

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2014

Argued: January 7, 2015 Decided: June 24, 2015
Docket No. 14-1012-cv

RICKEY L. TOLBERT,

Plaintiff-Appellant,

—v.—

RICHARD SMITH AND ROCHESTER CITY SCHOOL DISTRICT,

Defendants-Appellees.

Before: LYNCH AND CARNEY, Circuit Judges, and KOELTL, District Judge.^{*}

1 The plaintiff, Rickey Tolbert, appeals from the judgment of
2 the United States District Court for the Western District of New
3 York (Siragusa, J.) dismissing his complaint. The district
4 court granted summary judgment dismissing the plaintiff's claims
5 for defamation, discrimination, and hostile work environment, in
6 violation of federal and state anti-discrimination laws and New
7 York State common law.

* The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 We affirm the judgment of the district court in all
2 respects, except that we vacate the judgment dismissing the
3 discrimination claims and remand as to those claims for further
4 proceedings.

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6 DAVID ROTHENBERG, Greiger and Rothenberg, LLP, for Plaintiff-
7 Appellant Rickey Tolbert.

8
9 MICHAEL E. DAVIS (Edwin Lopez-Soto, General Counsel, on the
10 brief), Rochester City School District, Law Department, for
11 Defendants-Appellees Richard Smith and Rochester City School
12 District.

13
14 _____
15 John G. Koeltl, District Judge:

16
17 The plaintiff, Rickey Tolbert, is an African-American
18 former teacher at John Marshall High School ("John Marshall") in
19 the Rochester City School District (the "School District"). He
20 appeals from a judgment of the United States District Court for
21 the Western District of New York (Siragusa, J.). The district
22 court granted summary judgment dismissing the plaintiff's claims
23 of discrimination and hostile work environment under Title VII
24 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.
25 ("Title VII"); the New York State Human Rights Law ("NYSHRL"),
26 N.Y. Exec. Law § 296 et seq.; and 42 U.S.C. § 1981. The
27 district court also dismissed the plaintiff's defamation claim.

28 On appeal, Mr. Tolbert contends that he identified
29 sufficient facts to establish a prima facie case of racial

1 discrimination, to show a hostile work environment, and to
2 support a claim for defamation. For the reasons explained
3 below, we affirm the judgment of the district court except with
4 respect to the discrimination claims, as to which there are
5 genuine disputes as to material facts that preclude summary
6 judgment based on Mr. Tolbert's prima facie case of
7 discrimination.

8 **I.**

9 **A.**

10 Mr. Tolbert was a culinary arts teacher at John Marshall
11 from 2006 to 2009. He was a non-tenured, probationary teacher,
12 who taught three culinary arts classes a day.

13 Because he was a probationary teacher, Mr. Tolbert's
14 classes were observed by John Marshall administrators. The
15 reviewing administrator would then write a "Formal Teacher
16 Observation." The Formal Teacher Observation Form includes a
17 space for written comments and also a "Summary of Performance"
18 section that asks the evaluator to check one of five boxes. The
19 available boxes are "Distinguished," "Proficient," "Meets
20 Professional Standards," "Below Professional Standards," and
21 "Unsatisfactory."

1 At the end of each school year, Mr. Tolbert also received
2 an annual evaluation by a John Marshall administrator.¹ The
3 Annual Evaluation Form includes eighteen categories. The
4 evaluator is asked to check one of five boxes for each category—
5 which are the same as those on the Formal Teacher Observation
6 Form—and provide written comments. The evaluator must also
7 provide an “Overall Summary Rating,” again by checking one of
8 five boxes.

9 During his second year teaching, Mr. Tolbert consistently
10 received marks of “Proficient” or “Meets Professional Standards”
11 on his evaluations. Laurel Avery-DeToy, an administrator at
12 John Marshall, conducted Mr. Tolbert’s Formal Teacher
13 Observations and his annual evaluation for the 2007–2008 school
14 year. Mr. Tolbert has no complaints about these reviews.

15 **B.**

16 Before the start of the 2008–2009 school year, defendant
17 Richard Smith was hired to replace Joseph Munno as the principal
18 of John Marshall. According to Mr. Tolbert, this is when his
19 employment situation started to sour.

20 Mr. Tolbert alleges that he did not receive a budget to
21 purchase supplies for his classes. The size of his classes also
22 grew. In the two previous years, he had around sixteen to

¹ The evaluations from the 2006–2007 school year were not included in the record.

1 eighteen students per class. In the fall of 2008, each of his
2 classes had at least twenty-eight students—despite a collective
3 bargaining agreement provision limiting at least one of his
4 classes to twenty-four students. After Mr. Tolbert complained,
5 the John Marshall administrators eventually reduced the number
6 of students in his classes.

7 Mr. Tolbert also claims that many Individualized Education
8 Plan students were placed in his classes, and he was not given
9 the assistance of a paraprofessional. The defendants insist
10 that due to budget cuts, a number of paraprofessional positions
11 were eliminated. As a result, the Special Education
12 Administrator determined that Mr. Tolbert would not be assigned
13 a paraprofessional for the 2008–2009 school year. The
14 defendants also note that twenty-three percent of the John
15 Marshall students had Individualized Education Plans.

16 Mr. Tolbert also experienced some problems with the
17 cleanliness and the maintenance of the kitchen in his classroom
18 (known as the “Jurist Room”). In the fall of 2008, the Monroe
19 County Department of Health and the New York State Department of
20 Health identified various health code violations. As a result,
21 Principal Smith closed the kitchen. The parties dispute the
22 cause of these violations. Mr. Tolbert insists that the
23 janitorial staff did not clean the kitchen regularly, and the

1 defendants contend that Mr. Tolbert and his students were—in
2 part—at fault.

3 But these problems were not new. In December 2007, Mr.
4 Tolbert complained to school officials that the custodial staff
5 was not cleaning the kitchen properly. And in March 2008, the
6 New York State Department of Health identified a number of
7 health code violations in the kitchen.

8 **C.**

9 Mr. Tolbert also alleges that Principal Smith made racist
10 remarks. In the fall of 2008, Mr. Tolbert volunteered to cook
11 for a homecoming breakfast. When discussing what food would be
12 served, Mr. Tolbert alleges that Principal Smith asked him: “Do
13 you only know how to cook black, or can you cook American too?”
14 JA 332.

15 In October 2008, a student in Mr. Tolbert’s class alleges
16 that Principal Smith asked her if she was learning anything from
17 Mr. Tolbert. In January 2009, during a conversation about
18 reopening the kitchen, Principal Smith asked the same student
19 “how [she] expected to learn if all [she] was learning to cook
20 was black food.” JA 450. When asked to define “black food,”
21 Principal Smith allegedly said “that what he meant was American
22 food.” Id. And another one of Mr. Tolbert’s students alleges
23 that in January or February of 2009, Principal Smith told her

1 that "black kids can't learn in a cooking class because all they
2 want to do is eat." JA 453.

3 At some point, Principal Smith and Mr. Tolbert both
4 inspected Mr. Tolbert's classroom. Mr. Tolbert claims that he
5 showed Principal Smith areas in the classroom that had not been
6 cleaned by the janitorial staff, and Principal Smith remarked
7 that "the kids we get to this school are not from much better
8 than this." JA 335. Because of the demographics of the John
9 Marshall student body, Mr. Tolbert interpreted this comment as a
10 reference to the students' race. And in the beginning of the
11 2008-2009 school year, Barbara Postell, then a counselor at John
12 Marshall, asserts that Principal Smith—when referring to John
13 Marshall students—stated that "my friends, they are not like
14 us." JA 457. Ms. Postell interpreted this as a comment about
15 the students' race. Principal Smith denies making any of these
16 statements.

17 Mr. Tolbert also claims that Principal Smith told him and
18 his students that the Monroe County Department of Health had
19 closed the kitchen in Mr. Tolbert's classroom. That statement,
20 according to Mr. Tolbert, was incorrect; Principal Smith had
21 closed the kitchen.

1 **D.**

2 Mr. Tolbert received three Formal Teacher Evaluations
3 during the 2008–2009 school year. In November 2008, Ms. Avery-
4 DeToy observed one of Mr. Tolbert’s classes and submitted a
5 lengthy and negative evaluation. She rated his performance as
6 “Unsatisfactory,” the lowest of the five options.

7 In December 2008, Anthony Bianchi observed one of Mr.
8 Tolbert’s classes and concluded that Mr. Tolbert had met
9 professional standards. In March 2009, Mr. Tolbert requested
10 that someone other than Ms. Avery-DeToy conduct his next
11 evaluation, and Principal Smith assigned the review to Jason
12 Muhammad. After observing an April 6, 2009, class, Mr. Muhammad
13 concluded that Mr. Tolbert had met professional standards.

14 In March 2009, the “Administrative Team” at John Marshall
15 sent a memorandum to the teaching staff. The memo discussed
16 year-end evaluations and identified which administrator would
17 review each teacher. According to the memo, Mr. Muhammad would
18 conduct Mr. Tolbert’s annual evaluation. But Principal Smith
19 later reassigned the evaluation to Ms. Avery-DeToy, the only
20 administrator who had previously rated Mr. Tolbert’s performance
21 as “Unsatisfactory.” Mr. Tolbert claims that he received no
22 notice of the reassignment.

23 Mr. Tolbert’s annual evaluation was not positive. For
24 twelve of the eighteen categories, Ms. Avery-DeToy described Mr.

1 Tolbert's teaching as "Below Professional Standards." For the
2 remaining six categories, Mr. Tolbert received marks of "Meets
3 Professional Standards." The Overall Summary Rating was "Below
4 Professional Standards." The comment sections noted that Mr.
5 Tolbert had shown some growth, but expressed concern about his
6 teaching strategy, professional development, and lack of
7 involvement with his students' parents. In the end, Ms. Avery-
8 DeToy recommended denying Mr. Tolbert tenure.

9 Principal Smith agreed, but he recommended that Mr. Tolbert
10 receive a fourth year of probation. Principal Smith declared
11 that he made this decision "[b]ased on Tolbert's observations
12 throughout 2008-2009, his final evaluation and my own
13 observations of his performance." JA 45. Principal Smith and
14 Ms. Avery-DeToy informed Mr. Tolbert of the decision in April
15 2009.

16 Mr. Tolbert refused the fourth-year-probation offer.
17 Accordingly, a recommendation against granting Mr. Tolbert
18 tenure was forwarded to the Rochester City School Board.
19 Although the School Board did not approve the denial of tenure,
20 Superintendent Jean-Claude Brizard made a "final decision" to
21 deny tenure. Superintendent Brizard testified that his decision
22 was based on Principal Smith's recommendation and the reviews of
23 Mr. Tolbert from "the last year and part before that." JA 260.

1 By a letter dated August 31, 2009, the School District
2 informed Mr. Tolbert that he would not receive tenure. The
3 School District again offered Mr. Tolbert a fourth year of
4 probation, which he refused.

5 **E.**

6 Mr. Tolbert filed his original complaint in November 2009.
7 After an amendment, the complaint alleged a claim for racial
8 discrimination arising under 42 U.S.C. § 1981 and a claim for
9 defamation against Principal Smith. Against the School
10 District, the plaintiff alleged that he was subjected to
11 discrimination and a hostile work environment because of his
12 race, in violation of Title VII and the NYSHRL.²

13 The defendants filed a motion for summary judgment on all
14 claims, which the district court granted. The district court
15 dismissed the discrimination claims because it found that Mr.
16 Tolbert had failed to establish a prima facie case of
17 discrimination because he had not suffered an adverse employment
18 action and had failed to raise an inference of discrimination.

² The defendants suggest, without elaboration, that the plaintiff did not timely exhaust his administrative remedies before the Equal Employment Opportunity Commission with respect to his Title VII claims. The defendants do not explain this argument in their brief. The district court noted that an argument of non-exhaustion had been raised but never decided it. Therefore, we do not reach the issue of non-exhaustion and any appropriate argument of non-exhaustion can be addressed on remand.

1 It dismissed the hostile work environment claims because it
2 concluded that the alleged hostility was not a result of Mr.
3 Tolbert's race and was not sufficiently severe. And the
4 district court dismissed the defamation claim because the
5 complaint failed to allege when or to whom the defamatory
6 statements were made.

7 Mr. Tolbert timely appealed.

8 **II.**

9 We have jurisdiction pursuant to 28 U.S.C. § 1291, and the
10 district court had jurisdiction pursuant to 28 U.S.C. §§ 1331
11 and 1367.

12 We review a grant of summary judgment de novo, Velazco v.
13 Columbus Citizens Found., 778 F.3d 409, 410 (2d Cir. 2015) (per
14 curiam), and may affirm on any basis that finds support in the
15 record. Mauro v. S. New England Telecomms., Inc., 208 F.3d 384,
16 387 n.2 (2d Cir. 2000) (per curiam). Summary judgment is
17 appropriate when "there is no genuine dispute as to any material
18 fact and the movant is entitled to judgment as a matter of law."
19 Fed. R. Civ. P. 56(a); see Celotex Corp. v. Catrett, 477 U.S.
20 317, 322 (1986). In determining whether summary judgment is
21 appropriate, we must resolve all ambiguities and draw all
22 reasonable inferences against the moving party. See Matsushita
23 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587
24 (1986).

This Court has “repeatedly expressed the need for caution about granting summary judgment to an employer in a discrimination case where, as here, the merits turn on a dispute as to the employer’s intent.” Holcomb v. Iona Coll., 521 F.3d 130, 137 (2d Cir. 2008). At the same time, we have also made it clear that “the salutary purposes of summary judgment—avoiding protracted and harassing trials—apply no less to discrimination cases than to . . . other areas of litigation.” Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (internal quotation marks omitted).

III.

Mr. Tolbert alleged a racial discrimination claim against Principal Smith under § 1981, and a racial discrimination claim against the School District under Title VII and the NYSHRL. The Title VII, § 1981, and NYSHRL discrimination claims are governed at the summary judgment stage by the burden-shifting analysis first established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Brown v. City of Syracuse, 673 F.3d 141, 150 (2d Cir. 2012). Although the § 1981 claim is against Principal Smith and the Title VII and NYSHRL claims are against the School District, the analysis is the same.³ The claims against both defendants turn on Principal Smith's conduct.⁴

³ Section 1981 provides for individual liability. Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2d Cir.

1 Under the McDonnell Douglas framework, Mr. Tolbert bears
2 the burden of establishing a prima facie case of discrimination
3 by showing “(1) he belonged to a protected class; (2) he was
4 qualified for the position he held; (3) he suffered an adverse
5 employment action; and (4) that the adverse employment action
6 occurred under circumstances giving rise to an inference of
7 discriminatory intent.” Brown, 673 F.3d at 150 (internal
8 quotation marks omitted). “The requirement is neither onerous
9 nor intended to be rigid, mechanized or ritualistic.” Abdu-
10 Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 467 (2d Cir.
11 2001) (internal citations and quotation marks omitted).

12 There is no disagreement that as an African American, Mr.
13 Tolbert is a member of a protected class. Nor do the defendants
14 question Mr. Tolbert’s qualifications. The defendants, however,
15 argue that Mr. Tolbert did not suffer an adverse employment

2000). Title VII does not. Spiegel v. Schulmann, 604 F.3d 72,
79 (2d Cir. 2010) (per curiam). The NYSHRL provides for
individual liability under an aiding-and-abetting theory, see
Feingold v. New York, 366 F.3d 138, 157–58 (2d Cir. 2004), but
the plaintiff made no such claim against Principal Smith.

⁴ Although Superintendent Brizard made the ultimate tenure
decision, he relied on Principal Smith’s recommendation. And
“the impermissible bias of a single individual at any stage of
the promoting process may taint the ultimate employment decision
in violation of Title VII. This is true even absent evidence of
illegitimate bias on the part of the ultimate decision maker, so
long as the individual shown to have the impermissible bias
played a meaningful role in the promotion process.” Bickerstaff
v. Vassar Coll., 196 F.3d 435, 450 (2d Cir. 1999) (internal
citation omitted).

1 action and that there is no evidence giving rise to an inference
2 of discrimination. We disagree.

3 **A.**

4 An employee suffers an “adverse employment action” if he
5 “endures a materially adverse change in the terms and conditions
6 of employment. An adverse employment action is one which is
7 more disruptive than a mere inconvenience or an alteration of
8 job responsibilities.” Joseph v. Leavitt, 465 F.3d 87, 90 (2d
9 Cir. 2006) (internal citation and quotation marks omitted).

10 Denying Mr. Tolbert tenure and extending his probation was an
11 adverse employment action.

12 In New York, teachers serve a three-year probationary
13 period. Then it is usually up or out: the teacher either
14 receives tenure or is terminated. But, as here, school
15 districts may extend the probationary term for one year and
16 postpone the tenure decision. See Borkowski v. Valley Cent.
17 Sch. Dist., 63 F.3d 131, 134 (2d Cir. 1995).

18 This Court has held or assumed that the denial of tenure is
19 an adverse employment action under Title VII and other
20 employment statutes. See, e.g., Donnelly v. Greenburgh Cent.
21 Sch. Dist. No. 7, 691 F.3d 134, 147 (2d Cir. 2012) (Family
22 Medical Leave Act retaliation); Leibowitz v. Cornell Univ., 445
23 F.3d 586, 591–92 (2d Cir. 2006) (per curiam) (Title VII and the
24 Age Discrimination in Employment Act); Back v. Hastings On

1 Hudson Union Free Sch. Dist., 365 F.3d 107, 113, 123–26 (2d Cir.
2 2004) (42 U.S.C. § 1983); Zahorik v. Cornell Univ., 729 F.2d 85,
3 93 (2d Cir. 1984) (Title VII); see also Okruhlik v. Univ. of
4 Ark., 395 F.3d 872, 879 (8th Cir. 2005) (Title VII and § 1983).
5 This makes sense. Tenure is a material condition of employment
6 because it provides long-term job security. See Mt. Healthy
7 City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977)
8 (“The long-term consequences of an award of tenure are of great
9 moment both to the employee and to the employer.”).⁵

10 But the defendants insist that this case is different
11 because Mr. Tolbert was offered a fourth year of probationary
12 employment. According to the defendants, Mr. Tolbert’s
13 employment situation would have been no worse had he accepted
14 the offer.

15 The defendants ignore the fact that the offer of a fourth
16 year of probation was intertwined with the denial of tenure.
17 Had the plaintiff received tenure, he could have been terminated
18 only for cause. But had he remained a probationary teacher, he
19 could have been terminated for any lawful reason. N.Y. Educ.

⁵ In the context of university tenure decisions, “a prima facie case that a member of a protected class is qualified for tenure is made out by a showing that some significant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on the question.” Zahorik, 729 F.2d at 93–94. That requirement does not apply to a prima facie case for an elementary or high school teacher. Donnelly, 691 F.3d at 151.

1 Law §§ 2573(1)(a), 2573(5)(a), 3020-a. The denial of tenure
2 therefore was the denial of a material improvement in the
3 conditions of the plaintiff's employment.

4 Title VII prohibits "discriminat[ion] against any
5 individual with respect to his compensation, terms, conditions,
6 or privileges of employment," § 2000e-2(a)(1), the NYSHRL
7 similarly prohibits employers from "discriminat[ing] against
8 such individual in compensation or in terms, conditions or
9 privileges of employment," N.Y. Exec. Law § 296(1)(a), and
10 § 1981 provides that all "persons . . . shall have the same
11 right . . . to make and enforce contracts . . . as is enjoyed by
12 white citizens," § 1981(a). Refusing to award a contract or a
13 material employment benefit for a discriminatory reason violates
14 those statutes. See, e.g., Zahorik, 729 F.2d at 93 ("Tenure
15 decisions are not exempt under Title VII, . . . and plaintiffs
16 seeking to show that forbidden purposes lurk in a tenure
17 decision have available methods of challenging such decisions.")

18 Indeed, were we to accept the defendants' interpretation,
19 then failure to promote claims—or any claims alleging the denial
20 of an employment benefit—would be non-actionable. And that
21 cannot be the case. "A benefit that is part and parcel of the
22 employment relationship may not be doled out in a discriminatory
23 fashion, even if the employer would be free under the employment

1 contract simply not to provide the benefit at all.” Hishon v.
2 King & Spalding, 467 U.S. 69, 75 (1984).⁶

3 Extending an employment relationship by one year by itself
4 may not qualify as an adverse employment action. But when
5 coupled with the denial of tenure, it is assuredly an adverse
6 employment action. During the fourth year of probationary
7 employment, a teacher can be fired at any time for any lawful
8 reason. N.Y. Educ. Law § 2573(1)(a). But if granted tenure,
9 the teacher may be fired only for cause. Id. §§ 2573(5)(a),
10 3020-a. The denial of tenure after three years, when a teacher
11 was otherwise eligible for tenure, does not become any less an
12 adverse action because the teacher is provided with another year
13 of probationary employment.

14 Of course, a school district may defer a decision on tenure
15 and obtain another year’s experience with a teacher, provided
16 that the decision is not made for an unlawful reason such as
17 racial discrimination. But the denial of tenure after three
18 years cannot lawfully be based on a discriminatory reason, even
19 if the teacher remains employed as a probationary teacher. The

⁶ Douglass v. Rochester City School District, 522 F. App’x 5
(2d Cir. 2013), an unpublished disposition upon which the
defendants rely, is not to the contrary. In that case, the
Court held that a fourth-year extension of probation did not
place the plaintiff “in any worse employment position than she
would have been in absent the offer.” Id. at 9. However, this
Court was careful to explain that the plaintiff did not “assert
a claim for discriminatory denial of tenure.” Id. at 9 n.1.
Mr. Tolbert asserts that claim here.

1 plaintiff alleges that is precisely what occurred here, and that
2 is a sufficient allegation of an adverse action.

3 **B.**

4 The defendants next contend that Mr. Tolbert did not
5 identify facts giving rise to an inference of discrimination.

6 Mr. Tolbert identified racially offensive comments
7 allegedly made by Principal Smith, two of which concerned Mr.
8 Tolbert's qualifications as a teacher. According to Mr.
9 Tolbert, in the fall of 2008, Principal Smith asked him: "Do you
10 only know how to cook black, or can you cook American too?" One
11 of Mr. Tolbert's students declared that in January 2009,
12 Principal Smith asked her "how [she] expected to learn if all
13 [she] was learning to cook was black food." JA 450. Another
14 student declared that in January or February of 2009, Principal
15 Smith told her that "black kids can't learn in a cooking class
16 because all they want to do is eat."⁷ JA 453.

⁷ As the district court found, the other evidence cited by the plaintiff does not raise an inference of discrimination. Reverend Willie Harvey and Barbara Postell declared that Malik Evans told them that Principal Smith was racist, but Reverend Harvey's and Ms. Postell's testimony would be inadmissible hearsay if offered at trial. Finnegan v. Bd. of Educ., 30 F.3d 273, 274 (2d Cir. 1994) (per curiam) (explaining that "double hearsay" cannot "create a genuine issue to be tried"); see also Fed. R. Civ. P. 56(c)(2). Cynthia Elliott's testimony that she "believe[d]" Principal Smith's decision to deny tenure "was based on race" is mere speculation. JA 264; see Bickerstaff v. Vassar Coll., 196 F.3d 435, 448 (2d Cir. 1999) (noting that courts must "carefully distinguish between evidence that allows for a reasonable inference of discrimination and evidence that

1 When responding to Mr. Tolbert's discrimination claims, the
2 defendants did not discuss any of these remarks in their briefs
3 to this Court or in their briefs before the district court. The
4 district court nonetheless found that Principal Smith's "stray
5 remarks" were "too attenuated" from the tenure decision and not
6 probative of Principal Smith's intent. Tolbert v. Smith, No.
7 09cv6579, 2014 WL 906158, at *15-16 (W.D.N.Y. Mar. 7, 2014).

8 "[T]he more remote and oblique the remarks are in relation
9 to the employer's adverse action, the less they prove that the
10 action was motivated by discrimination." Tomassi v. Insignia
11 Fin. Grp., Inc., 478 F.3d 111, 115 (2d Cir. 2007), abrogated on
12 other grounds by Gross v. FBL Fin. Servs., Inc., 557 U.S. 167,
13 177-78 (2009). But there is no bright-line rule for when
14 remarks become "too attenuated" to be significant to a
15 determination of discriminatory intent.

16 In April 2009, Principal Smith and Ms. Avery-DeToy told Mr.
17 Tolbert that he would not receive tenure, and the two "black
18 food" remarks concerning Mr. Tolbert were made in the fall of

gives rise to mere speculation and conjecture"). And Allen Williams's testimony that Superintendent Brizard said that there was a problem with Principal Smith is inadmissible hearsay and does not raise an inference of discrimination. Ms. Postell thought that she was also the victim of discrimination and filed a complaint with the Employment Equal Opportunity Commission. But the complaint was found to be without merit, and the district court here fairly concluded that it had "little probative value." Tolbert v. Smith, No. 09cv6579, 2014 WL 906158, at *7 (W.D.N.Y. Mar. 7, 2014).

1 2008 and in January 2009. The remarks all occurred during a
2 single school year, and one occurred within three months of
3 Principal Smith's decision to recommend that Mr. Tolbert be
4 denied tenure. A third alleged remark in January or February
5 2009 attributed to Principal Smith also reflected racial bias.
6 None of the remarks was so attenuated that it should be ignored.

7 Moreover, the remarks were made by the de facto
8 decisionmaker, the remarks clearly suggest racial bias, and two
9 of the comments were about Tolbert's qualifications as a
10 teacher. And Principal Smith's comment to a student that "black
11 kids can't learn in a cooking class because all they want to do
12 is eat," JA 453, could be viewed as evidence of a discriminatory
13 intent on Principal Smith's part in dismantling John Marshall's
14 culinary arts program. The fate of that program, for which Mr.
15 Tolbert was the only teacher at John Marshall, was directly
16 relevant to the decision whether to grant him tenure. See Henry
17 v. Wyeth Pharm., Inc., 616 F.3d 134, 149–50 (2d Cir. 2010)
18 (noting factors that district courts consider when determining
19 if a remark is probative of discriminatory intent).⁸ But the
20 district court appeared to find that because the formal
21 evaluations did not refer to Mr. Tolbert's race, there was no

⁸ The two other allegedly racist remarks by Principal Smith—that the students "are not from much better than this" and that "they are not like us"—are less probative.

1 “nexus” between the decision to deny tenure and Principal
2 Smith’s remarks. Tolbert, 2014 WL 906158, at *16.

3 Employers are unlikely to leave a “smoking gun” admitting a
4 discriminatory motive. See, e.g., Chambers v. TRM Copy Ctrs.
5 Corp., 43 F.3d 29, 37 (2d Cir. 1994). And such evidence is not
6 required to make a prima facie case of discrimination. Luciano
7 v. Olsten Corp., 110 F.3d 210, 215 (2d Cir. 1997). The
8 plaintiff need not show that Principal Smith declared that the
9 tenure decision was tied to the plaintiff’s race. Statements
10 showing an employer’s racial bias, which Mr. Tolbert identified,
11 are sufficient to support a prima facie case of discrimination.
12 See id.

13 Moreover, there is a factual dispute as to whether
14 Principal Smith followed regular procedures when he evaluated
15 Mr. Tolbert for tenure. “Departures from procedural regularity,
16 such as a failure to collect all available evidence, can raise a
17 question as to the good faith of the process where the departure
18 may reasonably affect the decision.” Zahorik, 729 F.2d at 93.

19 The plaintiff submitted evidence that Principal Smith
20 changed the person who conducted Mr. Tolbert’s year-end
21 evaluation without providing notice to Mr. Tolbert,⁹ that

⁹ While the defendants assert that Mr. Tolbert’s evaluation was reassigned because Mr. Muhammad was having difficulty completing his evaluations on time, it is for a jury to decide whether that explanation is credible and rebuts any inference of

1 Principal Smith relied on the 2008–2009 evaluations in
2 isolation, and that the unsatisfactory performance reviews by
3 Ms. Avery-DeToy were aberrational. These irregularities, when
4 combined with Principal Smith’s alleged remarks, are sufficient
5 to establish a prima facie case of discrimination. See Back,
6 365 F.3d at 124–25 (finding sexist remarks and procedural
7 irregularities sufficient to rebut a nondiscriminatory reason
8 for denying tenure).

9 There was no argument in the district court or before us
10 that summary judgment should be granted at the second or third
11 stages of the McDonnell Douglas analysis. Therefore, because we
12 conclude that Mr. Tolbert met his initial burden of establishing
13 a prima facie case of discrimination, we vacate and remand with
14 respect to the § 1981, Title VII, and NYSHRL discrimination
15 claims.

discrimination that could be drawn from the alleged procedural
irregularity.

1 **IV.**

2 We next consider whether the district court erred by
3 granting summary judgment dismissing the hostile work
4 environment and defamation claims. We conclude that it did not.

5 **A.**

6 Mr. Tolbert asserted hostile work environment claims
7 against the School District under Title VII and the NYSHRL.¹⁰
8 Hostile work environment claims under Title VII and the NYSHRL
9 are governed by the same standard. Summa v. Hofstra Univ., 708
10 F.3d 115, 123-24 (2d Cir. 2013). To establish a prima facie
11 case of hostile work environment, the plaintiff must show that
12 the discriminatory harassment was "sufficiently severe or
13 pervasive to alter the conditions of the victim's employment and
14 create an abusive working environment," and "that a specific
15 basis exists for imputing" the objectionable conduct to the
16 employer. Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d
17 Cir. 1997) (internal quotation marks omitted). It is axiomatic
18 that the plaintiff also must show that the hostile conduct
19 occurred because of a protected characteristic. Alfano v.
20 Costello, 294 F.3d 365, 374 (2d Cir. 2002).

¹⁰ A hostile work environment claim may be brought against an individual pursuant to § 1981. Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 151 n.6 (2d Cir. 2014). But the complaint asserts no such claim.

1 Mr. Tolbert failed to identify sufficient material facts
2 showing that his work environment was objectively hostile and
3 abusive. “As a general rule, incidents must be more than
4 ‘episodic; they must be sufficiently continuous and concerted in
5 order to be deemed pervasive.’ Isolated acts, unless very
6 serious, do not meet the threshold of severity or
7 pervasiveness.” Id. at 374 (internal citation omitted) (quoting
8 Perry, 115 F.3d at 149).

9 Mr. Tolbert alleges that Principal Smith made two offensive
10 statements in his presence. Only one—the remark regarding
11 “black food”—necessarily concerns race. The other remark—that
12 the students were “not from much better than this”—is ambiguous.
13 And whatever the meaning of the remarks, they do not qualify as
14 “a steady barrage of opprobrious racial comments” that altered
15 the conditions of Mr. Tolbert’s employment. Schwapp v. Town of
16 Avon, 118 F.3d 106, 110 (2d Cir. 1997) (internal quotation marks
17 omitted).

18 Nor do the other alleged instances of hostility support a
19 hostile work environment claim. Mr. Tolbert complains that he
20 did not receive a budget. But Principal Smith did not give a
21 lump-sum budget to any teacher; he instead requested that each
22 teacher submit a request for supplies.

23 Mr. Tolbert contends that he lost the assistance of a
24 paraprofessional. But the Special Education Administrator made

1 that decision because of budget cuts. And there is no evidence
2 that the Special Education Administrator's decision was a
3 product of racial animus.

4 More students were placed in Mr. Tolbert's classes for the
5 2008-2009 school year than in the previous two years. But after
6 Mr. Tolbert protested, the class sizes were reduced. And there
7 is no evidence that Principal Smith—or anyone with a
8 discriminatory motive—initially assigned an excessive number of
9 students to Mr. Tolbert's classes.

10 Finally, Mr. Tolbert alleges that the janitorial staff did
11 not properly clean his classroom. But Mr. Tolbert's problems
12 with the janitorial staff predated Principal Smith's arrival,
13 and there is no evidence that the janitorial staff acted out of
14 animus or at the direction of Principal Smith.

15 Accordingly, we affirm the dismissal of the hostile work
16 environment claims.

17 **B.**

18 Mr. Tolbert next contends that the district court erred in
19 dismissing the defamation claim against Principal Smith. The
20 amended complaint identifies four defamatory statements, but Mr.
21 Tolbert discusses one on appeal. He alleges that Principal
22 Smith told Mr. Tolbert's students that the Monroe County
23 Department of Health had closed the kitchen in Mr. Tolbert's

1 classroom. That statement, according to Mr. Tolbert, was
2 incorrect; Principal Smith closed the kitchen.

3 A slanderous statement, by definition, must be false. "But
4 in defamation law, as in life, determinations of fact and
5 fiction are not zero-sum. In New York, a statement need not be
6 completely true, but can be substantially true, as when the
7 overall 'gist or substance of the challenged statement' is
8 true." Chau v. Lewis, 771 F.3d 118, 129 (2d Cir. 2014) (quoting
9 Printers II, Inc. v. Prof'ls Publ'g, Inc., 784 F.2d 141, 146-47
10 (2d Cir. 1986)); see also Kraus v. Brandstetter, 562 N.Y.S.2d
11 127, 130 (App. Div. 1990).

12 Principal Smith's statement was substantially true. In the
13 fall of 2008, Principal Smith closed the kitchen after the
14 Monroe County Department of Health had identified a number of
15 sanitation problems. A Monroe County Department of Health
16 Inspection Report Observation stated that in order for the
17 kitchen to reopen, it needed to be reinspected. Although
18 Principal Smith had "closed" the kitchen, the Monroe County
19 Department of Health prohibited its reopening without an
20 inspection. "Prevented reopening" is substantially similar to
21 "closed."

22 Accordingly, we affirm the dismissal of Mr. Tolbert's
23 defamation claim.

