

1 BARRINGTON D. PARKER, *Circuit Judge, concurring in part and dissenting*  
2 *in part:*

3 I concur in the majority's affirmance of the dismissal of  
4 Kwan's gender and national origin discrimination, hostile work  
5 environment, and COBRA claims. I would affirm the dismissal of  
6 her federal retaliation claim as well. District Judge Katherine B.  
7 Forrest concluded after a thorough and careful review that "no  
8 rational juror could find for the plaintiff in this case after comparing  
9 the overwhelming facts in the record supportive of legitimate  
10 business reasons for plaintiff's termination with what may only be  
11 characterized as cobbled together conduct allegedly supportive  
12 of . . . retaliation." In my view, she was correct.

13 I will assume for the moment that Kwan established a prima  
14 facie case of retaliation, and that Andalex proffered legitimate,  
15 performance-based reasons for her termination. As the majority  
16 notes, at that point, Kwan was obligated to come forward with  
17 sufficient evidence on the basis of which a reasonable jury could find  
18 that Andalex's performance-based reasons were pretextual. *See*  
19 *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000). In other  
20 words, evidence that would permit a reasonable jury to find that she  
21 engaged in a protected activity, and that the activity, as opposed to  
22 the reasons proffered by Andalex, led to her termination. The bar is  
23 even higher in the wake of *Nassar*, as Kwan must now adduce facts  
24 sufficient to allow a reasonable trier of fact to find that retaliation  
25 was the "but for" cause of her termination. *Univ. Of Tx. Sw. Med.*

1           *Ctr. v. Nassar*, 133 S. Ct. 2514, 2533 (2013).<sup>1</sup> Kwan failed to carry this  
2           burden.

3           The majority opinion hangs by a slender factual thread – that  
4           Kwan purports to have complained to Alex Silverman that she was  
5           being discriminated against, that she was fired three weeks later,  
6           and that her employer gave multiple reasons for her termination.  
7           Because more than one reason was offered, the majority concludes  
8           that Andalex’s reasons were necessarily pretextual. The problem  
9           with this analysis is that it obscures the failure of proof on Kwan’s  
10          part that the myriad performance-based reasons for her discharge  
11          were “mere pretext for actual [retaliation],” *Weinstock*, 224 F.3d at 42,  
12          and that this supposed retaliation was the “but for” cause of her  
13          termination, *Nassar*, 133 S. Ct. at 2533.

14          Even accepting, for the purposes of argument, that Kwan has  
15          established that Andalex offered differing and thus apparently  
16          pretextual explanations for her termination, summary judgment  
17          would still be appropriate. As we explained in *Schnabel v. Abramson*,  
18          even where a plaintiff has demonstrated pretext, rather than simply  
19          applying a *per se* rule precluding summary judgment for the  
20          defendant, we must instead employ a “case-by-case approach” and

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<sup>1</sup> The “but for” causation standard would apply to Kwan’s Title VII and NYSHRL claims, but not to her retaliation claims under the NYCHRL. See *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 116 (2d Cir. 2013) (explaining that under the NYCHRL “summary judgment is appropriate only if the plaintiff cannot show that retaliation played any part in the employer’s decision.”). I decline to address Kwan’s claims under the NYCHRL, because in the absence of a viable federal claim, I would decline to exercise supplemental jurisdiction over any remaining state or city law claims. 28 U.S.C. § 1367.

1 “examin[e] the entire record to determine whether the plaintiff could  
2 satisfy h[er] ‘ultimate burden of persuading the trier of fact that the  
3 defendant intentionally discriminated against the plaintiff.’” 232  
4 F.3d 83, 90 (2d Cir. 2000) (quoting *Reeves v. Sanderson Plumbing*  
5 *Prods., Inc.*, 530 U.S. 133, 143 (2000) (internal quotation marks  
6 omitted)). While *Schnabel* dealt with an age discrimination claim,  
7 this approach applies to retaliation claims as well. In conducting  
8 this “case-by-case” analysis, “[t]he relevant factors . . . ‘include the  
9 strength of the plaintiff’s prima facie case, the probative value of the  
10 proof that the employer’s explanation is false, and any other  
11 evidence that supports [or undermines] the employer’s case.’” *James*  
12 *v. N.Y. Racing Ass’n*, 233 F.3d 149, 156 (2d Cir. 2000) (third alteration  
13 in original) (quoting *Reeves*, 530 U.S. at 148-49).

14 First, Kwan’s prima facie case was particularly weak. To  
15 establish a prima facie case of retaliation under Title VII, she was  
16 obligated to demonstrate that: (1) she was engaged in an activity  
17 protected under Title VII; (2) her employer was aware of her  
18 participation in the protected activity; (3) the employer took adverse  
19 action against her; and (4) a causal connection existed between the  
20 protected activity and the adverse action. See *Gordon v. New York*  
21 *City Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000) (quoting *Cosgrove v.*  
22 *Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir.1993)).

23 Kwan addressed the knowledge and causation prongs in the  
24 most minimal way possible, relying exclusively on the legal fiction  
25 of general corporate knowledge and on a temporal proximity  
26 between her complaint and her discharge. Notably, she failed to

1 even allege, much less proffer evidence after taking extensive  
2 discovery, that the complaint she purportedly made to Alex  
3 Silverman was actually communicated to or known by the  
4 executives who terminated her, Andrew Silverman and Gregory  
5 Marks. This critical factual omission is telling.

6 Moreover, the probative value of her proof of pretext was  
7 minimal. As discussed below, Andalex consistently relied on the  
8 same facts and events justifying Kwan's termination at each stage of  
9 the proceedings. There is no evidence that Andalex shifted its  
10 position for strategic reasons because, for example, new evidence  
11 undermined a prior asserted justification, *see Carlton v. Mystic*  
12 *Transp., Inc.*, 202 F.3d 129, 137 (2d Cir. 2000); *EEOC v. Ethan Allen*, 44  
13 F.3d 116, 120 (2d Cir. 1994). To the extent its position has shifted at  
14 all (and I would find, for the reasons discussed below, that it has  
15 not), that shift merely reflected a change in the description it applied  
16 to a consistent set of facts.

17 In any event, Andalex presented ample evidence of legitimate,  
18 non-retaliatory reasons for its termination of Kwan. Andalex  
19 established that, consistent with their shift in business strategy,  
20 another employee who held a similar position, but also lacked the  
21 skills and experiences Andalex was seeking, was terminated three  
22 days before Kwan. In addition, Andalex demonstrated that Kwan  
23 was replaced by a woman with the Spanish language skills that  
24 Kwan lacked.

1           In addition, Andalex documented a host of performance based  
2 reasons why Kwan was fired. For example, in December 2007, in  
3 connection with a casino acquisition project in Argentina, Marks  
4 asked Kwan to prepare a financial model over the weekend so that it  
5 could be checked Monday morning in preparation for a business trip  
6 that evening. Kwan avoided working over the weekend and  
7 claimed that she needed help translating the Spanish-language  
8 documents. Although another employee, fluent in Spanish, offered  
9 to help Kwan complete the work on Sunday, she declined. Kwan  
10 began work on the model on Monday morning, and was unable to  
11 complete the assignment in a timely fashion, forcing the executives  
12 to travel without the model.

13           In October 2007, Kwan was asked to update a financial model  
14 for a pending deal by adding and removing certain projected  
15 acquisitions. Marks found numerous errors in Kwan's work product  
16 and was forced to assign the project to a more junior analyst to be  
17 completed properly. Kwan does not deny that the incident  
18 occurred, but only denies that she was ever told of this incident.

19           In September 2008, Marks asked Kwan to prepare a financial  
20 projection for a deal involving the acquisition of a chain of Mexican  
21 casinos. Kwan made errors in the model that led to grossly  
22 overstated losses. After a potential investor noticed the mistake and  
23 contacted Andrew Silverman to ask why Andalex was  
24 recommending an investment that was projected to have a  
25 significant loss, Marks and another employee were forced to redo  
26 Kwan's work and to suffer the obvious embarrassment to the

1 company's reputation. In response, Kwan denies that she was ever  
2 told she had made "errors," and argues that Marks and the other  
3 employee merely were "simplifying" the formulae, rather than  
4 redoing her work.

5 In his deposition, Andrew Silverman noted that he received  
6 feedback from other employees that Kwan had conducted herself in  
7 an unprofessional manner during several business meetings,  
8 including inappropriately taking photos of Marks on two occasions.  
9 Further, at the end of her employment Kwan was taking long  
10 lunches and leaving the office early even when work remained  
11 unfinished. As a result, Marks required Kwan to let him know  
12 before she left so that he could make sure there was no additional  
13 work that needed to be completed, but she regularly failed to do so.  
14 On the day before her termination, Marks observed Kwan leaving  
15 the office around 5:00 p.m even though she had a looming deadline.

16 Kwan denies taking long lunches, and provides a different  
17 explanation for leaving early the day before her termination and  
18 avers that she was a competent employee. However, her subjective  
19 disagreement with her employer's assessment of her performance is  
20 not sufficient to demonstrate retaliatory intent and defeat summary  
21 judgement. *Ricks v. Conde Nast Publ'ns*, 6 F. App'x 74, 78 (2d Cir.  
22 2001) (summary order); see also *Stern v. Trustees of Columbia Univ. in*  
23 *City of New York*, 131 F.3d 305, 315 (2d Cir. 1997) ("This court does  
24 not sit as a super-personnel department that reexamines an entity's  
25 business decisions." (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d  
26 458, 464 (7th Cir. 1986)). In any event, in light of this abundance of

1 largely unrefuted evidence of poor performance, no reasonable trier  
2 of fact could conclude that retaliation was the “but for” reason for  
3 Kwan’s termination.

4 But we need not even reach the foregoing analysis, however,  
5 as I would find that Kwan has neither demonstrated that Andalex  
6 shifted positions, nor, as a result, pretext. The majority finds that  
7 she has done so by characterizing Andalex’s position as shifting  
8 between its Position Statement in the Equal Employment  
9 Opportunity Commission (“EEOC”) proceedings and this lawsuit.  
10 As our precedent recognizes, however, it is not uncommon for an  
11 employer to have multiple reasons for terminating an employee, and  
12 we have held that where the employer offers “variations . . . on the  
13 same theme rather than separate inconsistent justifications,” there is  
14 not sufficient evidence of pretext to preclude the entry of summary  
15 judgment. *Roge v. NYP Holdings, Inc.*, 257 F.3d 164, 170 (2d Cir.  
16 2001); *see also Timothy v. Our Lady of Mercy Med. Ctr.*, 233 F. App’x 17,  
17 20 (2d Cir. 2007).

18 In *Roge*, after the employer cited, among other things, the lack  
19 of work for the plaintiff-employee and its own business  
20 restructuring as reasons for the employee’s termination, the  
21 employee argued that those two reasons were inconsistent and thus  
22 pretextual. 257 F.3d at 169-70. We disagreed, finding that the  
23 business restructuring was motivated by the lack of work, and thus  
24 that these two explanations were “variations . . . on the same  
25 theme.” *Id.* at 170. Similarly, in *Timothy*, we found that the  
26 employer’s various and shifting justifications for an employee’s

1 repeated reassignments were not pretextual because they “share[d] a  
2 consistent theme of a[n employer] facing the double bind of a severe  
3 labor shortage and desperate financial straits that is trying to deal  
4 with this terrible situation through reorganization and  
5 reassignments.” 233 F. App’x at 20.

6 Rather than “inconsistent explanations,” as the majority  
7 asserts, Andalex has offered complementary justifications for  
8 Kwan’s discharge: a shift in the company’s business focus as well as  
9 her poor performance – that are part of the same theme and which  
10 support her termination. These rationales, and the key facts  
11 supporting them, are consistently reflected in Andalex’s  
12 submissions.

13 In a pre-litigation letter, Andalex relied not only on the fact  
14 that its “business shifted,” but also on Kwan’s poor performance to  
15 justify her termination. Andalex explained that as a result of the  
16 shift in business focus Kwan’s “skill set became increasingly  
17 obsolete,” and that “[Kwan] repeatedly took long lunches, arrived to  
18 the office late, left early, and generally made little effort to make  
19 herself valuable to the company as its business focus changed.”

20 Similarly, in Andalex’s Position Statement before the EEOC, it  
21 explained that its “business changed dramatically,” that “[Kwan’s]  
22 skill set no longer matched the needs” of the company, and that “she  
23 had failed and had been unable to make the transition to the foreign  
24 hospitality and gaming aspect of the business operation,” as  
25 evidenced by Andrew Silverman’s recollection of “several instances



1 in which [her] work product contained significant errors, which in at  
2 least one case adversely affected a transaction being negotiated with  
3 a global financial institution.” The EEOC Position Statement also  
4 recounted the instances where Kwan had inappropriately  
5 photographed Marks during business meetings, as well as her “long  
6 lunches” and penchant for “leaving the office early” in violation of  
7 Marks’ requirement that he first check in with him, including the  
8 specific instance on the day before she was terminated.

9 The majority’s narrow focus on a single answer Marks gave in  
10 his deposition, disputing that Kwan was fired due to the business  
11 shift, ignores the other facts that Marks relied upon. Like both  
12 Andalex’s pre-litigation letter and EEOC Position Statement,  
13 Marks’s deposition testimony described a number of specific  
14 projects in which Kwan had performed poorly, both in the quality of  
15 her work, and her unwillingness or inability to complete her work in  
16 a timely fashion. The fact that in one answer Marks characterized  
17 these events as strictly performance problems does not change the  
18 reality that Andalex and its executives have advanced the same facts  
19 justifying Kwan’s termination throughout these proceedings.

20 In its summary judgment brief, Andalex also relied upon these  
21 same facts to support its argument that the combination of the  
22 company’s shifting business focus and Kwan’s poor performance  
23 justified her termination. In the brief, Andalex explained that the  
24 decision to terminate Kwan was “a culmination of ongoing issues  
25 that were brought to [its] attention by a number of people regarding  
26 the quality and accuracy of Kwan’s work product, the level of her

1 performance, and her attitude.” The brief reviewed the instances  
2 where Kwan’s work was deficient or late to the detriment of the  
3 company, and where she resisted working the hours necessary to  
4 finish her work before deadlines, or left the office early despite  
5 pressing responsibilities.

6 Further, there is no evidence that Andalex ever altered its  
7 rationale because new evidence undermined a previously asserted  
8 justification for her discharge, *see Carlton*, 202 F.3d at 137, and *Ethan*  
9 *Allen*, 44 F.3d at 120, nor does the record establish that the allegedly  
10 shifting reasons Andalex has asserted are in fact contradictory.  
11 Rather, the shift in business focus and Kwan’s poor performance are  
12 complementary — indeed the shift in focus may in fact be a cause of  
13 at least some of Kwan’s performance problems. Therefore, to the  
14 extent one or the other is more heavily emphasized at times, that  
15 does not mean that they are not part of a consistent theme.  
16 Consequently, Kwan failed to demonstrate that Andalex shifted its  
17 positions, let alone that such a shift rendered its proffered, legitimate  
18 reasons for her termination pretextual.

19 The only remaining evidence of pretext offered by Kwan is the  
20 temporal proximity of her alleged complaint and her termination.  
21 We have, however, repeatedly held that temporal proximity alone is  
22 insufficient as a matter of law to defeat summary judgment. *See, e.g.,*  
23 *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010)  
24 (affirming district court’s grant of summary judgment to defendant  
25 where plaintiff relied only upon temporal proximity and made no  
26 showing of pretext). Whatever modest probative value temporal

1 proximity might have in this case is washed away by the facts that  
2 Plaintiff did not offer any evidence to suggest that the decision-  
3 makers who fired her knew about the complaints she allegedly  
4 made and that Plaintiff did not produce any evidence to undermine  
5 Andalex's position that her performance was demonstrably poor  
6 and incompatible with its shift in business focus.

7  
8 **CONCLUSION**

I would affirm the judgment of the district court in its entirety.