related to her aid and support of Dr.

Fernandes. Consequently, her retaliation claim fails.

IV. PLAINTIFF CANNOT ESTABLISH THAT SHE WAS DISCRIMINATED AGAINST ON THE BASIS OF A DISABILITY UNDER THE DISTRICT OF COLUMBIA HUMAN RIGHTS ACT.

To establish a claim of discrimination based on a disability under the DCHRA, plaintiff must be able to establish a *prima facie* case, demonstrating: (1) she has a disability under the DCHRA, (2) that she was otherwise qualified to perform the essential functions of her job, with or without a reasonable accommodation, and (3) that a causal connection exists between the disability and the adverse action. *Swanks v. Washington Metro. Area Transit Auth.*, 179 F.3d 929, 934 (D.C. Cir. 1999). The DCHRA defines “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of an individual having a record of such an impairment or being regarded as having such an impairment.” D.C. Code § 2-1401.02(5A).

For purposes of this motion, Gallaudet agrees that plaintiff suffers from hearing loss that substantially limited the major life activity of hearing. However, plaintiff’s claim of discrimination is not based on her hearing loss, but on her perception that she is being forced out of her job because she is “not Deaf enough.” *See Comp.* at ¶¶ 42-43. In fact, she alleges throughout her Complaint that the adverse actions being taken against her are based on her being “not Deaf enough.” *See Comp.* at ¶¶ 8, 9, 13, 14, 15, 17, 18. Being “not Deaf enough,” as explained by plaintiff, “signifies a culture rather than the physical condition of hearing loss.” *Comp.* at ¶ 9. In other words, it is plain from the Complaint itself that being considered “not Deaf enough” has nothing to do with the physical condition of hearing loss, but that being “not Deaf enough” means that the individual does not embrace the philosophy of using only ASL to communicate. *See Comp.* at ¶ 9. Because being “not Deaf enough” is not a physical

impairment, it cannot be a disability under the DCHRA. Accordingly, plaintiff's claim of discrimination based on a disability fails as a matter of law.²

V. PLAINTIFF CANNOT ESTABLISH A CLAIM OF HOSTILE WORK ENVIRONMENT BASED ON A DISABILITY UNDER THE DISTRICT OF COLUMBIA HUMAN RIGHTS ACT.

To establish a claim of hostile work environment based on a disability under the DCHRA, plaintiff must be able to establish a *prima facie* case, demonstrating: (1) that she has a disability under the DCHRA and thus a member of a protected class, (2) that she was subjected to unwelcome harassment; (3) that the harassment was based on her disability; and (4) that the harassment was severe and pervasive enough to affect a term, condition or privilege of employment. *McCain v. CCA of Tenn., Inc.*, 254 F. Supp. 2d 115, 120 (D.D.C. 2003) (citing *Howard Univ. v. Best*, 484 A.2d 958, 978 (D.C. 1984)).

For the same reason that plaintiff cannot establish that she was discriminated on the basis of a disability, plaintiff also cannot establish that she was subjected to a hostile work environment based on a disability. Plaintiff does not allege that she was unlawfully harassed because she has hearing loss. Rather, she pleads that the harassment occurred “specifically because she is considered ‘not Deaf enough.’” Comp. at ¶ 47. Being “not Deaf enough,” as explained by plaintiff, “signifies a culture rather than the physical condition of hearing loss.” Comp. at ¶ 9. Because being “not Deaf enough” is not a physical impairment, it cannot be a disability under the DCHRA. Accordingly, plaintiff's claim of hostile work environment based on a disability fails as a matter of law.³

² At this time, defendant does not intend to address the other two elements of a disability discrimination *prima facie* case. Defendant reserves the right to address these elements in a later motion or at trial.

³ At this time, defendant does not intend to address the other elements of a disability hostile work environment claim. Defendant reserves the right to address these elements in a later motion or at trial.

VI. PLAINTIFF'S INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS CLAIM FAILS AS A MATTER OF LAW.

To establish a claim of intentional infliction of emotional distress, plaintiff must establish: “(1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress.” *Howard Univ.*, 484 A.2d at 985 (citations and quotations omitted).

In this case, plaintiff claims that the “extreme and outrageous actions of Gallaudet employees and agents resulted in severe emotional distress to” her. Comp. at ¶ 50. Thus, as pleaded in her Complaint, the actions that plaintiff alleges were “extreme and outrageous” occurred within the context of her employment. For instance, the Washington Post article referred to plaintiff’s request to other faculty members to changes the grades of some students. Comp. at ¶ 21. The NCAA report also discussed an allegation that plaintiff was involved in changing grades. Comp. at ¶ 25. Whether or not plaintiff engaged in such activity is limited to the scope of her employment. Thus, at bottom, the statements that plaintiff contends are defamatory are based on an employer-employee conflict. As held by the District of Columbia Court of Appeals, “employer-employee conflicts do not, as a matter of law, rise to the level of outrageous conduct.” *Howard Univ.*, 484 A.2d at 986. According, plaintiff’s claim for intentional infliction of emotional distress must be dismissed as a matter of law.

VII. PLAINTIFF'S TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS FAILS AS A MATTER OF LAW.

To prevail on a claim of tortious interference with prospective business relations, plaintiff must allege: “(1) a valid business relationship or expectancy with a third party; (2) knowledge of the relationship or expectancy on the part of the defendant; (3) intentional interference by the defendant, causing a breach or termination of the relationship or expectancy; and (4) resultant

damage.” *Williams v. Federal Nat’l Mortgage Ass’n*, 2006 U.S. Dist. LEXIS 42911, at *26 (D.D.C. June 26, 2006) (attached hereto as Exhibit 3).

Plaintiff first claims that “agents and employees of Gallaudet intentionally interfered with . . . her dream of educating the deaf at the nation’s premiere institution of higher education for the deaf.” Comp. at ¶ 53. The District of Columbia Court of Appeals has held that a party to the contract cannot tortiously interfere with its own contract. *Press v. Howard Univ.*, 540 A.2d 733, 735 (D.C. 1988). *See also Newman v. Legal Services Corp.*, 628 F. Supp. 535, 541 (D.D.C. 1986) (reiterating the holding that “it is a well settled principle of law that this tort arises only when there is interference with a contract between the plaintiff *and a third party*” and that a “corporate officer is not a third-party to a contract between his corporation and one of its employees” (citations and quotations omitted)). In fact, a cause of action based on this assertion “borders on the frivolous.” *Press*, 540 A.2d at 735. While plaintiff does not allege a contractual relationship, her claim that Gallaudet is intentionally interfering with its own business relations with plaintiff is equally unavailing.

Plaintiff then claims that Gallaudet tortiously interfered with plaintiff’s prospective business interests with third parties, that “[a]t least three potential sources of prospective employment have disappeared, which . . . were the results of the false information about her that was spread in the public domain by agents and/or employees of Gallaudet.” Comp. at ¶ 54. Plaintiff’s allegation fails to allege the elements of this tort. She vaguely refers to “three potential sources” that are not identified. Her inability to specifically identify the third parties with whom she had a business expectancy is fatal to her tortious interference claim. *See Williams*, 2006 U.S. Dist. LEXIS at *27 (holding that because the plaintiff was only able to

specifically identify one third party, that was “the only relationship that conceivably can support her tortious interference claim”).

Likewise, plaintiff’s failure to assert in any way that Gallaudet had any knowledge about her prospective business interests is fatal to her claim. Finally, she alleges that her employment opportunities “disappeared” because of “the false information about her that was spread in the public domain” -- thus, plaintiff does not allege that Gallaudet acted in any way to intentionally interfere with her alleged prospective business interests.

In summary, because Gallaudet cannot interfere with its own business relation and because the Complaint is deficient in its allegations to establish the elements of this claim, this cause of action must be dismissed.

VIII. PLAINTIFF CANNOT ESTABLISH A BREACH OF CONTRACT.

Plaintiff’s breach of contract claim rests on her assertion that Gallaudet’s nondiscrimination policy is a contractual agreement. Comp. at ¶ 58. It has been held by the District of Columbia Court of Appeals that:

[T]he terms of an employer’s “personnel or policy manual may be sufficient to raise a jury question as to whether the manual creates contractual rights for the employee. However, employers can effectively disclaim any implied contractual obligation arising from such provisions. The legal effect of such a disclaimer is, in the first instance, a question for the court to decide.

Boulton v. Institute of Int’l Educ., 808 A.2d 499, 505 (D.C. 2002) (quotation and citation omitted).

The policy referenced in paragraph 7 of the Complaint -- Section 3.01 EEO/Affirmative Action -- is found in Gallaudet’s Administration & Operations Manual (“Manual”). The Introduction to the Manual explicitly states:

