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2 Zaleon, *on the brief*), Corporation Counsel of the City of
3 New York, New York, NY, *for Defendants-Appellees*.

4 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, and DECREED
5 that the judgment of the district court be AFFIRMED.

6 Plaintiff-Appellant Paul Desir (“Desir”) appeals from a judgment of the United States
7 District Court for the Eastern District of New York (Amon, *J.*) granting summary judgment to
8 Defendants-Appellees New York City Department of Education (“Department of Education”),
9 Sharyn C. Burnett (“Burnett”), Richard Cooperman (“Cooperman”) and George Lombardi
10 (“Lombardi”).¹ Desir alleged discrimination and unlawful retaliation in violation of Title VII of
11 the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e *et seq.*; race
12 discrimination and retaliation in violation of the New York State Executive Law and the New
13 York City Administrative Code; and violations of his constitutional rights to free speech, equal
14 protection, and substantive and procedural due process under the First, Fifth, and Fourteenth
15 Amendments. By Memorandum and Order of August 24, 2010, the district court granted the
16 Defendants-Appellees’ motion for summary judgment on Desir’s federal claims and declined to
17 exercise supplemental jurisdiction over Desir’s state law claims. Desir timely appealed on
18 September 20, 2010. We assume the parties’ familiarity with the underlying facts and
19 procedural history.

20 * * *

¹The district court dismissed defendant City of New York (the “City”) from the action, reasoning that the Department of Education, rather than the City, was Desir’s direct employer. The district court also dismissed the Title VII claims against Cooperman, Lombardi, and Burnett on the ground that individuals are not subject to liability under Title VII. Desir does not challenge either of these rulings on appeal.

1 We review *de novo* a district court’s order granting summary judgment. *Molinari v.*
2 *Bloomberg*, 564 F.3d 587, 595 (2d Cir. 2009). Summary judgment “is appropriate where there
3 exists no genuine issue of material fact and, based on the undisputed facts, the moving party is
4 entitled to judgment as a matter of law.” *10 Ellicott Square Court Corp. V. Mtn. Valley Indem.*
5 *Co.*, 634 F.3d 112, 119 (2d Cir. 2011) (internal quotation marks omitted). The burden is on the
6 moving party to demonstrate that no genuine issue respecting any material fact exists. *Id.* In
7 reviewing a court’s decision granting summary judgment, the appellate court must consider “the
8 evidence in the light most favorable to the non-moving party and draw[] all reasonable
9 inferences in its favor.” *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 187 (2d Cir. 2006).
10 “Nevertheless, the non[-]moving party must come forward with specific facts showing that there
11 is a genuine issue of material fact for trial.” *Shannon v. N.Y. City Transit Auth.*, 332 F.3d 95, 99
12 (2d Cir. 2003). “Conclusory allegations, conjecture, and speculation . . . are insufficient to create
13 a genuine issue of fact.” *Id.* (internal quotation marks omitted); *see also Weinstock v. Columbia*
14 *Univ.*, 224 F.3d 33, 41 (2d Cir. 2000) (“[U]nsupported allegations do not create a material issue
15 of fact.”).

16 When deciding whether summary judgment should be granted in a discrimination case,
17 we must take additional considerations into account. *Gallo*, 22 F.3d at 1224. “A trial court must
18 be cautious about granting summary judgment to an employer when, as here, its intent is at
19 issue.” *Id.* “[A]ffidavits and depositions must be carefully scrutinized for circumstantial proof
20 which, if believed, would show discrimination.” *Id.* Summary judgment remains appropriate in
21 discrimination cases, as “the salutary purposes of summary judgment – avoiding protracted,
22 expensive and harassing trials – apply no less to discrimination cases than to . . . other areas of

1 litigation.” *Weinstock*, 224 F.3d at 41 (internal quotation marks omitted); *see also Abdu-Brisson*
2 *v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir. 2001) (“It is now beyond cavil that summary
3 judgment may be appropriate even in the fact-intensive context of discrimination cases.”).
4 Finally, we are free to affirm a district court’s grant of summary judgment “on any ground fairly
5 supported by the record,” including “for different reasons than those relied upon by the district
6 court.” *Abdu-Brisson*, 239 F.3d at 466.

7 ***A. Desir’s Discrimination Claim***

8 On appeal, Desir argues that the district court erred in granting summary judgment to the
9 Defendants-Appellees on his discrimination claim because disputed issues of material fact exist
10 as to whether he was subject to unlawful discrimination. We examine discrimination claims
11 brought pursuant to Title VII under the burden-shifting analysis articulated by the Supreme
12 Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). *See, e.g., Feingold*
13 *v. New York*, 366 F.3d 138, 152 (2d Cir. 2004). Under the *McDonnell Douglas* framework, the
14 plaintiff must first establish a *prima facie* case of discrimination. 411 U.S. at 802. To do so, the
15 plaintiff must demonstrate that: 1) he was in a protected group; 2) he was qualified for the
16 position; 3) he was subject to an adverse employment action; and 4) the adverse employment
17 action occurred under circumstances giving rise to an inference of discrimination. *See Terry v.*
18 *Ashcroft*, 336 F.3d 128, 137-38 (2d Cir. 2003); *Collins v. N.Y. City Trans. Auth.*, 305 F.3d 113,
19 118 (2d Cir. 2002). We have held that the plaintiff’s burden of proof at this stage is *de minimis*.
20 *Weinstock*, 224 F.3d at 42.

21 Once the plaintiff has established a *prima facie* case of discrimination, the burden then
22 shifts to the employer to articulate a “legitimate, nondiscriminatory reason” for the employment

1 action. *McDonnell Douglas*, 411 U.S. at 802. In other words, “[t]he defendant must clearly set
2 forth, through the introduction of admissible evidence, reasons for its actions which, *if believed*
3 *by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the
4 employment action.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (internal
5 quotation marks omitted).

6 Upon the defendant’s proffer of such a reason, the presumption of discrimination arising
7 with the *prima facie* case “drops from the picture.” *Weinstock*, 224 F.3d at 42 (citing *St. Mary’s*
8 *Honor Ctr.*, 509 U.S. at 510-11). The plaintiff must then establish that the defendant’s proffered
9 reason is a mere pretext for actual discrimination. *See McDonnell Douglas*, 411 U.S. at 804;
10 *Weinstock*, 224 F.3d at 42. The plaintiff must produce “sufficient evidence to support a rational
11 finding that the legitimate, non-discriminatory reasons” presented by the defendant were false,
12 and that “more likely than not discrimination was the real reason for the employment action.”
13 *Weinstock*, 224 F.3d at 42 (internal quotation marks and alterations omitted). “In short, the
14 question becomes whether the evidence, taken as a whole, supports a sufficient rational inference
15 of discrimination.” *Id.* “It is not enough . . . to disbelieve the employer; the factfinder must
16 [also] believe the plaintiff’s explanation of intentional discrimination.” *St. Mary’s Honor Ctr.*,
17 509 U.S. at 519 (emphasis omitted).

18 Desir has failed to raise an inference of discrimination by showing that he was treated
19 differently than similarly situated home instruction teachers. “A showing of disparate
20 treatment—that is, a showing that the employer treated plaintiff less favorably than a similarly
21 situated employee outside his protected group – is a recognized method of raising an inference of
22 discrimination for the purposes of making out a *prima facie* case.” *Mandell v. Cnty. of Suffolk*,

1 316 F.3d 368, 379 (2d Cir. 2003) (internal quotation marks omitted). “An employee is similarly
2 situated to co-employees if they were (1) subject to the same performance evaluation and
3 discipline standards and (2) engaged in comparable conduct.” *Ruiz v. Cnty. of Rockland*, 609
4 F.3d 486, 493-94 (2d Cir. 2010) (internal quotation marks omitted). Desir principally relies on
5 the fact that he was both the only African-American teacher of the five who received
6 unsatisfactory ratings for the 2004-2005 school year and the only one of those five who was
7 fired. Desir does not dispute, however, that the four Caucasian teachers who received
8 unsatisfactory ratings were all tenured, while Desir held a probationary position and could be
9 fired at-will. Thus, the four Caucasian teachers were *not* “subject to the same performance
10 evaluation and discipline standards” as Desir. *See id.* Further, Desir has not presented any
11 evidence to show that the conduct for which the other four teachers were sanctioned was similar
12 to the conduct he engaged in. Instead, he offers only the conclusory assertion that the four
13 instructors “committed far more egregious acts” than Desir. This will not suffice to demonstrate
14 that the four instructors engaged in comparable conduct.

15 Moreover, even assuming that Desir has established a *prima facie* case of discrimination,
16 he has failed to demonstrate that the non-discriminatory reasons put forth by the Defendants-
17 Appellees were pretextual. Beginning shortly after Desir was hired as a home instruction teacher
18 on September 7, 2004 and continuing throughout the school year, Cooperman issued a series of
19 letters documenting deficiencies in Desir’s performance. These letters consistently identify the
20 same flaws in Desir’s performance: failure to accurately log teaching hours, failure to report
21 absences, and failure to call in cancellations to the home office. Desir has not shown why this
22 substantial record should be considered merely a pretext for discriminatory motives. In sum,

1 Desir has failed to submit evidence providing any basis on which a reasonable jury could
2 conclude that he suffered adverse employment actions as a result of discriminatory animus. We
3 therefore find that the district court did not err in granting summary judgment to the Defendants-
4 Appellees on Desir's discrimination claims.

5 ***B. Desir's Retaliation Claim***

6 Desir argues that the Defendants-Appellees unlawfully retaliated against him for
7 complaining about his allegedly discriminatory treatment. We review Title VII retaliation
8 claims under a four-step burden-shifting analysis similar to the *McDonnell Douglas* test for Title
9 VII disparate treatment claims. *See Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d
10 Cir. 2005) (citing *McDonnell Douglas*, 411 U.S. at 802-05). As with *McDonnell Douglas*, the
11 plaintiff must first establish a *prima facie* case of retaliation by showing 1) participation in
12 protected activity; 2) defendant's knowledge of the protected activity; 3) an adverse employment
13 action; and 4) a causal connection between the protected activity and the adverse employment
14 action. *Id.*; *see also Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 205-06 (2d
15 Cir. 2006). The plaintiff's burden of proof as to this first step "has been characterized as
16 'minimal' and '*de minimis*.'" *Jute*, 420 F.3d at 173 (internal quotation marks omitted).

17 Desir fails to establish a *prima facie* case of retaliation because he has not shown a causal
18 connection between the protected activity and the adverse employment action. The district court
19 correctly noted that the only protected activity at issue here was the filing of complaints with the
20 City's Office of Equal Opportunity and the Equal Employment Opportunity Commission in
21 April 2005. Desir points to the short period of time between the filing of the complaints in April
22 and his receipt of the unsatisfactory rating and firing in June of 2005 as evidence of a causal

1 connection between his complaints and his subsequent firing. But, as discussed above, the
2 Defendants-Appellees documented their dissatisfaction with Desir’s performance beginning well
3 before the filing of the complaints in April. Thus, Desir has not met his initial burden of
4 establishing a *prima facie* case of retaliation and his retaliation claim must fail.

5 ***C. Desir’s First Amendment Claim***

6 “[T]he First Amendment protects a public employee’s right, in certain circumstances, to
7 speak as a citizen addressing matters of public concern.” *Garcetti v. Ceballos*, 547 U.S. 410,
8 417 (2006). “To constitute speech on a matter of public concern, an employee’s expression must
9 be fairly considered as relating to any matter of political, social, or other concern to the
10 community. Speech that, although touching on a topic of general importance, primarily concerns
11 an issue that is personal in nature and generally related to the speaker’s own situation, such as his
12 or her assignments, promotion, or salary, does not address matters of public concern.” *Jackler v.*
13 *Byrne*, No. 10-0859-cv, 2011 WL 2937279, at *8 (2d Cir. July 22, 2011) (citation omitted).

14 Desir has not shown that his complaints about his treatment by his home instruction
15 supervisors addressed “matters of public concern.” Although Desir argues he addressed
16 organizational problems with the home instruction program and not just personal matters, his
17 speech fundamentally concerned his own entitlement to privileges as a home instructor and
18 therefore cannot be considered to have encompassed matters of public concern.² Accordingly,
19 the district court correctly concluded that Desir’s First Amendment claim fails as a matter of law.

²To the extent that Desir identifies statements he made concerning the treatment of other instructors in the program, those remarks were made in his official capacity and thus do not receive protection under the First Amendment. *See Garcetti*, 547 U.S. at 424 (holding that the “First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities”).

1 ***D. Desir’s Procedural Due Process Claim***

2 Desir claims that he was deprived of his right to a hearing prior to his termination.³ The
3 record is clear, however, that Desir was a probationary teacher at the time of his termination.
4 Desir therefore had no Fourteenth Amendment property interest in his position. *See Segal v.*
5 *City of New York*, 459 F.3d 207, 212 (2d Cir. 2006) (noting that an at-will government employee
6 has no property interest in continued employment). Desir claims that he had achieved tenure by
7 virtue of his years of service as a probationary teacher and a substitute teacher. He was afforded
8 an opportunity to present this claim in an Article 78 proceeding and it was denied. *See Hellenic*
9 *Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 881 (2d Cir. 1996) (finding
10 Article 78 proceeding to be a “perfectly adequate postdeprivation remedy”). Accordingly, the
11 district court properly dismissed Desir’s procedural due process claim.

12 ***E. Desir’s Equal Protection Claim***

13 To assert a claim for municipal liability under § 1983, a plaintiff must produce evidence
14 showing “(1) an official policy or custom that (2) cause[d him] to be subjected to (3) a denial of
15 a constitutional right.” *Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir. 2007). Here, Desir
16 has alleged only that Cooperman and Lombardi fired him improperly; he pled no facts, nor
17 offered any evidence, to show that these actions occurred pursuant to a Department of Education
18 policy or practice. The district court therefore properly concluded that Desir’s equal protection
19 claim fails as a matter of law.

³Desir does not challenge the district court’s dismissal of his substantive due process claim on appeal.

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F. Conclusion

We have reviewed the parties' remaining arguments and find them to be moot, waived, or without merit. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998). The judgment of the district court is therefore AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk