COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12787

MORGAN HELFMAN,

Plaintiff-Appellant

v.

NORTHEASTERN UNIVERSITY, KATHERINE ANTONUCCI, ROBERT JOSE, BRIANA R. SEVIGNY, MARY WEGMANN and MADELEINE ESTABROOK,

Defendants-Appellees

On Appeal from a Judgment of the
Suffolk Superior Court

BRIEF OF THE APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Northeastern University is a private, non-profit, charitable corporation. It has no parent corporation and no stock.

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STATEMENT OF ISSUES

1. Whether the Court should affirm summary judgment for Northeastern University ("NU") and its administrators on the claim that they negligently failed to protect plaintiff-appellant Morgan Helfman from an alleged sexual assault where (a) they had no duty to prevent the alleged assault; (b) the alleged assault was not reasonably foreseeable; (c) no act or omission of the defendants could be deemed a proximate cause of the alleged assault; (d) NU is not vicariously liable for the acts or omissions of its Resident Assistants (RAs); and (e) there is no evidence that defendants were negligent in training or supervising the RAs.

2. Whether the Court should affirm summary judgment for NU on the breach of contract and Massachusetts Equal Rights Act claims relating to Helfman's complaint against her alleged assailant where (a) NU did not act contrary to Helfman's reasonable expectations, (b) there is no evidence that NU failed to train the Conduct Board, and (c) Helfman seeks emotional distress damages, which she cannot recover on a contract claim in any event.

3. Whether the Court should affirm summary judgment for NU on the Title IX claim where (a) NU was not deliberately indifferent to Helfman's claim of harassment, (b) Helfman was not subjected to any further harassment, (c) gender bias was not a motivating factor for the outcome of the disciplinary proceeding or appeal, and (d) no act or omission by NU deprived Helfman of any educational opportunity.

STATEMENT OF THE CASE

This is an appeal from an order of the Superior Court granting summary judgment for the defendants-appellees.

The plaintiff-appellant, Morgan Helfman, filed her original Complaint on October 31, 2016, RAI/14 (Super. Ct. Dkt. No. 1), which she later amended, RAI/19 (Super. Ct. Dkt. No. 35). The Amended Complaint alleges that in the fall of Helfman's freshman year at NU, a male student sexually assaulted her in his dormitory room. RAI/42. Helfman alleges that one cause of the assault was her own underage drinking that night, some of which occurred during a party in the room of a Resident Assistant (RA), at which another RA also was present. RAI/37-40, 43; RAII/343, 358. The

Amended Complaint asserts that NU and five of its administrators should be held liable for allegedly contributing to cause the alleged assault, RAI/49-54, 57-60; not providing adequate remedies to Helfman after she reported the alleged assault, RAI/45, 48; and mishandling the disciplinary hearing and appeal of Helfman's complaint against her alleged assailant, RAI/45-48, 50, 53, 57.

Relevant to these proceedings, the Amended Complaint asserts claims of (a) negligence against NU (Count I), two NU administrators with responsibilities in the area of student housing, Katherine Antonucci and Robert Jose (Count II), and three NU administrators with responsibilities relating to student conduct proceedings, briana (with a small "b") Sevigny, Mary Wegmann, and Madeleine Estabrook (Count III); (b) negligent infliction of emotional distress against all the defendants (Count VII); (c) breach of contract against NU (Count IV); (d) gender discrimination in violation of Title IX of the Education Amendments of 1972 against NU (Count V); and (e) violation of the Massachusetts Equal Rights Act

against NU (Count VIII).[1]

Following discovery, the defendants moved for summary judgment on all counts of the Amended Complaint. RAI/20 (Super. Ct. Dkt. No. 46). After a hearing and supplemental briefing, the Superior Court (Hon. Robert B. Gordon) allowed the motion. *Id.* (Super. Ct. Dkt. Nos. 49-52); RAIII/521-66.

Helfman timely filed a notice of appeal, RAI/021 (Super. Ct. Dkt. No. 54), followed by an application for direct appellate review (DAR-26909 Dkt. No. 2), which this Court allowed (DAR-26909 Dkt. No. 4).

STATEMENT OF FACTS

A. The Parties

NU is a non-profit, charitable corporation, which offers undergraduate and graduate degree programs. RAI/191, 222. Helfman enrolled as an undergraduate in August 2013. RAI/270. She graduated on time, magna cum laude, with a GPA of 3.7. RAI/268-70.

At the time of the events at issue, Antonucci was an Area Coordinator in NU's Department of Residential

[1] The Amended Complaint also includes claims for intentional infliction of emotional distress (Count VI) and misrepresentation (Count X), which Helfman abandoned at summary judgment. RAIII/522 n.1.

Life, with responsibility for training and overseeing the work of RAs in certain residence halls, including the one at 97 St. Stephen Street. RAI/336, 338-39, 341-42; Jose was a Director and then Associate Dean with general oversight of the Department of Residential Life, RAI/393, 408-09, 483-84; Sevigny was an Assistant Director in the Office for Student Conduct and Conflict Resolution (OSCCR), with responsibilities for training Student Conduct Board members, RAI/497-98, 507, 528-29; Wegmann was the Director of OSCCR, with responsibility for enforcing the Code of Student Conduct (the "Code") and for training Student Conduct Board and Appeals Board members, RAI/552, 561, 564; and Estabrook was Associate Vice President for Student Affairs, with oversight responsibility for various student affairs functions including OSCCR, RAI/217-19.

B. NU's Conduct Policies

At all relevant times, NU prohibited underage students from drinking or possessing alcohol anywhere on campus, including the residence halls; prohibited all students from providing alcohol to underage students or allowing them to drink alcohol; and

prohibited underage students from being in the presence of alcohol, unless it was in the possession of a roommate who was 21 or older. RAI/606-07. NU prohibited all students from consuming alcohol excessively. *Id*. at 609. NU also prohibited all students from engaging in sexual misconduct, including sexual assault. *Id*. at 610-11. NU disciplined students in accordance with its Code for violations of its policies. RAI/436, 508, 572; RAII/34.

C. NU's Resident Assistants

NU engages students who meet certain academic and conduct standards as RAs to serve as role models for the NU community and to report potential violations of NU's policies. RAI/352; RAII/14-16, 34-35, 59, 61. NU considers RAs to be "paraprofessional" members of the Residential Life Office. RAII/13. RAs receive campus housing at no charge in exchange for their service. RAII/292.

NU formally trains its RAs at least twice each year. RAII/17, 118-19. The training covers alcohol violations, excessive consumption, and sexual assault, among other topics. RAII/17, 118-19, 205, 209, 211. RAs receive additional training in workshops during

the academic year and in weekly meetings with their Resident Director ("RD") or Area Coordinator ("AC"). RAII/17, 21-22, 219-26.

RAs hold office hours, RAII/79-80, 85, and conduct rounds, RAII/60, 79-80, which consists of walking through all hallways and common areas of their assigned residence hall(s) and addressing any issues they observe. RAII/254. RAs are supervised by on-call RDs and ACs, who are full-time members of the Residential Life staff. RAII/20-21, 41, 254.

D. The Events of October 31, 2013

1. Helfman begins drinking in her room

Helfman was an 18-year-old freshman at NU in October 2013. RAI/37, 267. She lived in the International Village residence hall. RAI/275.

On the night of October 31, Helfman drank three shots of rum in her room while she was in the company of AG, a male freshman who lived in her dorm, was in one of her classes, and was in her study group. RAI/276-77, 279. Helfman describes her relationship with AG at the time as mutually "friendly [and] flirty." RAI/278. Helfman obtained the rum from another NU student. RAI/279; RAII/336.

Helfman and AG left her room to attend a party in the residence hall at 97 St. Stephen Street. RAI/279, 281-82; RAII/156, 159-60, 336-37. Helfman and AG took with them a soda bottle filled with a mixture of rum and Coke; they used a soda bottle so as not to be caught in possession of alcohol by an RA or NU Police on their walk across campus. RAI/279-82; RAII/336-37.

2. Helfman continues drinking at a party across campus

The party at 97 St. Stephen Street was in the room of Stacey Anderson, an RA for that residence hall and other properties that NU leased for student housing. RAI/280-81; RAII/337. Anderson was on duty that night, but she was in her room for some of the party that evening. RAI/281, 284; RAII/337, 366. Patrick Ward, an off-duty RA from another residence hall, also was present. RAI/163, 281-82; RAII/156, 196. Both Anderson and Ward participated in RA training prior to the events at issue. RAII/118-19, 195-96, 202-03, 209-11. Neither of them provided any alcohol to Helfman or any other students who were present. RAI/283; RAII/337; *see* Pl. Br. at 39.

Helfman and AG drank the rum and Coke mixture that they brought to the party. RAI/283; RAII/337. AG then

obtained a bottle of whiskey from another student and gave some of it to Helfman. RAI/283; RAII/337. Helfman played drinking games at the party. RAI/283-84; RAII/337. She became very intoxicated and vomited several times in the bathroom, RAI/285; RAII/176-78, 337, but she did not require any medical attention, RAI/286.

3. Helfman returns to her dorm with AG

AG offered to walk Helfman back to International Village, noting that he also lived there and that he had to get up early for crew practice. RAI/287, 290-91; RAII/337. Helfman admits there was no reason for anyone to be concerned at that time about AG or his offer to walk her home. RAI/282, 288.

On the walk back to their dorm, AG had his arm around Helfman and was supporting her; she was unsteady on her feet but able to walk on her own. RAII/355-57. During the walk, AG and Helfman kissed, which Helfman wanted to do. RAI/298; RAII/357.

Upon arriving at their dorm, Helfman and AG checked in with the proctor, RAII/337, 356, who monitors access to the residence hall. RAI/406-07. Helfman leaned on the proctor station as she was

checking in and was unsteady on her feet when she walked to the elevators. RAII/356. Helfman agrees that the proctor was correct not to call NU Police to arrest her for underage drinking or to take her to the hospital. RAI/296-97. If anyone had asked about her wellbeing, Helfman would have said, “I’m fine, I’m here with my friend.” RAI/297.

4. The events in AG’s room

AG invited Helfman to come to his room, which she willingly did. RAI/297; RAII/337. Once inside, they began kissing and removing their clothing; eventually they were in AG’s bed, fully undressed. RAI/292; RAII/337-38, 357-58. Everything up to this point was “fine” with Helfman. RAII/337-38, 357-58; RAI/292.

According to Helfman, AG then initiated sex with her. RAII/338, 373-74. Helfman said “ouch” several times and told AG she was a virgin. RAII/338. When AG said he would get a condom, Helfman did not respond or say that she did not want to have sex. RAII/338, 357-58, 374. AG attempted to get Helfman to perform oral sex on him by pushing her head down toward his groin. RAII/338; RAI/299. When Helfman said she had never done this before, AG told her she could stop. RAII/338, 358;

RAI/299. Helfman says they proceeded to have vaginal, oral, and anal sex over a period of several hours. RAII/358. She got up to vomit in the bathroom at one point. RAI/299-300; RAII/338. AG also got up to use the bathroom at one point. RAI/301; RAII/338.

When Helfman met with NU Police two days later, she said that "although she was very uncomfortable with what was going on, she didn't want to hurt [AG's] feelings by saying anything to him or telling him to stop," RAII/358, 374, and that she "wasn't scared" during the events at issue. RAII/358, 374. Helfman now says she did not leave AG's room because she thought he would not let her or might hurt her. RAI/302-03.

E. Helfman Reports an Assault and NU Responds

When Helfman returned to her room, she cried and told her roommate that she had gotten drunk and had sex with AG and was embarrassed about it. RAII/343. The roommate asked Helfman whether she would have stopped the sexual encounter had she been sober and Helfman said yes. RAII/343. The roommate told Helfman it was not her fault and that she should report to NU Police that she had been assaulted. RAII/343. Helfman allowed her roommate to notify an RA on their hall. RAII/343.

Helfman and her mother met with NU Police on November 2, at which time Helfman gave a detailed statement. RAII/336. NU Police accompanied Helfman and her mother to the hospital, where a "rape kit" was performed. RAI/307, 314. NU Police promptly conducted an investigation, which included reviewing security camera recordings and interviewing Helfman, AG, and Helfman's roommate. RAII/335-75; RAI/273.

NU imposed a no-contact order between Helfman and AG, which prohibited them from communicating with each other directly or indirectly. RAII/365; RAI/230-31, 234. The order remained in place for the remainder of Helfman's time at NU. RAI/598. Helfman encountered AG occasionally on campus, RAII/377, but she does not allege that he violated the no-contact order and admits that he never subjected her to any further harassment or other mistreatment. RAI/313; RAIII/532 & n.4.

NU provided regular counseling services to Helfman. RAI/305-06; *see, e.g.*, RAII/382-93; RAI/230. NU offered to arrange for a "safe room" for Helfman and her roommate and offered Helfman the opportunity to move to a different residence hall, but she declined. RAI/309; RAII/382-83. NU offered to change Helfman's

academic schedule, but she declined that option as well. RAI/308-09; RAII/382-83. NU did not grant Helfman's request that AG be transferred from her residence hall and class, RAI/308-09, because AG had not been found responsible for any policy violation and it never was determined that taking this action was necessary to prevent a hostile educational environment for Helfman. RAI/312-13; RAII/385-87.

F. The Initial Conduct Hearing

Under Wegmann's direction, OSCCR reviewed the NU Police report of Helfman's allegations and charged AG with violating the Code of Student Conduct by committing "sexual assault with penetration." RAI/578, 580; *see* RAII/498. Brooke Tempesta, an Assistant Director of OSCCR and the hearing administrator for the case, met with Helfman to discuss the process. RAI/580; RAII/440-41, 445. Tempesta also assembled a five-person Student Conduct Board for the hearing. RAII/425, 451. In order to serve on these Boards, students must meet certain eligibility requirements; receive training from OSCCR, the Office of the General Counsel, and others; and observe a full OSCCR proceeding. RAII/418-24. In order to sit on a sexual

assault case, Board members must complete additional training, which includes training on the definition of consent and the effects of alcohol. RAII/419-21, 428-33; RAIII/26. Board Chairs receive additional training relative to their service in that role. RAIII/19, 21-26; RAII/419-21.

Tempesta was present for the hearing to ensure that it was conducted according to the procedures outlined in the Code and to answer any questions from the Board or the parties. RAII/450, 453-55, 474, 479-81. The Board heard opening and closing statements from NU Police officer Adam Keeling, Helfman, and AG, and questioned each of them. RAII/449-50. Helfman and AG each asked questions of each other through the Board Chair. RAII/462-64; RAI/310, 321-22. The Board also asked its own questions about Helfman's level of intoxication, the acts to which Helfman gave consent or not, and how she indicated consent or lack thereof. RAII/385, 457-61,472; RAIII/51.

During its deliberations, the Board considered all of the information available to it, including with respect to the degree of Helfman's intoxication and whether a reasonable person would have considered her

words or actions to have indicated consent to each sexual act. RAII/474-81, 491-92; RAIII/18. The Board considered the fact that Helfman had a very strong memory of the details of the encounter and it gave her account more weight because of that. RAI/175; RAII/480-81, 489-90.

The Code provided that "[c]onsent may never be given by [someone] incapacitated as a result of alcohol or other drug consumption." RAI/610. It defined "incapacitation" as "a state where one cannot make a rational, reasonable decision because they lack the ability to understand the who, what, when, where, why, or how of their sexual activities." *Id.*

The Board determined by a 4-1 vote that AG did not commit sexual assault. RAII/484, 498; RAIII/85-86. The Board found that Helfman, although intoxicated, was not incapacitated; that she communicated consent to the sexual activity; and that she never communicated any withdrawal of that consent. RAII/429, 442-43, 457-60, 474-77, 480-81; RAIII/85-86.

G. The Appeals

Helfman appealed the Board's finding. RAI/313, 317; RAIII/96-102. Helfman did not believe that she had

any grounds for appeal because she had not identified any procedural error or new information, as the Code required for an appeal, RAI/620-21, but her parents insisted that she appeal. RAII/385. Helfman had the opportunity to review the audio recording of the hearing in connection with her appeal, RAI/582, 620-21, but she declined to do so. *See* RAIII/110.

An Appeals Board, overseen by Wegmann, decided that Helfman's appeal should be allowed for procedural error. RAI/588, 590; RAIII/114. Estabrook overruled that decision for two reasons: (1) Helfman had failed to identify any procedural error or new information as the basis for her appeal and (2) AG had not been given notice of the appeal and an opportunity to respond. RAI/237-45, 248-50, 252, 254-55; RAIII/116-17.

Helfman was allowed the opportunity to amend her appeal to identify any procedural error or new evidence. RAI/314; RAIII/116-17. Helfman at that point sought to review the recording of the hearing, RAIII/110, but it had been destroyed after the Appeal Board's original decision, in accordance with the Code. RAI/179, 229, 596, 620; RAII/469.

Helfman filed an amended appeal claiming both

procedural error and new evidence. RAI/313-14, 317; RAIII/104-12. A new Appeals Board denied the amended appeal as to procedural error but allowed it for the review of new evidence - the results of the rape kit. RAIII/119-20.

H. The Hearing on Remand

The case was remanded to the original Board for a hearing on the question whether the rape kit results warranted a different outcome. RAI/314; RAII/456; RAIII/119-20. Helfman did not attend. RAI/314-15. The Board upheld its original decision, noting that the rape kit results would not change the outcome; they only would tend to confirm that intercourse had occurred, which was not disputed, and would not indicate anything about the issue of consent. RAI/48, 314; RAII/447.

SUMMARY OF THE ARGUMENT

The Court should affirm summary judgment on Helfman's negligence claims because the defendants had no duty to protect Helfman from the alleged assault: universities have no duty to protect their students from the consequences of their own drinking, nor from assaults by other students except in circumstances not

applicable here, i.e., if the university knew the assailant presented a risk of assault or the assault involved the safety of activities or facilities within the university's control. [pp. 30-37] Helfman's claims are not saved by the fact that she did some of her drinking in the presence of RAs because NU is not vicariously liable for the RAs' alleged acts or omissions, which occurred outside of and contrary to their job duties; the defendants did not ratify the RAs' conduct; and that conduct cannot be deemed a proximate cause of the assault in any event. [pp. 38-42] The claim for negligent supervision and training of the RAs and OSCRR staff is waived because Helfman did not develop it in her brief; no evidence supports it in any event; there is no duty in negligence relative to student conduct proceedings; and the individual defendants are not liable for conduct in which they did not participate. [pp. 42-44]

The Court should affirm summary judgment for NU on the breach of contract and Massachusetts Equal Rights Act claims relating to Helfman's complaint against AG because NU did not act contrary to Helfman's reasonable expectations in connection with

her appeal of the Student Conduct Board decision; there is no evidence that NU failed to train the Board members; and Helfman seeks only emotional distress damages, which she cannot recover on a contract claim in any event. [pp. 45-48]

The Court should affirm summary judgment for NU on the Title IX claim. [pp. 48] Her deliberate indifference claim fails because NU responded appropriately to Helfman's complaint against AG; Helfman was not deprived of any educational opportunity; and she has not been subjected to further harassment by AG. [pp. 49-54] Her erroneous outcome claim fails because there is no evidence of a procedural irregularity that led to an erroneous outcome, nor any evidence that the supposed irregularities were the product of gender bias. [pp. 54-57]

ARGUMENT

Standard of Review

The Court reviews a summary judgment decision de novo, *Yee v. Mass. State Police*, 481 Mass. 290, 294 (2019), viewing the evidence in the light most favorable to the non-moving party. *Meyer v. Viola*

Energy N. Am., 482 Mass. 208, 211 (2019). Summary judgment is proper where the moving party is entitled to judgment as a matter of law, Mass. R. Civ. P. 56(e), as when the opposing party has no reasonable expectation of proving an essential element of her case. *Lambert v. Fleet Nat'l Bank,* 449 Mass. 119, 123 (2007); *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 711, 714 (1991). The Court may affirm on any ground supported by the record. *Roman v. Trs. of Tufts Coll.*, 461 Mass. 707, 711 (2012).

I. The Court Should Affirm Summary Judgment on the Negligence Claims.

A. NU and its Administrators Had No Duty to Protect Helfman from the Alleged Assault.

The Superior Court correctly ruled that NU and its administrators had no duty to protect Helfman from the alleged assault, consistent with the following, settled principles of Massachusetts law.

A defendant has no duty to protect or rescue a plaintiff from a dangerous situation the defendant has not created, unless there is a special relationship. *Nguyen v. Mass. Inst. of Tech.*, 479 Mass. 436, 448 (2018); *see also Kavanagh v. Trs. of Boston Univ.*, 440 Mass. 195, 201 (2003) (no duty to protect plaintiff

from criminal conduct of a third party absent a special relationship).

The university-student relationship is not, in and of itself, a special relationship. As a result, universities do not owe "a general duty of care to all students in all aspects of their collegiate life." *Nguyen*, 479 Mass. at 451 (citations omitted).

Universities generally owe their students a duty of care only in relation to activities that the university sponsors or the safety of facilities that the university controls. *Id*. at 452-54.[2]

Universities have no duty to supervise the social or private activities of their students, who are adults, who are expected to exercise their own judgment with respect to their own safety, and who

[2] Helfman's argument that *Nguyen* broadly recognizes a special relationship between universities and their students with respect to "potentially dangerous activities," Pl. Br. at 37, is incorrect. *Nguyen* addresses only the narrow question "whether a special relationship and accompanying duty exists . . . in regard to suicide prevention," 479 Mass. at 452, as other courts consistently have recognized. RAIII/536-37; *Doe v. Trs. of Boston Coll.*, 892 F.3d at 94; *Tang v. President and Fellows of Harvard Coll.*, No. 18-2603, slip. op. at 7 (Mass. Super. Ct. Sept. 9, 2019); *Doe v. Northeastern Univ.*, No. 1581CV04200, slip. op. at 8-9 (Mass. Super. Ct. Sept. 18, 2018).

have strong expectations of autonomy and privacy. *Id*. at 450-51; *Mullins v. Pine Manor Coll.*, 389 Mass. 47, 52 (1983).

Universities have no duty to protect students from the harmful consequences of alcohol or drug use, whether their own or that of another student, regardless of whether the conduct was illegal or violated university policy, including underage drinking, and regardless of the fact that such conduct and harm resulting therefrom – including assaults – is generally foreseeable.[3] *See Doherty v. Am. Int'l Coll.*, No. 17-cv-10161-JT, 2019 WL 1440399, *11 (D. Mass. Mar. 31, 2019); *Doherty v. Emerson Coll.*, No. 1:14-cv-13281-LTS, 2017 WL 4364406, at *10 (D. Mass. Sept. 29, 2017); *Doe v. Emerson Coll.*, 153 F. Supp. 3d 506, 514 (D. Mass. 2015); *Doe v. Northeastern Univ.*, No. 1581-CV-04200, slip op. at 8-9; *Destefano v. Endicott*

[3] Helfman's citation to *Brody v. Wheaton College*, 74 Mass. App. Ct. 1105, 2009 WL 1011051 (Mass. App. Ct. Apr. 16, 2009) (unpub. dec.), on this point, Pl. Br. at 42, is misleading. That case, far from recognizing any duty based upon "the prevalence and dangers of underage drinking," distinguished *Mullins* and held that an underage guest, who drank alcohol "furnished" by student employees at an on-campus party, was in a better position to prevent harm to himself than the college. 2009 WL 1011051 at *1-2.

Coll., No. 1777-CV-00152, 2017 WL 7693451, at *3-4 (Mass. Super. Ct. Dec. 18, 2017); *Bash v. Clark Univ.*, No. 06745A, 2006 WL 4114297, at *4 (Mass. Super. Ct. Nov. 20, 2006).[4]

Universities have no duty to protect students from assaults, including those committed by other students, except in two narrow circumstances not present here: (1) if the university had actual knowledge that the eventual assailant presented a risk of assault,[5] *see*, *e.g.*, *Schaefer v. Fu*, 272 F. Supp. 3d

[4] Cases outside Massachusetts are to the same effect. *See Bradshaw v. Rawlings*, 612 F.2d 135, 140-41 (3rd Cir. 1979) (cited in *Nguyen*, 479 Mass. at 451); *Hartman v. Bethany Coll.*, 778 F. Supp. 286, 293 (N.D. W. Va. 1991); *Leonardi v. Bradley Univ.*, 625 N.E.2d 431, 435-36 (Ill. App. Ct. 1993); *Beach v. Univ. of Utah*, 726 P.2d 413, 418-20 (Utah 1986); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 311-12 (Idaho 1999); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 59-61 (Colo. 1987).

[5] This factor, and the fact that the assault at issue occurred in a classroom environment that the university controlled, were central to the decision in *Regents of Univ. of Cal. v. Super. Ct.*, 413 P.2d 656, 629-30 (Cal. 2018), on which Helfman relies to no avail. Pl. Br. at 35-38. "The holding in *Regents* is actually quite narrow," *Doe v. Walmart Stores, Inc.*, No. G054660, 2018 WL 4626229, at *9-10 (Cal. App. Ct. Sept. 27, 2018), and entirely consistent with the principles cited above – i.e., a duty of care exists only when foreseeable harm occurs in the context of curricular activities, over which the university exercises control, and not in the context of social

285, 288-89 (D. Mass. 2017). *Cf. Williamson v. Bernstein*, No. 951471, 1996 WL 1185104, at *4 & n.6 (Mass. Super. Ct. Feb. 20, 1996),[6] or (2) the university put the student in harm's way and then unreasonably failed to mitigate the risk of harm – such as in *Mullins*, where the college required a student to live in campus housing, undertook security measures that were uniquely within the college's ability and on which a student reasonably could rely,

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activities that are "quite properly, beyond the institution's control." *Regents*, 413 P.2d at 626.

[6] Cases outside Massachusetts are to the same effect. *See, e.g., Freeman v. Busch*, 349 F.3d 582, 587-89 (8th Cir. 2003) (university not liable after on-duty RA failed to assist intoxicated guest at dorm party, when guest later sexually assault by the party host who was also an off-duty student security guard); *Doe v. Brown Univ.*, 304 F. Supp. 3d 252, 261-64 (D.R.I. 2018) (where fraternity member drugged and sexually assaulted female student, court declined to find special relationship between university and students or premises liability due to serious policy implications and noting that awareness of other assaults that year by other students not sufficient to find foreseeability); *Facchetti v. Bridgewater Coll.*, 175 F. Supp. 3d 627, 644 (W.D. Va. 2016); *Murrell v. Mount St. Clare Coll.*, No. 3:00-CV-90204, 2001 WL 1678766, at *4 (S.D. Iowa Sept. 10, 2001); *Tanja H. v. Regents of Univ. of Cal.*, 228 Cal. App. 3d 434, 438 (Cal. Ct. App. 1991), *disapproved on other grounds by Regents of Univ. of Cal.*, 413 P.3d at 623; *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 619 (W.D. Tex. 2017).

and then negligently carried out those measures, thereby enabling an intruder to assault a student in her room. 389 Mass. at 54-62.[7]

The Superior Court correctly ruled that, applying these well-settled principles, NU and its administrators had no legal duty to protect Helfman from the alleged assault. RAIII/537-48. The alleged assault, according to Helfman, resulted from her own, voluntary intoxication, which she was not relying on NU to prevent. RAI/37-40, 43; RAII/343, 358. To the contrary, Helfman took steps to conceal her alcohol and counted on the fact that NU would ***not*** prevent her from drinking that night. RAI/279-81, 296. Helfman concedes that no one had any reason to foresee that AG posed a threat of harm to her or anyone else. RAI/282, 288. NU did not place Helfman in harm's way; to the

[7] Helfman's argument that *Mullins* recognizes a broad obligation on the part of universities "to protect resident students from the criminal acts of third parties" or "to prevent injury to their students by third persons," Pl. Br. at 34, 36, is incorrect. Courts consistently have recognized that the holding and rationale of *Mullins* are much narrower. *See Doe v. Trs. of Boston Coll.*, 892 F.3d at 94; *Doe v. Northeastern Univ.*, No. 1581-CV-04200, slip. op. at 7-12; *Erickson v. Tsutsumi*, No. CA199801842B, 2000 WL 1299515, at *2 (Mass. Super. Ct. May 17, 2000).

contrary, it was Helfman who decided to become intoxicated, go to AG's room, remove her clothing, and get into bed with him – all of which was "fine" with her. RAII/337-38, 357-58; RAI/292. The alleged assault also did not involve any inadequate security measures, much less any measures that were uniquely within NU's control and on which Helfman could have relied.[8]

Simply put, NU and its administrators had no duty to prevent the alleged assault because it occurred in a time, place, and manner that they could not prevent "except possibly by posting guards in each dorm room on a 24-hour, 365-day per year basis" – an impossible undertaking and one that students would not tolerate. *See Bash*, 2006 WL 4114297, at *5-6 (citation omitted).

Helfman's reliance on the fact that alcohol-related sexual assaults on college campuses are generally foreseeable, and were foreseen by NU, Pl.

[8] Helfman's argument that she, like the plaintiff in *Mullins*, was required to live on campus as a freshman, Pl. Br. at 38, is a red herring. Helfman allegedly was assaulted not in her room but in a different place where she willingly had gone, and not by an intruder but by someone with whom she willingly got into bed. RAI/292, 297; RAII/337-38, 357-58.

Br. at 42, 45-51,[9] is unavailing. The fact that a type of incident foreseeably may occur on campus at some point does not create a special relationship between the university and the person who is harmed in the incident at issue. *Kavanagh v. Trs. of Boston Univ.*, 440 Mass. 195, 203 (2003). "[F]oreseeability," for these purposes, "must mean something more than awareness of the ever-present possibility" that a type of assault may occur at some point; rather, in order for a special relationship to exist, the university "would have to have specific information about [the assailant] suggesting a propensity to engage in violent conduct, or some warning that [the assailant] appeared headed toward such conduct." *Id*.[10] There are no such facts in this case. RAI/165.

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[9] In making this argument, Helfman cites extensively to materials outside the record, which she improperly included in her addendum. Mass. R. App. P. 16(d).

[10] *See also Murrell*, 2001 WL 1678766, at *4 ("A college . . . is incapable of foreseeing an acquaintance rape that takes place in the private quarters of a student … unless [the assailant] has a past history of such crimes.")

B. Helfman's Negligence Claims Are Not Saved by the Fact That She Did Some of Her Drinking in the Presence of Two RAs.

Helfman makes much of the fact that she did some, albeit not all, of her drinking on the night in question in the presence of two RAs, who are supposed to enforce NU's policies including its prohibition against underage drinking. Pl. Br. at 19-21. This fact, however, fails to save Helfman's negligence claims against NU or its administrators.

As an initial matter, Helfman offers no authority for her assertion that the RAs should be considered "employees" of the University, and at least the Tenth Circuit has held to the contrary. *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1327-28 (10th Cir. 1981).[11]

Moreover, even assuming the RAs were NU employees, they plainly were not acting within the scope of their employment in connection with the conduct on which Helfman bases her claim – i.e., that

[11] The Eight Circuit in *Freeman*, *supra*, assumed without deciding that an RA was an employee but held there was no basis for liability in any event, because the college had no duty to protect guests of its students on campus and because the RA did not take charge of the guest's wellbeing. 349 F.3d at 586, 588-89.

the RAs "invited"[12] Helfman to a party they "hosted," at which underage drinking occurred, thereby "furnishing" alcohol to minors (even though it is undisputed the RAs did not provide any alcohol that Helfman or other students drank). Pl. Br. at 19-20, 39; RAI/038-39; *see Wang Labs., Inc. v. Business Incentives, Inc.*, 398 Mass. 854, 859-60 (1986) (listing factors). Of course there is no evidence that an RA's job responsibilities included hosting parties, much less parties in their dorm rooms where underage students would be drinking alcohol. Moreover, the undisputed evidence is that Ward was not on duty at the time of the party, Pl. Br. at 20; RAII/196, and that Anderson ***left*** the party to perform her RA duties, RAI/162, 281, 284; RAII/71, 366, which were holding office hours in another building and conducting rounds. RAII/71, 86, 93.

The mere fact that the RAs allegedly were aware that Helfman was drinking and became intoxicated did not create a duty of care on the part of NU or its administrators to protect Helfman from the harm of

[12] No evidence in the record supports this claim.

being sexually assaulted by AG, for the reasons stated in Section I.A. above. *See also* L.B. Helms, et al., "The Risks of Litigation: A Case Study of Resident Assistants," 180 Ed. L. Rptr. 25, 28-29 (2003) (institutions are not liable for harm resulting from student drinking, even when RAs are aware of it and do not intervene) (collecting cases)[13]; *Bradshaw*, 612 F.2d at 137, 140-41, 143 (university not liable for harm resulting from student drinking at a university-sanctioned event, even where university funds were used to purchase the alcohol).[14]

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[13] For the same reasons, there also is no merit to Helfman's argument that liability can be based upon the alleged failure of the RAs, or the proctor at Helfman's residence hall, to call NU Police to "ensure that qualified professionals would determine whether [she and AG] needed assistance." Pl. Br. at 41. It is undisputed that Helfman did not believe she needed any medical assistance, RAI/286, and that if anyone had spoken to her when she returned with AG and was about to go to his room, she would have said that she was "fine" and "with a friend," RAI/297. As the Superior Court determined, no rational jury could find that the supposed failure to check on Helfman proximately caused the alleged assault, which occurred later that evening, behind closed doors, by an unforeseeable assailant. RAIII/544. *Cf. Petrell v. Shaw*, 453 Mass. 377, 386-88 (2009).

[14] Helfman's argument that Anderson, by allowing minors to drink in her room, perhaps could have been prosecuted for "furnishing" alcohol to minors, Pl. Br. at 39, is of no consequence. Whether Anderson could

There also is no merit to Helfman's argument that NU and its administrators can be held liable because they allegedly "ratified" the RAs' acts or omissions. Pl. Br. at 41. There is no evidence in the record to support Helfman's wild assertion that "[a]ll [the individual defendants] were aware and acquiesced in underage drinking by NU employees and students in Anderson's room, the RAs' role in arranging and furnishing alcohol to underage students, and the [RA's Code] and employment contract violations." *Id.* at 53. In fact there is no evidence that any NU administrator with responsibility for the RAs was aware of underage drinking in Anderson's room at any point before this lawsuit was filed.[15] In addition, there is no evidence

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have faced a criminal charge on that basis has no bearing on the question whether NU and its administrators, who had no involvement in or knowledge of that conduct, could be found liable in negligence for the alleged assault. *Destefano*, 2017 WL 7693451, at *1, 3-4 (university had no duty to protect underage student from the consequences of his own drinking at a dorm party, which led to his assault of three other students and subsequent criminal conviction).

[15] Information about underage drinking in Anderson's room was reported to NU Police. However, pursuant to NU's practice of sharing information about sexual assault cases only on a "need to know" basis, the NU Police report did not go to anyone in Residential Life. As a result, no one in Residential Life was

of any harm flowing from the defendants' alleged failure to discipline the RAs after-the-fact, which also is fatal to Helfman's ratification claim. RAIII/547 n.8 (citing *Jupin v. Kask*, 447 Mass. 141, 146 (2006)).

C. The Claim for Negligent Supervision and Training Has Been Waived and is Without Merit in Any Event.

Helfman's brief makes an oblique reference to claims that NU's administrators can be held liable for negligent training and supervision of the RAs and "OSCCR staff." Pl. Br. 53-54. Helfman fails to develop the argument in any meaningful way. Accordingly, these claims have been waived. *See* Mass. R. App. P. 16(a)(9)(A); *Popp v. Popp*, 477 Mass. 1022, 1023 (2017); *Atwater v. Comm'r of Educ.*, 460 Mass. 844, 853 n.8 (2011); *see also Rodriguez v. Municipality of San Juan*, 659 F.3d 168, 175 (1st Cir. 2011).

The claims have no merit in any event. With respect to the RAs: It is undisputed that the RAs did receive training about alcohol issues and were aware

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aware of that information until this lawsuit was filed. RAII/49-50, 52-53, 103, 187-91, 193-94; RAI/372-73, 376, 405, 464, 481, 483-85.

that they were supposed to report, not facilitate, underage drinking, RAII/17, 118-19, 125, 205, 230. Any neglect by the RAs in following that training does not, without more, support an inference that the defendants were negligent in providing the training, RAIII/545-46. Further, there is no evidence that the defendants knew or had any reason to know of any problems with these RAs in terms of their performance or knowledge of their responsibilities. RAIII/546; *see Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 614 (D. Mass. 2016) (applying Massachusetts law); *Foster v. Loft, Inc.*, 26 Mass. App. Ct. 289, 291-92 (1988).

With respect to the OSCCR staff, including Board members: It is undisputed that they received training in relation to their responsibilities, RAI/171-73. There is no evidence that any of them neglected to follow that training. There is no evidence the defendants knew or had reason to know of any problems with their performance or knowledge of their responsibilities. And there is no claim of physical harm to Helfman resulting from any supposed mishandling of her conduct case against AG, *see*

Choroszy v. Wentworth Inst. of Tech., 915 F. Supp. 446, 451 (D. Mass. 1996) (citing RESTATEMENT (SECOND) OF TORTS §§ 317, 411 (1965)). *Cf. Jah v. Naphcare, Inc.*, No. 14-CV-2420-B, 2015 WL 1530876, at *4 (Mass. Super. Ct. Mar. 31, 2015).

Any negligence claim in relation to the conduct proceedings also fails because a university's duties to its students in that context arise only as a matter of contract, not in tort. RAIII/522; *Doe v. Trs. of Boston Coll.,* 892 F.3d 67, 94 (1st Cir. 2018).

The individual defendants also cannot be held personally liable for the alleged negligence of other persons connected with the University, where they did not personally participate in the allegedly negligent acts. *See Tibbets v. Wentworth,* 248 Mass. 468, 472 (1924) (chief operating officer not personally liable for faulty elevator repair by employee he supervised, as he had no knowledge of failure to perform what he ordered).

D. The Claim for Negligent Infliction of Emotional Distress Fails.

Because Helfman's negligence claims fail for the reasons discussed above, her negligent infliction of emotional distress claim necessarily fails as well.

RAIII/549 (citing *Doherty v. Emerson Coll.*, 2017 WL 4364406, at *10); *see Urman v. S. Boston Sav. Bank*, 424 Mass. 165, 171 (1997).

II. The Court Should Affirm Summary Judgment on the Contract and Mass. Equal Rights Act Claims.

A. NU Did Not Violate Any of Helfman's Reasonable Expectations.

Helfman offers two arguments in support of her claim that NU breached its contractual obligations to her in relation to her complaint against AG, neither of which has merit.

First, Helfman claims that NU breached its contract when Estabrook reversed the original decision of the Appeals Board – the decision that Helfman's appeal should be allowed on the basis of procedural error. Pl. Br. at 56. That claim fails because Helfman herself recognized that she had no basis to appeal on grounds of procedural error, RAI/620-21, and she identified no such error in her request to appeal. RAI/237. There was no violation of NU policy, nor Helfman's "reasonable expectations," when Estabrook exercised her authority to correct the Appeals Board's mistake. RAIII/549, 551-53. As Associate Vice President for Student Affairs, Estabrook had overall

authority for the student conduct process and was responsible for overseeing the Appeals Board. RAIII/551 (citing RAI/235, 604). The Board's decision was patently incorrect and if left to stand it would have violated ***AG's*** rights, especially if, as Helfman would have it, AG received no notice of her appeal. RAIII/552. Far from affording AG "special treatment," as Helfman suggests, Pl. Br. at 56, Estabrook merely ensured that both AG and Helfman were treated fairly and consistent with the Code. As the Superior Court found, Estabrook's decision to correct the Appeals Board's error was "plainly appropriate." RAIII/553.

Second, Helfman complains that NU breached its contract by failing adequately to train the Student Conduct Board to resolve the "central question" of consent, including in relation to Helfman's claimed incapacitation by alcohol. Pl. Br. 57-58. Helfman cites no evidence to support this "lack of training" claim. To the contrary, it is undisputed that the Board received training about consent and the potential effects, including incapacitation, of alcohol. RAI/171-72. In actuality, Helfman's contract claim is not based on any supposed lack of training.

Instead, it is based on her disagreement with the result that the Board reached in her case. Helfman's argument lacks any citation to the record, *see* Pl. Br. at 58, and fails in any event because it is not for the Court to second-guess or re-litigate the Board's decision. *See Doe v. Brown Univ.*, 210 F. Supp. 3d 310, 313 (D.R.I. 2016) ("This Court is not a super-appeals court for sexual misconduct cases, nor is it an advisor to [the university] on how it should handle these messy and unfortunate situations."); *see also Schaer v. Brandeis Univ.*, 432 Mass. 474, 479 n.9 (2000).

Helfman's contract claim fails for the additional reason that she claims only damages for emotional distress in relation to the outcome of her complaint against AG. Pl. Br. at 59. Emotional distress damages are not recoverable in contract, except in very limited circumstances not present here. RAIII/553-54 (citing *John Hancock Mut. Life Ins. Co. v. Banerji*, 447 Mass. 875, 888 (2006)); *see also Young v. Wells Fargo Bank, N.A.*, 109 F. Supp. 3d 387, 395 (D. Mass. 2015), *aff'd*, 828 F.3d 26 (1st Cir. 2016).

Helfman also is mistaken that summary judgment should have been denied because she could recover damages for "diminution in the value of her contract and at least nominal damages." Pl. Br. at 59. Helfman made no such argument below, with the result that the Court need not consider it now. *Young*, 109 F. Supp. 3d at 396, n.3 (citing *Flynn v. AK Peters, Ltd.*, 377 F.3d 13, 23 (1st Cir. 2004))(declining to consider plaintiff's new argument that nominal damages could sustain her breach of contract claim). Helfman also has no basis to claim a "diminution in the value of her contract," where there is no evidence of any interruption in or diminution of her educational experience at NU.

Helfman's Equal Rights Act claim is merely duplicative of her breach of contract claim, and accordingly it fails for the same reasons. RAIII/564.

III. The Court Should Affirm Summary Judgment on the Title IX Claim.

Helfman contends that NU violated Title IX because it conducted the disciplinary proceedings in

a discriminatory manner. Pl. Br. at 60-63.[16] Her brief advances two arguments, neither of which has merit.

A. Deliberate Indifference

Helfman contends that NU was "deliberately indifferent" in its "response to the [alleged] rape," thereby causing her "psychological injuries." Pl. Br. at 60. Her brief fails to explain what aspect of NU's "response" was "deliberately indifferent," except for an oblique reference to the claim that the Student Conduct Board was not "properly trained" to adjudicate her claim against AG. Pl. Br. at 62.

To support a deliberate indifference claim under Title IX, Helfman had to adduce evidence that one or more university officials with authority to address harassing conduct and take corrective measures was "deliberately indifferent to an act of discrimination on the basis of sex" – i.e., had actual knowledge of the harassing conduct and responded in a manner that was "clearly unreasonable" under the circumstances. *Doe v. Trs. of Boston Coll.*, 892 F.3d at 93; *Doe v.*

[16] Helfman also argued below that NU violated Title IX in failing to prevent the alleged assault, but she has not pursued, and accordingly has waived, that argument on appeal.

Emerson Coll., 271 F. Supp. 3d 337, 357 (D. Mass. 2017).

> It is not enough for a plaintiff to show "that the school [] could or should have done more." [Rather, the] plaintiff must establish that the school had notice of the harassment and "either did nothing or failed to take additional reasonable measures after it learned that its initial remedies were ineffective."

Doherty v. Emerson Coll., 2017 WL 4364406, at *8 (quoting *Porto v. Tewksbury,* 488 F.3d 67, 73 (1st Cir. 2007)); *see also, e.g.*, *Keel v. Del State Univ. Bd. of Trs.*, No. 17-1818-MN-MPT, slip. op. at 3-4 (D. Del. Oct. 29, 2019) (where university allowed plaintiff to suffer further harassment at the hands of her alleged assailant and allowed alleged assailant to remain on campus despite his arrest, multiple accusers, finding of responsibility, and year-long suspension, court held no deliberate indifference because university responded in a manner "not clearly unreasonable" when it conducted investigation and disciplinary proceeding and provided counseling to plaintiff; dismissing Title IX claim for failure to state a claim). A claim of deliberate indifference cannot be based upon a plaintiff's "speculative assertion" that some

difference in the handling of her complaint “might have changed the outcome of the . . . disciplinary process." *Wyler v. Conn. St. Univ. Sys.,* 100 F. Supp. 3d 182, 195 (D. Conn. 2015).

The Superior Court properly concluded that no rational view of the evidence permitted a finding that NU acted with “deliberate indifference” to Helfman’s report of assault, including with respect to the disciplinary proceedings. RAIII/557-64. To the contrary, NU promptly and appropriately responded to Helfman’s complaint by, among other things, instituting a no-contact order; investigating the allegations of sexual assault; conducting disciplinary proceedings against AG; providing Helfman with counseling services; and offering Helfman other accommodations, most of which she declined. RAII/335-75; RAI/230-31, 234, 273, 306, 308-09, 597-98; *see Doherty v. Am. Int’l Coll.*, 2019 WL 1440399, at *6-9 (no Title IX violation on very similar facts); RAIII/557-58. NU then afforded Helfman the opportunity to be heard during the disciplinary proceedings and to appeal the Board’s decision. RAIII/558-59; RAI/313-14, 317-20, 321-25, 578, 580; RAII/440-41, 445, 453-55;

RAIII/96-102, 116-17; *see Doherty v. Emerson Coll.*, 2017 WL 4364406, at *9 (no Title IX violation where college promptly and seriously responded to plaintiff's report, conducted investigation, issued stay-away order, provided counseling, and expelled assailant).

The Superior Court also properly held that the alleged lack of Board training and Estabrook's involvement in the appeal did not render the disciplinary proceedings "clearly unreasonable." RAIII/559-60; *see Doe v. Emerson Coll.*, 271 F. Supp. 3d at 357 (alleged inadequacies in training of college officials did not constitute deliberate indifference; distinguishing cases "where officials had no training whatsoever, or where the training was obviously or grossly inadequate"). With respect to training, the Superior Court correctly found that the undisputed summary judgment record belied Helfman's claim that the Board lacked training in the definition of consent and incapacity to consent to sex. RAIII/559-60; *see supra* Sections I.C & II.A; RAII/419-21, 428-33; RAIII/19, 21-26. Board members were trained on those topics and considered during the proceeding the issue

whether Helfman could have consented to sex given her state of intoxication on the evening at issue. RAIII/560; *see* RAII/385, 457-61, 472, 474-81, 491-92; RAIII/18, 51. Helfman also made no showing that Estabrook's direction to amend and resubmit her appeal violated NU policy or otherwise was unfair. RAIII/560-61.

Helfman's deliberate indifference claim also fails because she provided no evidence that NU's response to her complaint had the "systemic effect of denying [her] equal access to an educational program or activity." *See* RAIII/557-63; *Doe v. Trs. of Boston Coll.*, 892 F.3d at 93 (quoting *Porto*, 488 F.3d at 72) ("The discriminatory act must be 'so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.'"); *see also Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 652 (1999); *Gabrielle M. v. Park Forest-Chicago Heights, IL. Sch. Dist. 163*, 315 F.3d 817, 823 (7th Cir. 2003); *Roe v. Penn. St. Univ.*, No. 18-2142, 2019 WL 652527, at *5 (E.D. Pa. Feb. 15, 2019). It is undisputed that Helfman's education was

uninterrupted; she suffered no impact on her academic performance; and she continued to be fully engaged in extracurricular activities. RAI/268-70, 319

Helfman's claim is not saved by her conclusory assertion that she remained "vulnerable" to "ongoing harassment." Pl. Br. at 60. Even though AG was exonerated on Helfman's complaint against him, NU nevertheless maintained the "no contact" order between Helfman and AG for the rest of Helfman's time at NU, RAI/598; AG never violated it; and at no point after filing her complaint did Helfman ever experience any harassment or other mistreatment by AG. RAIII/532 & n.4, 555 n.14.

B. Erroneous Outcome

Helfman contends that NU violated Title IX because Estabrook's alleged "interference" in the appeal process demonstrated gender bias and led to an "erroneous outcome" in her case. Pl. Br. at 63. This claim is raised for the first time on appeal and thus has been waived. *See Freedman v. United States Liability Ins. Co.*, 82 Mass. App. Ct. 331, 335 (2012); *Borne v. Haverhill Golf & Country Club, Inc.*, 58 Mass. App. Ct. 306, 316 (2003).

The argument is without merit in any event. To establish an erroneous outcome claim under Title IX, the plaintiff must "offer evidence 'cast[ing] some articulable doubt on the accuracy of the outcome of the disciplinary proceeding,' and indicating that 'gender bias was a motivating factor.'" *Doe v. Trs. of Boston Coll.*, 892 F.3d at 90 (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)). Helfman adduced no such evidence on either point.

On the first point, Helfman had to introduce evidence of some procedural error or other deficiency in the process that led to the alleged "erroneous outcome." *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 187-88 (D. Mass. 2017) (citing *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 766 (D. Md. 2015) and *Yusuf*, 35 F.3d at 715). She has identified no such error or deficiency. As the Superior Court found, Estabrook's actions were "plainly appropriate." RAIII/553.

On the second point, assuming for the sake of argument that she had cleared the first hurdle, Helfman cites no evidence to support her assertion that Estabrook's actions were motivated by gender

bias. The plaintiff "cannot merely rest on superficial assertions of discrimination, but must establish that 'particular circumstances suggest[] that gender bias was a motivating factor.'" *Doe v. Trs. of Boston Coll.* 892 F.3d at 91 (citation omitted) (alteration in original). Helfman cites no such "circumstances."

Helfman suggests that gender bias can be inferred "when the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based on the evidence)," Pl. Br. at 63 (quoting *Doe v. Columbia Univ.* 831 F.3d 46, 57 (2d Cir. 2016)). Here, the evidence did not "substantially favor" Helfman's version. To the contrary, the Board found that it supported AG's version of events. RAII/429, 442-43, 457-60, 474-77, 480-81; RAIII/85-86. In addition, Estabrook was not the "evaluator" of the evidence. She merely acted to correct the obvious procedural errors in the Appeal Board's original decision, which she had "apparent reason" to do. RAI/237-45, 248-52, 254-55; RAIII/116-17, 119-20. Moreover, she provided an opportunity for Helfman to submit a new appeal, after which the Board affirmed

its original decision. RAI/48, 313-14; RAII/447; RAIII/104-12.

Helfman cites Estabrook's deposition testimony that this was the first time an Appeals Board in a sexual misconduct case had determined that a new hearing was required. She also asserts, without citation to the record, that "sexual assault victims are overwhelmingly female." Pl. Br. at 63. Nothing about those facts remotely suggests that Estabrook's decision was the product of gender bias. The fact that the Appeals Board had not erred in handling other appeals suggests nothing other than the fact that these Boards are well-trained and generally get things right. The fact that sexual assault victims "are overwhelmingly female" suggests nothing at all in relation to the handling of Helfman's appeal. This might be a different case if Helfman had adduced evidence that Estabrook routinely overturns appeals that were resolved in favor of female complainants, or female respondents for that matter, but there is no such evidence – only evidence that Estabrook acted appropriately in the particular circumstances of this case.

CONCLUSION

The Court should affirm the Superior Court's order granting summary judgment in favor of the defendants-appellees.

NORTHEASTERN UNIVERSITY, KATHERINE ANTONUCCI, ROBERT JOSE, BRIANA R. SEVIGNY, MARY WEGMANN and MADELEINE ESTABROOK,

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November 12, 2019

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 16-03335-C

MORGAN HELFMAN
Plaintiff

v.

NORTHEASTERN UNIVERSITY, KATHERINE ANTONUCCI, ROBERT JOSE, BRIANA R. SEVIGNY, MARY WEGMANN & MADELEINE ESTABROOK
Defendants

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Morgan Helfman (the "Plaintiff") alleges that, while she was a student at Northeastern University ("NU" or the "University"), she was sexually assaulted by another student in that student's dormitory room. Plaintiff brings against action against NU and several of its employees, Katherine Antonucci, Robert Jose, Briana R. Sevigny, Mary Wegmann, and Madeleine Estabrook (collectively, the "Defendants"), alleging that they failed to protect her against the assault and inadequately handled her ensuing complaint. Plaintiff asserts claims for negligence, negligent infliction of emotional distress, and violation of the Massachusetts Equal Rights Act (the "MERA") against all Defendants, as well as claims for breach of contract and violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* ("Title

IX") against NU.[1] Presented for decision is the Defendants' Motion for Summary Judgment. Following a hearing and for the reasons which follow, the Defendants' motion shall be **ALLOWED**.

FACTUAL BACKGROUND

The following facts are taken from the summary judgment record and the statement of undisputed material facts filed jointly by the parties under Superior Court Rule 9A(b)(5). The Court reserves further recitation of the facts for its discussion below.

I. The Parties

NU is a non-profit, charitable corporation that offers undergraduate and graduate education degrees. Plaintiff was a student at NU from the fall of 2013 until she graduated in December, 2017.

NU operates a Department of Residential Life (the "Department"), which employs and trains staff to supervise campus residential life. During the relevant time period, Defendant Jose was NU's Associate Dean of Cultural, Residential and Spiritual Life, and the Director of NU's Residence Life Office. Jose was tasked with general oversight of the Department, including the hiring, training and overseeing its staff, and with ensuring that NU campus policies were enforced. Jose had supervisory authority over Defendant Antonucci, who served as an Area Coordinator at NU. Antonucci was responsible for training and directly overseeing the work of certain resident assistants ("RAs").

NU operates a Student Conduct and Conflict Resolution ("OSCCR") program, which

[1] Plaintiff is no longer pursuing her claims for intentional infliction of emotional distress (Count VI) and misrepresentation (Count IX). The Court, therefore, shall enter judgment in favor of the Defendants on these counts of the Complaint.

administers disciplinary proceedings against students alleged to have violated the University's Code of Student Conduct (the "Code"). Defendant Estabrook was NU's Associate Vice President for Student Affairs, and oversaw OSCCR. Defendant Wegmann was NU's Director of OSCCR, and was charged with enforcing the Code and other University policies, as well as supervising, hiring and training Student Conduct Board and Appeals Board members. Defendant Sevigny was NU's Assistant Director of OSCCR, and provided training to both Residential Life staff and members of the Student Conduct Board.

II. Relevant NU Policies

A. The Code

At all relevant times, the Code prohibited underage students from drinking or possessing alcohol on campus, including in residence halls, and prohibited all students from furnishing alcohol to underage students. Underage students were prohibited from even being in the presence of alcohol, unless such alcohol was in the possession of a roommate who was age 21 or older. The Code further prohibited excessive alcohol consumption and sexual assault. Students who violated the Code could be subject to discipline by NU.

B. NU's Security and Supervision of Residence Halls

NU engages certain students as RAs to serve as role models for the University's undergraduate community. RAs are "paraprofessional" members of NU's Residence Life Office. They are required to sign a "Resident Assistant Agreement," and receive financial compensation in the form of on-campus housing in exchange for their service. RAs are engaged, trained and supervised by NU staff.

NU requires its RAs to be familiar with the Code, to perform periodic rounds in their

assigned buildings, to serve as resident hall proctors, to intervene if students violate community norms, to remain sober and drug-free while on duty, and to maintain high standards of personal conduct and integrity. RAs also are required to take corrective action and report any violation of the Code to their supervisors, even if the violation occurs when the RA is "off duty" or in a building to which the RA is not ordinarily assigned. The failure of an RA to intercede when students under 21 years old are drinking alcohol, to obtain assistance for students in need, and to report Code infractions are all violations of an RA's duties under the Code. Such violations could serve as a basis to dismiss the RA from that role.

III. The Events of October 31, 2013

In the fall of 2013, Plaintiff was a freshman at NU. NU required that all freshman students live on campus. Plaintiff lived in International Village, one of the University's residence halls. Another freshman student ("the assailant"), who was Plaintiff's classmate and part of her student study group, also lived in International Village.[2]

On October 31, 2013, Plaintiff and the assailant were invited to attend a Halloween party hosted by a sophomore student, Stacey Anderson, in Anderson's dorm room at 97 St. Stephen Street, a property leased by NU for student housing. Plaintiff, the assailant, Anderson, and Patrick Ward, another sophomore student attending the party, were classmates and had socialized on prior

[2] The other student will be referred to as "the assailant" (rather than by his name) because this student is not a party to the action, the nature of the allegations are sensitive, and other courts have followed the same procedure. See, e.g., Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *2 n.1 (D. Mass. Sept. 29, 2017) (Sorokin, J.). This other student has not, in fact, been found responsible for committing the sexual assault at issue by any internal or external adjudicatory body. Nevertheless, because Rule 56 requires the undersigned to view the record in the light most favorable to the Plaintiff, the Court accepts the factual premise of the claimed assault as true, and will accordingly refer to this other student as "the assailant" throughout.

occasions. These four students, as well as all of the other attendees at the party, were under the age of 21.

That evening, Plaintiff and the assailant consumed alcohol in Plaintiff's dorm room, and then made their way to the party at around 9:00 p.m. Once at the party, Plaintiff and the assailant consumed rum and Coke that they had brought with them in a Coca Cola bottle; and the assailant additionally provided Plaintiff with Fireball whiskey that he obtained from another party-goer (not Anderson or Ward). Plaintiff also played drinking games with some or all of the party participants.

Anderson was an RA on duty on the evening of the party. She left the party at times to attend to her rounds, but always returned to the room when she was finished. Ward was also an RA, but served in another dorm and was not on duty at the time of the party.

At some point during the evening, Plaintiff became very intoxicated and vomited several times in Anderson's bathroom. Two female NU students who also were at the party stayed with Plaintiff in the bathroom to lend support to her. The two wanted to take Plaintiff back to her dorm room, but did not believe that the proctors who signed residents into the dormitory would allow Plaintiff to enter the building in her visibly intoxicated state, and might even seek to discipline them on account of Plaintiff's condition. The assailant, who was also intoxicated, volunteered to take Plaintiff home, because they lived in the same dormitory and he needed to get up early for crew practice.

Despite their awareness that party attendees were under the age of 21, RAs Anderson and Ward observed many attendees drink alcohol to the point of intoxication, personally consumed alcohol themselves, and played drinking games with other party-goers. During the time that

Plaintiff was at the party, neither Anderson nor Ward assisted Plaintiff by calling NU police to assess her condition, by offering her safe transport home (as was available pursuant to the University's Medical Amnesty policy), or by volunteering to escort Plaintiff back to her dorm room.

Plaintiff and the assailant departed the party at around 11:20 p.m., and Plaintiff texted her roommate to let her know that she was on her way home. Plaintiff relied on the assailant for support as the two walked and, at one point, Plaintiff stumbled and fell, causing the assailant to fall himself. At some point during the walk, the assailant took the Plaintiff's cell phone and identification from her. The two students also kissed during the course of the walk. When they arrived at their dormitory, Plaintiff leaned on the proctor's desk as the proctor checked her and the assailant's identification. Plaintiff was unsteady on her feet as she left the proctor's desk and approached the elevators in the dorm.

The assailant then told Plaintiff that he needed to get something from his room, and invited Plaintiff to come with him while he retrieved the item. Plaintiff agreed, and accompanied the assailant to his room. Once inside the room, the assailant kissed Plaintiff, and the two eventually ended up undressed in the assailant's bed. The assailant then initiated sexual relations with Plaintiff. Plaintiff said "ouch" several times, and further informed the assailant that she was a virgin. The assailant then told Plaintiff that he would get a condom. Plaintiff did not respond or say that she did not want to have sex, but recalls today that she was very uncomfortable at the time. The assailant also guided Plaintiff's head down to his groin in an attempt to prompt her to perform oral sex on him, but told her she could stop when she said, "I have never done this before." At certain points during the encounter, Plaintiff rolled over and pulled the blanket up

over her head; and, at least at one other point, Plaintiff vomited in the assailant's bathroom. Plaintiff was afraid to leave the dorm room, because she thought that the assailant would not let her do so or that he might hurt her. Ultimately, the assailant and Plaintiff had oral, anal, and vaginal sex over the course of several hours.

When Plaintiff returned to her own dorm room the next morning, she cried and confided to her roommate what had occurred. The roommate asked whether Plaintiff would have stopped the encounter had she been sober, and Plaintiff replied that she would have. With Plaintiff's consent, the roommate told their RA about the alleged sexual assault. Plaintiff also disclosed the sexual assault to her mother, who accompanied Plaintiff to the NU Police Department ("NUPD") to report the incident. NUPD then accompanied Plaintiff and her mother to the Emergency Room at Beth Israel Hospital for an assessment, and the hospital thereupon performed a rape kit.

IV. NU's Response to Plaintiff's Report

A. Interim Measures Offered to Plaintiff

NU extended Plaintiff certain interim protective measures following her report of this incident. Specifically, the University issued a "no contact" order which precluded the assailant and Plaintiff from directly or indirectly communicating with one other. The assailant fully adhered to the no contact order. NU additionally offered Plaintiff the option to transfer out of the lone class that she was then taking with the assailant and to move out of International Village, but Plaintiff declined. Plaintiff requested instead that NU transfer the assailant out of her class and dormitory. The University declined to do so, however, because the assailant had not been found responsible for any policy violation, and because the University had not yet determined whether failing to take such actions would create a hostile environment for the Plaintiff.

B. NUPD's Investigation and Report

NUPD promptly investigated Plaintiff's report by collecting evidence, reviewing surveillance footage, and interviewing Plaintiff, the assailant, and Plaintiff's roommate. The NUPD then generated a report (the "NUPD Report") that identified other party attendees, including Anderson and Ward. NUPD did not, however, interview any of these other party attendees. One of the two female students who stayed in the bathroom with Plaintiff when she was sick at the party provided an account to NUPD on her own initiative, but NUPD did not document her statement.

C. Anderson and Ward

The NUPD Report was furnished to Defendant Wegmann, the OSCCR Director, who shared it with Defendant Sevigny, the OSCCR Assistant Director, and Defendant Estabrook, the Associate Vice President of Student Affairs. Although the Report revealed that Anderson and Ward had consumed alcohol with NU students who were under 21 years of age, Wegmann, Sevigny and Estabrook did not discipline Anderson or Ward for their violations of the Code and their agreement as RAs; nor did they inform the University staff responsible for their supervision, including Defendants Antonucci or Jose, of these violations. Ultimately, Anderson and Ward were never investigated, disciplined or sanctioned for their conduct on October 31, 2013.

After learning of Plaintiff's report, Ward told his supervisor, a Residence Hall Director ("RD"), that minor students (including Plaintiff and the assailant) had consumed alcohol at a party at a student's residence on the night that Plaintiff reported being sexually assaulted by the assailant. The RD did not convey this information to his supervisors, including Defendants Antonucci or Jose.

D. Disciplinary Proceedings

Based on the NUPD Report, OSCCR charged the assailant with a Code violation of "sexual assault with penetration." Disciplinary proceedings were conducted before a Student Conduct Board (the "Board") comprised of five students who operated under the supervision of an OSCCR staff member. In this instance, Brooke Tempesta ("Tempesta"), an Assistant Director of Student Conduct, assembled the five-person Board and oversaw its hearings into the charge brought against the assailant. Tempesta's role was to ensure that the hearing procedures outlined in the Code were followed, and to answer any procedural questions that arose.

In order to become a Board member, NU students first needed to meet eligibility requirements and to be interviewed by OSCCR staff. Selected Board members were further required to complete a four-hour training module conducted by OSCCR, the Office of the General Counsel, and other campus partners, and to observe one full OSCCR proceeding. In order to serve on a sexual assault case, Board members were additionally required to complete a three- to four-hour specialized training in which Defendants Wegmann and Sevigny assisted. This training focused on sexual misconduct charges, the definitions of consent and incapacitation, and the implications of drug and alcohol consumption in matters of sexual assault.

At the time of the decision, the Code provided:

> **CONSENT:** Appropriate sexual behavior requires consent from all parties involved. Consent means a voluntary agreement to engage in sexual activity proposed by another and requires mutually understandable and communicated words and/or actions demonstrating agreement by both parties to participate in all sexual activities.
>
> Consent may never be given by ... those who are incapacitated as a result of alcohol or other drug consumption (voluntary or involuntary).... A person who knows or should reasonably have known that another person is incapacitated may not engage in sexual activity with that person. Incapacitation is a state where one cannot make a rational,

> reasonable decision because they lack the ability to understand the who, what, when, where, why or how of their sexual activities.

(J.A., Ex. 8 at 20.).

On November 21, 2013, the matter proceeded to a disciplinary hearing before the Board. Plaintiff and the assailant both had hearing advisors present to assist them during this proceeding. The Board heard opening and closing statements from NUPD Officer Adam Keeling, the Plaintiff, and the assailant. The Board then asked questions of each individual and, per Plaintiff's request, the questions were posed through the Board Chair.

After the hearing, the Board deliberated and determined by a vote of 4-1 that the assailant was not responsible for the Code violation of sexual assault with penetration. The following day, November 22, 2013, Tempesta issued a letter to the assailant, informing him of the Board's decision. Plaintiff also received notification of this decision; but, in accordance with NU's policy at the time (and to which she consented), Plaintiff was not provided with the rationale for the Board's decision. In the notification letter transmitted to the assailant, Tempesta explained:

> The Board determined that you and the complainant had consumed alcohol on the night of the incident and engaged in sexual activity. Throughout the hearing you relayed to the Board actions that occurred with the other party that you believed to have communicated consent. The Board considered your account along with the account provided by the complainant. The Board then considered whether a "reasonable person" would consider the words and/or actions expressed by the complainant during the incident to indicate consent to each sexual activity.
>
> Due to the severity of the alleged violation, members of the Board spent a substantial amount of time reviewing all information presented. The Board considered Northeastern University's Code of Student Conduct definition for Sexual Assault and consent. Upon review of the information as it relates to the charge of Sexual Assault with penetration, the Board could not come to a more likely than not determination that you are responsible for this violation.

(J.A., Ex. 24 at 1.).[3]

Plaintiff appealed the Board's finding to the University's Appeals Board. The Appeals Board was overseen by Defendant Wegmann, and consisted of one student, one administrator from Student Affairs, and one administrator from Academic Affairs. In preparing her request for appeal, Plaintiff was afforded the opportunity to review the audio recording of the Board hearing, but declined to do so. On December 4, 2013, Wegmann notified Plaintiff that the Appeals Board had determined that a procedural error occurred during the original hearing, but did not specify the nature of that error. As a result, the Appeals Board remanded the matter to be reheard *de novo* by a different Board. (See J.A., Ex. 28.)

On January 8, 2014, Defendant Estabrook informed Plaintiff and the assailant that, in preparing for the rehearing, NU had determined that Plaintiff did not cite either the specific procedural error or the new evidence that was the basis for her appeal, and the assailant had likewise not been provided with a copy of Plaintiff's request for appeal or afforded an opportunity to respond thereto. As a result of these "appellate error[s]," Estabrook provided Plaintiff an opportunity to amend her request for appeal to identify both the alleged procedural error and the new evidence upon which she sought to rely, and then afforded the assailant an opportunity to respond to same. Estabrook explained that the amended request and any response thereto would be considered anew by the Appeals Board. (See J.A., Ex. 29.). Plaintiff submitted an amended request, but was at this point unable to review the recording of the original Board hearing because

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[3]NU's Code prescribes a more victim-protective preponderance of the evidence standard for proving sexual assault than that provided for in the disciplinary handbooks of many other colleges and universities. Nonetheless, the Board found the evidence insufficient to demonstrate the assailant's guilt under even this less rigorous standard of proof.

it had been destroyed per standard NU procedure when the appeals period passed.

On February 7, 2014, the Appeals Board rendered its decision on Plaintiff's amended request for appeal. The Appeals Board first found that there had been no procedural error, because "[t]he procedures outlined in the Code of Student Conduct were followed during the hearing and pre-hearing process." (J.A., Ex. 30.). The Appeals Board next found that the results of the rape kit that Plaintiff had offered as one of the bases for her appeal constituted new evidence, and remanded the matter to the original Board to evaluate whether consideration of that information would alter its previous findings. (See id.).

On February 25, 2014, Tempesta notified Plaintiff that the Board had determined its original decision should stand. Tempesta explained that the Board's perspective did not change in light of the new evidence, because "[t]he Board determined that during the original hearing both parties stated that various sexual activities had taken place over a period of time, and that semen would be likely to be present in rape kit results." (J.A., Ex. 53.).

Following disposition of the assailant's disciplinary hearing, Plaintiff remained a full-time student at NU and continued her education program at the University without interruption. Plaintiff had no further interactions with the assailant, and experienced no harassment or mistreatment of any kind.[4]

DISCUSSION

In this lawsuit, Plaintiff alleges that the Defendants were negligent, negligently inflicted emotional distress upon her, and violated the MERA. Plaintiff additionally claims that NU

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[4]These latter facts were confirmed by counsel during the summary judgment hearing, and in their follow-on submissions responsive to the Court's Procedural Order.

breached its contract with Plaintiff as its student, and violated Title IX. For the reasons which follow, the Defendants are entitled to summary judgment on all claims.

I. Legal Standard

"Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113, 118-19 (2010). In determining whether the moving party is entitled to judgment as a matter of law, the evidence is viewed in the light most favorable to the non-moving party. Harrison v. NetCentric Corp., 433 Mass. 465, 468 (2001). "Where the party opposing the motion bears the burden of proof at trial, the moving party will prevail only if it demonstrates that the nonmoving party has no reasonable expectation of proving an essential element of the case." Cabot Corp. v. AVX Corp., 448 Mass. 629, 637 (2007) (citing Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991)). "A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial." Kourouvacilis, 410 Mass. at 711. "Conclusory statements, general denials, and factual allegations not based on personal knowledge are insufficient to avoid summary judgment." Madsen v. Erwin, 395 Mass. 715, 721 (1985) (internal modifications and quotations omitted).

II. Merits of Plaintiff's Claims

A. Negligence Against NU (Count I)

Plaintiff alleges that NU was negligent in failing to protect her from a sexual assault perpetrated against her by another student. This negligence claim is premised on three distinct theories of institutional liability: (1) NU breached its duty to protect Plaintiff from the criminal acts of third parties; (2) NU is vicariously liable for the acts and omissions of its RAs on the

evening of the sexual assault; and (3) NU was otherwise negligent in training and supervising its RAs. (See Pl.'s Mem. In Opp'n to Def.'s Mot. Summ. J., at 22-29.). NU counters that Plaintiff's claim under each of these theories fails, because the University owed Plaintiff no legal duty to protect her from the sexual assault of a fellow student in the circumstances presented.

In order to prevail on a negligence claim, a plaintiff must show the existence of an act or omission in violation of a duty owed to her by the defendant. See Roe No. 1 v. Children's Hosp. Med. Ctr., 469 Mass. 710, 713 (2014). If a duty exists, its scope is limited to protecting against only those harms that are reasonably foreseeable. See Kavanagh v. Trustees of Boston Univ., 440 Mass. 195, 203 (2003). "[T]he existence of a duty is a question of law, and is thus an appropriate subject of summary judgment." Jupin v. Kask, 447 Mass. 141, 146 (2006).

1. **NU's Duty to Protect Students from Crimes Committed by Other Students**

As a general rule, there is no duty to protect another from the criminal or wrongful acts of third parties. See, e.g., Jupin, 447 Mass. at 148; Kavanagh, 440 Mass. at 201. There are exceptions to this general rule, however, when there exists a special relationship between the defendant and the injured party that gives rise to a duty, see Kavanagh, 440 Mass. at 201, or when the defendant voluntarily assumes a duty to the victim, see Mullins v. Pine Manor College, 389 Mass. 47, 52 (1983). The general rule is likewise inapplicable when an actor realizes or reasonably should realize that his act or omission "involves an unreasonable risk of harm to another through the [criminal] conduct of ... a third person," *viz.*, when the actor *creates* the situation by his own conduct that exposes another to a recognizably high degree of harm, including at the hands of a third party perpetrator of a crime. See Jupin, 447 Mass. at 148

(quoting Restatement (Second) of Torts § 302B). None of these circumstances exist here.

a. ***Special Relationship***

Plaintiff first argues that a special relationship exists between her and NU, such that the University had a duty to protect her from the assailant's criminal acts. Plaintiff rests this argument on the Supreme Judicial Court's decisions in Mullins v. Pine Manor College, 389 Mass. 47 (1983), and Nguyen v. Massachusetts Institute of Technology, 479 Mass. 436 (2018). Plaintiff's argument, however, depends for its viability on a reading of those cases that is far too expansive to withstand scrutiny.

In Mullins, the SJC recognized that a college has a duty to implement adequate security measures, including the provision of door locks and security guards, to protect its students in on-campus housing from the criminal acts of third party intruders. The SJC found the existence of this duty under two tort principles. First, the SJC located a source of the duty in "existing social values and customs," in light of evidence that there was a consensus among colleges that it was their responsibility, and not that of resident students who live in their dorms for a relatively short period of time, to provide an adequate level of security on campus. See Mullins, 389 Mass. at 51-52. Second, the SJC found that the college defendant had voluntarily assumed a duty to provide adequate security on its campus by posting guards, erecting a fence, and furnishing locks on the residential buildings. Having thus voluntarily assumed a duty to furnish students with security, therefore, the university was required to carry out that duty with due care. See id. at 52-54.

In Nguyen, a case involving a graduate student who committed suicide on his university's campus, the SJC expressly recognized that a school might have a "special relationship" with its students that could give rise to a duty to rescue. See Nguyen, 479 Mass. at 449-50 (citing

Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§ 40(a) and (b)(5)). The SJC cautioned, however, that the potential existence of a special relationship between a student and university was "the beginning and not the end of the analysis," Nguyen, 479 Mass. at 450, because such analysis involves "a complex mix of competing considerations," id. at 452. The SJC then went on to consider the nature of the university-adult student relationship, explaining that, since Mullins, "[t]here is universal recognition that the age of in loco parentis has passed, and that the [university's] duty, if any, is not one of a general duty of care to all students in all aspects of their collegiate life." Id. at 451 (quoting Massie, "Suicide on Campus: The Appropriate Legal Responsibility of College Personnel," 91 Marq. L. Rev. 625, 640 (2008)) (citing Mullins, 389 Mass. at 52; Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979); Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 610 (W.D. Va. 2002)). Ultimately, the SJC determined that a university has a special relationship with a student and a corresponding duty to take reasonable measures to prevent his suicide *only* if the university has either actual knowledge of the student's previous suicide attempt (either while enrolled at the school or shortly before the student's matriculation) or of the student's declared plan or intent to commit suicide. See Nguyen, 479 Mass. at 453.[5] The SJC explained, however, that the duty was "*definitely not* a

[5] In determining whether a duty existed in those circumstances, the SJC considered a number of factors customarily used to delineate duties in tort law: *viz.*, whether the university could reasonably foresee that it would be expected to take action to protect the student and could anticipate harm to the student from its failure to do so; whether the student's reasonable reliance on the university impeded other persons who might seek to provide aid; the degree of certainty of harm to the student; the burden on the university to take reasonable steps to prevent the injury; the existence of any kind of mutual dependence between the student and the university, including the financial benefit that may flow from the student to the university; the moral blameworthiness of the university's conduct in failing to act; and the social policy considerations involved in placing an economic burden of loss on the university. See Nguyen, 479 Mass. at 452.

generalized duty to prevent suicide," and emphasized the "limited circumstances creating the duty ...[that] hinge[] on foreseeability." Id. at 455 (emphasis added).

It is clear from Mullins and Nguyen, therefore, that, in *limited* circumstances, a special relationship does exist between a university and its adult students, such that the university owes its students a duty of reasonable care with regard to risks that arise within the scope of their relationship. See id. at 449-50. Indeed, as NU rightly acknowledges in this case, the University has an affirmative duty to prevent harm to students resulting from sexual assault either when it has actual knowledge that a particular person presents a foreseeable risk of committing an assault, or, like in Mullins, when the University has itself placed the student in harm's way and then thereafter fails to mitigate the risk of harm when it is in a position to do so. (See Defs.' Mot. for Summ. J. at 17-19.). None of those narrow circumstances that would give rise to a special duty of care are present in the case at bar.

In the present action, Plaintiff voluntarily consumed alcohol in her dorm room and then again at a party hosted by an on-duty RA in that RA's room. After she became intoxicated and was escorted by the assailant back to the dormitory where they both lived, the assailant sexually assaulted Plaintiff in his dorm room. As NU argues, and the Court agrees, universities do not occupy a special relationship with their adult students such that they have a legal duty to protect such students (like Plaintiff) from harms that follow or result from underage drinking. This is so, regardless of whether the drinking itself is illegal or otherwise prohibited by University policy. See Doe v. Emerson Coll., 153 F. Supp. 3d 506, 514 (D. Mass. 2015) ("Massachusetts does not impose a legal duty on colleges or administrators to supervise the social activities of adult students, even though the college may have its own policies prohibiting alcohol or drug abuse.");

Doe v. Northeastern Univ., No. MICV15-04200, slip op. at 9 (Mass. Super. Ct. Sept. 18, 2018) (Sullivan, J.) (university has no duty to protect students from harms associated with the consumption of drugs or alcohol as a matter of law); Bash v. Clark Univ., 22 Mass. L. Rptr. 84, 2006 WL 4114297, at *4 (Mass. Super. Ct. Nov. 20, 2006) (Agnes, J.) (university does not have a duty to protect students from the voluntary use of drugs and alcohol). Indeed, courts have widely recognized that imposing such a duty on universities would be both "impractical and unrealistic." Doe v. Emerson Coll., 153 F. Supp. 3d at 514. See Bash, No. 06745A, 2006 WL 4114297, at *5 (quoting Crow v. California, 222 Cal. App. 3d 192, 209 (1990)) ("[A] university cannot prevent [students' voluntary consumption of drugs and alcohol] from occurring 'except *possibly* by posting guards in each dorm room on a 24-hour, 365-day per year basis.'"); Beach v. University of Utah, 726 P.2d 413, 419 (Utah 1986) ("It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol and, should they do so, with responsibility for assuring their safety and the safety of others."). Nor does a university have a legal duty to educate its students regarding the potentially heightened risk of sexual assault due to drinking. See Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *10 (allowing summary judgment on negligence claim premised on college's failure to educate students, including plaintiff, about the increased risk of sexual assault due to drinking).

Plaintiff argues that the facts of this case are distinguishable because, as in Mullins, the University RAs' acts and omissions placed her in harm's way and thereby created the very situation that caused her harm. This argument both misapprehends the essential teaching of

Mullins,[6] and misapplies its holding to materially different facts. Notably, none of the RAs provided Plaintiff with the alcohol that she consumed that night, nor did they ignore signs that would have alerted them that the assailant might sexually assault Plaintiff. The RAs' presence at the party, their participation in underage drinking, and their failure to assist Plaintiff once she was intoxicated did not, taken singly or together, impose a duty on NU to safeguard Plaintiff from a sexual assault that might occur after she became voluntarily intoxicated. Nor do these facts demonstrate that NU itself caused the situation that led to the Plaintiff's harm. The sexual assault was committed by a third party, in a different place, and in private. The University's failure to put a stop to Plaintiff's drinking that evening cannot be considered to have placed her in harm's way in the manner contemplated by Mullins. See, e.g., Freeman v. Busch, 349 F.3d 582, 587-89 (8th Cir. 2003) (university could not be held liable after on-duty RA failed to assist an intoxicated guest at a dorm party, when that guest was later sexually assaulted by the party host who was also an off-duty student security guard); Beach, 726 P.2d at 419 (university did not have duty to protect underage students from their voluntary off-hours intoxication during a school-sponsored field trip, even where a tenured professor was present and drinking). At the very most, Plaintiff has demonstrated *not* that NU was the cause of her harm in any legal sense, but only that it tolerated underage drinking by adult students. As discussed above, however, the University has no affirmative duty to *prevent* such commonplace conduct. See Nguyen, 479 Mass. at 451 ("[T]he

[6] Contrary to Plaintiff's assertion that Mullins recognizes a college's broad duty to protect students in all circumstances from sexual assault, cases since Mullins have made clear that the case's holding is more narrow and situation-based. See, e.g., Nguyen, 479 Mass. at 450 (citing Mullins as supporting the proposition that universities are "property owners and landlords responsible for their students' physical safety on campus"); Doe v. Trustees of Bos. Coll., 892 F.3d 67, 94 (1st Cir. 2018) (recognizing that the Mullins court imposed narrow legal duties on colleges based on their voluntary assumption of care) (collecting cases).

modern university-student relationship is respectful of student autonomy and privacy.").

Moreover, and unlike in Nguyen, there is no evidence in the record to suggest that NU had any knowledge that the assailant posed a foreseeable risk of assaulting other students. It is undisputed that the NUPD was aware of no incident reports or allegations that the assailant had ever assaulted, sexually or otherwise, anyone previously. Further, it is undisputed that "[t]here was no reason for anyone at [NU] to be concerned about [the assailant] as of October 31, 2013." (SMF ¶ 33.). Compare Schaefer v. Fu, 272 F. Supp. 3d 285, 288-89 (D. Mass. 2017) (university may be negligent when plaintiff informed two professors of assailant's disruptive behavior targeted at her, and one professor acknowledged familiarity with assailant's behavior prior to the assault). In the present case, Plaintiff arrived at the party in the company of the assailant, and then left with him willingly. No one else at the party expressed any doubts or concerns about permitting the assailant, with whom Plaintiff was obviously acquainted, to walk her back to the dorm where they both lived. There is no evidence in the record that the assailant was touching Plaintiff inappropriately at the party, or that he engaged in any another conduct that might reasonably have given rise to a concern for Plaintiff's safety. Accordingly, NU lacked the requisite fore-knowledge of the assailant's potential for abusive conduct such as would impose a duty on it to prevent the Plaintiff's harm.

For all of these reasons, the Court concludes that no special relationship between Plaintiff and NU existed such that the University can be held liable for the sexual assault perpetrated by another student. See Doe v. Brown Univ., 304 F. Supp. 3d 252, 261 (D. R.I. 2018) (no special relationship existed between university and student such that university could be held responsible for sexual assault committed by another student after plaintiff was drugged at an on-campus

fraternity party).

b. ***Foreseeability***

Plaintiff's negligence claim fails for the additional reason that wholly absent from the record is evidence that the assailant's abuse was reasonably foreseeable (to anyone) before the assault occurred inside the assailant's dorm room. The fact that two undergraduate students who were acquainted with one other were drinking at a party, one became intoxicated, and the other offered to walk her home is a routine and unexceptional occurrence on today's college campuses. The law cannot rationally be stretched so far as to impose liability on colleges to prevent all instances of this sort, merely in consideration of the *possibility* that one student may sexually assault another. See Facchetti v. Bridgewater Coll., 175 F. Supp. 3d 627, 644 (W.D. Va. 2016) (college could not have foreseen sexual assault when plaintiff invited assailant to stay in her room and assailant had no prior history of committing assaults); Murrell v. Mount St. Clare Coll., No. 3:00-CV-90204, 2001 WL 1678766, at *4 (S.D. Iowa Sept. 10, 2001) (Pratt, J.) ("A college, or any other kind of landlord, is incapable of foreseeing an acquaintance rape that takes place in the private quarters of a student or tenant, unless a specific student or tenant has a past history of such crimes."); Tanja H. v. Regents of Univ. of California, 228 Cal. App. 3d 434, 438 (Cal. Ct. App. 1991), disapproved on other grounds by Regents of Univ. of California v. Superior Court, 413 P.3d 656 (Cal. 2018) (sexual assault committed after students consumed alcohol is not sufficiently foreseeable in the legal sense such that it should give rise to duty for college to protect against such assaults). See also Hernandez v. Baylor Univ., 274 F. Supp. 3d 602, 619 (W.D. Tex. 2017) ("Courts across the country have determined ... that the general foreseeability of sexual assault on campus is insufficient to warrant negligence liability."). NU thus did not have a duty to protect

Plaintiff from a sexual assault perpetrated against her by another student. This follows both because the University was not in a special relationship with Plaintiff in these circumstances, and because the harm that Plaintiff actually suffered was not reasonably foreseeable to NU or its agents.

The lack of foreseeable harm in this case likewise demonstrates that Plaintiff cannot establish another essential element of her negligence claim, *viz.*, that any acts or omissions of NU were the *proximate cause* of her injuries. See, e.g., Davis v. Westwood Grp., 420 Mass. 739, 743 (1995) (in order to succeed on negligence claim, plaintiff must demonstrate that breach of a legal duty was the proximate cause of his injuries). See also Dubuque v. Cumberland Farms, Inc., 93 Mass. App. Ct. 332, 347 n.25 (2018) ("The question of foreseeability relates to both duty of care and proximate cause."); R.L. Currie Corp. v. East Coast Sand & Gravel, Inc., 93 Mass. App. Ct. 782, 784 (2018) (issue of proximate cause may be resolved as a matter of law at summary judgment stage when plaintiff has no reasonable expectation of proving that the injury was a foreseeable result of defendant's negligence). Here, the sexual assault perpetrated against Plaintiff by the assailant cannot be considered a foreseeable consequence of NU's failure to prevent her from consuming alcohol or its failure to intervene once aware that she was intoxicated. See Freeman v. Busch, 150 F. Supp. 2d 995, 1003-04 (S.D. Iowa 2001), aff'd on other grounds, 349 F.3d 582 (8th Cir. 2003) (RA's failure to assist an intoxicated guest was not the proximate cause of a sexual assault later perpetrated against her by a resident in that RA's dormitory). See also Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *10 (plaintiff could not prove that university's alleged failure to properly educate students about issues of consent, sexual assault, the high correlation between alcohol and sexual assault, and their Title IX rights

was the proximate cause of the sexual assault perpetrated against her by another student).

In sum, Plaintiff's negligence claim – premised on NU's alleged failure to protect Plaintiff from the criminal acts of third parties – fails as a matter of law both because NU had no such duty in these circumstances, and because any failures on the part of the University to this effect were not the proximate cause of foreseeable harm suffered by the Plaintiff.

2. **NU's Vicarious Liability for the Acts or Omissions of its RAs**

Plaintiff's argument that NU can be held vicariously liable for the acts or omissions of its RA fares no better. (See Pl.'s at Def.'s Mot. Summ. J., at 25-26.). Plaintiff contends that RAs at NU qualify as "student employees," and that the University can thus be held vicariously liable for the torts they commit within the scope of their employment. Even if Plaintiff were correct as to this point, her claim still fails for the same reasons as described above.[7]

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[7] The Court questions whether RAs do in fact meet the criteria of "employees" such that vicarious liability could attach to NU in these circumstances. The law is by no means settled in this regard. See Freeman v. Busch, 150 F. Supp. 2d at 1001 (assuming without deciding that vicarious liability would attach to university, but finding its on-duty RA was not negligent in failing to intervene when intoxicated guest was later sexually assaulted by the student with whom she was staying); L.B. Helms, C.T. Pierson, & K.M. Streeter, The Risks of Litigation: A Case Study of Resident Assistants, 180 Ed. Law Rep. 25, 28-29 (2003) ("Courts appear somewhat reluctant to hold institutions liable for students who voluntarily abuse alcohol. Courts seem to reach the same conclusion even when RAs are aware of these drinking behaviors and fail to intervene.") (collecting cases). Cf. Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1327-28 (10th Cir. 1981) (RAs are not employees under Fair Labor Standards Act, but rather are "more like students in other campus programs receiving financial aid"). In the case at bar, the record reflects that sophomore RAs like Ward and Anderson serve as a resource and mentor to other students, monitor their activities when on duty (see J.A., Ex. 32 at I.A.-D, II.B), and receive modest financial assistance in exchange for same, *viz.*, a dorm room, 19 meals per week and $120 in "Dining Dollars" each semester (see J.A., Ex. 32 at III.H). That said, the Court finds that the existing record is insufficient to decide the issue of whether they are employees for all legal purposes at the summary judgment stage. See Kavanagh, 440 Mass. at 198 (quoting Dias v. Brigham Med. Assocs., Inc., 438 Mass. 317, 322 (2002)) ("In determining whether an employer-employee relationship exists, various factors are to be considered, including 'the method of payment (*e.g.*, whether the employee receives a W-2 form from the employer), and

Assuming that Anderson and Ward breached their duties under the "Resident Assistant Agreement" (the "Agreement") by hosting a party where underage drinking occurred and by failing to assist the Plaintiff once she was observed to be intoxicated, these actions and inactions were in all events *not* the proximate cause of the ensuing sexual assault. At most, Anderson and Ward permitted Plaintiff to become inebriated and then allowed her to leave a party with an acquaintance. That she was later sexually assaulted by that acquaintance in the privacy of his dorm room is not the foreseeable consequence of these Defendants' arguably negligent conduct. Such lack of foreseeability is fatal to any negligence claim Plaintiff might raise based on the RAs' conduct and, coextensively, to any cause of action asserted against NU under a vicarious liability theory arising out of that same conduct. See Elias v. Unisys Corp., 410 Mass. 479, 481 (1991) ("The liability of the principal arises simply by the operation of law and is only derivative of the wrongful act of the agent."); James-Brown v. Commerce Ins. Co., 85 Mass. App. Ct. 1111, 2014 WL 1325663, at *1 (2014) (Rule 1:28 decision) (quoting Mamalis v. Atlas Van Lines, Inc., 364 Pa. Super. 360, 364-65 (Pa. Super. Ct. 1987)) ("A claim of vicarious liability depends on the life of the claim from which it derives.").

Accordingly, Plaintiff's negligence claim against NU, premised on the theory that the University can be held vicariously liable for the acts or omissions of its RAs, fails as a matter of law.

3. NU's Duty to Adequately Train and Supervise its RAs

Plaintiff next alleges that NU was negligent in the training and supervision of its RAs, who participated in underage drinking on the evening in question and failed to report such Code

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whether the parties themselves believe they have created an employer-employee relationship.'").

violations or obtain assistance for Plaintiff when she was visibly intoxicated. This negligence theory as applied to NU fails for many of the same reasons discussed above.

"The torts of negligent hiring, retention, and supervision ordinarily relate to situations where 'employees are brought into contact with members of the public in the course of an employer's business.'" Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 613 (D. Mass. 2016) (quoting Vicarelli v. Business Int'l, Inc., 973 F. Supp. 241, 246 (D. Mass. 1997)). "In such circumstances, employers are responsible for exercising reasonable care to ensure that their employees do not cause foreseeable harm to a foreseeable class of plaintiffs." Roe No. 1, 469 Mass. at 714.

Plaintiff's negligent training and supervision claim thus fails for each of two independently sufficient reasons. First, as discussed *supra*, see Section II.A.1.b., it is not foreseeable as a matter of law that, standing alone, permitting underage drinking (even to the point of intoxication) would lead to a sexual assault, or that permitting an intoxicated person to walk home with an acquaintance would lead to such an assault. See Nelson v. Salem State Coll., 446 Mass. 525, 538 (2006) (essential element of negligent supervision claim is a causal relationship between the breach of duty and the harms suffered). Second, Anderson testified without contradiction that she was aware that excessive alcohol use violated the Code, and both Anderson and Ward testified that they had in fact received training on excessive alcohol consumption. (See J.A., Ex. 11, at 146:21-147:8, 167:8-21, 196:11-16; J.A., Ex. 12, at 137:5-21. See also SMF ¶¶ 9-14.). Whether these students neglected to utilize the skills they were taught during that training, or failed to acquire the necessary skills in the first instance, will not, without more, permit the inference that NU was negligent in providing the training itself. Moreover, to the extent that

Plaintiff's claim is premised on the supervisory conduct of these two particular individuals, there are no facts in the record to suggest that there was any basis upon which NU knew or should have known that there were problems (or failures of skill acquisition) with Anderson's or Ward's performance as RAs prior to the incident at issue. This deficit in the evidence is fatal to the Plaintiff's negligent supervision claim. See Doe v. Brandeis Univ., 177 F. Supp. 3d at 614 (under negligent supervision theory, plaintiff must demonstrate facts that would show that university knew or should have known there were problems with employee indicating her unfitness to serve in role, and then failed to take appropriate action).

In sum, NU is entitled to summary judgment on Count I. This follows because the University had no legal duty to Plaintiff to prevent the harm that occurred, because the University cannot be held vicariously responsible for the acts and omissions of two student RAs on the facts of this case, and because the sexual assault committed was neither proximately caused by nor the foreseeable consequence of any of NU's own conduct (including the conduct of its RAs).

B. Negligence Claim Against Defendants Antonucci and Jose (Count II)

Plaintiff brings a negligence claim against Defendants Antonucci and Jose that also arises out of these RAs' conduct on the night in question. Plaintiff asserts that Antonucci may be held liable, because she was personally responsible for training Anderson and Ward and for supervising Anderson; and Jose may be held liable for "creating an atmosphere where RAs were able to violate their employment obligations and [Code] rules with impunity, as well as for his personal failures to properly train and supervise RAs, including Anderson and Ward." (Pl.'s Opp'n to Defs.' Mot. For Summ. J., at 37.). As discussed *supra*, see Section II.A.3., the undisputed evidence of record permits no reasonable inference that Anderson and Ward were

negligently trained or supervised. Likewise, and as discussed *supra,* see id., the evidence in this case permits no reasonable inference that the sexual assault Plaintiff suffered at the hands of the assailant was a foreseeable consequence of (and thus proximately caused by) the negligence of these RAs. The negligence claim asserted against Defendants Antonucci and Jose thus fails as a matter of law.

C. Negligence Claim Against Defendants Sevigny, Wegmann and Estabrook (Count III)

Plaintiff brings a negligence claim against Defendants Sevigny, Wegmann and Estabrook, on the grounds that they negligently administered and supervised the disciplinary proceedings against the assailant, and in this connection failed to properly train their staff and Board members on the Code.[8] Plaintiff fails to present a cognizable negligence claim, because a university has no duty in tort to its students to conduct disciplinary proceedings with due care. See Doe v. Trustees of Bos. Coll., 892 F.3d at 94-95 (university had no duty of care to an accused student to conduct disciplinary proceedings in a particular manner where contracts between the university and its students outlined the process to be followed); Doe v. Emerson Coll., 153 F. Supp. 3d at 515 (dismissing negligence claim of student who accused another of sexual assault, on the grounds that "Massachusetts does not ... impose a common-law or statutory duty on administrators to enforce university policies.").

The claim fails for the additional reason that the undisputed evidence shows that the Board

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[8] To the extent that any of Plaintiff's negligence claims are premised on the failure to discipline Anderson and Ward for their conduct after the fact, such a claim fails as a matter of law. Plaintiff has not demonstrated or even alleged any harm that flowed to her based on NU's and its employees' disciplinary response to these Defendants' conduct. An essential element of a negligence claim is thus lacking. See Jupin, 447 Mass. at 146.

members who served during the assailant's disciplinary proceeding had received both a generalized training and a training focused on sexual misconduct charges, the definitions of consent and incapacitation, and the implications of alcohol and drug consumption in sexual assault cases. (See SMF ¶¶ 62-65.). Moreover, as discussed *infra*, see Sections II.E and II.F, Plaintiff has identified no procedural errors in the handling of her complaint. In point of fact, it is clear that the Board *did* consider the definition of "consent" and the effect of intoxication on Plaintiff's ability to give consent to sex during their deliberations, notwithstanding Plaintiff's contentions to the contrary. See *infra* notes 18-19.

Sevigny, Wegmann and Estabrook, therefore, are entitled to summary judgment on Count III. Plaintiff has no claim sounding in negligence against these Defendants based on the disciplinary proceedings against the assailant, and has failed to identify any deficiencies in the training or supervision of the Board members or staff who were involved in this disciplinary process.

D. Negligent Infliction of Emotional Distress Claim Against All Defendants (Count VII)

Plaintiff alleges that the same conduct underlying her negligence claims caused her to suffer emotional distress. In order to prevail on a claim for negligent infliction of emotional distress, a plaintiff must prove: "(1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case." Sullivan v. Boston Gas Co., 414 Mass. 129, 132 (1993) (quoting Payton v. Abbott Labs, 386 Mass. 540, 557 (1982)). For the reasons discussed *supra*, see Sections II.A through C, the Plaintiff's claim is deficient as to the

first and third elements. Plaintiff has failed to identify evidence from which a jury could reasonably find that these Defendants were negligent, or caused her to suffer a sexual assault, based on the cited conduct. See Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *10 (claim for negligent infliction of emotional distress must fail when negligence claim based on same conduct fails). Accordingly, the Defendants are entitled to summary judgment on Count VII.

E. Breach of Contract Claim Against NU (Count IV)

Plaintiff brings a common law breach of contract claim against NU. This claim is premised on the assertion that Estabrook was not permitted to deny her appeal after the appeal had already been granted, and that, as a result, there was a lack of "basic fairness" in the subsequent proceedings because the audio-recording from the original Board hearing had been destroyed. NU counters that the Plaintiff has failed to demonstrate any breach of her contract with the University. The Court agrees.

The terms of the claimed contract at issue in this case are those set forth in the portion of the Code that covers disciplinary proceedings.[9] "In reviewing a student's breach of contract claim against his or her university, [courts] employ a reasonable expectations standard in interpreting the relevant contracts." Doe v. Trustees of Bos. Coll., 892 F.3d at 80. "Under this reasonable

[9] NU does not dispute the existence of such a contract for the purposes of summary judgment. Thus, as other courts faced with the same circumstances have done, this Court assumes without deciding that such a contract exists. See, e.g., Walker v. President & Fellows of Harvard Coll., 840 F.3d 57, 61 n.5 (1st Cir. 2016) ("[W]hile courts have treated student handbooks as contracts between students and schools, the question of whether such a document always constitutes a contract is, arguably, an unsettled issue under Massachusetts law."); Bleiler v. College of Holy Cross, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at *14 n.7 (D. Mass. Aug. 26, 2013) (Casper, J.) (collecting cases).

expectation standard, courts ask, in interpreting the contractual terms, 'what meaning the party making the manifestation, the university, should reasonably expect the other party [, the student,] to give it.'" Walker, 840 F.3d at 61 (quoting Schaer v. Brandeis Univ., 432 Mass. 474, 478 (2000)). "In the context of disciplinary hearings, [courts] 'review the procedures followed to ensure that they fall within the range of reasonable expectations of one reading the relevant rules.'" Doe v. Trustees of Bos. Coll., 892 F.3d at 80 (quoting Cloud v. Trustees of Bos. Univ., 720 F.2d 721, 724-25 (1st Cir. 1983)). "[I]f the facts show that the university has failed to meet [the student's] reasonable expectations, the university has committed a breach." Doe v. Trustees of Bos. Coll., 892 F.3d at 80 (quoting Walker, 840 F.3d at 61-62) (internal quotations omitted). Moreover, the courts must "'examine the hearing' afforded to the student 'to ensure that it was conducted with basic fairness.'" Doe v. Brandeis Univ., 177 F. Supp. 3d at 594 (quoting Cloud, 720 F.2d at 725).[10]

Plaintiff first contends that Estabrook's action in requiring her to submit an amended request for appeal after the original appeal had been allowed by the Appeals Board was contrary to

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[10] The "reasonable expectation" and "basic fairness" framework has been employed almost exclusively to analyze the contractual rights of the *accused* during disciplinary proceedings. See, e.g., Schaer, 432 Mass. at 478-82; Doe v. Trustees of Bos. Coll., 892 F.3d at 80-89; Doe v. Amherst Coll., 238 F. Supp. 3d 195, 215-20 (D. Mass. 2017). While the Court questions whether a *complainant* ever has an affirmative right sounding in contract to challenge a college's process for adjudging and disciplining an accused student, and will await appellate guidance on the point, there is at least some case law suggesting (albeit in circumstances not present in those cases) that such a claim might potentially lie. See Shank v. Carleton Coll., 232 F. Supp. 3d 1100, 1116-17 (D. Minn. 2017) (no breach of contract based on broad promise of "fair" and "supportive" process for addressing reports of sexual misconduct, when college allegedly failed to adequately investigate and take appropriate disciplinary actions against two students who sexually assaulted plaintiff); Theriault v. University of S. Maine, 353 F. Supp. 2d 1, 15 (D. Me. 2004) (dismissing breach of contract claim, because plaintiff had no reasonable expectation under the student code to challenge the involvement of a faculty advisor during a disciplinary proceeding against student who sexually assaulted her).

the Code's directive that "[a]ll decisions of the Appeals Board are final." (J.A., Ex. 8 at 31.). In essence, Plaintiff's position is that, once her first appeal was allowed, Estabrook was required to permit the new Board hearing to proceed notwithstanding the errors Plaintiff had identified with the review process. This position simply cannot be reconciled with what could have been Plaintiff's (or the assailant's) reasonable expectations when reading the Code.

Although Plaintiff argues that Estabrook had no authority whatsoever to alter the Appeals Board's decision once it was issued to her, the "Decision-making Authority" section of the Code provides:

> The Vice President of Student Affairs is responsible for the overall administration of the Code of Student Conduct as well as the Student Conduct Process. Under the oversight of the Vice President for Student Affairs, the Director in the Office of Student Conduct and Conflict Resolution has been charged with the day-to-day responsibility for administering the Code of Student Conduct and the Student Conduct Process.

(Id. at 14.). Estabrook, the Associate Vice President for Student Affairs, was the person at NU designated to oversee the Appeals Board's decision-making during the relevant time period, and that Code-conferred oversight necessarily included the authority to rectify errors in the process. (See J.A., Ex. 2 at 246:3-18.). Plaintiff cites to no evidence in the record conflicting with or casting doubt upon such a common-sense reading of the Code.

Estabrook supportably identified two errors in the Appeals Board's decision to allow the Plaintiff's appeal. First, Plaintiff had not identified a proper basis upon which an appeal could be granted. The Code only affords a complainant in a case involving alleged sexual violence a right to appeal a Board decision based on: (1) "a procedural error that impaired ... her right to a fair opportunity to be heard;" (2) the availability of new information "that could not reasonably have been made available during the original hearing and may be sufficient to alter the original Student

Conduct Board ... decision;" or (3) a request to review the sanction "because of extraordinary circumstances." (J.A., Ex. 8 at 30.). Here, Plaintiff's appeal did not reference any of the above grounds, and was on this basis deemed deficient.[11]

Second, Estabrook noted that the assailant had received no notice of Plaintiff's request for an appeal, and was likewise afforded no opportunity to respond to it before the Appeals Board reached its decision. Plaintiff argues that the assailant's lack of notice was not an error, because the Code does not *expressly* provide that the charged student must receive notice of a request for an appeal. While Plaintiff is correct that the Code then in effect lacked an express requirement that notice of an appeal be given to the assailant, that omission obviously did not prohibit NU from requiring that such elementally fair notice be given.[12] To conclude that Plaintiff was entitled to an *ex parte* appeal of a disciplinary decision concerning another student would defy logic, the due process-informed spirit of the procedures set forth in the Code, and any *reasonable* expectation of a complainant reviewing the Code. Where the charged student is the one who may be subject to sanctions as a result of disciplinary proceedings, notice to him is – as a matter of fundamental fairness inherent in any college process – essential prior to the Board hearing and any related appeal. See Doe v. Western New England Univ., 228 F. Supp. 3d 154, 175 (D. Mass. 2017) (insufficient notice of the charged misconduct that could result in a student's discipline

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[11] In her original appeal, Plaintiff pointed out only substantive issues with the Board's decision (*i.e.*, discrepancies between the assailant's statements to NUPD and his statement to the Board at hearing that, she maintained, demonstrated his lack of credibility), and argued that the Board improperly concluded that Plaintiff was capable of giving consent to the sexual encounter. (See generally J.A., Ex. 25.)

[12] The 2014-2015 version of the Code (post-dating the events at issue) now expressly requires that a charged student be given notice of any appeal and an opportunity to respond thereto. (See J.A., Ex. 41 at 26.)

violates fundamental fairness of proceeding).

Estabrook's action in response to these two errors was plainly appropriate. She did not deprive Plaintiff of her right to appeal the Board's decision, but merely afforded Plaintiff an opportunity to amend her request for an appeal and thereby ensure that the assailant received proper notice thereof. Plaintiff could not have held any reasonable expectation that she was entitled to more based on the procedures outlined in the Code. As such, no breach of contract claim can rest on Estabrook's exercise of her broad authority over the administration of NU's student disciplinary process.

Plaintiff's related argument that the hearings following Estabrook's decision lacked basic fairness is similarly unavailing. Plaintiff expressly declined the opportunity to review the audio-recording of the Board's initial hearing prior to filing her request for appeal. Nevertheless, Plaintiff argues now that, had the recording been available to her while preparing her amended request, she could have identified procedural errors that would have given rise to a meritorious appeal. While the Court agrees that destroying the audio-recordings of disciplinary hearings prior to the exhaustion of all appeals therefrom is not best practice, the Court does not agree that such practice renders all subsequent proceedings fundamentally unfair. See Schaer, 432 Mass. at 482 ("A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts."). Plaintiff herself actively participated in the Board hearing. Thus, to the extent the Board committed any *procedural* errors, such failures would have been clear to Plaintiff based on her own first-hand knowledge of the handling of her complaint and a review of the Code. The record in this case in all events demonstrates that the Board did, in fact, follow the procedures required by the University's Code;

and the only argument Plaintiff has advanced to the contrary concerns actions taken *after* the Board reached its exonerating decision concerning the assailant.[13] The Court, therefore, cannot conclude that NU's disciplinary proceedings in this case lacked fundamental fairness to the Plaintiff.

Plaintiff's breach of contract claim fails for the additional reason that Plaintiff seeks only to recover damages for the emotional distress that she suffered during the disciplinary proceedings, and for the remainder of her freshman year when she continued to live uneasily in the same dormitory with the assailant. As NU rightly notes, "damages for mental suffering are generally not recoverable in an action for breach of contract." John Hancock Mut. Life Ins. Co. v. Banerji, 447 Mass. 875, 888 (2006). Such damages are only recoverable in the limited instances where emotional harm results from physical injury, or when it is "the result of intentional or reckless conduct of an extreme and outrageous nature." Id. Here, Plaintiff does not allege that she suffered any physical harm from the University's process in addressing her complaint against the assailant; nor does she allege any intentional or reckless conduct on the part of NU during the handling of her claim or thereafter. Thus, Plaintiff does not seek to recover damages that are cognizable in a breach of contract claim.

For all these reasons, NU is entitled to summary judgment on Count IV.

F. Title IX Claim Against NU (Count V)

Plaintiff next asserts that the manner in which NU conducted its disciplinary proceedings

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[13] To the extent Plaintiff's breach of contract claim is premised on the Board's allegedly inadequate training on the issue of consent, this argument fails for the reasons discussed *supra*, see Section II.C, and *infra*, see Section II.F. The record demonstrates that Board members did receive training on the definition of "consent," and did apply that definition during their disciplinary proceedings in this case.

violated Title IX. To demonstrate liability under Title IX, a plaintiff must show "(1) that [she] was a student, who was (2) subjected to harassment (3) based upon sex; (4) that the harassment was sufficiently severe and pervasive to create an abusive educational environment; and (5) that a cognizable basis for institutional liability exists." Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002). "To satisfy the fifth part of that standard, a plaintiff must show that a school official authorized to take corrective action had 'actual knowledge' of the sexual harassment and either failed to act or exhibited 'deliberate indifference' to it." Doe v. Emerson Coll., 271 F. Supp. 3d 337, 354 (D. Mass. 2017). "Deliberate indifference in the case of student-on-student harassment requires that the school's 'response (or lack thereof) is clearly unreasonable in light of the known circumstances.'" Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *7 (quoting Porto v. Tewksbury, 488 F.3d 67, 73 (1st Cir. 2007)). A university will not be held liable if it takes "timely and reasonable measures to end the harassment." Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999).

At the outset, the Court questions whether Title IX affords the Plaintiff, as the accuser, a right to press a claim in the absence of any post-report harassment or mistreatment. See Davis, 526 U.S. at 645 ("[D]eliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.").[14] Two federal district court recently certified this precise question to their respective circuit courts of appeal after recognizing the absence of clear authority on the issue and the existence of colorable arguments on both sides. See Kollaritsch v. Michigan State Univ. Bd. of Trustees, 285 F. Supp. 3d 1028 (W.D. Mich. 2018)

[14]The evidence is undisputed in this case that, following her report of sexual assault to NU, Plaintiff experienced no further harassment or mistreatment of any kind.

(certifying question of whether "a plaintiff [must] plead, as a distinct element of a Title IX claim, that she suffered acts of further discrimination as a result of the institution's deliberate indifference, rather than alleging mere vulnerability to further acts of discrimination"); Weckhorst v. Kansas State Univ., No. 16-CV-2255, 2017 WL 3701163, at *6 (D. Kan. Aug. 24, 2017) (certifying question of whether a plaintiff must show "as a distinct element of her Title IX claim, that the [university's] deliberate indifference caused her to suffer actual further harassment, rather than alleging that [the university's] post-assault deliberate indifference made her 'liable or vulnerable to' harassment").[15]

Some courts have found in circumstances similar to those at issue here that a plaintiff left open or "vulnerable" to harassment or assault due to a university's deliberate indifference has an actionable Title IX claim even if no *further* harassment or assault in fact occurs. See Weckhorst, 241 F. Supp. 3d at 1171-75 & nn.92-93 (holding that a plaintiff must allege that a university's "alleged deliberate indifference left her 'liable or vulnerable to' further assault or harassment, [even if plaintiff does not] additionally allege that post-report assault or harassment actually occurred") (collecting cases). It is the undersigned's view, however, that no such claim can properly lie. The Court recognizes that a college or university may respond inadequately to a charge of sexual harassment (*e.g.*, fail to carry out a satisfactory investigation, fail to conduct a proper hearing, and the like), and thereby leave a dangerous predator free to harm his victim further. In the event such harm at the hands of the accused comes to pass, the Court has no

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[15] These appeals remain pending before the United States Courts of Appeals for the Sixth and Tenth Circuits. See Kollaritsch v. Michigan State Univ. Bd. of Trustees, 298 F. Supp. 3d 1089 (W.D. Mich. 2017), appeal docketed, No. 18-1715 (6th Cir. Jun 25, 2018); Weckhorst v. Kansas State Univ., 241 F. Supp. 3d 1154 (D. Kan. 2017), appeal docketed, No. 17-3208 (10th Cir. Sept. 26, 2017).

difficulty seeing that the school can and should be held accountable for the further and foreseeable injury to an accusing party whom it has failed to protect in circumstances where it knew or should have known protection to be required. Relief is awarded, however, *not* for the failure of the investigative/disciplinary process *itself*, but for the *ensuing harm* that the Plaintiff suffered and that was allowed to occur because of the school's failures in process. This, of course, is consistent with the elemental requirements of proximate cause and foreseeability of harm in all civil tort actions.[16] But where, as here, there is no ensuing harm that flows from the University's actions or inactions, no claim should logically avail based on an accuser's dissatisfaction or discomfort with the manner in which the school administered its disciplinary proceedings.

Given that the question concerning the necessity of demonstrating post-report harassment "is difficult and has little direct precedent," see Kollaritsch, 285 F. Supp. 3d at 1031, the Court does not (and need not) render its ruling on this ground alone. Plaintiff's Title IX claim in all events fails as a matter of law, because Plaintiff has not and cannot prove that NU exhibited

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[16] It is likewise consistent with the established law in analogous statutory contexts. For instance, under G.L. c. 151B and Title VII, an employer is absolved of liability for employee-on-employee sexual harassment if it takes remedial and preventive action "reasonably calculated to end the harassment and reasonably likely to prevent the conduct from recurring." Modern Continental/Obayashi v. MCAD, 445 Mass. 96, 109-10 (2005) (quoting Berry v. Delta Airlines, Inc., 260 F.3d 803, 813 (7th Cir. 2001)). See Sarin v. Raytheon Co., 905 F. Supp. 49, 54 (D. Mass. 1995) (allowing summary judgment where employer conducted investigation, verbally warned harassers, and harassment did not recur); Messina v. Araserve, Inc., 906 F. Supp. 34, 38 (D. Mass. 1995) (allowing summary judgment against harassment claim where employer timely reprimanded offending coworker and harassment did not recur). Conversely, no claim will lie based on the alleged inadequacy of an employer's process if there is no actual harm to the plaintiff that eventuates as a consequence of such inadequacy. See, e.g., Walton v. Johnson & Johnson Servs., 347 F.3d 1272, 1288 (11th Cir. 2003) (holding that "where the substantive measures taken by the employer are sufficient to address the harassing behavior, complaints about the process under which those measures are adopted ring hollow").

"deliberate indifference" to her report of sexual assault. See Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 649 (1999) (court may determine at summary judgment if a university's response was not clearly unreasonable as a matter of law). In the case at bar, the record demonstrates that NUPD promptly responded to Plaintiff's complaint of sexual assault by accompanying her to the hospital for an examination, and then by initiating an investigation of the assailant. At the conclusion of NUPD's investigation, approximately three weeks after Plaintiff first made her complaint, disciplinary proceedings against the assailant commenced, and Plaintiff was afforded an opportunity to be heard at those proceedings. The Board then notified Plaintiff of its decision, and Plaintiff exercised her right to appeal that decision. Throughout the NUPD investigation, the ensuing disciplinary proceedings, and thereafter, NU imposed a "no contact" order between Plaintiff and the assailant which neither party violated during the entirety of Plaintiff's tenure at the University. NU additionally offered Plaintiff the option to move to a different dorm, and to transfer out of the lone class she was then taking with the assailant. Plaintiff declined these protective measures, and her counsel acknowledged at hearing that they proved to be unneeded.[17] See Leader v. President & Fellows of Harvard Coll., No. 16-10254, 2018 WL 3213490, at *4 (D. Mass. June 29, 2018) (Casper, J.) ("Harvard provided [plaintiff] with a range of options, including removing herself from the shared house [with her harasser]; although [plaintiff] ... would have preferred that the putative harasser be required to move instead, Harvard's conduct does not rise to the level of deliberate indifference because it did not provide that option.").

NU's response to Plaintiff's complaint was timely and appropriate and, therefore, does not

[17] Throughout her time at NU, the University apprised Plaintiff of the assailant's class schedule and on-campus living arrangements so that she could avoid coming into any kind of contact with him if she so chose.

fail Title IX's "clearly unreasonable" standard as a matter of law. See, e.g., Tubbs v. Stony Brook Univ., 343 F. Supp. 3d 292, 316 (S.D.N.Y. 2018) (disciplinary procedure not clearly unreasonable when university met its notice requirements, conducted an investigation, and arranged for a hearing, even if the hearing was "flawed and imperfect" because alleged assailant was permitted to question complainant); Facchetti, 175 F. Supp. 3d at 637 (university's response to sexual assault complaint was not clearly unreasonable, when school quickly interviewed alleged assailant, held a hearing, and took disciplinary action against him even when plaintiff was afforded no notice of the hearing or the university's decision); Butters v. James Madison Univ., 208 F. Supp. 3d 745, 762 (W.D. Va. 2016) (university's response to claimed assault was not clearly unreasonable when school initiated disciplinary proceedings upon receipt of a formal complaint and ultimately disciplined assailants).

Plaintiff points to what she contends are two specific deficiencies in NU's handling of the assailant's disciplinary proceedings; but neither rise to the level of deliberate indifference or manifest unreasonableness. See Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 174 (1st Cir. 2007), rev'd on other grounds, 555 U.S. 246 (2009) ("Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, [or] to craft perfect solutions."); Butters, 208 F. Supp. 3d at 763 ("[W]hether [a university] could have designed a more victim-friendly system, whether it could have taken steps to protect [the complainant] better, or even whether [the university] followed its own policy to the letter, are not dispositive" of the issue of whether the university's response was clearly unreasonable).

Plaintiff first argues that Board members were improperly trained on the definition of "consent," and on the effect of one's incapacitation on his or her ability to furnish consent to sex.

It is clear from the record, however, that all students who sat on the Board *did* receive such training, and that students who participated in sexual assault-based disciplinary hearings were required to complete supplemental training tailored to sexual assault. (See J.A., Ex. 23, at 62:5-16.)[18] Moreover, the students who sat on the Board during the disciplinary proceedings at issue in this case did, in fact, consider the issue of whether Plaintiff could provide proper consent given her state of intoxication at the time.[19] While inadequate training may give rise to a Title IX claim in certain limited circumstances, this is not a case where "a reasonable juror could conclude on the evidence that any inadequacies in training were so deficient that they constituted 'encouragement of the [harassing] conduct' or otherwise amounted to deliberate indifference." Doe v. Emerson Coll., 271 F. Supp. 3d at 357 (quoting Simpson v. University of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007)) (no deliberate indifference when students received training on issues related to Title IX, including on sexual harassment and student conduct proceedings).

Plaintiff next contends that Estabrook for some reason lacked the authority to deny her appeal after it had been initially granted by the Appeals Board. As discussed *supra*, however, see

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[18] The student who served as the chair of the Board specifically recalled her own participation in an in-person training that was administered, at least in part, by a representative of the Boston Area Rape Crisis Center, and likewise recalled receiving training on the relationship between alcohol and sexual assault. (See J.A., Ex. 23, at 38:14-39:9, 41:12-15, 54:6-19.)

[19] The Board chair thus testified that she "always" read off the essential terms of the Code during deliberations; and, while she had no specific recollection of doing so in this case, she was "confident in saying that [the Board] would have looked at the definition of 'incapacitation' and discussed it." (See J.A., Ex. 23, at 86:4-12, 178:16-18.) Moreover, Tempesta, the OSCCR staff member who oversaw the Board proceedings at issue here, specifically testified that she remembered that the Board "talked about the fact that [Plaintiff] vomited and whether or not she had capacity at the time of the sexual encounter." (J.A., Ex. 21, at 225:1-12.) Finally, Tempesta noted in her letter to the assailant concerning the Board's decision that the Board had expressly considered the Code's definition of "consent" when arriving at its determination. (See J.A., Ex. 24 at 1.)

Section II.E, Estabrook's action was not a violation of NU policy. Estabrook articulated two reasonable bases for her decision: Plaintiff had not specifically identified either a procedural error or new evidence that could serve as a basis for allowing an appeal; and the assailant had not received fair notice of the appeal or an opportunity to respond to it. Furthermore, Estabrook's decision did not have any preclusive effect on the Plaintiff's appeal, as Plaintiff was allowed to resubmit her request for Board review (albeit on more limited grounds). The Court discerns no transgression of either the University's Code or basic fairness in any of this.[20]

Plaintiff obviously takes strong exception to the outcome of NU's disciplinary proceedings, and believes that the University should have found sexual misconduct and expelled the assailant. Even in the context of Rule 56, however, the facts of record make clear that Plaintiff's dissatisfaction with NU's handling of her complaint cannot give rise to a cognizable Title IX claim. See Davis, 526 U.S. at 648 (Title IX complainant "lacks [the] right to make particular remedial demands."); Roe v. Pennsylvania State Univ., No. 18-2142, 2019 WL 652527, at *11 (E.D. Pa. Feb. 15, 2019) (Kelly, J.) (recognizing that Title IX vests no right in a complaining party to challenge the allegedly erroneous outcome of disciplinary proceedings initiated against another student).[21] This is so because "[f]ederal law gives school officials wide

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[20] Even assuming, *arguendo,* that Estabrook did violate an NU policy, this would still not give rise to a Title IX claim. A university's failure to follow its own policy will not, without more, suffice to demonstrate deliberate indifference. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291-92 (1998) (school district's failure to comply with its own regulations does not establish deliberate indifference); Doe v. Board of Educ. of Prince George's Cty., 982 F. Supp. 2d 641, 657 (D. Md. 2013) ("[T]he failure to follow sexual harassment grievance procedures does not prove deliberate indifference under Title IX."); Facchetti, 175 F. Supp. 3d at 638 (same).

[21] Even if Plaintiff had standing under Title IX to challenge the allegedly erroneous outcome of the assailant's disciplinary proceeding, a jury could not reasonably infer deliberate

discretion in making disciplinary decisions, especially as they have to balance the interests of all concerned." Doe v. Galster, 768 F.3d 611, 621 (7th Cir. 2014).[22] In the absence of deliberate indifference, and such is the case here, "courts should refrain from second-guessing the disciplinary decisions made by school administrators." Id. at 617 (quoting Davis, 526 U.S. at 648). See also Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 996 (5th Cir. 2014) (recognizing that "[j]udges make poor vice principals" in the context of evaluating disciplinary decisions in the Title IX framework); S.B. ex rel. A.L. v. Board of Educ. of Harford Cty., 819 F.3d 69, 77 (4th Cir. 2016) (internal quotations and citations omitted) ("[A]dministrators are entitled to substantial deference when they calibrate a disciplinary response to student-on-student ... harassment, ... and a school's actions do not become 'clearly unreasonable' simply because a

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indifference from the outcome of the University's process in this instance. (See Pl.'s Opp'n to Defs.' Mot. for Summ. J., at 33-34 (citing Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994)). The Board undeniably (and on multiple occasions) considered the evidence before it, and reached a decision that was altogether supportable based on that evidence. That Plaintiff may have been intoxicated on the evening in question does not, without more, render her sexual activity with the assailant a rape. Cf. Commonwealth v. Blache, 450 Mass. 583, 590 (2008) (in a criminal rape prosecution, consent does not turn not on whether complainant consumed alcohol or was intoxicated; the issue is "whether, as a result of the complainant's consumption of drugs, alcohol, or both, she was unable to give or refuse consent"). Even if, as Plaintiff contends, the result of the assailant's disciplinary hearing should have been different, there is no evidence whatsoever to suggest gender bias or gender-based indifference on the part of the Board. See Yusuf, 35 F.3d at 715 (plaintiff must point to "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding").

[22] As one court recognized, "[t]here has been much debate in recent times about the most effective method for addressing the formidable problem of sexual assault on college campuses. College administrators, politicians, academics and students alike have clashed on how best to balance the interests and rights of complainants with those of the accused." Yu v. Vassar Coll., 97 F. Supp. 3d 448, 460-61 (S.D.N.Y. 2015). For an extremely thoughtful analysis of the competing rights of accuser and accused in college disciplinary matters, see E. Gerstmann, Campus Sexual Assault: Constitutional Rights and Fundamental Fairness (Cambridge Univ. Press 2018).

victim or his parents advocated for stronger remedial measures.").

Plaintiff's Title IX claim also fails for the additional reason that she has not demonstrated that any actions or inactions of the University related to her claimed sexual assault had "the *systemic* effect of denying [Plaintiff] equal access to an educational program or activity." Roe v. Pennsylvania State Univ., No. 18-2142, 2019 WL 652527, at *5 (quoting Davis, 526 U.S. at 652) (emphasis added) (noting that the Supreme Court expressly recognized this standard in cases involving a single instance of student-on-student sexual harassment). See Davis, 526 U.S. at 653 ("By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored."). Plaintiff has cited the Court to records reflecting that, during counseling, she expressed distress and frustration over the interim measures afforded to her by NU and over the University's disciplinary proceedings more generally. (See Ex. to Pl.'s Br. in Resp. to Court's Procedural Order). Plaintiff has not, however, demonstrated that this distress and frustration had any effect on her *education*, including on her grades, class attendance, ability to graduate, and the like. Plaintiff's claimed psychological discomfort alone will not suffice to trigger a Title IX violation. See Gabrielle M. v. Park Forest-Chicago Heights, IL. Sch. Dist. 163, 315 F.3d 817, 823 (7th Cir. 2003) (no concrete, negative effect on education when plaintiff was "diagnosed with some psychological problems" following harassment).

In accordance with the foregoing, NU is entitled to summary judgment on Count V of the Complaint. Plaintiff has not and cannot demonstrate deliberate indifference on the part of the

University in connection with her report of sexual assault, a fact fatal to her claim under Title IX. Nor can she demonstrate that the isolated conduct at issue had the systemic effect of denying her educational access, an adequate and independent ground for dismissing this claim.

G. Massachusetts Equal Rights Act Claim Against All Defendants (Count VIII)

Finally, Plaintiff brings a gender discrimination claim against all Defendants under the MERA. In relevant part, the MERA provides: "All persons within the commonwealth, regardless of sex ..., shall have ... the same rights enjoyed by white male citizens, to make and enforce contracts, ... and to the full and equal benefit of all laws ...." G. L. c. 93, § 102(a). Plaintiff again rests her claim on the contention that Estabrook improperly denied her the benefits of her contractual relationship with NU, and that NU inadequately trained its Board and professional staff to handle her sexual assault complaint. (See Pl.'s Mem. in Opp'n to Def.'s Mot. Summ. J., at 39-40.) As discussed *ante*, Plaintiff has not demonstrated either a breach of contract based on Estabrook's actions, or based on the inadequate training of University staff. Plaintiff's MERA claim, therefore, premised as it is on the same conduct, must also fail. The Defendants are entitled to summary judgment on Count VIII.

CONCLUSION AND ORDER

For the foregoing reasons, Defendants' Motion for Summary Judgment is **ALLOWED**. Judgment shall enter for the Defendants on all claims.

SO ORDERED.

Robert B. Gordon
Justice of the Superior Court

Dated: March 8, 2019

NOTIFY

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SUMMARY JUDGMENT MASS. R. CIV. P. 56	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 1684CV03335	Michael Joseph Donovan, Clerk of Court
CASE NAME Morgan Helfman vs. Paris Sanders et al	COURT NAME & ADDRESS Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)

Northeastern University
Antonucci (as amended), Katherine
Jose, Robert
Sevigny, Briana R
Wegmann, Mary
Estabrook, Madeleine

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)

Helfman, Morgan

Notice issued 3/4/19 MFF KCK DOL BHK LAG

This action came before the Court, Hon. Robert B Gordon, presiding, upon Motion for Summary Judgment of the named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

Defendants' Motion for Summary Judgment is ALLOWED. Judgment shall enter for the Defendants on all claims.

JUDGMENT ENTERED ON DOCKET May 10, 19 +9
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SEND TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

DATE JUDGMENT ENTERED	CLERK OF COURT/ASST. CLERK
03/08/2019	X

Date/Time Printed: 03-08-2019 15:33:39 SCV081, 03/2015

565

114

United States Code Annotated
Title 20. Education
Chapter 38. Discrimination Based on Sex or Blindness (Refs & Annos)

20 U.S.C.A. § 1681

§ 1681. Sex

Currentness

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

CREDIT(S)

(Pub.L. 92-318, Title IX, § 901, June 23, 1972, 86 Stat. 373; Pub.L. 93-568, § 3(a), Dec. 31, 1974, 88 Stat. 1862; Pub.L. 94-482, Title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234; Pub.L. 96-88, Title III, § 301(a)(1), Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

Notes of Decisions (1150)

20 U.S.C.A. § 1681, 20 USCA § 1681
Current through P.L. 116-66.

End of Document

M.G.L.A. 93 § 102

§ 102. Equal rights; violations; civil actions; costs

Currentness

(a) All persons within the commonwealth, regardless of sex, race, color, creed or national origin, shall have, except as is otherwise provided or permitted by law, the same rights enjoyed by white male citizens, to make and enforce contracts, to inherit, purchase, to lease, sell, hold and convey real and personal property, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) A person whose rights under the provisions of subsection (a) have been violated may commence a civil action for injunctive and other appropriate equitable relief, including the award of compensatory and exemplary damages. Said civil action shall be instituted either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

(c) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that any individual is denied any of the rights protected by subsection (a).

(d) An aggrieved person who prevails in an action authorized by subsection (b), in addition to other damages, shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

Credits

Added by St.1989, c. 332.

Notes of Decisions (43)

M.G.L.A. 93 § 102, MA ST 93 § 102
Current through Chapter 88 of the 2019 1st Annual Session

End of Document

22 Mass.L.Rptr. 84
Superior Court of Massachusetts,
Worcester County.

Daniel BASH, as Co-Adminstrator[1]
v.
CLARK UNIVERSITY et al.[2]

No. 06745A.
|
Nov. 20, 2006.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND DEFENDANTS' MOTION TO FILE A THIRD-PARTY COMPLAINT

PETER W. AGNES, JR., Justice.

INTRODUCTION

***1** Plaintiff, Daniel Ms. Bash ("Plaintiff"), brought this wrongful death action against Clark University ("Clark") and nine individuals for the death of his daughter, Michele Claudia Bash ("Ms.Bash"). Ms. Bash died on campus after using heroin while she was a freshman at Clark in Worcester, Massachusetts. Defendant Matthew Book ("Book") was a freshman at the time of Bash's death and allegedly supplied Ms. Bash with heroin. The other eight individual defendants, administrators at Clark at the time of Ms. Bash's death, are alleged to have been negligent in taking preventative steps necessary to protect Ms. Bash and for misrepresenting to Plaintiff that Ms. Bash would be provided with a safe and healthy environment while at Clark.

The Clark administrators have moved collectively, pursuant to Mass.R.Civ.P. 12(b)(6), for dismissal of the misrepresentation claim (Count IV) against them on the ground that the claim is based only on vague, generalized statements. Separately, defendants John Bassett ("Bassett"), then President of Clark; Erin Ellison ("Ellison"), then Bash's academic probation advisor; Julianne Ohotnicky ("Ohotnicky"), then Clark's Associate Dean of Students; and Jason Zelesky ("Zelesky"), then Clark's Assistant Dean of Students/Wellness Outreach Coordinator; have further moved pursuant to R. 12(b)(6) for dismissal of all claims against them asserting that no special relationship existed between them individually, and Ms. Bash.

Also, defendants Clark; Kristin Conti ("Conti"), then the area coordinator for Bash's residence, Johnson Hall; Denise Darrigrand ("Darrigrand"), then the acting Dean of Students at Clark; Amy Gauthier ("Gauthier"), then Clark's Director of Residential Life; and Stephen Goulet ("Goulet"), then Chief of Campus Police at Clark, have moved for leave to file a third-party complaint against Daniel Ms. Bash and Emily Bash, the decedent's parents, seeking indemnity and/or contribution asserting that Ms. Bash's parents had a special relationship with their daughter and through their knowledge/omissions, they proximately caused their daughter's death. For the reasons stated below the Motions to Dismiss are *ALLOWED* and the Motion for Leave to File a Third-Party Complaint is *ALLOWED*.[3]

BACKGROUND

The following are facts as alleged in the plaintiff's complaint which are assumed to be true for purposes of deciding the motions to dismiss.

Ms. Bash enrolled as a freshman at Clark in August of 2003. She was an on-campus resident in Johnson Hall until her death on March 2, 2004. During the academic year that Ms. Bash attended Clark, the university required all its students to live in on-campus housing for their first four semesters. During orientation, Clark distributed to parents and students a handbook which states, *inter alia*, the "[s]taff in the Dean of Students Office manages the nonacademic services that [they] provide to ensure the health and safety of the individuals who are living and learning at Clark University."

***2** Clark had a policy of not allowing students under 21 years of age to possess or consume alcohol on school property. Clark also had a policy of not tolerating the

distribution, possession, sale or use of any illegal drugs. While Ms. Bash attended Clark, the City of Worcester was known to have a problem with illegal narcotics and was identified as one of the three areas of eastern Massachusetts with the greatest heroin overdose problem. Clark reported over 20 on-campus drug-related violations in each of the three years preceding Ms. Bash's death.

During Ms. Bash's first semester at Clark, she encountered some difficulties in her academic and personal life. For instance, on September 23, 2003, the campus police were called to talk to Ms. Bash after she became intoxicated and vomited in a dormitory bathroom. Also in September and October, Ms. Bash's residential advisors made several notations in logs/reports that indicated concern over Ms. Bash's suspected use of alcohol.

In the fall of 2003, Ms. Bash's parents found evidence in Ms. Bash's on-line journal that indicated Ms. Bash had possibly used illegal drugs while at Clark. Ms. Bash's father contacted Clark's Counseling Center to report his daughter's possible drug use and his concern. On December 8, 2003, Darrigrand met with Ms. Bash after hearing her name in connection with drug use on campus. Ms. Bash denied using drugs at this time.

In January of 2004, Ms. Bash was put on academic probation due to her poor grades from the previous semester. Ellison was assigned as Bash's Academic Probation Advisor and met with Ms. Bash on at least three occasions. Following these meetings, Ellison noted that Ms. Bash did not look well, was not sleeping, and was homesick. Ellison also recommended that Ms. Bash go to the Counseling Center and Clark's Health Center. Ellison's concerns were not shared with Ms. Bash's parents and no further action to assist her or monitor her health was taken.

Darrigrand, along with Ohotnicky, met with Ms. Bash again on February 5, 2004 in response to additional information Darrigrand had received about drug use on campus. Ms. Bash admitted to Darrigrand that contrary to what she had told her at their previous meeting in December, she had tried heroin once in the fall, but it had made her sick, she had not used it since, and was not taking any other illegal drugs. Darringrand informed her mother of this meeting and assured her that "she was going to get rid of heroin on the Clark campus."

In a report for the week of March 1, 2004, Bash's residential advisor stated that Ms. Bash ignored him, looked mad and/or upset and might be drinking a bit much. On the evening of March 1, 2004, Matthew Book obtained and provided Ms. Bash with heroin purchased on campus. Ms. Bash and Book then wandered the campus and broke into a campus building to watch television. On or about the morning of March 2, 2004, Ms. Bash and Book returned to Ms. Bash's dormitory room and went to sleep. When Book allegedly awoke around 12:00 p.m., Ms. Bash was not responding and Book called 911. Worcester Emergency Medical Technicians subsequently performed CPR on Ms. Bash in her room and then transported her to St. Vincent's Hospital, where she was pronounced dead at 12:55 p.m. on March 2, 2004.

DISCUSSION

I. Standard of Review

***3** The standard of review for a motion to dismiss pursuant to Mass.R . Civ.P. 12(b)(6) is well settled. The court takes as true "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor ..." *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407, 649 N.E.2d 1102 (1995); *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429, 583 N.E.2d 228 (1991). In evaluating the allowance of a motion to dismiss, we are guided by the principle that a complaint is sufficient "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nader v. Citron*, 372 Mass. 96, 98, 360 N.E.2d 870 (1977), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Warner-Lambert Co. v. Execuquest Corp.*, 427 Mass. 46, 47, 691 N.E.2d 545 (1998).

Also, an allegation of fraud must be pled with particularity pursuant to Mass.R.Civ.P. 9(b) in order to enable the defendants to be warned adequately of the particular actions that constitute the alleged fraud or misrepresentation so that they may prepare their defense. *Friedman v. Jablonski*, 371 Mass. 482, 488, 358 N.E.2d 994 (1976).

II. Negligence

"Negligence, without qualification and in its ordinary sense, is the failure of a responsible person, either by omission or by action, to exercise that degree of care, vigilance and forethought which, in the discharge of the duty then resting on him, the person of ordinary caution and prudence ought to exercise under the particular circumstances." *Carroll v. Bouley*, 338 Mass. 625, 627, 156 N.E.2d 687 (1959). In any negligence case, a plaintiff must prove: (1) a legal duty owed by defendant to plaintiff; (2) a breach of that duty; (3) proximate or legal cause; and (4) actual damage or injury. See e.g. *Jorgensen v. Massachusetts Port Authority*, 905 F.2d 515, 522 (1st Cir.1990) (applying Massachusetts law); see also W. Prosser & W. Keeton, *The Law of Torts*, § 30 (5th ed.1985). Ordinarily "we do not owe others a duty to take action to rescue or protect them from conditions we have not created." *Cremins v. Clancy*, 415 Mass. 289, 296, 612 N.E.2d 1183 (1993).

A. Special Relationship Exception

Section 314A of the Restatement (Second) of Torts expressly recognizes that there exist "special relationships" which give rise to a duty to act or protect a person where otherwise no duty would exist:

> This Section states exceptions to the general rule, stated in § 314 that the fact that the actor realizes or should realize that this action is necessary for the aid and protection of another does not in itself impose upon him any duty to act. The duties stated in this Section (common carrier, innkeeper, land owner, one who is required by law or voluntarily takes custody of another) arise out of special relationships between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found.

***4** *Id.* at Comment B.

The Supreme Judicial Court explained the basis for imposing a duty where a "special relationship" exists in *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984). It stated that special relationships are "based to a large extent on a uniform set of considerations. Foremost among these is whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so." *Irwin v. Town of Ware*, 392 Mass. 745, 756, 467 N.E.2d 1292 (1984).

However, Massachusetts has not adopted the principle of section 321 of the Restatement under which an actor is liable to another simply as a result of doing an act that he or she "realizes or should realize" creates "an unreasonable risk of causing physical harm" to another. *Panagakos v. Walsh*, 434 Mass. 353, 356, 749 N.E.2d 670 (2001). Thus, the foreseeability of physical harm is not the linchpin for determining the existence of a common-law duty under Massachusetts tort law. Instead, the question of duty is determined by a consideration of "existing social values, customs, and considerations of policy." *Luoni v. Berube*, 431 Mass. 729, 730, 729 N.E.2d 1108 (2000), quoting *Cremins v. Clancy*, 415 Mass. 289, 292, 612 N.E.2d 1183 (1993), and cases cited. As the Court noted in *Yakubowicz v. Paramount Pictures Corp.*, 404 Mass. 624, 629, 536 N.E.2d 1067 (1989), "there can be negligence only where there is a duty to be careful, and whether there is a duty to be careful is a question of law. In determining whether the law ought to provide that a duty of care is owed by one person to another, we look to existing social values and customs, and to appropriate social policy." (Citations omitted.) After carefully reviewing the circumstances involved in this case and the challenges faced by university officials and staff in attempting to eradicate drug use on college campuses, recognizing a special relationship in this instance would impose on university officials and staff an unreasonable burden that would be at odds with contemporary social values and customs. See *Kavanagh v. Trustees of Boston University*, 440 Mass. 195, 201, 795 N.E.2d 1170 (2003) ("[A]s a general rule, there is no duty to protect another from the criminal conduct of a third party").

B. Determining the Existence of a Special Relationship

The appellate courts of Massachusetts have yet to decide whether a special relationship exists between a university or its officials on the one hand and its students on the other, which would impose a duty to protect students from the voluntary use of drugs and alcohol. However, courts in other jurisdictions have dealt with this question, and this court adopts the reasoning found in a majority of those cases in concluding that Clark owes no duty in this case.

First, courts in other jurisdictions have balanced the foreseeability of harm with what steps would be necessary to protect students. This court finds this balancing approach to be the most appropriate way to resolve the issue at hand. "The question is whether the risk of harm is sufficiently high and the amount of activity needed to protect against harm sufficiently low to bring the duty into existence ..." *Baldwin v. Zoradi*, 123 Cal.App.3d 275, 286, 176 Cal.Rptr. 809 (1981). The evidence before the court, viewed in the light most favorable to the plaintiffs, does not support the conclusion that the tragic death of Michele Claudia Bash from a heroin overdose was reasonably foreseeable to the defendants. The complaint states that Ms. Bash admitted to trying heroin once, several months before her death. It also states that it made her sick and she had not done any illegal drugs since. See Complaint ¶ 42. Furthermore, nowhere in the complaint does it state that Ms. Bash was suicidal or made any reference to wanting to end her life. This court believes that although there is ample evidence to suggest that Ms. Bash was homesick, or looked mad and upset without additional facts, the risk of death or serious injury resulting from a drug overdose was not so plainly foreseeable that a special relationship existed between the student and the university. In addition, as discussed below, this court has grave reservations about the capacity of any university to undertake measures to guard against the risk of a death or serious injury due to the voluntary consumption of drugs other than those provided by or with the approval of the university. The doctrine of *in loco parentis* has no application to the relationship between a modern university and its students. See *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir.1979), *cert. den. sub nom.*, *Doylestown v. Bradshaw*, 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 261 (1980). See Peter F. Lake, "The Special relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College," 37 Idaho L.Rev. 531, 535 (2001). Most college students have attained the age of majority by the time they enroll as freshman and are responsible for their own conduct. There are fundamental and obvious distinctions between children at the elementary, middle and secondary levels, on the one hand, and students in colleges and universities on the other hand, and the corresponding responsibility of those who are in charge of their care and education. This distinction was highlighted in *Baldwin v. Zoradi*, 123 Cal.App.3d 275, 176 Cal.Rptr. 809 (1981), where the California Court stated, "college administrators no longer control the general area of general morals. Students have insisted upon expanded rights of privacy, including liberal, if not unlimited, [parietal] visiting hours. The students had attained majority, with all the rights accorded to them save the right to consume alcoholic beverages." *Baldwin v. Zoradi*, 123 Cal.App.3d 275, 176 Cal.Rptr. 809 (1981), citing *Bradshaw v. Rawlings*, 612 F.2d 135 (3rd Cir.1979). Here, Ms. Bash made a decision in a private place to ingest heroin despite being aware of the risks and consequences, and after her parents warned her she would be taken out of school if she did it again.

***5** Second, it is not appropriate to ground the existence of a legal duty on the part of university officials and staff on the basis of unrealistic expectations about their ability to protect their students from the dangers associated with the voluntary use of illegal drugs. In *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331 (1983), the Supreme Judicial Court distinguished between the responsibility of a college or university to safeguard its female students from physical harm resulting from criminals who intrude into unlocked or inadequately locked dormitories, on the one hand, and the responsibility of students and parents to take responsibility for the moral well being of the students. The burden of protecting against the risks associated with the illegal use of drugs is far more like the burden associated with maintaining the moral well being of students than it is like the burden of protecting the physical integrity of dormitories. *Mullins v. Pine Manor, supra*, 389 Mass. at 52, 449 N.E.2d 331. Contrast *Schieszler v. Ferrum College*, 236 F.Sup.2d 602, 609 (W.D.Va.2002) (Recognizing a special relationship in circumstances in which the university was aware that the decedent had emotional problems, that he was found alone in his dormitory room with bruises on its head that he described as self-inflicted, and that around the same time he told his girlfriend that he intended suicide; based on these facts the university simply obtained written assurances from the decedent that he would not harm; the decedent's subsequent suicide was certainly foreseeable).

It is not possible for the most vigilant university to police all drug use and protect every student from the tragic consequences of voluntary drug use. In *Crow v. State of California*, the court held imposing a duty of care on a university to protect its students from the risks of harm flowing from the use of alcoholic beverages would be "unwarranted and impracticable." *Crow v. State of California*, 222 Cal.App.3d 192, 209, 271 Cal.Rptr. 349 (1990). To impose liability on the part of university officials and staff in this case would be tantamount to imposing on them the duty of an insurer against the type of tragedy that happened to Ms. Bash. The inherent nature of drugs is that they are small, easily transportable, easily obtainable, and can be easily concealed. As such, this court is not of the view that the tragic consequences of the voluntary use of drugs by Ms. Bash was reasonably foreseeable. As the defendants have pointed out, a university cannot prevent these incidents from occurring "except *possibly* by posting guards in each dorm room on a 24-hour, 365-day per year basis." *Id.* at 209, 271 Cal.Rptr. 349. This is not the type of burden that one may expect a party or a social institution such as a university to assume as the basis of a special relationship.

Third, recognition of the existence of a legal duty on the part of university officials and staff in this case would conflict with the expanded right of privacy that society has come to regard as the norm in connection with the activities of college students. The incursion upon a student's privacy and freedom that would be necessary to enable a university to monitor students during virtually every moment of their day and night to guard against the risks of harm from the voluntary ingestion of drugs is unacceptable and would not be tolerated.

***6** The cases that have found a special relationship exists between a college and a student thus giving rise to a legal duty on the part of university officials and staff are distinguishable. See, e.g., *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331 (1983) (plaintiff was abducted from her dorm room and raped and the SJC held that the college and an administrator owed a duty to exercise care to protect the well being of their resident students, including seeking to protect them against the criminal acts of third parties); *Shin v. Massachusetts Institute of Technology*, 19 Mass. L. Rptr. 570, 2005 Mass.Super. LEXIS 333, 2005 WL 1869101 (Middlesex Super.Ct.) (McEvoy, J.) (finding a special relationship existed because MIT administrators were part of Shin's "treatment team" who met regularly to discuss Shin's ongoing problems, personally observed Shin's self-inflicted wounds, referred her to mental health professionals, and received numerous reports regarding Shin's self-destructive behavior and safety; therefore it was reasonably foreseeable that Shin was going to attempt to kill herself again); *Schieszler v. Ferrum College*, 236 F.Sup.2d 602 (W.D.Va.2002) (finding that a trier of fact could conclude that there was "an imminent probability" that the decedent would try to hurt himself, and defendants had notice of this specific harm).

Unlike *Mullins*, the complaint here does not allege that the individual defendants failed to protect Ms. Bash from third-party criminal acts because there were not any third parties she needed protection from. Rather, Ms. Bash voluntarily ingested heroin and tragically died as a result of the choice that she made. In *Shin*, Shin had attempted to kill herself in the past and the school administrators were on notice of the fact that she was in imminent danger of killing herself again. With Bash, nothing in the record before this court indicates that there was an "imminent probability" that she was going to ingest heroin again and tragically die as a result. In fact, nothing in the complaint suggests Ms. Bash was suicidal or had a desire to hurt herself or end her life. Also, other than Darrigrand and Ohotnicky, the complaint does not allege that any of these administrators knew Ms. Bash had ever tried heroin. The level of involvement the Clark administrators had with Ms. Bash was significantly different from the involvement of the MIT administrators with Shin.

III. Misrepresentation

There are two types of misrepresentation claims that are recognized in Massachusetts: intentional and negligent. Although Plaintiff has not specified under which theory of misrepresentation he is trying to recover under, the defendants contend Plaintiff's misrepresentation claim must fail regardless. This court agrees.

To recover for intentional misrepresentation, Plaintiff must show that the defendants: (1) made a false representation of material fact; (2) with knowledge of its falsity; (3) to induce Plaintiff to act thereon; and (4) that Plaintiff relied on such representation as true and acted upon it to his detriment. *Barrett Assoc., Inc. v. Aronson*, 346 Mass. 150, 152, 190 N.E.2d 867 (1963). Furthermore, pursuant to Mass.R.Civ.P. 9(b), a claim for fraudulent misrepresentation must be pled with particularity. An averment of fraud may be considered pled with particularity pursuant to Rule 9(b) if it is alleged

who made the statements, to whom the statements were made, the statements were false, the defendant's knowledge of their falsity, the period which they were made, that they were made to induce the plaintiffs' reliance, and that the plaintiffs relied to their detriment. *Friedman v. Jablonski,* 371 Mass. 482, 488, 358 N.E.2d 994 (1976).

***7** The defendants are liable for negligent misrepresentation if, in the course of their business, they: (1) supplied false information for the guidance of Plaintiff in their business transactions; (2) which caused and resulted in pecuniary loss to Plaintiff by his justifiable reliance on the information; and (3) defendants failed to exercise reasonable care or competence in obtaining or communicating the information. *Fox v. F & J Gattozzi Corp.*, 41 Mass.App.Ct. 581, 587, 672 N.E.2d 547 (1996), quoting Restatement (Second) of Torts § 552(1) (1977).

If Plaintiff's misrepresentation claim is based on a theory of fraudulent misrepresentation, it fails because it has not been properly pled. While the complaint may recite to statements that ended up being false, it does not state that the defendants knew them to be false, made them to induce the Plaintiff to send Ms. Bash to Clark, or that Plaintiff relied upon the statements when he made the decision to send Ms. Bash to Clark.

If Plaintiff's claim is based on a theory of negligent misrepresentation, it must also fail because generalized statements in promotional materials or brochures are too vague and indefinite to give rise to a cause of action. In *Morris v. Brandeis University,* a student was found to have plagiarized his final paper and he challenged the university's decision. The Appeals Court found the basis for a valid contract based on the detailed procedural standards of the student judicial process contained in the university student handbook. 60 Mass.App.Ct. 1119 (2004) (unpublished opinion). The Court noted, however, that "generalized representations" to treat its students with "fairness and beneficence" in Brandeis's promotional materials were too vague and indefinite to form an enforceable contract. *Id.* at n. 6.

Also, Darrigrand's statement to Ms. Bash's mother that "she was going to get rid of heroin on the Clark campus" is also not strong enough to maintain a claim for negligent representation. Such a statement, by itself, would not lead reasonable people to send their children exclusively to Clark and therefore this court does not consider this statement a specific promise in which Plaintiff would be justified in relying upon.

IV. Third-Party Complaint

Defendants have filed a motion for leave to file a third-party complaint against Plaintiff and his wife pursuant to MassR.Civ.P. 14(a). Mass.R.Civ.P. 14 largely tracks Federal Rule 14. See, Mass.R.Civ.P. 14 Reporter's Notes. Joinder of third-party defendant is discretionary with the trial judge when the motion is made more than 20 days after the filing of the answer. The first factor to be considered by the judge is whether prejudice will result. If there is no possibility of prejudice either to the parties or to the court resulting from the delay, the motion should be granted. *Meilinger v. Metropolitan Edison Co.,* 34 F.R.D. 143 (D.C.Pa.1963).

This court concludes that there is no prejudice in allowing the third-party complaint. The third-party plaintiffs filed the complaint only one day after the 20-day deadline. The third-party defendants claim there is prejudice because Ms. Bash's death has been traumatic for her mother and the third-party complaint will "make her a party against her wishes." While one cannot help but sympathize with the Ms. Bash family for the terrible loss they suffered, the fact that someone wishes not to be sued is a baseless argument for proving prejudice. Therefore, this court allows the Motion for Leave to File a Third-Party Complaint, however, in light of the disposition with respect to Defendants' Motions to Dismiss, this ruling may have no practical significance.

ORDER

***8** For the foregoing reasons, it is *ORDERED* that all of the defendants' Motions to Dismiss are *ALLOWED* and Defendants' Motion for Leave to File a Third-Party Complaint is *ALLOWED.*

All Citations

Not Reported in N.E.2d, 22 Mass.L.Rptr. 84, 2006 WL 4114297

Footnotes

1 Of the Estate of Michele Claudia Bash.

2 John Bassett, Matthew Book, Kristin Conti, Denise Darrigrand, Erin Ellison, Amy Gauthier, Stephen Goulet, Julianne Ohotnicky, and Jason Zelesky.

3 Also before the court are Defendants' Motions for Leave to File a Reply Brief in Support of their Motions to Dismiss. Attached to these motions for leave to file are the proposed reply briefs. As the procedure used to file these motions was not in contravention of Superior Court Rule 9A, the court allows these two motions and will consider the arguments presented therein in reaching its decision.

74 Mass.App.Ct. 1105
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.
Robert S. BRODY, administrator,[1]
v.
WHEATON COLLEGE & others.[2]
No. 08–P–997.
|
April 16, 2009.

By the Court (KAFKER, DREBEN & WOLOHOJIAN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** In July, 2004, the plaintiff's son Benjamin S. Brody (Brody) attended a party at the residence of two Wheaton College students who had summer jobs at the college and lived in a college-owned house. Brody, who was twenty years old, was not himself a student or employee of the college. He drank alcohol furnished by the students at the party. The party was not registered with the college and violated various provisions of the college's alcohol policy.[3] Brody was killed later that night when he drove into a disabled bus on Route 93 in Canton. The plaintiff appeals from the Superior Court judgment entered after the motion judge granted the defendants' motion to dismiss.[4]

The sole question we are asked to decide is whether Massachusetts law imposes a duty on Wheaton College (Wheaton)[5] to protect an adult but underage guest of its resident summer employees from injuries sustained while operating an automobile after voluntarily consuming alcohol on college-owned property, where the alcohol was not furnished by the college. We hold that no such duty exists.

Discussion. Whether a duty exists is a question of law for the court to decide. *Commerce Ins. Co. v. Ultimate Livery Serv., Inc.*, 452 Mass. 639, 646 (2008). "The concept of 'duty' ... 'is not sacrosanct in itself, but is only an expression of the sum total of ... considerations of policy which lead the law to say that the plaintiff is entitled to protection.' " *Jupin v. Kask*, 447 Mass. 141, 146 (2006), quoting from *Luoni v. Berube*, 431 Mass. 729, 735 (2000). "[A] duty finds its source in existing social values and customs...." *Jupin*, *supra*, quoting from *Mullins v. Pine Manor College*, 389 Mass. 47, 51 (1983). "We have recognized that '[a]s a general principle of tort law, every actor has a duty to exercise reasonable care to avoid physical harm to others.' ... A precondition to this duty is, of course, that the risk of harm to another be recognizable or foreseeable to the actor." *Jupin*, *supra* at 147, quoting from *Remy v. MacDonald*, 440 Mass. 675, 677 (2004). "[F]oreseeability must mean something more than awareness of the ever-present possibility...." *Kavanagh v. Trustees of Boston Univ.*, 440 Mass. 195, 203 (2003) (college not liable for violent conduct of basketball player without specific knowledge of his proclivity to engage in such behavior).[6]

The plaintiff, citing *Mullins v. Pine Manor College*, 389 Mass. at 51, argues that social values and customs within the college community put Wheaton in a position to foresee and prevent the circumstances that led to Brody's death.[7] In *Mullins*, we held that Pine Manor College had a duty to protect its students from the criminal acts of third parties on campus. Pine Manor College's duty stemmed both from prevalent social values and customs and from the fact that the college had recognized an obligation to protect its students by instituting various safety practices and policies. *Id.* at 51, 54–55. The plaintiff asserts that, as in *Mullins*, because Wheaton and the college community have recognized the prevalence and dangers of underage drinking and have instituted resident alcohol policies, a duty should be imposed on Wheaton.

***2** This argument fails because the outcome in *Mullins* rested equally on the "distinctive relationship between colleges and their students." *Id.* at 56. Brody was not a student at Wheaton and is not alleged to have relied on Wheaton's alcohol policy for protection. Wheaton's institution of alcohol policies was alone insufficient to create a duty to someone who was not a member of the college's community. See *Yakubowicz v. Paramount Pictures Corp.*, 404 Mass. 624, 632–633 (1989) (theater has no duty despite violation of theater's policy against admitting patrons carrying alcoholic beverages).

Moreover, no special relationship with Brody was created by Wheaton's ownership of the building in which the party took place. See *Dhimos v. Cormier*, 400 Mass.

504, 506–507 (1987) (a lessor does not have a relationship with a party who has solely used the lessor's premises for the consumption of alcoholic beverages). See also *Langemann v. Davis*, 398 Mass. 166, 168 (1986); *Yakubowicz v. Paramount Pictures Corp.*, *supra* at 632; *Wallace v. Wilson*, 411 Mass. 8, 11–12 (1991); *Ulkwick v. DeChristopher*, 411 Mass. 401, 406 (1991). And, to the extent that the plaintiff argues that a special relationship with Brody arose from the fact that his student-hosts were summer employees of the college, there was nothing in the complaint to suggest that the party or Brody's presence at it had anything to do with the students' summer employment. "Absent a relationship, we cannot say that there was a duty of care owed by the defendants to the plaintiff and absent a duty of care there can be no actionable negligence." *Dhimos v. Cormier*, 400 Mass. at 507.

Public policy considerations support our conclusion that no duty exists. No one was in a better position to prevent harm to Brody than Brody himself. Cf. *Mullins v. Pine Manor College*, 389 Mass. at 51–52 (college was in better position than students to ensure their safety); *Commerce Ins. Co. v. Ultimate Livery Serv., Inc.*, 452 Mass. at 651 ("A private carrier, engaged in the business of transporting persons consuming alcohol, is in a primary position to use care to avoid leaving an intoxicated passenger at a location where it is likely the passenger will drive"). Brody could have abstained from alcohol, moderated his consumption, or not gotten behind the wheel of his car. See *Manning v. Nobile*, 411 Mass. 382, 392–393 (1991). See also *Hamilton v. Ganias*, 417 Mass. 666, 668 (1994); *Panagakos v. Walsh*, 434 Mass. 353, 355 (2001); *Sampson v. MacDougall*, 60 Mass.App.Ct. 394 (2004). He was an adult capable of and responsible for avoiding the combination of drinking and driving. Under the circumstances presented here, Wheaton is not responsible for Brody's decision to put his own life in danger.

For the reasons set forth above, the judgment is affirmed.

So ordered.

All Citations

74 Mass.App.Ct. 1105, 904 N.E.2d 493 (Table), 2009 WL 1011051

Footnotes

1 Of the estate of Benjamin S. Brody.

2 Sue A. Alexander; Claudia Bell; Nancy Just; and Doreen Long.

3 The complaint alleges that "[c]ontrary to applicable policy: (a) the party was unregistered; (b) the residents bought and made available a keg of beer; (c) no effort was made to monitor what alcohol was brought to the party; (d) no effort was made to monitor alcohol consumption; (e) no effort was made to prevent those under the legal drinking age from consuming alcohol; and, (f) Benjamin Brody, while underage, was provided with alcohol and otherwise permitted to consume alcohol...."

4 We have reviewed the plaintiff's complaint under the standard for sufficiency as it existed before the Supreme Judicial Court's recent decision in *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635–636 (2008). Facts as alleged in the complaint have been accepted as true, as have facts outside the complaint that were submitted to the motion judge.

5 The complaint alleges identical negligence claims against Wheaton and four of its administrators. At oral argument, plaintiff's counsel conceded the complete absence of factual allegations supporting any claim against three of the administrators and, as to the fourth (Just), the allegation was simply that she had heard music from the party and failed to investigate. The claims against the individual defendants were properly dismissed.

6 Here, the complaint stated that Wheaton "knew, or should have known, of the proclivities of undergraduate students to act irresponsibly and to violate applicable Wheaton policy including its policies related to parties on it[s] property." The complaint also sets forth that Just, the associate director of student life at Wheaton, "heard loud noise and music coming from the house." These allegations amounted to no more than an assertion of a general awareness on the part of Wheaton that underage drinking and drunk driving were possibilities.

7 The plaintiff is not proceeding on a theory of social host liability because it is undisputed that the defendants did not

own or furnish the alcohol. See *Commerce Ins. Co. v. Ultimate Livery Serv., Inc.,* 452 Mass. at 646, quoting from *Burroughs v. Commonwealth,* 423 Mass. 874, 878 (1996) ("[I]n numerous social host cases, we have held that a social host is not liable to a person injured as a result of a guest's excessive consumption of alcohol that was not owned or furnished by the host").

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34 Mass.L.Rptr. 579
Only the Westlaw citation is currently available.
Superior Court of Massachusetts,
Essex County.

Dillon DESTEFANO
v.
ENDICOTT COLLEGE, et al.[1]
1777CV00152
|
December 18, 2017

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS (PAPER # 8)

Salim Rodriguez Tabit, Associate Justice of the Superior Court

INTRODUCTION

***1** This action arises out of an unusual set of circumstances where an underage student attending Endicott College ("Endicott") in Beverly, Massachusetts, became intoxicated and assaulted three individuals over the course of the evening on February 1, 2014, and the early morning of February 2, 2014. That student, Dillon Destefano ("Destefano"), subsequently pleaded guilty to three counts of assault and battery and was sentenced in Essex County Superior Court. Destefano has now brought a three-count negligence complaint against Endicott and its President, Richard Wylie (collectively, the "Defendants"). Destefano contends that but for the Defendants' negligence, he would not have committed the assault and batteries to which he pleaded guilty, and would not have suffered the damages that have resulted from those convictions. This matter is currently before the court on the Defendants' Motions to Dismiss. For the reasons that follow, the Motion to Dismiss is *ALLOWED*.

BACKGROUND

The following facts are taken from the Complaint and are presumed true for the purposes of the Motion to Dismiss. The court has also considered court documents from Essex County Superior Court case No. ESCR2014–00269.[2] Some facts are reserved for discussion below.

On the evening of February 1, and the early morning of February 2, 2014, Destefano, a nineteen-year-old sophomore at Endicott, became extremely intoxicated while at a "dorm party" and at a senior house on campus called the "Farm House." At approximately 1:00 a.m. on February 2nd, Destefano left the "Farm House" with two friends in search of food. Along the way, Destefano engaged another individual in a fight. After the fight, Destefano and his two friends continued to a location known as the "Lodge" to eat. After eating, Destefano and his friends headed to another campus party located at the "Yellow House." While on their way to the "Yellow House," Destefano engaged a second individual in a fight. After the second fight, Destefano and his friends continued *en route* to the "Yellow House." Destefano and his friends never made it to the "Yellow House." On the way, Destefano engaged yet a third individual in a fight. Thereafter, the three friends abandoned their plan to go the "Yellow House" and, instead, returned to the "Farm House."

Following the events of February 1st and 2nd, a criminal investigation ensued, resulting in Destefano's indictment on two charges of assault and battery causing serious bodily injury and one charge of assault and battery. On August 5, 2014, Destefano pleaded guilty to all three indictments and was sentenced to two years committed to the Massachusetts House of Correction on indictment number ESCR2014–269–001, two years committed to the Massachusetts House of Correction on indictment number ESCR2014–269–002, from and after indictment number ESCR2014–269–001, and three years of probation on indictment number ESCR2014–269–003, from and after indictment number ESCR2014–269–002.

DISCUSSION

I. Standard of Review

***2** To survive a motion to dismiss pursuant to Mass.R.Civ.P. 12(b)(6), a complaint must set forth the basis of the plaintiff's entitlement to relief with "more than labels and conclusions." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While factual allegations need not be detailed, they "must be enough to raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) ..." *Id.*, quoting *Bell All. Corp.*, 550 U.S. at 555. At the pleading stage, Mass.R.Civ.P. 12(b)(6) requires that the complaint set forth "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief ..." *Id.*, quoting *Bell Atl. Corp.*, 550 U.S. at 557.

Here, Destefano asserts three claims seeking damages from the Defendants. While the Complaint alleges three separate counts, the action is in essence a negligence action, in which Destefano seeks to establish that the Defendants owed him a duty of care under three distinct theories of liability—social host liability, liability based on the existence of a special relationship, and liability premised upon negligent supervision. Because none of the theories Destefano presents plausibly suggest the Defendants owed him a duty of care based on the facts alleged, the Motion to Dismiss must be allowed.

II. Analysis

A. Social Host Liability

First, Destefano suggests that the Defendants should be held responsible for damages he sustained, as result of his own criminal behavior, under a theory of social host liability.[3] Destefano essentially argues that the Defendants had a duty to protect him from his own conduct. In *McGuiggan v. New England Tel. & Tel. Co.*, 398 Mass. 152 (1986), the Supreme Judicial Court first recognized that common-law tort liability may be imposed on social hosts, stating:

> We would recognize a social host's liability to a person injured by an intoxicated guest's negligent operation of a motor vehicle where a social host who knew or should have known that his guest was drunk, nevertheless gave him or permitted him to take an alcoholic drink and thereafter, because of his intoxication, the guest negligently operated a motor vehicle causing third person's injury.

Id. at 162.

Our appellate courts, however, have been cautious about expanding on the duty identified in *McGuiggan*. See *Juliano v. Simpson*, 461 Mass. 527, 532 (2012). Mindful of public policy considerations, the courts are reluctant to impose a duty of care in the absence of "clear existing social values and customs" supporting such a step. See, e.g., *Remy v. MacDonald*, 440 Mass. 675, 678 (2004) (discussing pregnant woman's legal duty of care to unborn child). For those reasons, social host liability attaches in very limited circumstances. "Liability attaches only where a social host either serves alcohol or exercises effective control over the supply of alcohol." *Juliano*, 461 Mass. at 528, 532–39.

Here, there is no allegation that the Defendants served or supplied the alcohol Destefano consumed. At most, the facts alleged demonstrate that Destefano was allowed to consume alcohol at the "Farm House." There are, however, no factual allegations suggesting the Defendants purchased, served, or controlled the flow of alcohol Destefano consumed. Further, despite Destefano's assertion that Endicott campus security observed students that were drinking who were "obviously under-age," there is nothing in the record to support the conclusory statement that it was "obvious[ ]," to campus security, that the students who were drinking alcohol at the "Farm House" were under age.

***3** "Policy considerations support the imposition of a duty only in cases where the host can control and therefore regulate the supply of liquor." See *Ulwick v. DeChristopher*, 411 Mass. 401, 406 (1991) (declining to extend social host liability to individual who hosted drinking party at his house, but who never served or

provided alcohol to guest who drank vodka while at house, and who was subsequently involved in serious accident injuring third party). Historically, the courts have refused to extend liability to persons who merely owned or controlled property where drinking occurred, as is the case here. See *Juliano*, 461 Mass. at 534–35; *Cremins v. Clancy*, 415 Mass. 289, 290–91, 294 (1993).

Even if this court were to conclude that the facts Destefano alleges were adequate to demonstrate that the Defendants exercised sufficient control over the supply of alcohol, to support social host liability, for the same policy consideration detailed in *Ulwick*, the court refuses to extend the limits of such liability to a college or university. *Id.* at 406.

No Massachusetts court has ever applied social host liability theory to a college or university. All the relevant cases addressing social host liability involve the excessive consumption of alcohol at someone's home. See *Juliano*, 461 Mass. 530 (defendant "invited several friends ... to a party at her home"); *Cremins*, 415 Mass. at 290–91 (stating friend "arrived at the defendant's home" with "two cases of beer," which were "brought into the defendant's residence" and, thereafter, consumed by defendant and four friends); *Ulwick*, 411 Mass. 401 (involving "Bring Your Own Booze" party at "the home of the defendant"); *Langemann v. Davis*, 398 Mass. 166, 166–67 (1986) (stating alcohol was consumed at defendant's home during party hosted by defendant's underage daughter). The principle behind imposing social host liability on homeowner is quite simple—a homeowner has control over the alcohol she furnishes during social gatherings at her home. In essence, the homeowner acts as a bartender who can "shut off" a patron who is showing signs of excessive drinking. See *Ulwick*, 411 Mass. at 406. To impose such a duty on a college or university that may have thousands of students as well as multiple buildings and units to house such students, would be impractical and unreasonable.

B. Special Relationship

Next, Destefano argues that a special relationship existed between the Defendants and himself due to his status as a student, such that the Defendants owed him "a heightened duty of care to insure" his safety while on campus. Destefano maintains the Defendants knew that underage drinking occurred on campus, despite rules and regulations prohibiting such a practice. He claims the Defendants had a duty to enforce the policies and procedures prohibiting these practices and that the failure to do so constitutes a breach of the duty they owed him as a result of their special relationship.

The Supreme Judicial Court set forth the criteria for determining the existence of a special relationship in *Irwin v. Town of Ware*, stating special relationships "are based to a large extent on a uniform set of considerations." 392 Mass. 745, 756 (1984). The most significant of these being "whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so." *Id.* at 756. Although this court can find no case with an analogous set of facts to the current one in which a Massachusetts court has determined a special relationship existed between a college and student, several cases are instructive. See *Mullins v. Pine Manor College*, 389 Mass. 47, 51–52 (1983) (recognizing special relationship between college and university and students, especially female students, and imposing a responsibility to safeguard students from physical harm resulting from criminals intruding into unlocked or inadequately locked dormitories); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 500 (1968) (special relationship existed in addressing liability of private party to members of general driving public where alcohol and driving were involved).

***4** No Massachusetts case, however, has ever determined that a special relationship exists between a college or university or its officials and its students that would impose a duty to protect students from the voluntary use of drugs or alcohol. In *Bash v. Clark University*, 22 Mass. L. Rptr. 84, 2006 WL 414297 (Mass.Super.Ct., Nov. 20. 2006) (Agnes, J.), the court thoughtfully expressed the reasons for the courts' reluctance to find such a special relationship and impose such a duty. This court adopts this reasoned analysis and likewise refuses to find a special relationship between the Defendants and Destefano.

As stated in *Bash*:

> The doctrine of *in loco parentis* has no application to the relationship between a modern university and its students ... Most college students have attained the age of majority by the time they enroll as freshman and are responsible for

> their own conduct ... The burden of protecting against risks associated with the illegal uses of drugs [or alcohol] is far more like the burden associated with maintaining the moral well-being of students than it is like the burden of protecting the physical integrity of dormitories.

Id. at *4 (internal citations omitted). And, "it is not appropriate to ground the existence of a legal duty on the part of university officials and staff on the basis of unrealistic expectations about their ability to protect their students from the dangers associated with the voluntary use of illegal drugs [or alcohol]." *Id.* at *5 (internal citations omitted).

C. Negligent Supervision

Finally, Destefano argues that the Defendants owed him a duty of reasonable care to supervise his behavior to ensure he did not drink alcohol to excess. This theory is novel indeed.

Negligent supervision is a relatively new theory of tort liability and is typically referenced in the context of an employer/employee relationship where an employer is alleged to have negligently hired, retained, or supervised and employee. See *Foster v. Loft, Inc.*, 26 Mass.App.Ct. 289, 291 (1988) (employer sued for the negligent hiring and retention of a bartender who assaulted a customer). This is not to suggest, however, that a claim for negligent supervision can only survive in the context of an employer/employee relationship. See, e.g., *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 241 (1986) (contending negligent supervision of party was proximate cause of auto accident).

In *Cooke v. Lopez*, the Appeals Court provided an avenue for a plaintiff to pursue a claim of negligent supervision against a parent whose fifteen-year-old daughter had taken her mother's car and gotten into an accident, injuring the plaintiff. 57 Mass.App.Ct. 703, 705–06 (2003). Although the court ultimately found there was insufficient evidence to support a finding of negligence, it detailed the elements a plaintiff needed to prove to seek damages for negligent supervision against a parent for the conduct of a child. Therefore, this court sees no reason why, in theory, Destefano could not bring a claim for negligent supervision simply because no employer/employee relationship existed between the Defendants and Destefano.

Simply because a plaintiff may bring a claim for negligent supervision outside the context of an employer/employee relationship, however, does not mean that Destefano is entitled to rely on such a claim in this instance. All the negligent supervision cases the parties reference (and the court found) involve injuries to a third party. In essence, a person was injured by the conduct of another, and sued the party the individual believes to be responsible for the supervision of the person who caused the injury. See *Nelson v. Salem State College*, 446 Mass. 525, 538–39 (2006); *Kavanagh v. Trustees of Boston University*, 440 Mass. 195, 203–04 (2003); see also *First Security Ins. Corp. v. Pilgrim Ins. Co.*, 83 Mass.App.Ct. 812, 816 (2013); *Cooke*, 57 Mass.App.Ct. at 705–06; *Phoenix Ins. Co. v. Churchwell*, 57 Mass.App.Ct. 612, 614–15 (2013). The court is aware of no case, and the parties have cited none, where a Massachusetts court has entertained a claim of negligent supervision where a plaintiff argues that the defendant has a duty to protect him from himself. Unlike every other meritorious negligent supervision claim where a plaintiff seeks to recover damages caused by someone's conduct, here, Destefano seeks to recover damages he himself caused.

***5** Destefano cites *Kavanagh* as authority for his suggestion that a college or university may be held accountable for failing to properly supervise a student. This reliance is misplaced. *Kavanagh* involved a basketball player who brought an action against an opposing player and coach after being punched during an interscholastic basketball game. 440 Mass. at 196–98. The plaintiff argued that the university breached a duty to protect him from the allegedly foreseeable assault and battery of its student. *Id.* at 201. The Supreme Judicial Court, however, rejected the argument, on among other grounds, the fact that no "special relationship" existed between the plaintiff and the university that would extend to a plaintiff who has no relationship to the university, "special or otherwise." *Id.* at 201–03.

Although this court is cognizant of the fact that unlike in *Kavanagh*, Destefano was a student at Endicott, for reasons already stated, this court has determined that no special relationship existed between the Defendants and Destefano that would create a duty on the part of Endicott in this instance. A special relationship, derived from principles recognized under common law, as is the case here, "is predicated on a plaintiff's reasonable

expectations and reliance that a defendant will anticipate harmful acts of third persons and take appropriate measures to protect the plaintiff from harm." *Luoni v. Berube*, 431 Mass. 729, 732 (2000). Here, the harmful acts alleged are not those of a third person and, it is not reasonable to expect the Defendants to monitor the actions of an adult when it comes to his voluntary intake of alcohol on a large college campus.

ORDER

For the reasons explained, it is hereby *ORDERED* that the Motion to Dismiss is *ALLOWED*.

All Citations

Not Reported in N.E.3d, 34 Mass.L.Rptr. 579, 2017 WL 7693451

Footnotes

1 Richard Wylie, in his capacity as President of Endicott College.

2 A court may take judicial notice of the records of other courts when determining a motion to dismiss under Mass.R.Civ. P. 12(b)(6). *Jarosz v. Palmer,* 436 Mass. 526, 530 (2002).

3 It is difficult to decipher with any accuracy what damages Destefano seeks. At the hearing on the Motion to Dismiss, Destefano suggested that his "reputation" was damaged. Meanwhile, in the Complaint, he seeks "compensatory damages" for being expelled from school, criminal prosecution, loss of his good name and reputation, and severe physical pain and mental anguish.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1581CV04200

JANE DOE

vs.

NORTHEASTERN UNIVERSITY & ADAM SHAWKY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Jane Doe ("Doe"), alleges that while she was a student at Northeastern University ("Northeastern"), she was sexually assaulted by another student in her dormitory ("dorm") room. Doe subsequently filed this negligence action alleging that Northeastern's failure to provide adequate supervision and security in the dorms caused her to be sexually assaulted.[1] The matter is presently before the court on Northeastern's motion for summary judgment. For the following reasons, the motion is **ALLOWED**.

BACKGROUND

The following undisputed facts are taken from the summary judgment record, with certain additional facts reserved for later discussion.

Northeastern is an undergraduate educational institution located in Boston with over 9,000 students. Doe graduated from Northeastern with a Bachelor of Arts degree in August 2014. During the summer of 2013, while working at the Museum of Fine Arts as part of the

[1] On December 7, 2015, Doe voluntarily dismissed defendant Adam Shawky ("Shawky") from the suit without prejudice.

Northeastern co-op program, Doe resided at 116 St. Stephen Street, a student residence hall that Northeastern owns and maintains.

A. The Assault

On the evening of August 16, 2013 Doe and a classmate and friend, Matt Russo ("Russo"), went to dinner, where she did not have any alcoholic beverages. Afterwards, Doe and Russo purchased a bottle of wine and brought it back to her apartment.[2] However, they did not have a corkscrew, so they knocked on some of Doe's neighbor's doors to borrow one. They received one from a neighbor one floor below ("Student A").[3] Doe and Russo then went back to her apartment where she and Russo drank about an inch of wine.

Later, Student A knocked on Doe's door and asked if she and Russo wanted to attend a social gathering in his apartment. Doe and Russo accepted the invitation. Shawky, another Northeastern student, was one of the people present in Student A's apartment.[4] Shawky lived in another Northeastern dorm. Aside from Russo, Doe did not know anyone else in Student A's apartment.

At some point, either Student A or Shawky offered to make Doe and Russo a drink of red wine and citrus soda, which they accepted.[5] Doe believes her drink was spiked with a "date rape drug" – i.e., one that would incapacitate her and leave her vulnerable to sexual assault – because she began to feel sick to her stomach, light-headed, and disoriented after drinking it. Subsequently, Doe vomited in Student A's bathroom and passed out.

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[2] Doe and Russo were both of the legal drinking age.
[3] Doe did not know Student A.
[4] Northeastern's housing rules permit students to host other Northeastern students in their residence halls as their guests. Students, however, must escort their guests at all times, and all guests are required to observe all rules that apply to their host. On the night of the assault, Shawky was present at 116 St. Stephen Street as Student A's authorized guest.
[5] Both Shawky and Student A were under the legal drinking age.

Russo then took Doe back to her apartment and put her in her bed. When Russo left Doe's apartment, he put her key, which was on a lanyard, around her neck and shut the door behind him. Because Doe's apartment door had a barrel lock on it that could only be secured from inside the apartment by turning a knob on the door or from outside the apartment by using a key, the door was unlocked when Russo left. Doe testified at her deposition, that if she had not been incapacitated, she would have locked the door to her room before going to sleep.

Later on, Shawky went into Doe's apartment. Doe claims that he kissed her, pushed her up against a dresser, said, "You're so sexy," and penetrated her vagina with his fingers.[6] The next day, Doe reported the assault to Northeastern's Police Department ("NUPD").[7]

B. Security

Doe's residence hall is one of four adjoining buildings that make up the St. Stephen Street residential complex. Each building has four floors and a separate entrance on St. Stephen Street. The four buildings are connected by a common basement consisting of a lounge area and laundry facilities. Collectively, the buildings contain ninety-two dorm rooms.

Doe's apartment building, like all of Northeastern's residence halls, are accessible only by the students who reside there as well as authorized guests and Northeastern personnel.[8] To enter the building from the street, students have to use an electronic access card.

At the time of the assault, Doe's individual dorm room had a barrel lock, which meant that her dorm room door did not automatically lock when it was closed. In 2009, however, Northeastern began the process of replacing dorm room locks with a key card access system.[9]

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[6] Shawky admitted that he went into Doe's apartment to check on her; however, he claimed that they only talked and kissed.

[7] For the purpose of summary judgment, Northeastern does not dispute that Doe was sexually assaulted.

[8] All students are prohibited from gaining unauthorized access to another student's residence hall or dorm room.

[9] Some doors were also replaced in order to accommodate the new system.

This new feature allows a student to access his or her respective residence hall and individual dorm room electronically with one key card. The new system also automatically closes and locks a student's door, unless it is propped open. Today, every Northeastern residence hall has been updated to the one card system; however, at the time of the assault, Doe's door lock had not been updated yet.

C. Supervision

At the time of the assault, each residence hall or residence hall complex had at least one student Resident Assistant ("RA") on duty from 7:00 p.m. to 7:00 a.m. Sunday through Thursday and twenty-four hours per day on Fridays, Saturdays, and holidays.[10] Doe's residence hall and another residence hall shared one RA.[11]

The RAs are responsible for enforcing Northeastern's housing rules and Code of Student Conduct. The RAs also complete at least three rounds per night on Sunday through Wednesday and at least four rounds per night on Thursday through Sunday, which consist of walking through all hallways and common areas of a residence hall and addressing any issue the RAs may observe. The RAs, however, do not enter students' dorm rooms or apartments during their rounds, nor do they check if a student's door is locked. Individual rooms and apartments are considered the student's private space subject to certain health and safety inspections, which are described below.

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[10] The larger residence halls also have proctors, who are stationed at the front door of the residence hall to monitor and control access to the building. Proctors ensure that anyone entering the building with a student is a guest of that student. All guests must also sign in by recording their name in a log book. The residence halls on St. Stephen Street do not have proctors.

[11] The RAs are supervised by Resident Directors and Residential Life Administrators, who are on-call twenty-four hours a day, seven days a week.

On the night of the assault, the RA on duty made rounds at 9:07 p.m., 10:30 p.m., midnight, and 1:55 a.m. The RA's round report indicates that there was no unusual activity that night.

Northeastern also employs police who are sworn officers with the ability to make arrests, bring charges in court, and carry guns, and they receive emergency calls from RAs. In cases involving sexual assault allegations, RAs are required to contact NUPD.

D. Code of Conduct

Northeastern prohibits underage students from drinking or possessing alcohol anywhere on its campus and prohibits all students from furnishing alcohol to underage students. Underage students are also prohibited from being in the presence of alcohol unless the alcohol is in the possession of a roommate who is twenty-one or older. Regardless of age, however, Northeastern prohibits the excessive consumption of alcohol and prohibits the possession or use of illegal drugs on campus. Northeastern also prohibits students from engaging in inappropriate sexual behavior, including any form of sexual assault.

To ensure compliance with these rules, Northeastern's Department of Housing and Residential Life conducts health and safety room inspections in the middle and at the end of each academic term. These inspections took place in 2013.

DISCUSSION

A. Standard of Review

Summary judgment shall be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 714 (1991). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. Pederson v. Time, Inc., 404

Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting affirmative evidence negating an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 809 (1991); Kourouvacilis, 410 Mass. at 716. Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. Pederson, 404 Mass. at 17. The opposing party cannot rest on its pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

When deciding a motion for summary judgment, the court considers pleadings, deposition transcripts, answers to interrogatories, admissions on file, and affidavits. Mass. R. Civ. P. 56(c). The court reviews the evidence in the light most favorable to the nonmoving party but does not weigh evidence, assess credibility, or find facts. Attorney Gen. v. Bailey, 386 Mass. 367, 370 (1982).

B. Analysis

Although Doe asserts one count for negligence against Northeastern, her claim is based on two theories. First, she alleges that Northeastern negligently failed to supervise students in relation to alcohol consumption and drug use in the residence halls. Second, Doe alleges that Northeastern negligently failed to provide adequate security measures in the residence halls. To prevail on her claim under either theory, Doe must prove that Northeastern owed her a duty of care, that Northeastern breached that duty, and that there was a causal relationship between the breach of the duty and her injury. Jupin v. Kask, 447 Mass. 141, 146 (2006). Generally, summary judgment is not an appropriate means to resolve negligence claims because the

question is usually one of fact. Petrell v. Shaw, 453 Mass. 377, 381 (2009). However, "a judge may decide the issue as a matter of law when no rational view of the evidence permits a finding of negligence." Id. See Jupin, 447 Mass. at 146 ("[T]he existence or nonexistence of a duty is a question of law, and is thus an appropriate subject of summary judgment."). Here, Northeastern argues that it had no duty with respect to either theory of negligence that Doe alleges. Northeastern further argues that even if a duty of care existed, there is no evidence that Northeastern breached that duty.[12]

"[A]s a general rule, there is no duty to protect another from the criminal conduct of a third party." Kavanagh v. Trustees of Boston Univ., 440 Mass. 195, 201 (2003). There are exceptions to this rule, such as where there is a special relationship between the defendant and the injured party *and* the criminal conduct is reasonably foreseeable. Id. at 201-203. In Mullins v. Pine Manor Coll., 389 Mass. 47, 54-55 (1983), the Supreme Judicial Court held that a college owes a special duty to students housed in a facility on its campus. See id. (finding that college owed residential students a duty to provide physical security measures to prevent foreseeable sexual assaults by trespassers). See, e.g., Doe v. Emerson Coll., 153 F. Supp. 3d 506, 515 (D. Mass. 2015) ("As a general matter, Emerson owed a special duty to Doe as a student housed in a facility on its campus."). The extent of that duty is at issue in this case.

1. Negligent Supervision

One theory that Doe alleges is that Northeastern was negligent by failing to provide adequate supervision in the residence halls where alcohol use was rampant and underage drinking was not policed. She also alleges that Northeastern should have had additional RAs or proctors on duty to monitor the residence halls and that Northeastern should have conducted

[12] In light of the disposition of the motion, the court does not address Northeastern's argument regarding the charitable cap statute, G. L. c. 231, § 85K.

more frequent and thorough room inspections. It is well-settled, however, that "Massachusetts does not impose a legal duty on colleges . . . to supervise the social activities of adult students, even though the college may have its own policies prohibiting alcohol or drug abuse." Emerson Coll., 153 F. Supp. 3d at 514. "Imposing such an affirmative duty on colleges would be impractical and unrealistic." Id.

Furthermore, the doctrine of *in loco parentis*[13] no longer has any application to the relationship between a modern university and its students. See Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436, 457-458 (2018) ("[M]odern university relationship with its students . . . is no longer in loco parentis but rather provides for the students' independence and self-determination."). See also Bash v. Clark Univ., 2006 Mass. Super. LEXIS 657 at *13 (Mass. Super. 2006) ("There are fundamental and obvious distinctions between children at the elementary, middle and secondary levels, on the one hand, and students in colleges and universities on the other hand, and the corresponding responsibility of those who are in charge of their care and education."); Nero v. Kansas State Univ., 253 Kan. 567, 580 (1993) ("The in loco parentis doctrine is outmoded and inconsistent with the reality of contemporary collegiate life."). As a result, courts have held that it is not appropriate to impose a legal duty on colleges and universities on the basis of unrealistic expectations about their ability to protect their students from the dangers associated with the use of drugs or alcohol. See e.g., Bash, 2006 Mass. Super. LEXIS at *14-*15. See also Doherty v. Emerson Coll., 2017 U.S. Dist. LEXIS 161602 at *27-*28 (D. Mass. 2017) (finding no duty where student alleged that college failed to educate students properly to identify rape and about the increased risk of sexual assault due to drinking).

[13] Black's Law Dictionary defines "*in loco parentis*" as, "Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." Black's Law Dictionary 803 (8th ed. 2007).

Therefore, as a matter of law, Northeastern did not have a duty to supervise the social activities of its resident students nor a duty to protect them from the harms associated with the consumption of alcohol or drugs.

In addition, to the extent that Doe argues that Northeastern should have had additional RAs on duty or conducted rounds more frequently, the summary judgment record is devoid of evidence establishing a causal connection between this alleged duty and Doe's injury.[14] According to Northeastern's policies, RAs roam the hallways and do not enter students' rooms or apartments because they are considered their private space. The RAs also do not search students' or guests' bags for drugs or alcohol upon entering the residence halls, and Doe does not argue that they should. Rather, Doe relies on speculation and conjecture in arguing that an increase in the presence of RAs in the residence halls could have reasonably prevented Doe from being sexually assaulted. On summary judgment, however, "any inference that could be drawn in favor of the nonmoving party must be based on probabilities rather than possibilities and cannot be the result of mere speculation and conjecture" (quotations and citation omitted). Cesso v. Todd, 92 Mass. App. Ct. 131, 139 (2017). Accordingly, Northeastern's motion for summary on Doe's negligent supervision theory is **ALLOWED**.

2. Negligent Security

Doe also alleges that Northeastern negligently failed to provide adequate security measures in the residence halls. Doe argues that Northeastern breached this duty by failing to have the type of self-closing and self-locking mechanism that it currently has, which prevents third parties from accessing another student's dorm room.

[14] Although causation is generally a matter reserved for the fact finder, see Mullins, 389 Mass. at 58, it may be determined as a question of law where there is no set of facts that could support a conclusion that the injuries were within the scope of liability. Leavitt v. Brockton Hosp., Inc., 454 Mas. 37, 44 (2009).

i. Duty of Care

Doe relies on Mullins, in which the Supreme Judicial Court held that a college owes a duty to protect students housed on its campus against criminal acts by third parties. 389 Mass. at 50. In that case, the plaintiff was raped on campus by a trespasser. Id. at 49-50. The SJC found that the duty of care the school owed to its students was grounded on two principles. Id. at 50-51. First, it concluded that "colleges of ordinary prudence customarily exercise care to protect the well-being of their resident students, including seeking to protect them against the criminal acts of third parties." Id. at 51. The SJC also noted that the threat of criminal acts to resident students was "self-evident" and that no student had the ability to design and implement a security system; therefore, only the college was in the position to take the necessary steps to ensure the safety of the students. Id. Second, the SJC determined that the college had voluntarily assumed the duty, upon which the plaintiff relied, because the school required its students to live on campus and charged its students a fee to provide security. Id. at 49, 53-54. As such, the SJC held that the jury could have found that students and their parents rely on the willingness of colleges to exercise due care to protect its students from *foreseeable harm*. Id. at 54.

Notably, however, even though the SJC concluded that the school owed its students a duty of care, Mullins is clear that such a duty is not without boundaries, and rather extends only to those acts that are reasonably foreseeable. Id. at 54-55; Kavanagh, 440 Mass. at 203. Ultimately, the SJC held that the rape was foreseeable, because the director of student affairs had warned students during orientation regarding the inherent danger of being housed at a women's college in a metropolitan area that was only a short distance from the bus and train lines that led into Boston. 389 Mass. at 54-55. Therefore, even if this Court adopts the general principle that

Northeastern owes its resident students a duty to protect them from being sexually assaulted by third parties, the question remains whether such an act was reasonably foreseeable.

ii. Foreseeability

Particularly on college campuses, "[t]here is always a possibility that criminal conduct will occur." Doyle v. Gould, 2007 Mass. Super. LEXIS 234 at *13 (Mass. Super. 2007), citing Whittaker v. Saraceno, 418 Mass. 196, 200 (1994). Therefore, foreseeability is "something more than awareness of the ever-present possibility," see Kavanagh, 440 Mass. at 203. In determining foreseeability, the focus is often on the previous occurrence of similar criminal acts.[15] See e.g., Doyle, 2007 Mass. Super. LEXIS at *14. In addition, the Supreme Judicial Court has suggested that where a claim is based on criminal conduct of a third party, a defendant must have "specific information . . . suggesting propensity to engage in violent conduct . . . ." Kavanagh, 440 Mass. at 203.

In this case, there is no such evidence before the court. Prior to Doe's lawsuit, no Northeastern student had ever claimed that he or she was assaulted as a result of a deficiency in the door locks or the security of the dorm rooms or residence halls. Moreover, Doe's door lock was in good working order. In addition, according to NUPD's records, there were no reports or allegations that Shawky had assaulted anyone previously. See id. at 204 (college could not have reasonably foreseen altercation between student athletes where student had never exhibited violent behavior and nothing that occurred earlier in the game provided any warning that the

[15] Typically, foreseeability insofar as it affects the causal relationship between the breach of a duty and a victim's injury is a matter reserved for the factfinder; however, insofar as foreseeability bears on the existence of a duty, the question is more appropriate for resolution by the court. Jupin, 447 Mass. at 147 n.7.

student would engage in a violent outburst). Cf. Schaefer v. Yongjie Fu, 272 F. Supp. 3d 285, 288-289 (D. Mass. 2017) (holding university had a duty to protect student from harassment and assault by another student where school was on notice of student's behavior towards the victim); Nero, 253 Kan. at 584-585 (where school was on notice that assailant had been accused of rape and the school moved the assailant to another co-ed dorm where he allegedly raped another student, reasonable people could disagree whether rape was foreseeable). Therefore, Northeastern could not have reasonably foreseen that such a criminal act would occur.

Nevertheless, even assuming that Northeastern owed its students the type of duty of care that Doe alleges, there is no evidence in the record suggesting that Northeastern breached this duty. It is undisputed that Doe's dorm room door was equipped with a lock. Doe testified at her deposition that she never had a problem with the lock on her door, and an inspection after the assault confirmed that the lock was in good working order. See e.g., Doyle, 2007 Mass. Super. LEXIS at *16 (holding plaintiff could not prove breach of duty to provide security because student's apartment was equipped with a lock). Therefore, even if Northeastern had a duty to provide adequate security measures to prevent sexual assault, Doe cannot prove that it breached that duty.[16] Accordingly, Northeastern's motion for summary judgment is **ALLOWED** on Doe's negligent security theory.

[16] Although Doe testified that if she had not been incapacitated, she would have locked her door before going to sleep, such an argument relates back to the principles discussed in the foregoing section, which this Court rejected. See subsection 1, *supra* (discussing cases declining to impose a duty on colleges to protect its students from the dangers associated with the consumption of alcohol and drugs).

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Northeastern University's motion for summary judgment is **ALLOWED**.

Dated: September 18, 2018

Susan E. Sullivan
Justice of the Superior Court

2018 WL 4626229
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.
Court of Appeal, Fourth District, Division 3, California.

Jane DOE, Plaintiff and Appellant,
v.
WALMART STORES, INC.,
Defendant and Respondent.

G054660
|
Filed 9/27/2018

Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed. (Super. Ct. No. 30-2015-00799667)

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OPINION

ARONSON, J.

***1** Plaintiff Jane Doe (Doe) appeals from a final judgment following the trial court's order granting summary judgment to defendant Walmart Stores, Inc. (Walmart). Walmart employee Doe alleged Walmart negligently hired, retained, and supervised a fellow Walmart employee who sexually assaulted her after work hours, and outside the workplace. She further alleged Walmart was negligent in not warning her of her coworker's criminal history. Walmart moved for summary judgment, arguing it owed no duty to discover or warn Doe of her coworker's past criminal conduct, and that any failure to discover and warn Doe of his criminal history did not cause the injuries she suffered when she was off work and not in the workplace. The trial court granted the motion, finding that Doe had failed to produce evidence showing a disputed material issue of fact on either duty or causation. We agree with the trial court's conclusions and affirm the judgment.

I.

FACTS AND PROCEDURAL HISTORY

The series of events leading to this lawsuit are undisputed. In July 2013 Jane Doe was employed by Walmart as a Customer Service Associate and worked the Returns desk at a Walmart retail store in the City of Orange. Olin Martin also worked for Walmart at the Orange store, and was employed as an Associate who stocked shelves and oversaw the alcohol and food aisles. Doe testified in her deposition she first met Martin at work sometime in 2010 or 2012. [1] Doe's and Martin's shifts did not always coincide, although they did on the night of July 21, 2013; Martin normally worked nights but Doe's schedule varied. Doe occasionally saw Martin at work, but estimated she did not talk to him even once a week.

[1] Martin's Walmart job application is dated April 18, 2011, and his consent to a background check is dated April 19, 2011.

At about 6:00 p.m. on July 21, Doe and Martin met at a nearby park during their hour-long lunch break and smoked marijuana together in his car. The park is about a three-minute drive from the Walmart store and they drove to the park separately. Earlier that day, Doe told Martin she wanted to smoke some "weed" because she was having a "crappy day." He responded: "Okay. Sure. At lunchtime."

While at the park, Martin attempted to "hit" on Doe, but she told him "it was just strictly about the weed." He asked her if she had "feelings" for him, and she told him "No." "So you're just here for my weed," he asked, to which she replied "Yes." When Martin became upset because Doe had rejected him, Doe offered to pay him for the marijuana she had used because she did not "want him to get the wrong impression of me trying to get with him or him trying to get something out of me." Martin remained silent. From the time she returned from lunch until she finished her shift, Martin did not contact her.

At the end of their shifts, both clocked out at 11:00 p.m., but Doe stayed at the store about 45 minutes to do some shopping. While she was shopping, Martin texted her six or seven times,

asking her "where are you," and "aren't you off." She ignored his text messages.

***2** When Doe left the store, Martin approached her and asked what she was doing and where she was going. She replied she had been shopping for her family and was going home. She asked Martin why he was still there, and "[d]on't you have to go home to your wife?" He did not reply.

Martin followed her as she walked to her van in the Walmart parking lot.[2] She began putting her groceries into her van and, and when she had her back turned to him, he attacked and sexually assaulted Doe repeatedly. Doe estimated the attack lasted "over an hour." During his assaults, Martin told her he was upset she had rejected him earlier that day.

2 While it is not clear from the record, Doe apparently was parked behind the Walmart store because she testified at her deposition that after she was attacked she drove "all the way around to the front of Walmart."

Following Martin's attack, the severely traumatized Doe returned to the front of the store, where fellow employees found and assisted her, one of whom ultimately took her to the police station. Walmart fired Martin two days later. Martin was convicted for his crimes against Doe, and sentenced to a 35-years-to-life prison term.[3]

3 In 2016, we affirmed Martin's conviction and remanded the matter for a minor sentence correction that did not affect the length of his prison commitment. (*People v. Olin Johnston Martin, Jr.* (June 22, 2016, G050805 [nonpub. opn.]).)

Doe thereafter sued Walmart. In her first amended complaint, Doe's first cause of action alleged Walmart was negligent in hiring, supervising, and retaining Martin because, unknown to Walmart, Martin had suffered two prior robbery convictions in Los Angeles County — one in 1982, the other in 1994. Within this first cause of action, Doe additionally alleged Walmart was negligent in failing to warn "other employees and customers" that Martin was a convicted felon. Her second cause of action is specifically captioned as a "Failure to Warn," and incorporates the relevant allegations from the first cause of action.

II.

DISCUSSION

A. *Legal Background*

"[A]ny party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his favor...." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Ibid.*) "Summary judgment is appropriate only 'where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.' [Citation.] A defendant seeking summary judgment must show that the plaintiff cannot establish at least one element of the cause of action. [Citation.]" (*Regents of University of California. v. Superior Court* (2018) 4 Cal.5th 607, 618 (*Regents*).)

Thus, a defendant moving for summary judgment bears the initial burden of persuasion demonstrating "there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law." (*Aguilar, supra,* 25 Cal.4th at p. 843.) A defendant meets this burden by "present[ing] evidence which, if uncontradicted, would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879; cf. *Regents, supra,* 4 Cal.5th at p. 618 ["A defendant seeking summary judgment must show that the plaintiff cannot establish at least one element of the cause of action"].) Once the [defendant] has met that burden, the burden shifts to the [plaintiff] to show that a triable issue of one or more material facts exists as to the cause of action." (Code of Civil Procedure, § 437c, subd. (p)(1) & (2); *Aguilar*, *supra*, 25 Cal.4th at p. 850.)

***3** A plaintiff opposing summary judgment defeats the motion by showing one or more triable issues of material fact exist as to the challenged element. (*Aguilar, supra*, 25 Cal.4th at p. 849.) To do so, however, the plaintiff may not merely rely on the allegations in the complaint. (*Ibid.*) Moreover, a plaintiff cannot establish a triable issue of material fact based on inferences drawn from assumptions or suppositions. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.)[4] Rather, it "must present evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' " (*Aguilar, supra*, 25 Cal.4th

at p. 843.) Ultimately, "[t]he court must 'grant[ ]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' ... and that the 'moving party is entitled to a judgment as a matter of law.' " (*Ibid.*, citations omitted.)

4 " 'An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.' [Citation.] However, '[a] reasonable inference ... "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] ... A finding of fact must be an inference drawn from evidence rather than ... mere speculation as to probabilities without evidence." [Citation.]' " (*People v. Davis* (2013) 57 Cal.4th 353, 360.)

" 'On review of an order granting or denying summary judgment, we examine the facts presented to the trial court and determine their effect as a matter of law.' [Citation.] We review the entire record, 'considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.' [Citation.] Evidence presented in opposition to summary judgment is liberally construed, with any doubts about the evidence resolved in favor of the party opposing the motion. [Citation.]" (*Regents, supra,* 4 Cal.5th at p. 618.) Consequently, "we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. [Citation.]" (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769 (*Saelzer*).) We are "not bound by the trial court's stated reasons for its ruling on the motion, as the appellate court reviews only the ruling and not its rationale." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 457.)

B. *The Negligent Hiring/Retention/Supervision Cause of Action*

"The elements of a cause of action for negligence are (1) the existence of a legal duty to use due care; (2) a breach of that duty; and (3) the breach as a proximate cause of the plaintiff's injury. [Citation.] 'As a practical matter, these elements are interrelated, as the question whether an act or omission will be considered a breach of duty or a proximate cause of injury necessarily depends upon the scope of the duty imposed.... [Citation.]' " (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1210-1211 (*Federico*).) Consequently, to prevail in a negligence suit requires a plaintiff "to prove duty, breach [of that duty], causation, and damages." (*Regents, supra,* 4 Cal.5th at p. 618.)

" 'Duty, being a question of law, is particularly amenable to resolution by summary judgment.' [Citation.]" (*Regents, supra,* 4 Cal.5th at p. 618.) Negligence, on the other hand, normally presents a question of fact for the jury. "However, where reasonable jurors could draw only one conclusion from the evidence presented, lack of negligence may be determined as a matter of law, and summary judgment granted." (*Federico, supra*, 59 Cal.App.4th at p. 1214.)

***4** Generally, "one owes no duty to control the conduct of another, nor to warn those endangered by such conduct" unless " '(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.' [Citations.]" (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203 (*Davidson*).) In other words, " '[a] person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.' [Citation.]" (*Regents, supra,* 4 Cal.5th at p. 619.) Therefore, "[w]here, as here, a 'complaint alleges injuries resulting from the *criminal acts of third persons* ... "the common law, reluctant to impose liability for nonfeasance, generally does not impose a duty upon a defendant to control the conduct of another [citations], or to warn of such conduct [citations], unless the defendant stands in some *special relationship* either to the person whose conduct needs to be controlled, or to the foreseeable victim of such conduct. [Citations.]" [Citation.]' " (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564 (*Roman Catholic Bishop*).)

In the employment context, "[a]n employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citation.]" (*Roman Catholic Bishop, supra,* 42 Cal.App.4th at pp. 1564-1565.) "[A]s defined by California authority...," this duty "is breached *only when* the employer knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons *in light of the particular work to be performed.*" (*Federico, supra,* 59 Cal.App.4th at p. 1214 (italics added).) [5]

5 In *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133 (*Phillips*), the court observed: " 'An [employee] ...

> may be incompetent because of his reckless or vicious disposition, and if [an employer], without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others *while in the performance of a duty*, he is subject to liability for harm caused by the vicious propensity .... [¶] One who employs another to act for him is not liable ... merely because the one employed is incompetent, vicious, or careless. If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person *for the business in hand*.... [¶] ... "In 2006, the Restatement Third of Agency was published ... stating: '(1) A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent ....' [Citation.] 'Liability under this rule is limited by basic principles of tort law, including requirements of causation and duty.' [Citation.] Furthermore, '[l]iability under this rule also requires some nexus or causal connection between the principal's negligence in selecting or controlling an actor, *the actor's employment or work*, and the harm suffered by the third party.' [Citation.]" (*Phillips, supra,* 172 Cal.App.4th at p. 1140, italics added.)

Here the undisputed record shows Martin had a single disciplinary incident in June 2012 involving disrespectful or harassing comments made to fellow Walmart employees and customers. Doe provided no allegations or evidence regarding the nature or specifics underlying this disciplinary incident other than the deposition testimony of a co-manager of the Orange Walmart store that "Martin admitted to making inappropriate comments to customers and co-workers." This comanager knew no other details, including the nature of the comments, to whom they were made, or on how many occasions. Doe evinced Walmart's internal memorandum regarding Martin's subsequent "coaching" about this incident, but it is opaque corporate doublespeak and provides no assistance here.

***5** Martin also had a criminal record that included two remote robbery convictions, one in 1982, the other in 1994. [6] It is uncontested Walmart was unaware of this criminal history, and Doe did not allege or present evidence of the underlying factual details of these two robberies.

[6] Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.)

Walmart's alleged negligence in hiring or retaining Martin as an employee is actionable only if it created an undue risk of harm to others when viewed in light of the work Martin was hired to perform. (*Federico, supra,* 59 Cal.App.4th at p. 1214.) "An employer is not charged with guaranteeing the safety of anyone his employee might incidentally meet while on the job against injuries inflicted independent of the performance of work-related functions. Rather, ... liability for negligence can be imposed only when the employer knows, or should know, that the employee, because of past behavior or other factors, is unfit *for the specific tasks to be performed.*" (*Federico, supra*, 59 Cal.App.4th at p. 1215, italics added.) Thus, Walmart was not a blanket guarantor of the safety of all persons, including other employees, who Martin may have incidentally met while working as an Associate performing his assigned shelf-stocking work for Walmart. Doe provides no authority suggesting otherwise.

Here, Walmart could be held liable for Martin's negligent hiring or retention only if it knew, or should have known, Martin was unfit to perform the work for which he was hired, i.e., as an Associate assigned to upkeep and stock the liquor and food aisles. Imposition of any further responsibility required Doe to demonstrate Walmart owed her an additional duty to use due care in the hiring and retention of Martin as regards to *extramural, nonwork related activities* involving its employees. She did not.

Furthermore, whatever assumed duty Walmart may have owed Doe, or other Walmart workers, for its hiring and retention of Martin as an employee, no evidence showed Walmart breached that duty. Assuming Walmart had discovered Martin's criminal history by performing a more comprehensive background check, Doe does not tell us what Walmart would have been obliged to do with that information. She does not allege it would have been per se negligent for Walmart to hire Martin in the first place, nor does she describe how Walmart should have somehow "supervised" Martin differently from its other employees, both while on the job and off, because of his prior criminal history. (Cf. *Roman Catholic Bishop, supra*, 42 Cal.App.4th at p. 1566-1567 ["Even if the church had learned of [the priest's] prior sexual affairs with adults, it is illogical to conclude the church should have anticipated [the priest] would commit sexual crimes on a minor. More important, the legal duty of inquiry [plaintiff] seeks to impose on the church as an employer would violate the employee's privacy rights."].)

Assuming Walmart owed its employees an additional duty of care, Doe also failed to establish a causal nexus between Walmart's supposed negligent hiring and retention of Martin and his subsequent sexual assault of Doe. In *Phillips, supra,* returning to the Restatement Third of Agency, the court stated there must be " 'some nexus or causal connection between the principal's negligence in selecting or controlling an actor, *the actor's employment or work*, and the harm suffered by the third party.' [Citation.] .... 'Likewise, when the actor's tort occurs in the course of an *extramural activity unrelated to the actor's employment*, the tort may lack a sufficient causal relationship to the actor's employment.' [Citation.]" (*Phillips, supra,* 172 Cal.App.4th at pp. 1145-1146, italics added.)

***6** As a result, in *Phillips* the court found "in the undisputed circumstances of this case, we doubt Defendants' alleged negligent hiring and retention of [employee] was a proximate or legal cause of [employee's] tortious conduct committed on [plaintiff] *two years after* Defendants terminated his employment, *especially when [employee] and [plaintiff's] initial social relationship began outside of [employee's] employment duties* and their romantic relationship did not begin until after his employment was terminated." (*Phillips, supra,* 172 Cal.App.4th at p. 1146, second italics added.)

Similarly, here Doe did not show Walmart's purported negligent hiring and retention of Martin was a proximate or legal cause of Martin's subsequent criminal conduct. Neither Doe nor Martin were at their workplace, or even on duty, at the time of the sexual assault, nor during their lunchtime meeting at the nearby park. Moreover, the motivation for Martin's assault was Doe's refusal to respond favorably to his amorous advances during their lunch in the park, and smoking marijuana at lunch that day was unquestionably outside of Doe and Martin's employment duties and responsibilities. (Cf. *Phillips, supra,* 172 Cal.App.4th at p. 1146.)

Just as important, "the prime concern in every case [is] foreseeability, because that factor is the chief element in determining a defendant's duty to [a] plaintiff." (*Newton v. Kaiser Foundation Hospitals* (1986) 184 Cal.App.3d 386, 389.) The "determination of foreseeability [is] to be made on a case-by-case basis." (*Id.* at p. 390.) If considered only in the abstract, "the quest for foreseeability is endless because [it], like light, travels indefinitely in a vacuum." (*Id.* at p. 391.) Thus, as to foreseeability, "the court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.' [Citations.]" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772, original italics.)

Two robberies committed 31 and 19 years earlier do not foreseeably indicate Martin would someday sexually assault a fellow employee in a Walmart parking lot after both employees were clocked out and off-duty. The foreseeability of that specific type of harm is simply too speculative and the causal nexus too attenuated. Doe provides no authority to suggest otherwise.

While both Doe and Martin worked the same shift in the Walmart store on July 21, there was no evidence they had worked together at the store. The evidence instead shows their contacts before the sexual assault were incidental ones, during breaks and lunch hours, and occasional small talk on the sales floor when Doe returned merchandise from the Returns Desk to the store shelves. Moreover, without more specific facts about the underlying robbery convictions — which Doe did not allege or evince below — it is doubtful whether it was reasonably foreseeable Martin would have *robbed* a fellow employee, let alone sexually assaulted one.

For the same reasons, the fact Martin may have been "coached" by his employer in June 2012 for making unspecified and unknown inappropriate comments to customers and fellow employees also does not reasonably suggest that more than a year later, in July of 2013, he would sexually assault another Walmart employee in the store parking lot while both were off-duty. The trial court properly found Doe failed to meet her burden to maintain a cause of action for negligent hiring, supervision, or retention.

C. *The Negligent Failure to Warn Cause of Action*

***7** In *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 (*Tarasoff*), subsequently limited by statute (Civil Code section 43.92), Tatiana Tarasoff was the specific target of threats by an eventual assailant. Our Supreme Court held that the defendant University's therapists who heard those threats had a duty to exercise due care by warning the potential victim. This duty arose from the special relation between a patient and his doctor or psychotherapist, generally recognized as supporting an affirmative duty for the benefit not only of the patient, but of other persons as well. (*Tarasoff, supra,* 17 Cal.3d at p. 436.)

In an often-overlooked part of that case, Tarasoff had also sued certain police defendants who briefly had detained and then released her eventual assailant. The court concluded the police officers "do not have any such special relationship to either [Tarasoff] or to [the assailant] sufficient to impose upon such defendants a duty to warn respecting [assailant's] violent intentions." (*Tarasoff, supra,* 17 Cal.3d at p. 444.) In fact, "no duty to warn was imposed on the police in *Tarasoff* where a stronger connection existed between them and [the assailant] — he had been in [police] custody and was released with knowledge of potential for violence against a specific victim." (*Davidson, supra,* 32 Cal.3d at p. 205, fn. 3.)

Although *Tarasoff* is not an employer-employee case, Doe has not identified any authority imposing a general duty upon employers to warn their employees about a coworker's criminal "propensities" or prior criminal convictions.[7] We find instructive *Duffy v. City of Oceanside* (1986) 179 Cal.App.3d 666 (*Duffy*), a case the trial court cited in its ruling below.

7 Nor has Doe ever explained how such a warning would be phrased or provided given California's strict personal privacy interests and the presumptive statutory confidentiality of an employee's personnel records. (Cf. *Roman Catholic Bishop, supra*, 42 Cal.App.4th at pp. 1566-1567 ["[T]he legal duty of inquiry [plaintiff] seeks to impose on the church as an employer would violate the employee's privacy rights."].) Indeed, if Doe were correct, Walmart would have been faced with the dilemma of having to choose between being sued by Martin for disclosing the contents of his confidential criminal and personnel records, or being sued by Doe or another employee for failing to warn them about Martin's prior criminal history.

In *Duffy,* the City of Oceanside through a special incentive program hired a parolee and assigned him to the engineering department. This new employee was on parole following three years in a state mental hospital, and an additional four years in state prison, after his convictions for kidnapping, rape and sexual assault. (*Duffy, supra,* 179 Cal.App.3d. at p. 669.) A month after the parolee was hired, the victim, also an employee in the engineering department, reported to her supervisors that the new employee had sexually harassed her during working hours by touching her in a suggestive fashion without her permission. Despite these reports, she was never told or warned about his criminal background. (*Ibid.*)

Within three months, however, she and the new employee "developed a friendly work and social relationship which continued for some four and one-half years. The City knew of the development of this relationship but nonetheless failed to warn [her]" about his past history. (*Duffy, supra,* 179 Cal.App.3d at p. 669.)

Four years later, the parolee "placed an inter-office call to [her] regarding work-related matters. During the conversation, [he also] asked for [her] help in remedying a problem he had earlier in the morning with his car. [She] agreed and apparently left the office with the [parolee] on her lunch break. Thereafter, [he] kidnapped [her], taking her to his home where he stripped, bound and gagged her. After tying a self-tightening noose around her neck, [he] left her and went back to work, intending to return later. While he was gone, [she] strangled herself attempting to escape." (*Duffy, supra,* 179 Cal.App.3d at p. 669.)

***8** Among other causes of action, the plaintiffs (the woman's children) sued the City of Oceanside for employing the parolee and for failing to warn their mother about the parolee's past history and "dangerous propensities." (*Duffy, supra,* 179 Cal.App.3d at p. 668.) The trial court sustained a demurrer to this cause of action, concluding the City owed plaintiffs no duty to warn. (*Id.* at p. 669.)

The Court of Appeal rejected plaintiffs' argument the City was obligated to warn all existing employees of the new employee's criminal history and violent propensities: "Were the substance of plaintiffs' complaint simply that the City was obliged to warn all female employees who might come in contact with [parolee] of his prior criminal conduct, we would be unpersuaded. While others might phrase this conclusion in terms of the lack of a duty to warn, we prefer to say that such a complaint, without more, would fail to state facts from which a reasonable jury could conclude the City acted negligently. The mere fact that [parolee] had been convicted of assaults on two women at least seven years earlier — for which he had served time in prison and been treated in a mental hospital — gives rise to an insufficiently strong inference that he would repeat similar criminal behavior." (*Duffy, supra,* 179 Cal.App.3d at p. 674.)

Nevertheless, the court went on to find that there were additional considerations present that did warrant overruling the City's demurrer. "Plaintiffs' allegation in the present case, however, is not based simply on the failure to warn all employees at the time the City hired [parolee]. They

additionally allege that [victim] reported to her supervisors that she had been sexually harassed by [parolee] shortly after he was hired.... If known to the City, these facts strengthen the inference that [parolee] might repeat his earlier criminal conduct and suggest [victim] as a possible victim. Under such circumstances we believe it becomes a question of fact as to whether the City acted reasonably in failing to respond to [victim's] report of harassment by alerting her in some manner to [parolee's] past conduct." (*Duffy, supra,* 179 Cal.App.3d at p. 674.)

Thus, under the additional facts present in *Duffy,* the court concluded "while [parolee] made no verbal threats to victims, his harassment of [her coupled with his prior criminal conduct made the 'threat' to [her] reasonably foreseeable. Whether the magnitude of that threat required the City to warn [her], i.e., whether the City was negligent, is a question of fact." (*Duffy, supra,* 179 Cal.Ap.3d at p. 675.)

In the present case, of course, Martin's prior criminal history involved robbery, not kidnapping, rape, and sexual assault. And unlike the just-released parolee in *Duffy,* Martin's robbery convictions were 31 and 19 years before to his attack on Doe. Moreover, Doe has offered no evidence Martin did anything that reasonably indicated he posed a risk to any of his coworkers, let alone to Doe in particular. Walmart counseled Martin after his unspecified verbal improprieties with customers and coworkers, but this alone does not suggest Martin posed a risk of sexually assaulting other employees.

Thus, the current case is quite different from *Duffy.* Not only were Martin's prior convictions in this case not sex crimes, but there were no additional circumstances to lead us to conclude anything other than the substance of Doe's complaint is that Walmart was categorically obliged to warn all employees who might come in contact with Martin of his prior criminal conduct. Like the *Duffy* court, we too are unpersuaded. (*Duffy, supra,* 179 Cal.App.3d at p. 674.)

***9** In supplemental briefing, Doe argues our Supreme Court's recent decision in *Regents, supra,* 4 Cal.5th 607, provides a "bright line rule requiring an employer to warn employees of, or protect them from, foreseeable harm." We do not read *Regents* in the same manner.

In *Regents*, "[a]fter he enrolled [at UCLA], Damon Thompson experienced auditory hallucinations. He believed other students in the classroom and dormitory were criticizing him. School administrators eventually learned of Thompson's delusions and attempted to provide mental health treatment. However, one morning Thompson stabbed fellow student Katherine Rosen during a chemistry lab. Rosen sued the university and several of its employees for negligence, arguing they failed to protect her from Thompson's foreseeable violent conduct. [¶] This case involves whether, and under what circumstances, a college or university owes a duty of care to protect students like Rosen from harm." (*Regents, supra,* 4 Cal.5th at p. 613, fn. omitted.) The holding in *Regents* is actually quite narrow: "Considering the *unique features of the collegiate environment*, we hold that universities have a special relationship with their students and a duty to protect them from foreseeable violence *during curricular activities.*" (*Regents, supra,* 4 Cal.5th at p. 613, italics added.) Further limiting the scope of its holding, the court observed "[a]lthough comparisons can be made, the college environment is *unlike any other.*" (*Regents, supra,* 4 Cal.5th at p. 625, italics added.) Thus, *Regents* is not an employer-employee case, and its analysis cannot be applied here.

Nevertheless, Doe argues a passage from *Regents* supports her claim for a "bright line holding" establishing Walmart's duty to warn her about "the criminal history and propensity for violence of Martin the rapist." Not so. The passage in question is neither a holding, nor even dicta. Instead, it is an observation: "The Restatement Third of Torts identifies several special relationships that *may* support a duty to protect against foreseeable risks. In addition to the common carrier and innkeeper relationships previously mentioned, the list includes a business or landowner with invited guests, a landlord with tenants, a guard with those in custody, an employer with its employees, and 'a school with its students.' (Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, subd. (b).)" (*Regents, supra*, 4 Cal.5th at p. 620, italics added.) We assume Doe's description of Martin as a "rapist" is hyperbole, because no evidence showed Martin was charged with or convicted of raping Doe, and Doe did not allege or show Martin ever raped anyone else. [8] Martin's past record, therefore, gave Walmart no basis to suspect Martin harbored a propensity for sexual violence.

8 Our review of our opinion affirming Martin's underlying criminal conviction shows Martin was charged with forcible oral copulation (count 1), sexual penetration by a foreign object and force (count 2), and possession of a controlled substance (count 3). A jury found him guilty of counts 1 and 3, and guilty of the lesser included offense of assault on count 2. In a bifurcated proceeding,

> the jury found true defendant had two prior strikes and two prior serious felony convictions. (*People v. Olin Johnston Martin, Jr.* (June 22, 2016, G050805 [nonpub. opn.]), slip opn., pp. 2, 5.)

***10** Furthermore, *Regents* established a university's duty to protect its students as regards curricular activities such as a chemistry lab, not extracurricular activities. Thus, in *Regents* the Supreme Court concluded a university has a "special relationship" (analogous to the common carrier/passenger or innkeeper/guest relationships) with its students in its classrooms, and "activities that are tied to the school's curriculum," that gives rise to a duty to warn them about or protect them from foreseeable acts of violence. (*Regents, supra,* 4 Cal.5th at pp. 613, 620, 627.) "The duty we recognize here is not owed to the public at large but is limited to enrolled students who are at foreseeable risk of being harmed in a violent attack *while participating* in curricular activities at the school." (*Id.* at p. 633, italics added.) In defining this relationship, the court concluded a university reasonably could foresee that a negligent failure to control a potentially violent student could result in harm. (*Id.* at p. 629.) Even so, the Supreme Court did not make any determination whether UCLA was or should have been on notice that the particular third party malefactor in the case posed a foreseeable risk of violence, noting that prior threats or violent acts, or other observations of the third party's behavior by UCLA, would determine the standard of care and its breach, if any. (*Id.* at pp. 630, 634.)

Justice Chin's concurrence in *Regents* took issue with the majority's extension of a university's duty to warn or protect its students from foreseeable acts of violence " 'in the classroom,' " which was the factual background in the case, to all " 'curricular activity.' " (*Regents, supra,* 4 Cal.5th at p. 635 (conc. opn. of Chin, J.).) "[A]ctivities outside the classroom differ in potentially significant ways from activities inside the classroom. As the majority explains, among the relevant factors is the extent of the defendant's control in the particular setting over the environment and third party behavior. [Citation.] As the majority also explains, '[p]erhaps more than any other place on campus, colleges can be expected to retain a measure of control over the classroom environment.' [Citation.] Implicit in this statement is recognition that the extent of a university's control over the environment and student behavior is likely to be considerably less outside of the classroom. Indeed, the extent of a university's control in a nonclassroom setting varies considerably depending on the particular activity and the particular setting." (*Id.* at pp. 635-636 (conc. opn. of Chin, J.).)

Similar observations are apropos in the employer-employee relationship, where the question is premised on an employer's assumed ability to protect and warn its employees regarding third parties when neither the employee or criminal co-employee is physically present in the workplace. A university is able to — undeniably, expected to — maintain full control of its classroom environments. Indeed, the *Regents* court emphasized that students' extra-curricular activity cannot reasonably be controlled by a university and, consequently, there is a limit to a university's duty to protect and warn its students. (*Regents, supra,* 4 Cal.5th at p. 627 ["The special relationship we now recognize is ... limited. It extends to activities that are tied to the school's curriculum but not to student behavior over which the university has no significant degree of control."])

Although the relationship between a university and its students is qualitatively different, a similar argument may apply to a retailer like Walmart and its ability to control the workplace environment. But even assuming such an ability, when a retailer's employees leave the workplace, or engage in activities outside the workplace, its ability to retain control of their behavior is diminished, if not extinguished. As such, any general, nonspecific duty to protect or warn its off-duty employees becomes less feasible. Simply put, Walmart cannot control what employees do when they leave work, or during their time away from the job.

III.

CONCLUSION

In performing our de novo review, we have viewed the evidence in a light favorable to Doe as the losing party, liberally construed her evidentiary submissions while strictly scrutinizing Walmart's own showing, and resolved any evidentiary doubts or ambiguities in Doe's favor. Even giving Doe the benefit of these favorable rules of construction, we conclude the record lacks specific facts to show that Walmart's alleged negligent hiring, retention, or supervision of Martin — or its failure to discover and warn her of his criminal history — breached a recognizable duty of care. Moreover, assuming such shortcomings, they were not an actual, legal cause of the injuries inflicted on her by Martin. In other words, Walmart showed Doe had not established, and could

not reasonably expect to establish, a prima facie case of either duty or causation in this case. (Cf. *Saelzer, supra,* 25 Cal.4th at p. 769.)[9]

9 Because we resolve this appeal on the basis of Doe's failure to establish duty and causation, we do not resolve the parties' dispute over the adequacy of Walmart's employee background check protocol, or whether Walmart could have (let alone should have) lawfully conducted a more full-blown criminal background check before hiring Martin, or for that matter any potential employee — whether full-time, part-time, summer, or holiday/seasonal. The issue of the appropriate standard of care assumes a duty exists and is fundamentally a question of whether that duty was breached. On the facts before us, it is an issue we need not resolve. (Cf. *Regents, supra,* 4 Cal.5th at p. 634.)

***11** In making this determination we do not minimize Doe's injuries, nor the damages she has suffered because of Martin's odious criminal activity. Indeed, Martin is currently serving a 35-years-to-life prison sentence for his crimes. Our holding is narrow: On the facts before us, Doe failed to show a disputed material issue of fact on crucial elements of both of her causes of action so as to establish Walmart is responsible for Martin's crimes.

IV.

DISPOSITION

The trial court's judgment following granting Walmart's motion for summary judgment is affirmed. Walmart is entitled to recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

WE CONCUR:

BEDSWORTH, ACTING P.J.

GOETHALS, J.

All Citations

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United States District Court, D. Massachusetts.

Elisabeth DOHERTY, Plaintiff,
v.
AMERICAN INTERNATIONAL COLLEGE,
Defendant.

Civil Action No. 17-cv-10161-IT
|
Signed 03/31/2019

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MEMORANDUM & ORDER

Indira Talwani, United States District Judge

***1** Plaintiff Elisabeth Doherty, who alleges that she was raped while she was a student, brought this action against Defendant American International College ("AIC"). AIC's Motion for Summary Judgment [#41] is now before the court. After review of the parties' arguments and the evidence presented, AIC's motion is ALLOWED.

At the outset, the court notes what this case does and does not address, and the framework within which this case must be decided. The complaint does not assert claims directly against Doherty's assailant, and is not an appeal of AIC's decision on such claims. Instead, the suit asserts that AIC violated Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688, by failing to respond promptly and appropriately to her report that she was sexually assaulted. On summary judgment, the court assumes that Doherty was indeed raped by her fellow student, but nonetheless must decide the federal claim for damages from AIC in the context of the purpose and scope of Title IX.

Title IX provides, in pertinent part, that "no person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX's primary purpose is "to prevent recipients of federal financial assistance from using [federal] funds in a discriminatory manner." Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). Although Title IX does not expressly provide a private right of action, the Supreme Court has held that Title IX's legislative scheme contains the landmarks of an implied private remedy for offending discrimination. See Cannon v. University of Chicago, 441 U.S. 677, 717, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, Title IX does not explicitly provide for monetary damages. The Supreme Court has recognized that monetary relief may be available in limited circumstances. See Gebser 524 U.S. at 287, 118 S.Ct. 1989 ("Whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds."); id. at 292, 118 S.Ct. 1989 ("Until Congress speaks directly on the subject, ... we will not hold a school district liable in damages under Title IX ... absent actual notice and deliberate indifference."); see also Davis v. Monroe Cty Bd. of Educ., 526 U.S. 629, 643, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) ("We consider here whether the misconduct identified in Gebser—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in limited circumstances, it does."). Accordingly, a damages recovery against the college is available only when such a remedy will not "frustrate the underlying purpose of the legislative scheme," Cannon 441 U.S. at 703, 99 S.Ct. 1946, namely in cases in which the funding recipient was deliberately indifferent to known acts of discrimination.

***2** With this framework in mind, the court proceeds to the facts in this case.

I. Factual Background[1]

Background

Doherty was a student at AIC from August 2012 through 2014. Def.'s Rule 56.1 Statement (Def.'s SOF) ¶ 1 [#43]. During this time, the college had written policies which prohibited sexual assault, and provided a procedure for reporting incidents and a disciplinary process for resolving sex discrimination complaints against students (hereinafter, "Title IX Policies"). Id. ¶ 2. AIC provided its Title IX Policies and alcohol policies to its students. Id. ¶ 11. At the time in question, Nicole Cestero was the Senior Vice President of Human Resources and Title IX Coordinator at AIC and Mathew Scott was the Dean of Students and the Deputy Title IX Coordinator. Id. ¶¶ 4, 7.

During her junior year, Doherty was living in a dormitory on campus ("the Dorm"). Id. ¶ 12.

August 30, 2014

In the early morning hours on Saturday, August 30, 2014, Doherty was in her suite with several other students, including, "Respondent,"[2] an AIC student who lived on Doherty's floor. Id. ¶¶ 13, 15. After Respondent left the suite, he sent Doherty a text message asking if she wanted to come to his room "to chill." Id. ¶ 16. Doherty agreed to go over. Id.

While she was in his room, Respondent took Doherty's clothes off her and raped her while Doherty pleaded with him to stop. Id. ¶ 18. Def.'s SOF Ex. 27 (Hearing Transcript) 3:14-4:17, 5:15-17 [#43-42]. Doherty tried to make noise but was unable to because Respondent pressed his body on her face. Pl.'s SOF ¶ 20 [#52]; Hearing Transcript 4:16-22 [#43-42]; Def.'s SOF Ex. 8 (Investigation Report) 2 [#43-23]; Def.'s SOF Ex. 9 (Doherty's Written Statement) 2 [#43-24]. At some point during the incident, Respondent got off Doherty, during which time she was able to put back on her clothes, fight off his efforts to grab her, and run out of his room. See Pl.'s Resp. to Def.'s Rule 56.1 Statement (Pl.'s SOF) ¶ 18 [#52] ¶¶ 21-27 [#52]; Hearing Transcript 5:14-20 [#43-43]; Def.'s SOF Ex. 1 (Doherty Dep.) 57:4-20 [#43-1].

Doherty woke up her suitemates, and told them that Respondent had raped her. Pl.'s SOF ¶ 29 [#52]; Doherty Dep. 58:12-59:7 [#43-1]; see also Investigation Report 9 [#43-23]; Doherty's Written Statement 3 [#43-24]; Def.'s SOF Ex. 10 (JK Statement) [#43-25]; Def.'s SOF Ex. 11 (EM Statement) [#43-26]; Def.'s SOF Ex. 12 (SD Statement) [#43-27]. Approximately twenty minutes later, Doherty went with her suitemates to the Campus Police and reported the rape. Pl.'s SOF ¶ 30 [#52].

***3** The Campus Police contacted Cestero, who arrived on campus within 30-45 minutes. Id. ¶ 31-32. The Responding Officer secured the Title IX Victims' Rights form from Doherty and written witness statements from Doherty and her suitemates. Id. ¶ 31. Cestero explained her role as Title IX Coordinator to Doherty and offered her water, a blanket, a professional counselor to speak with, and another place to rest. Cestero also informed Doherty that there were services available to her, including the College's counseling center and off campus resources. Id. ¶ 33. Cestero asked Doherty for a verbal statement, which Doherty provided. Id. ¶ 32. Cestero explained to Doherty her Title IX rights and reviewed the Victims' Rights form with her, and informed Doherty that she could file a formal complaint though the College's Title IX procedure and press criminal charges with the police. Id. ¶ 33.

After meeting with Doherty, police officers went to Respondent's room and transported him to the Campus Police station for an interview with the Police Chief and Cestero. Id. ¶ 38. Respondent denied raping Doherty. Id. The Chief gave Respondent a trespass notice and Respondent left campus with his mother.

The ensuing week

A couple of days after their initial contact, Cestero called Doherty to check on her well-being and advised that they should remain in touch. Id. ¶ 39.

On September 3, 2014, Doherty informed Cestero that she had decided to proceed with a formal complaint against Respondent. Cestero answered various questions that Doherty had about the College's complaint process and informed her that because the College could not completely trespass him until the outcome of the investigation, Respondent would be permitted on campus only to attend classes and football practice.[3] Cestero explained that Respondent would be prohibited from contacting Doherty for any reason in any manner, and that the College would provide her with needed support. Id. ¶ 41. The next day, Respondent was verbally informed of the formal complaint against him and told he was to have

no contact with Doherty. Id. ¶ 43. The College issued him a written no contact/no trespass order, alerting him that a violation of the order would be grounds for his immediate removal and potential dismissal from the College. The College made Doherty aware of the order and its terms. Id. ¶ 44.

September 8-9, 2014

On September 8, 2014,[4] Doherty reported to Campus Police that she saw Respondent walk into the Dorm. Campus Police immediately went to the Dorm to try to find Respondent and serve him with a new trespass notice. Campus Police were unable to locate Respondent but continued to make periodic checks of the Dorm and ensured that all Resident Hall Assistants were informed. Id. ¶ 45. Campus Police also went to the football field and spoke with the Head Coach, who stated that Respondent was not there. Id. ¶ 46.

Doherty emailed Cestero that same day, stating that she was upset about having seen Respondent entering the Dorm, and asking Cestero to confirm the details of Respondent's no contact order "ASAP." Id. ¶ 47. Cestero responded the next morning and confirmed that Respondent was only permitted to be on campus to attend classes and football practice; he was not permitted in the dormitories. Id. ¶ 48. A few hours later, Cestero sent Doherty another email that Respondent stated to Cestero that he would not be returning to AIC for the fall semester. Id. ¶ 49.

Cestero mailed Respondent an updated no contact/no trespass order to his home out of state. Id. ¶ 50. The order prohibited Respondent from entering any AIC dorms pending the investigation and reminded him that a violation of the order would be grounds for dismissal from the College. Id. ¶ 50.

***4** After that, Doherty never saw Respondent again. Id. ¶ 51.

Interim Accommodations

In accordance with its Title IX Policies pertaining to victims of sexual assault, AIC provided Doherty interim accommodations, including academic accommodations and counseling services. Id. ¶ 40. When Doherty resumed taking classes and returned to classes a few days later, she was provided counseling from the on-campus counseling center. Id. ¶ 52.

The Investigation, Hearing and Appeal

Cestero assigned two individuals to investigate Doherty's formal complaint. Both investigators had received Title IX training, including how to conduct investigations in cases alleging student-on-student sexual assault. Id. ¶ 54. The investigators interviewed ten students, including Doherty and Respondent, took photographs of the scene, reviewed evidence, and prepared a written investigation report to be provided to the Sexual Misconduct Hearing Board (the "Hearing Board"). Id. ¶ 55. The investigation report did not conclude whether Respondent should be found responsible for violating any College policy. Id. ¶ 56.

Six days prior to the hearing on her complaint, Doherty was informed of the prehearing process, and that parties could request witnesses to testify on their behalf. Id. ¶ 58. The board chair, Matthew Scott, answered all of Doherty's questions and explained to her that Respondent had the right to be present at the hearing, but that Doherty also had the right to reasonable accommodations to make her feel comfortable. Id. ¶ 59. Scott also offered to have a police officer present at the hearing. Id. Doherty did not request any accommodations for the hearing or that any witnesses to testify on her behalf. Id.

Respondent did not attend the hearing. Doherty presented her account to the Hearing Board, answered their questions to the best of her ability, and was given the opportunity to ask questions and make a closing statement. See id. ¶¶ 61, 63. Immediately after the hearing, the Board deliberated and unanimously decided that the Hearing Board was unable to find by a preponderance of the evidence that a sexual assault had occurred. Id. ¶ 64. Doherty was informed of the Hearing Board's decision the next day and was provided information on how to appeal. Id. ¶ 65.

Doherty appealed the Board's decision. Id. ¶ 66. AIC's Executive Vice President for Administration, Mark Berman, handled the appeal and determined that Doherty had not provided any new information related to the case, and that the Hearing Board made no substantial procedural error that might have affected its decision. Id. ¶ 67; Def.'s SOF Ex. 30 (Appeal Denial) [#43-45]. On November 18, 2014, Berman sent a letter to Doherty explaining in detail the reasons that he was denying her appeal. Doherty Dep. 144:17-21 [#43-1]; Appeal Denial

[#43-45].

Doherty's Withdrawal from AIC

The same day that she received the Hearing Board's determination, Doherty requested to withdraw from AIC. Id. ¶ 69. While her appeal was pending, Doherty requested that her withdrawal be changed to a leave of absence for the Fall 2014 semester, and AIC granted Doherty's request. Id. ¶¶ 70, 71. Doherty did not return to AIC and officially withdrew in January 2015. Id. ¶ 72.

II. Summary Judgment Standard

***5** Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is 'genuine' if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is 'material' if it has the potential of determining the outcome of the litigation." Baker v. St. Paul Travelers, Inc., Co., 670 F.3d 119, 125 (1st Cir. 2012) (quoting Scottsdale Ins. Co. v. Torres, 561 F.3d 74, 77 (1st Cir. 2009)). All reasonable inferences must be drawn in favor of the non-moving party, but the non-moving party cannot survive summary judgment by "rest[ing] merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

III. Analysis

In Count 1, Doherty alleges that AIC violated Title IX by failing to act or by acting with deliberate indifference in response to her report of sexual assault, thereby creating a hostile education environment and depriving her of access to education. Compl. ¶¶ 56–80 [#1]. In Count II, Doherty alleges that AIC was negligent in failing to protect her from sexual assault and failing to enforce AIC's sexual assault policies. Id. ¶¶ 81–93. In Counts III and IV, Doherty alleges that AIC's response negligently and intentionally inflicted emotional distress. Compl. ¶¶ 94–114.

A. Count I: Title IX

Doherty alleges that AIC failed to investigate her sexual assault in any meaningful way, and that AIC's procedures for handling sexual assault complaints inequitably placed the burden of proof on the complainant. Compl. ¶¶ 61–79 [#1]. Doherty claims that, as a result, AIC's response to her report was clearly unreasonable and systematically denied her the means to achieve a prompt and equitable resolution of her complaint. Id. ¶¶ 74–80.

To establish a Title IX claim, Doherty must prove that AIC: (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive, that it (4) deprived Doherty access to the educational benefits or opportunities provided by the school. See Davis, 526 U.S. at 651–54, 119 S.Ct. 1661. Deliberate indifference in the case of student-on-student harassment requires that the school's "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." Porto v. Tewksbury, 488 F.3d 67, 73 (1st Cir. 2007) (quoting Davis, 526 U.S. at 644, 119 S.Ct. 1661). The "clearly unreasonable" standard is a stringent one intended to afford flexibility to school administrators. Davis, 526 U.S. at 648, 119 S.Ct. 1661 (declining to impose liability under a negligence or mere "reasonableness" standard). The Title IX plaintiff must show that the educational institution either subjected or caused the student to be subjected to the sexual harassment, or made the student vulnerable to it, id. at 644–45, 119 S.Ct. 1661, either by "refus[ing] to take action to bring the [institution] into [Title IX] compliance," or by making "an official decision ... not to remedy the violation," Gebser, 524 U.S. at 290, 118 S.Ct. 1989. While a university may not avoid liability under the deliberate indifference standard simply by "act[ing] in some way in response to reported sexual harassment," Leader v. Harvard Bd. of Overseers, No. 16-10254-DJC, 2017 WL 1064160 (D. Mass. Mar. 17, 2017), "Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, [or] to craft perfect solutions." Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 174 (1st Cir. 2007), rev'd on other grounds, 555 U.S. 246, 129 S.Ct. 788, 172 L.Ed.2d 582, (2009). "A school satisfies its obligations if it engages in a reasonable process for investigating and

addressing claims of sexual harassment." Doe v. Emerson College, 271 F.Supp.3d 337, 356 (D. Mass. 2017).

1. Training

***6** Doherty directs the court to AIC's Title IX training materials for its Title IX administrators. First, AIC's May 29, 2013, and June 26, 2013, trainings included a PowerPoint slide entitled "Investigation: Equitable Process Part III." Def.'s SOF Ex. 6C (May and June 2013 Title IX Training) 29 [#43-9]. The slide summarizes the complaint in Bleiler v. College of Holy Cross, a case in which a male student accused of sexual misconduct sued his college for allegedly violating his civil rights after the college expelled him following a disciplinary hearing. See id. The next slide, entitled "Claims/Liability" states that "students accused of a sexual assault are just as likely to sue the institution as the accusing student." Id. at 30. Four slides later, a slide labeled "Lessons Learned, Con't," includes a bullet point stating "S[eparate other punishable behavior] of the perpetrator or the victim, such as alcohol or drug consumption, from the alleged assault." Id. at 34. Doherty argues that this training influenced the Hearing Board to construe the Title IX procedures in favor of male students accused of rape and indicates the school's bias and preferential treatment towards male students because "intoxication 'increase[s] the incidence of a variety of aggressive acts, including *sexual* and physical assaults." Pl. Opp'n to Def.'s Mot. for Summ. J. ("Pl's Opp'n") 12–13 [#51] (quoting Pl.'s SOF ¶ 75 [#52]) (emphasis in original).

Second, Plaintiff points to a case study in AIC's Title IX training on September 30, 2014, and October 9, 2014, arguing that it was "particularly designed to diminish Plaintiff's account of her rape, and prejudicially influence the hearing board to erroneously construct a narrative that Plaintiff had actually consented to intercourse." Pl.'s Opp'n 13 [#51]. The case study describes a situation in which a female student, Jane, was watching a movie with a male student, John, and "one thing led to another, and the next thing she knew her pants were off. John put on a condom and began penetrating her when there was a knock on the door. She told John to stop but he did not." Def.'s SOF Ex. 6D (September-October 2014 Title IX Training) 8-10 [#43-10]; Pl.'s SOF ¶ 74 [#52]. The training materials then asked the audience to answer five questions, including "[w]hat factors will you rely upon to assess the credibility of Jane, John and other witnesses?" and "[w]hat other evidence should you obtain and how will you go about obtaining it." Id. at 10. Doherty argues that this case study, included in the training a month before her sexual assault hearing, is "suspiciously identical" to her rape, but misconstrues the facts so that it appears that she consented to intercourse. Pl.'s Opp'n 13-14 [#51]. She alleges that the training was used to improperly influence the Hearing Board members and minimizes the violent and disturbing nature of her rape. Id.

"Some courts have found that that a school can be liable for an 'official policy ... of deliberate indifference to provide adequate training or guidance that is *obviously* necessary for implementation of a specific program or policy of the recipient.' " Emerson Coll., 271 F.Supp.3d at 356 (quoting Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178 (10th Cir. 2007)) (emphasis added). The First Circuit has not directly addressed what constitutes deliberate indifference to properly train in the Title IX context, but at least one court in this district has articulated that "the question is not whether the relevant [school] administrators could have been trained better, but whether a reasonable juror could conclude on the evidence that any inadequacies in training were *so deficient* that they constituted 'encouragement of the harassing conduct' or otherwise amounted to deliberate indifference." Id. (quoting Simpson, 500 F.3d at 1177) (emphasis added).

Doherty has not shown how the identified training materials could lead a reasonable jury to conclude that AIC's training of the relevant officials was *obviously* deficient as to constitute a deliberate indifference to provide its Title IX administrators proper training.[5] The PowerPoint slide in the May and June 2013 training presentation that discusses the complaint in Bleiler is followed by a number of slides entitled "Lessons Learned," in which AIC advised its Title IX administrators to "promptly investigate sexual assault complaints," "understand and coordinate how local police, campus police and student discipline will respond to sexual assaults," "document the initial meeting with the victim," and "refrain from concluding that an assault did (or did not) occur in a report." May and June 2013 Title IX Training 28-29 [#43-9]. When viewed in context, AIC's reference to Bleiler was properly being used to teach administrators to be impartial in their investigations, not to favor male students. See id.

***7** Nor does AIC's guidance to Title IX administrators in

the 2013 training to "separate other punishable behavior ... such as alcohol or drug consumption[ ] from the alleged assault" show deliberate indifference. Neither the training nor AIC's sexual misconduct policy is gender-specific. Notably, both AIC's 2012-2013 and 2013-2014 Student Handbooks define "sexual misconduct" as "inappropriate physical touching, sexual exploitation and sexual intercourse without consent, as well as other forms of sexual violence," and state that "[s]exual misconduct can be committed by males or by females, and it can occur between people of the same or different sex." Def.'s SOF Ex. 3 (2012-13 Student Handbook) 8 [#43-3]; Def.'s SOF Ex. 4-5 (2013-14 Student Handbook) 4-5 [#43-4]. Moreover, contrary to Doherty's assertion that administrators are taught to "disregard" alcohol consumption, Pl.'s Opp'n 13 [#51], the training instructs Title IX administrators to separate from the sexual assault investigation—not ignore—alcohol use by "the perpetrator *or the victim*," regardless of gender. See May and June 2013 Title IX Training 34 (emphasis added) [#43–9].[6]

The evidence further shows that AIC used the challenged hypothetical—which does not state that the encounter was consensual—to teach administrators to evaluate claims of consent by making credibility determinations based on "the totality of the circumstances," including the "level of detail and consistency, existence or absence of corroborative evidence, prior bad acts and/or prior false reports, reaction or behavior after the alleged incident, behavioral changes ... demeanor, interest, bias, motive, detail, corroboration, common sense." September and October 2014 AIC Title IX Training 11-13 [#43-10]. Doherty does not show how AIC's use of a hypothetical encourages assaultive behavior, see Doe, 271 F.Supp. at 357, or makes students more vulnerable to sexual harassment, see Fitzgerald, 504 F.3d at 172-73. Indeed, by including a hypothetical that begins with a consensual encounter but then includes a directive to "stop," the training material would more likely help administrators understand that consent may be withdrawn.

Nor has Doherty shown that she was prejudiced by the training. The mere fact that the Hearing Board did not find her credible is insufficient to show such prejudice. See, e.g., Emerson Coll., 271 F.Supp.3d at 357 ("Doe makes a variety of conclusory allegations about the alleged inadequate training, but offers little by way of specifics, and has not shown any alleged deficiencies cause any actual harm."). A "[p]laintiff has no right to a particular remedy; instead the University is entitled to latitude in determining what constitutes a reasonable response." Wyler v. Conn. State Univ. System, 100 F.Supp.3d 182, 195 (D. Conn. 2015) (citing Davis, 526 U.S. at 648–49, 119 S.Ct. 1661 ("We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.... School administrators will continue to enjoy the flexibility they require.")).

Accordingly, Doherty has failed to show how AIC's training constituted deliberate indifference.

2. Response to Title IX Complaint

Doherty next contends that a reasonable jury could find that AIC's response to her formal complaint were so unreasonable that AIC denied her an equitable resolution of her claim of sexual assault. Pl.'s Opp'n 14-20 [#51].

a. Investigation

"[A] school will not be held liable for deliberate indifference if it takes 'timely and reasonable' measures to address the harassment." Emerson Coll., 271 F.Supp.3d at 354 (quoting Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999)). cf. Doe v. Oyster River Co-op School Dist., 992 F.Supp. 467 (D.N.H. 1997) (to prove a Title IX claim, plaintiff must show that school district failed to take steps reasonably calculated to end harassment that it knew of) (citing Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1988)). "The test is objective—whether the institution's response, evaluated in light of the known circumstances, is so deficient to be clearly unreasonable." Fitzgerald, 504 F.3d at 174.

***8** The undisputed facts show that AIC's investigation was not clearly unreasonable. AIC quickly responded to Doherty's report that she had been raped, gathered statements from Doherty, Respondent, and witnesses, and ensured that Doherty was aware of her rights and provided with the resources and accommodations that she needed. See Pl's SOF ¶¶ 31-33, 36, 39, 40-42, 52, 55 [#52]. AIC further issued Respondent a trespass notice

and no contact order, prohibiting him from contacting Doherty, id. ¶¶ 38, 41, 43; Def.'s SOF Ex. 18 (No contact/No Trespass Order) [#43-33], and quickly and appropriately responded to Doherty's report that she saw Respondent in the Dorm. See Pl.'s SOF ¶ 45-49 [#52]; see also Def.'s SOF Ex. 22 (Modified No Contact/No Trespass Order) [#43-37]. Two investigators interviewed ten students, took photographs of the scene, reviewed evidence, and prepared a written investigation report. Id. ¶ 55. And, Doherty herself acknowledges the timeliness of AIC's response to her complaint. Pl.'s Opp'n 8, 11 [#51].

The court is not confronted with the more difficult situation where the assailant remained on campus, inflicting (or potentially inflicting) further harm on the victim and subjecting her to further emotional vulnerability. Nor was there additional harassment or threat of harassment to Doherty after AIC received notice of the rape and began to act. The court is sympathetic to the trauma Doherty suffered as a result of her sexual assault, but this Title IX action can remedy only harm caused by AIC's post-notice actions, and not the sexual assault itself.

Although AIC's investigation and hearing process did not result in the resolution that Doherty desired, "Title IX does not guarantee that an investigation will yield the outcome that a complainant desires." Doe v. Emerson Coll., 271 F.Supp.3d at 355. Even if the investigation questions could have been better, "the school's prompt commencement of an extensive investigation and its offer of suitable remedial measures distinguish this case from cases in which courts have glimpsed the potential for a finding of deliberate indifference." Fitzgerald, 504 F.3d at 174 (citing as examples Vance v. Spencer County Public Sch. Dist., 231 F.3d 253, 262 (6th Cir. 2000) (school district failed to "take any action whatsoever" besides talking to alleged perpetrator of harassment), and Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1244, 1247 (10th Cir. 1999) (school principle "refused to investigate" an allegation of sexual harassment)).

b. The Hearing

Doherty contends that the investigators and Hearing Board, despite knowing the effects of trauma on rape victims' memories, unreasonably discredited her because of her inconsistent recollection of the sexual assault. Pl's Opp'n 14-15 [#51]. Title IX does not require "that complainants be deemed credible, simply because they are complainants," Doe v. Emerson Coll., 271 F.Supp.3d at 355, and courts must "refrain from second-guessing the disciplinary decisions made by school administrators." Davis, 526 U.S. at 648, 119 S.Ct. 1661 (citing New Jersey v. T.L.O., 469 U.S. 325, 342-43, n.9, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)). Here, no reasonable jury could determine that the Hearing Board failed to consider the traumatic effect of the sexual assault because they questioned her about her inconsistent statements about the sexual assault.

Nor does Doherty provide any support for her assertion that asking credibility questions of a sexual assault complainant denies that complainant an equitable resolution. Pl's Opp'n at 17 [#51]. Doherty alleges that the hearing was so poorly executed that it failed to provide the equitable grievance procedures that Title IX requires, see 34 C.F.R. § 106.8, but the record reflects that the Hearing Board chair answered any questions that she had about the Title IX hearing process, Pl.'s SOF ¶ 59, offered her reasonable accommodations to make her feel safe, id., allowed her to come in and read all relevant reports and statements prior to the hearing, id. ¶ 60, allowed her to present her account of the incident and gave her the opportunity to ask questions, id. ¶ 61, informed her that regardless of the outcome, the college wanted to make her feel comfortable, id. ¶ 62, and gave her the opportunity to make a closing statement, id. ¶ 63. Her right to appeal the Hearing Board's decision was also explained to her, and she availed herself of that right. Id. ¶¶ 65-67.

***9** The Hearing Board determined that it could not conclude that assault occurred by a preponderance of evidence. Def.'s SOF ¶ 64 [#43]. This is not an appeal of that decision; courts must respect a school's flexibility in responding to student against student harassment as long as the school's response is not "clearly unreasonable in light of the known circumstances." Davis, 526 U.S. at 648, 119 S.Ct. 1661; see also id. ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators."); see also Tubbs v. Stony Brook Univ., 343 F.Supp.3d 292, 316 (S.D.N.Y. 2018) ("Indeed the [Office of Civil Rights 2011 "Dear Colleague Letter"] and case law advise[s] courts to defer to schools' internal procedures, and to even pardon noncompliance, so long as schools otherwise demonstrate attentiveness to the issue."); id. (finding that although grievance procedure may have been "flawed and imperfect ... no reasonable juror could find that University

Defendants violated their barebones Title IX obligations"). Doherty has not shown that asking questions to make a credibility determination is clearly unreasonable.

Doherty next contends that AIC's policy to "separate ... alcohol or drug consumption[ ] from the sexual assault" is discriminatory against victims because it bolsters witnesses' credibility and disproportionately favors perpetrators. May and June 2013 Title IX Training 34 [#43-9]; see Pl.'s Opp'n 14–17 [#51]. Doherty argues that the policy was implemented "so inartfull[y] as to render it clearly unreasonable" "because it disproportionately favors [Respondent], despite the fact that Defendant clearly recognizes even [l]ow to moderate doses of alcohol ... increase the incidence of sexual and physical assault.' " Pl.'s Opp'n at 16 [#51] (internal quotation marks omitted).

Although neither the Supreme Court nor the First Circuit have established a standard for evaluating a Title IX claim that a school's disciplinary procedures are discriminatory, the court uses here the Second Circuit's standard requiring "evidence 'cast[ing] some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and indicating that "gender bias was a motivating factor.' " Doe v. Trs. of Boston Coll., 892 F.3d 67, 90 (1st Cir. 2018) (quoting Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994)).[7]

Doherty cannot show a "a causal connection between the outcome of [the Hearing Board proceedings] and gender bias because she has not shown 'particular circumstances suggest[ing] that gender bias was a motivating factor.' " Id. at 91 (quoting Yusuf, 35 F.3d at 715). Doherty acknowledges the reasonableness of the challenged policy on its face, implemented to encourage witnesses to come forward without fear of being punished. Pl's Opp'n 15 [#51]. As the court has previously mentioned, see supra Section II(B)(1), the alcohol-separation policy is a gender neutral one, and was not clearly unreasonable or motivated by a gender bias.[8]

Title IX's purpose is not to ensure that the Hearing Board ultimately reached the correct result, but rather whether AIC took reasonable measures to protect Doherty from harassment for which it had notice. See Gebser, 524 U.S. at 298-93, 118 S.Ct. 1989 (finding school district not liable under Title IX for sexual harassment by a teacher of which it had no actual notice). Although the court acknowledges the trauma Doherty suffered as a result of her sexual assault, and urges AIC and other educational institutions to take vigorous steps to eliminate such incidents, Doherty has not shown that AIC violated its Title IX obligations in this case.

***10** AIC's Motion for Summary Judgment [#41] is ALLOWED as to Count I.

B. Claims under State Law

Doherty alleges that AIC was negligent in protecting its students from sexual assault due its lax enforcement of its alcohol policy, and that this negligence caused her emotional distress. Compl. ¶¶ 94–103 [#1]).

1. Count II: Negligence

Doherty argues that AIC breached its duty to its students by "fail[ing] to take reasonable precautions to safeguard its students, and fail[ing] to follow the school's guidelines with respect to responding to reported sexual assaults perpetrated by AIC students." Id. ¶ 86. Doherty's allegations are based on the same claims underlying her Title IX challenge: that AIC's Title IX training taught AIC's faculty to disregard alcohol use during Title IX investigations and hearings. Pl's Opp'n 21-22 [#5]. In Doherty's failure-to-safeguard claim, she argues that "AIC's lax enforcement of its alcohol policy created an environment in which alcohol-induced misconduct was manifestly foreseeable, and [AIC] accepted it, ignored it, and allowed this type of misconduct to proliferate." Compl. ¶ 87 [#1].

"To state a negligence claim under Massachusetts law, a plaintiff must allege that (1) the defendant owed the plaintiff a duty of reasonable care; (2) the defendant breached that duty; (3) damage resulted; and (4) the defendant's breach caused that damage." Saldivar v. Racine, 818 F.3d 14, 20–21 (1st Cir. 2016). Plaintiff bears the burden of establishing each element of her negligence claim. See Jorgensen v. Mass. Port Auth., 905 F.2d 515, 522 (1st Cir. 1990); Doe v. Amherst Coll., 238 F.Supp.3d 195, 227-28 (D. Mass. 2017).

"Under Massachusetts law, a duty to prevent against the criminal conduct of a third party only arises where there is a special relationship between the parties and the criminal conduct is reasonably foreseeable." Amherst Coll., 238

F.Supp.3d at 228. Colleges and universities have the duty " 'to use reasonable care to prevent injury' to their students against the criminal acts of third parties[ ]" that were reasonably foreseeable to the college. Mullins v. Pine Manor Coll., 389 Mass. 47, 449 N.E.2d 331, 337 (Mass. 1983); see also Kavanagh v. Trs. of Bos. Univ., 440 Mass. 195, 795 N.E.2d 1170, 1178 (Mass. 2003). But, "[a]s to college administrators ... 'Massachusetts does not ... impose a common-law or statutory duty on administrators to enforce university policies.' " Amherst Coll., 238 F. Supp. at 228 (finding that the obligation to enforce university policies are created instead by contractual relationships between students and colleges).

Although negligence is usually a question for the jury, the court may decide the issue as a matter of law "when no rational view of the evidence warrants a finding that defendant was negligent." Mullins, 449 N.E.2d at 338. Here, Doherty has provided no evidence under Massachusetts law that establishes that AIC owed her the specific duties that she seeks to impose, or that AIC breached any such duty owed.

Doherty argues that by failing to appropriately train its faculty members, AIC breached its voluntarily assumed duty to provide her with an effective and equitable investigation and adjudication process for her report of sexual assault. However, the duty that Doherty seeks to enforce arises from AIC's contract with Doherty, and not under Massachusetts tort law. See Trs. of Boston Coll., 892 F.3d at 94 ("Because it is clear that Doe's disciplinary proceedings arose from this contractual relationship, we hold that B.C. did not owe the Does any additional independent duty outside of their existing contractual relationship. Any remedy for a breach of this contractual obligation must sound in contract, not in tort."); see also Doe v. Trs. of Bos. Coll., 2016 U.S. Dist. LEXIS 137777, 2016 WL 5799297, at *27 (D. Mass. 2016) ("[T]ort obligations 'are imposed by law, independent of the promises' of contractual duties." (quoting Treadwell v. John Hancock Mut. Life Ins. Co., 666 F.Supp. 278, 289 (D. Mass. 1987))). Moreover, even if AIC did have such an independent duty to follow its policies, Doherty has not shown how AIC's training constituted a failure to use reasonable care to prevent a foreseeable injury.

***11** Doherty's claim of AIC's "lax" enforcement of its alcohol policy fares no better. Massachusetts law "does not impose a legal duty on colleges or administrators to supervise the social activities of adult students, even though the college may have its own policies prohibiting alcohol or drug abuse." Doe v. Emerson Coll., 153 F.Supp.3d 506, 514 (D. Mass. Dec. 23, 2015) (citing Bash v. Clark Univ., 2006 WL 4114297, at *5 (Mass. Super. Ct. Nov. 6, 2006) (imposing no duty on a college to protect a freshman student from a drug overdose despite school policy against illegal drug possession)); see also, e.g., Driscoll v. Bd. of Trs. of Milton Acad., 70 Mass.App.Ct. 285, 873 N.E.2d 1177, 1185 (Mass. App. Ct. 2007) (school owed no duty in tort to 17-year old student for failing to prevent him from committing a sexual offense, even if the school monitoring of its facilities and teenage sexual activity was not adequate); Erickson v. Tsutsumi, No. CA199801842B, 2000 WL 1299515 (Mass. Super. Ct. May 17, 2000) (declining to extend the university's duty of care to protect student hit by a car while crossing the street outside of school's boathouse). Furthermore, aside from the single instance described, Doherty fails to provide any evidence of AIC's allegedly "lax enforcement" of its alcohol policy.

AIC's Motion for Summary Judgment [#41] is ALLOWED as to Count II.

2. Counts III: Negligent Infliction of Emotional Distress

"In order to recover for negligently inflicted emotional distress, a plaintiff [must] prove (1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case." Rodriguez v. Cambridge Housing Auth., 443 Mass. 697, 823 N.E.2d 1249, 1253 (Mass. 2005) (quoting Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171, 181 (Mass. 1982)).

Doherty's allegations of negligent infliction of emotional distress stem from the same allegations described in Counts I and II. Compl. ¶¶ 94-114 [#1]. As Doherty has failed to show that AIC was negligent, the court ALLOWS AIC's Motion for Summary Judgment [#41] as to Count III. See, e.g. Amherst Coll., 238 F.Supp.3d at 228-29 (allowing motion for judgment on the pleadings as to claim of negligent infliction of emotional distress where plaintiff failed to show that college owed her a duty, and therefore failed to establish negligence).[9]

IV. Conclusion

For the foregoing reasons, the court ALLOWS Defendant American International College's Motion for Summary Judgment [#41] as to each of Doherty's claims.

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 1440399

Footnotes

1 At summary judgment, the court views the record in the light most favorable to the non-moving party and draws all reasonable inferences in her favor. Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). However, the court does not accept "conclusory allegations, improbable inferences, and unsupported speculation." Sullivan v. City of Springfield, 561 F.3d 7, 14 (1st Cir. 2009).

2 Both Plaintiff and Defendant use "Respondent" "[t]o comply with AIC's obligation to protect the privacy of AIC's students." Def.'s SOF ¶ 13 n.2. The court proceeds accordingly.

3 Respondent was a member of the AIC football team. Compl. ¶ 6 [#1].

4 Although both Plaintiff and Defendant stated in their statements of fact that this occurred in 2015, the chronology of the remaining facts show that this was a typographical error and the report took place in 2014. See id. ¶ 45; Pl.'s SOF ¶ 45 [#52].

5 The individuals assigned to conduct the investigation and the Hearing Board members all attended Title IX trainings. The Chair of the Hearing Board, Matthew Scott, received his Title IX training "from other higher education institutions." Pl's SOF ¶ 8 [#52]. The other two members of the Hearing Board "both attended Title IX trainings in 2013 and 2014," id. ¶ 57, that are challenged by Plaintiff. The record is silent as to whether the investigators attended any of the challenged trainings, but reflects that one of the two investigators "attended an additional external Title IX training on September 19, 2014." Pl's SOF ¶ 54 [#52].

6 AIC's 2014 training specifically instructs Title IX investigators to "[e]valuate the effect of any alcohol use" when evaluating a claim of consent, and discusses the effects that alcohol may have in claims of sexual assault. September and October 2014 Title IX Training 13-14 [#43-10].

7 The First Circuit did not need to adopt a framework itself because the parties agreed to use the Second Circuit's standard. Id.

8 Gender-based disparities in the application of facially neutral policies may also constitute a viable claim under Title IX. See Cohen v. Brown Univ., 101 F.3d 155, 171 (1st Cir. 1996) ("Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination."). Doherty does not assert a "disparate impact" claim; however, to the extent that she sought to do so, she cites to no "competent evidence" and "specific facts that demonstrate the existence of an authentic dispute" to support a claim that AIC policies differently affect people based on gender. McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

9 In Count IV, Doherty alleged intentional infliction of emotional distress. In her Opposition, Doherty did not defend this claim, see Opp'n [#52], and at the hearing on AIC's motion, Doherty's counsel acknowledged that Doherty was abandoning the claim. Accordingly, AIC's Motion for Summary Judgment [#41] is ALLOWED as to Count 4.

End of Document

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United States District Court, D. Massachusetts.

Jillian DOHERTY, Plaintiff,
v.
EMERSON COLLEGE et al., Defendants.

No. 1:14-cv-13281-LTS
|
Filed 09/29/2017

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ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. NO. 101) AND MOTION TO STRIKE (DOC. NO. 116)

Leo T. Sorokin, United States District Judge

***1** Jillian Doherty sued Emerson College and Michael Arno, individually and as Emerson's Title IX investigator, asserting four claims: violation of Title IX against Emerson; and negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress against Emerson and Arno. Doc. No. 39. The claims arise from Emerson's response to a report by Doherty that she had been sexually assaulted on campus by another student. Defendants have moved for summary judgment on all counts, Doc. No. 101, Doherty has opposed, Doc. No. 111, and Defendants have replied, Doc. No. 115. The Court held a motion hearing on September 19, 2017. Doc. No. 123. For the reasons stated below, the Motion for Summary Judgment is ALLOWED. Defendants' Motion to Strike, Doc. No. 116, is DENIED AS MOOT.

I. FACTS

The Court describes the undisputed facts established by the record evidence and draws all reasonable inferences in Doherty's favor. When material facts are in dispute, the Court accepts Doherty's facts.

A. Doherty's Report and Emerson's Initial Response

Doherty entered Emerson College as a freshman in the fall of 2011. Doc. No. 103-2 at 4. She attended Emerson's orientation and received a copy of the student handbook. Id. at 5. The student handbook included information on Emerson's sexual assault policies, including safety measures, reporting violations, and the student disciplinary process; it also contained Emerson's alcohol policy. Doc. No. 103-6 at 5-6.

Doherty completed her freshman year and went home for the summer. Doc. No. 103-2 at 14. She spent the fall semester of her sophomore year studying abroad as part of an Emerson program. Id. at 15. She returned to Emerson's campus for the spring semester. Id. at 15.

At 1:00 AM on March 2, 2013, Doherty sent an e-mail to Robert Ludman, Dean of Students; Lee Pelton, President of the College; and Sharon Duffy, Associate Dean of Students, the relevant portions of which follow:

To Whom It May Concern:

> It has come to my attention that Emerson College has not taken significant action to protect the students of the Emerson Community.... I, as a member of the Emerson Community, demand that you and the college take immediate action to protect the students of this community....
>
> Also, I, too, have been raped on campus. I didn't say anything because I was too afraid, but the fact still stands that the statistics on rape and sexual assault at Emerson College are grotesque and severe. Please help us stop this.
>
> Thank you for your time,
>
> Jillian Doherty

Doc. No. 103-10 at 2. Doherty's e-mail was the first report she made to Emerson about the sexual assault. Doc. No. 103-2 at 18. Ludman responded at 11:04 AM the same day, about ten hours after Doherty's e-mail, offering support and advising Doherty of Emerson's resources that were available to her, including the Counseling Center, Center for Health and Wellness, and Campus Police. Doc. No. 103-10 at 2. Additionally, Ludman forwarded Doherty's e-mail to several administrators, including Arno and Alexa Jackson, Associate Vice President of Human Resources and Title IX Coordinator. Id. Jackson responded within a few hours to set up a meeting among the administrators to discuss Emerson's response to Doherty's e-mail. Doc. No. 103-11 at 2.

***2** Michael Arno was designated by Emerson to investigate Doherty's report. On March 5, 2013, he e-mailed Doherty:

> Dear Jillian,
>
> I hope this email finds you well. My name is Mike Arno and I work in the conduct office. I am contacting you today because Dean Ludman informed me that you reported being sexually assaulted on campus. I'm so sorry to hear that you had to experience this awful event.
>
> Given the nature of the information you shared, I would like to invite you to meet with me. I would like to meet just to make sure you are doing ok and to make sure you are aware of the services at Emerson that can support you. It would be great if you could propose a time that is convenient for you to meet with me after you return from break. If you are around this week and would like to meet that would be great as well.
>
> It is important to me and the College that we touch base, even if you wish not to share any details of your experience.
>
> I look forward to hearing from you.
>
> Sincerely,
>
> Mike Arno

Doc. No. 103-12 at 2. Doherty responded the next day, stating: "Thank you for reaching out to me. It means a lot that the Emerson community and faculty are being so supportive and responsive." Id. She noted her availability, and Arno responded to schedule a meeting for the following week, on the first Monday after the school break. Id.

On March 11, 2013, Doherty and Arno met in Arno's office. Arno explained to Doherty that, while she was encouraged to share the name of the assailant,[1] she was not required to do so. Doc. No. 103-2 at 20. Doherty shared the assailant's name with Arno, but said she did not want to pursue criminal charges or school conduct charges against him. Id.; Doc. No. 103-13 at 2. Doherty stated she did not feel threatened by the assailant. Doc. No. 103-13 at 2. She noted he was on a semester abroad and asked that Emerson meet with him before he returned to campus. Id. Arno reminded Doherty of the resources available to her at Emerson. Doc. No. 103-2 at 20.

The same day, Arno sent Doherty an e-mail summarizing their meeting and asking her to confirm that the summary was accurate. Doc. No. 112 at 13. She responded with two clarifications—the spelling of a witness's name and an additional detail—and confirmed that the meeting notes were otherwise accurate. Id. at 13-14; Doc. No. 103-2 at 21. Arno confirmed with Doherty that she did not feel threatened by the assailant at that time and that she was comfortable with the assailant having guest access to her dorm. Doc. No. 103-2 at 21. He also informed her that Emerson would begin a Title IX investigation, id., and that a Stay Away Directive would be put in place between Doherty and the assailant, Doc. No. 112 at 15. Arno forwarded his meeting summary to Ludman and Jackson. Id.

B. Emerson's Title IX Investigation

On March 26, 2013, Arno met with Doherty to update her on the status of the Title IX investigation. Doc. No. 103-2 at 22. He confirmed that Doherty was willing to cooperate in the investigation and explained Emerson's student conduct disciplinary process. Doc. No. 112 at 15. He verified that Doherty felt safe on campus at that point and that she believed she would feel safe when the assailant returned to campus. Id.

***3** The next day, Doherty sent Arno two Facebook conversations, the first from April 16, 2012, in which the assailant invited Doherty to his room,[2] and the second from April 26, 2012, in which Doherty confronted the assailant.[3] Doc. No. 103-7. Doherty told Arno that one of the assailant's roommates had seen her and the assailant after the incident, but that she could not remember the witness's name. Doc. No. 112 at 16. Arno e-mailed Doherty to set up a time to look at photographs of the assailant's roommates at the time to identify the witness; she subsequently reviewed the photos and identified the

individual she recalled seeing. Id.; Doc. No. 103-2 at 23.

On April 12, 2013, Arno e-mailed Doherty to update her on the investigation and confirm that he would interview the individual she had identified. Doc. No. 112 at 16. He notified her of the date on which he planned to inform the assailant of Doherty's report and the pending investigation, and said he would meet with the assailant when he returned to Boston the following week. Id.

Arno contacted the assailant on April 15, 2013, informing him that a report had been made about his conduct and asking to meet when he returned to Boston. Id. The assailant responded that he would be in Boston for only one day, on April 17, 2013. Id. On that date, Arno met with the assailant and gave him a copy of the Stay Away Directive, which prohibited the assailant from communicating with Doherty and barred him from entering Doherty's residence hall. Id. at 17. Arno also sent Doherty a Stay Away Directive. Id. The assailant left campus for the semester after meeting with Arno. Id.

***4** On April 19, 2013, Arno e-mailed Doherty to tell her he had met with the assailant, that they had a "positive" conversation, and that the assailant had left campus for the semester. Doc. No. 103-22 at 2. Arno wrote a summary of his investigation and shared it with Ludman and Jackson. Doc. No. 112 at 17. Arno questioned the veracity of Doherty's account of the events because Doherty's own witnesses, according to Arno, did not seem to support her account,[4] and, although the assailant did not deny the event, he claimed not to remember it. Doc. No. 103-24 at 2. Arno ultimately determined, after consulting Jackson, that a conduct hearing was warranted. Doc. No. 112 at 17-18.

C. The First Conduct Board Hearing

On April 24, 2013, Arno e-mailed Doherty to inform her that Emerson had decided to move forward with a conduct board hearing. Id. at 18. He told her the hearing would be scheduled after finals, at the start of May. Id. The same day, Doherty called Arno and said she had incorrectly identified which one of the assailant's roommates had seen her and the assailant after the incident. Id. Doherty identified a different roommate as the witness, and Arno interviewed that person. Id.

The following day, Doherty contacted Arno to identify her friend as another witness, identified for purposes of the investigation as Witness 5. Id. at 19. Arno tried once to contact Witness 5 to request a meeting, but Witness 5 did not respond. Id. Doherty later asked Witness 5 to reply to Arno. Id.

On April 29, 2013, Arno sent Doherty a summary report of the meetings the two had about the incident and asked her to confirm the document was accurate. Id. at 19. Doherty sent no corrections. Id. The next day, Arno met with Doherty to discuss setting a hearing date. Id. He allowed her to choose between a Skype hearing over the summer or an in-person hearing in the fall. Id. Doherty said she preferred a Skype hearing. Id. Shortly after her finals, Doherty flew home to California. Id. at 20.

On May 2, 2013, Arno wrote to Doherty offering dates for the hearing. Id. On May 10, 2013, he sent her an e-mail confirming the planned date of May 17, 2013, and attaching information about the conduct board hearing. Id. The attachments notified Doherty that the hearing would proceed according to the Special Conduct Board Procedures for Sexual Misconduct and Sexual Harassment Complaints. Id. The attachments also explained Doherty could notify Emerson if she did not wish to participate in the hearing; Doherty informed Arno that she wanted to participate. Id. The three members of the Conduct Board were identified in the attachments, which informed Doherty she could object to the designated members. Id. Doherty raised no objections. Id.

Arno attached a copy of his Title IX investigation report to his May 2, 2013 e-mail, id. at 22, along with a letter from David Haden, the Associate Dean and Director of Housing and Residence Life, id. at 21. Haden's letter informed Doherty that she could have an advisor, including an attorney, work with her before the hearing and attend the hearing with her. Id. Doherty chose not to have an advisor present for the hearing. Id. Haden's letter also advised Doherty that she should provide the names of any additional witnesses she wished to present at the hearing. Id. Doherty provided no other names. Id. Haden encouraged Doherty to meet with him before the hearing if she had any questions. Id.

On May 13, 2013, Arno e-mailed Doherty to confirm that, during the hearing, Doherty would communicate with the assailant through the Board Chair, and to explain that Doherty could write down any questions she had for the assailant, and the Board Chair would read them aloud. Id. at 23. Arno confirmed that Doherty was comfortable with that procedure. Id.

***5** On May 15, Witness 5 contacted Arno to provide her witness account. Id. Arno interviewed Witness 5 and, on

May 16, sent Doherty and the assailant an updated Title IX investigation report that included a summary of the new interview. Id.

The Conduct Board hearing was held on May 17, 2013. Id. at 24. Doherty participated by Skype from California. Id. She did not request any disability accommodations for the hearing. Id. at 25. The Board consisted of three members, David Griffin, Seth Grue, and Tikesha Morgan. Id. at 24. All three were Emerson Administrators who had participated in previous student conduct board hearings, including some involving allegations of sexual harassment or sexual discrimination. Id. at 24. Morgan was a trained Title IX investigator, id., although Doherty disputes whether her training was adequate, id. at 25. Griffin served as the chair. Id. at 26.

Before the hearing, the Board received a copy of Arno's investigation report, including an update after his interview with Witness 5. Id. Arno sent Griffin a script to follow at the hearing, based on Emerson's Special Conduct Board Procedures for Sexual Misconduct and Sexual Harassment Complaints. Id. at 26.

Doherty and the assailant signed confidentiality statements and presented facts supporting their positions. Id. During the hearing, the Board read a statement from a female student that included a personal reference for the assailant; Doherty interpreted the statement as a personal attack on her. Id. at 26-27. Arno summarized his investigation report during the hearing without providing his opinion on whether the assailant was responsible for a policy violation. Id. at 28. The hearing lasted approximately one hour. Id. Doherty and the assailant each were given the option to submit a final statement in writing after the hearing, or to deliver a final statement orally. Id. Doherty chose to make an oral statement. Id.

D. The First Decision and Doherty's Appeal

After the hearing, the Board met to determine the outcome. Id. Morgan and Grue would vote with Griffin voting only if the other members could not reach a consensus. Id. Morgan and Grue—the two voting members—agreed the evidence was insufficient to find the assailant responsible for a policy violation. Id. Griffin agreed but did not vote. Id. at 28-29.

The practice at the time was for the Board to draft an explanation of the basis for their determination, and to submit the document to the Dean of Students. Id. at 29. The Dean of Students would review the rationale and identify anything requiring clarification. Id. The parties do not dispute that this process occurred: the Board drafted a rationale document that was submitted to Ludman, who reviewed it and asked for clarifications. Id. Doherty asserts that the process was "highly unusual" because the rationale was "written and rewritten six times before the final draft," and the drafting process involved Haden and Arno. Id. The Board's conclusion did not change during this process. Id. at 30.

Arno e-mailed Doherty on May 29 and June 5, 2013 to update her on the status of the deliberations and reiterate that she would be notified of the Board's decision as soon as it was issued. Id. In the June 5th e-mail, Arno stated: "I apologize that this process has taken so long." Doc. No. 103-43 at 3.

***6** On July 3, 2013, Emerson notified Doherty by letter that the Board had found the assailant "not responsible" for violating the student Code of Conduct. Doc. No. 112 at 30-31. The letter noted that one of the reasons the Board for the Board's determination was that Doherty's hearing testimony was inconsistent with an account she had provided to her roommate the day after the incident. Doc. No. 103-44 at 4; Doc. No. 112 at 31.

Arno contacted Doherty on July 10th to ensure that she had received the decision. Doc. No. 112 at 31. Emerson granted Doherty's request for additional time to appeal. Id. Doherty submitted her appeal on July 19, and Ludman confirmed its receipt on July 22. Id. In her appeal, Doherty stated that one of the assailant's suitemates—"Witness 4"—had additional information. Doc. No. 103-47 at 3. Specifically, Doherty alleged the assailant had changed his account of the incident to say he was awake when Doherty left; Doherty believed Witness 4 would confirm that the assailant had been asleep. Doc. No. 112 at 32. Arno had conducted a second interview with Witness 4 between the first hearing and the Board's decision. Id. at 33. On August 9, 2013, Ludman granted Doherty's appeal, based in part on the information from Witness 4 that had not been available before the first hearing. Doc. No. 103-49 at 3; Doc. No. 112 at 31-32. His decision meant that a new conduct board hearing would occur to permit consideration of the second interview of Witness 4 and any related testimony. Doc. No. 112 at 32.

In September 2013, Arno conducted an annual training for conduct board members. Id. at 33. The training covered how to handle reports of sexual assault. Id. All of the members selected for the second conduct board hearing had attended the Fall 2013 conduct board

training. Id. at 33-34.

E. The Second Conduct Board Hearing

On September 9, 2013, Emerson notified Doherty that the new Conduct Board hearing would be on October 9, 2013, and provided her with information on the procedures and Board members. Id. at 34. On September 17, Doherty provided Ludman with documents and names of witnesses she wanted to submit for the second hearing. Id. Ludman responded on September 20, specifying which evidence would be presented to the Board and why certain evidence was not permitted. Id. at 34-35. Ludman rescheduled the hearing for October 16th after Doherty became ill. Id. at 35. Before the hearing, Doherty and the assailant were permitted the opportunity to inspect the information that the Board would review. Id. On October 11, Ludman advised Doherty to come to his office before the hearing to minimize the chance that she would see the assailant on her way to the hearing. Id. at 35-36. Doherty did so. Id. at 36.

During the October 16, 2013 hearing, Doherty was assisted by an attorney acting as her advisor. Id. The hearing lasted about four hours and included live witness testimony. Id. Arno testified that, based on additional training he had received since the first hearing, he now believed the "scales were tipped in Doherty's favor." Id. Doherty disputes whether Arno had sufficient training, but she does not remember Arno telling her his training at the time of the first hearing was inadequate. Id. at 36-37.

After the second hearing, the Board found the assailant responsible for sexually assaulting Doherty, and Emerson expelled him. Id. at 37. Doherty received written notice of the Board's decision on October 22, 2013. Id. The letter explained the Board's reasoning and the sanctions against the assailant: the assailant was immediately expelled and was prohibited from entering or attempting to enter any Emerson building or residence hall and from attending any Emerson-sponsored activity or event. Id. Doherty was instructed to notify the Emerson police if the assailant failed to comply with any of the restrictions. Id. She never did so. Id.

***7** The assailant appealed the determination of the second Conduct Board. Id. Ludman provided Doherty with a copy of the appeal, informed her of the date by which Emerson would resolve it, and offered to meet with her to discuss it. Id. On November 14, 2013, Ludman notified Doherty that he had denied the appeal. Id. at 38.

F. Relevant Post-Hearing Events[5]

The assailant did not sexually assault or threaten Doherty after the April 2012 incident. Id. Doherty and the assailant had no in-person conversations after the April 2012 incident. Id. They neither had nor attempted to have contact with one another after the imposition of the Stay Away Directive in April 2013. Id. at 39. They had classes in the same building twice a week in the fall of 2013, and Doherty saw the assailant "regularly." Id. at 38. At some point after the second hearing, Doherty saw the assailant and he glared at her, an encounter she found "very frightening" to the point of requiring the assistance of a friend. Id. at 38-39. Doherty did not report these interactions to Emerson. Id.

After the assailant's expulsion, Doherty did not see him on campus. Id. at 39. Doherty suspects he hacked into her Gmail account and leaked a copy of her Department of Education complaint in June 2014. Id. Doherty further suspects he may have attended hockey games or had other interactions with the Emerson hockey team after his expulsion. Id. at 40. She did not report her suspicions to Emerson because she says Emerson did not instruct her on what to do if other students saw the assailant on campus, only if she saw him herself. Id. at 37, 40.

Doherty sought accommodations from Emerson throughout her time there. The Court need not recount each and every request and response related to Doherty's accommodations; it suffices for present purposes to note there was a lengthy back-and-forth between Doherty and her family and the school, and that Emerson offered Doherty some, but not all, of the accommodations she sought. See id. at 40-44.

Doherty withdrew from Emerson in the spring of 2014. Id. at 44.

II. DISCUSSION

The Court applies the familiar summary judgment standard to the defendants' motion. Fed. R. Civ. P. 56(a). Because no genuine dispute exists as to the facts material to any of Doherty's four claims, the defendants are entitled to judgment as a matter of law. Id.

A. Title IX

It is well-established that Title IX protects against discrimination on the basis of sex, and that sexual assault is a form of sex discrimination. To demonstrate liability under Title IX, Doherty must show: (1) that she "was a student, who was (2) subject to harassment (3) based upon sex; (4) that the harassment was sufficiently severe and pervasive to create an abusive educational environment; and (5) that a cognizable basis for institutional liability exists." Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002). Only the fifth element is contested here. "To satisfy the fifth part of this formulation, the plaintiff[ ] must prove that a school official authorized to take corrective action had actual knowledge of the harassment, yet exhibited deliberate indifference to it." Id. Deliberate indifference in the case of student-on-student harassment requires that the school's "response (or lack thereof) is clearly unreasonable in light of the known circumstances." Porto v. Tewksbury, 488 F.3d 67, 73 (1st Cir. 2007).

***8** It is not enough for a plaintiff to show "that the school system could or should have done more." Id. In the educational setting, a plaintiff must establish that the school had notice of the harassment and "either did nothing or failed to take additional reasonable measures after it learned that its initial remedies were ineffective." Id. at 74. "[T]he fact that measures designed to stop harassment prove later to be ineffective does not establish that the steps taken were clearly unreasonable in light of the circumstances known by [a defendant] at the time." Id. Title IX "does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by [complainants]." Fitzgerald v. Barstable Sch. Comm., 504 F.3d 165, 174 (1st Cir. 2007), rev'd on other grounds, 555 U.S 236 (2009).

It bears noting at the outset that Doherty has not suggested Emerson had reason to know—before she reported her assault and disclosed the assailant's name—that the assailant, in particular, posed a danger to Doherty or anyone else. Instead, she advances several more general arguments she asserts establish Emerson's liability under Title IX.

First, Doherty contends that "Emerson had an obligation to educate its students about the issues of consent, sexual assault, the high correlation between alcohol and sexual assault[,] and their Title IX rights." Doc. No. 111 at 15. She urges that the alcohol-and sexual-assault-related education and training Emerson provided to its students were so inadequate as to demonstrate a deliberate indifference to her sexual assault.[6] However, Doherty has not supplied evidence that would justify such a conclusion here. The undisputed evidence establishes that Emerson provided all students with information about sexual assault risks, alcohol risks, and resources available related to such risks. Doc. No. 103-2 at 5; Doc. No. 103-6 at 5-6. That these resources did not specifically link the associated risks of alcohol use and sexual assault to one other is insufficient to support a finding of deliberate indifference, at least where Emerson educated students on these topics, and there is no evidence suggesting Emerson knowingly ignored alleged deficiencies in this regard.[7] Doherty's assertions amount to an argument that Emerson was generally aware of the problem of sexual assault and alcohol use on campuses nationwide, and that it could have done more to educate its students on those topics. Even if Doherty's assertion is correct, it is legally insufficient to establish deliberate indifference.[8] See Thomas v. Bd. of Trs. of the Neb. State Colls., No. 15-2972, 2016 WL 3564252, at *1-2 (8th Cir. July 1, 2016) (holding that a college's knowledge of a dropped rape charge and accusations of sexual harassment against a student were insufficient to establish that the college had actual knowledge of a risk of harm); cf. Shank v. Carleton Coll., 232 F. Supp. 3d 1100, 1109 (D. Minn. 2017). ("Tolerating students' misuse of alcohol—even with knowledge that such misuse increases the risk of harmful behaviors such as sexual assault—is simply not the same thing as actual knowledge of sexual assault.").

***9** Second, Doherty asserts that Emerson's response to her rape was so inadequate, and demonstrated such bias against her, that it constituted deliberate indifference. Doc. No. 111 at 16-17. The record not only fails to support this contention, it proves otherwise. The evidence before the Court establishes that Emerson promptly and seriously responded to Doherty's report, commenced an investigation, issued a stay-away order, offered Doherty counseling, and, ultimately, expelled the assailant. Doherty correctly points out that Arno, at the time of the first hearing, questioned her account. However, an investigator's honest and open-minded evaluation of the evidence gathered in the course of a Title IX investigation is not evidence of either bias or deliberate indifference. Arno's skepticism of Doherty's claim after his first round of investigation does not establish deliberate indifference by Emerson where the undisputed facts establish that he undertook a prompt and generally complete investigation,

articulated non-frivolous reasons for his conclusion, and did not render the ultimate decision on behalf of Emerson. To the extent Doherty suggests Arno failed to follow up with one witness, and that such failure establishes deliberate indifference, there is no evidence supporting such a finding. Rather, the record shows Arno contacted every witness Doherty identified. Although Witness 5 failed to respond to Arno's interview request, she eventually contacted him in time to be interviewed before the first Conduct Board hearing. Arno included a summary of that interview in his final report to the Board. Under these circumstances, Doherty's second theory provides no basis for finding deliberate indifference. See Wyler v. Conn. State Univ. Sys., 100 F. Supp. 3d 182, 194 (D. Conn. 2015) (finding a "careless" investigation is insufficient to establish deliberate indifference).

Third, Doherty argues the investigation and adjudication of her complaint establish deliberate indifference. Doc. No. 111 at 17-19. To survive summary judgment, Doherty must show that Emerson's response to her report was "clearly unreasonable." Porto, 488 F.3d at 73. Emerson's reaction was anything but unreasonable. Emerson first learned of Doherty's rape on March 2, 2013. Within a day, she had received a response advising her of the resources available to her, and school administrators met to discuss an appropriate response. Within two days, a Title IX investigator reached out to her. Even while Doherty was maintaining that she did not want the assailant to get into trouble, Emerson was working to find out who he was and formulate an appropriate response. Emerson issued Stay Away Directives and banned the assailant from Doherty's dorm. Doherty received a Skype hearing, as requested, was later granted an appeal, and then had a second, in-person hearing. That Doherty did not receive the result she wanted after the initial hearing does not establish deliberate indifference by Emerson.

Fourth, Doherty asserts Emerson was deliberately indifferent in its dealings with her after she reported the assault. Doc. No. 111 at 20-21. This section of Doherty's Opposition is notably devoid of case law or developed argument supporting her position. Emerson expelled the assailant, banned him from Emerson's buildings and events, and instructed Doherty on how to contact Emerson police if she saw him.[9] Doherty has not advanced sufficient evidence to permit a jury to find deliberate indifference on this theory.

Finally, Doherty alleges Emerson offered her inadequate accommodations on her coursework, ultimately leading to her withdrawal from the college. Doc. No. 111 at 21-22. Emerson was not deliberately indifferent in discussing accommodations with Doherty. Doherty's own account of the accommodations she was given reveal that Emerson considered her requests, and that she was offered accommodations, just not every accommodation she wanted. Id. at 21. The extensive back-and-forth between Emerson and Doherty belies an assertion of deliberate indifference.

The sum of these parts leads to no different result under the deliberate indifference standard. Even considering all of the individual alleged shortcomings Doherty highlights, the evidence fails to provide a basis upon which a reasonable jury could conclude that Emerson was deliberately indifferent here. Accordingly, the Motion for Summary Judgment is ALLOWED as to Count I.

B. Negligence

***10** Doherty next asserts Emerson was negligent "in failing to provide a safe environment for its students, including the plaintiff, and violating its duty to comply with Title IX." Doc. No. 111 at 22. Doherty's negligence claim is based not on a risk specific to the assailant, nor on an argument that Emerson must attempt to eradicate drinking on campus to properly discharge its duties.[10] Id. Rather, her claim is that "Emerson failed to properly educate students, including her, to identify rape under circumstances like Doherty's assault, about the increased risk of sexual assault due to drinking, or about their Title IX rights." Id.

To establish negligence under Massachusetts law, a plaintiff must show (1) that the defendant owed her a legal duty, (2) that the defendant breached that duty, and (3) that the breach is the proximate cause of the her injuries. Davis v. Westwood Grp., 652 N.E.2d 567, 569 (Mass. 1995). In Massachusetts, colleges have a duty "to protect their resident students against the criminal acts of third parties." Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983). This duty requires colleges "to use reasonable care to prevent injury ... by third persons." Id. The duty extends only to acts by third parties that are "reasonably foreseeable" to the college. Kavanagh v. Trs. of Bos. Univ., 795 N.E.2d 1170, 1178 (Mass. 2003). Massachusetts law, however, "does not impose a legal duty on colleges or administrators to supervise the social activities of adult students, even though the college may have its own policies prohibiting alcohol or drug abuse." Doe v. Emerson Coll., 153 F.

Supp. 3d 506, 514 (D. Mass. 2015) (citing Bash v. Clark Univ., No. 06745A, 2006 WL 4114297, at *5 (Mass. Super. Ct. Nov. 6, 2006)). Doherty has not established the existence of the specific duty she seeks to impose, nor provided sufficient evidence to permit a jury to find in her favor on any of the elements of her negligence claim.

Insofar as Doherty's negligence claims relate to Title IX, they fail for a further reason. Doherty claims Emerson negligently implemented Title IX, in informing its students about the law and through its investigation and adjudication of her complaint. However, neither Title IX specifically, nor federal law generally, give rise to a cause of action for negligent implementation of Title IX. Federal law limits damage liability claims to deliberate indifference. See Frazier, 276 F. 3d at 66. Doherty has cited no Massachusetts law establishing a state common-law duty to implement Title IX in a non-negligent manner. Indeed, a negligence claim framed in this manner, with the duty itself arising from a federal law, likely would raise federal preemption concerns.[11] Accordingly, the Motion for Summary Judgment is ALLOWED as to Count II.

C. Negligent Infliction of Emotional Distress

To state a claim for negligent infliction of emotional distress under Massachusetts law, a plaintiff must establish: (1) negligence, (2) emotional distress, (3) causation, (4) physical harm manifested by objective symptomatology, and (5) that a reasonable person would have suffered emotional distress under the same circumstances. Payton v. Abbott Labs, 437 N.E.2d 171, 181 (Mass. 1982). As described above, Doherty has not produced evidence from which a jury could find that Emerson was negligent. Thus, she cannot establish the first element of negligent infliction of emotional distress. See Urman v. S. Bos. Sav. Bank, 674 N.E.2d 1078, 1083 (Mass. 1997). The Motion for Summary Judgment is ALLOWED as to Count III.

D. Intentional Infliction of Emotional Distress

***11** To state a claim for intentional infliction of emotional distress ("IIED") under Massachusetts law, a plaintiff must establish: (1) that the defendant intended to inflict emotional distress or knew that emotional distress was likely to result, (2) that the defendant's conduct was extreme and outrageous, (3) that the actions of the defendant were the cause of the plaintiff's emotional distress, and (4) that "the emotional distress suffered by the plaintiff was severe and of such a nature that no reasonable person could be expected to endure it." Tetrault v. Mahoney, Hawkes & Goldings, 681 N.E.2d 1189, 1197 (Mass. 1997). Conduct is "extreme and outrageous" if it is "beyond all possible bounds of decency and utterly intolerable in a civilized community." Id. This is a high bar. "Liability cannot be predicated on mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities, nor even is it enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." Polay v. McMahon, 10 N.E.3d 1122, 1128 (Mass. 2014) (quotation marks omitted); accord Tetrault, 681 N.E.2d at 1197.

Doherty has not identified extreme or outrageous behavior by Emerson that was targeted at her. She points to no case law suggesting Emerson's actions here—in the materials it distributed, its response to her complaint, its handling of the investigation and adjudication of her case, or the accommodations it offered her thereafter—exceeded the bounds of decency or are intolerable in a civilized community.[12] See Doe, 153 F. Supp. 3d at 518 (dismissing a case where "the complaint's allegations largely rest on Doe's dissatisfaction with Emerson's policies and procedures, what she perceived to be their inadequate sensitivity to her issues, and the results of the various investigations"); Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 247 (D. Vt. 1994) ("A College's decision, when confronted with a female student's accusation of rape, to confront the male student with the charges, hold a hearing, and support the findings of the initial tribunal on appeal, even where various procedural errors are alleged, cannot form the basis of an IIED claim."). The Motion for Summary Judgment is, therefore, ALLOWED at to Count IV.

III. CONCLUSION

Defendants' Motion for Summary Judgment, Doc. No.

101, is ALLOWED. Defendants have filed a Motion to Strike Exhibits 73 and 78, Doc. No. 116. The Court concludes that, even considering these exhibits, summary judgment in Defendants' favor is warranted. Thus, the Motion to Strike is DENIED AS MOOT.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 4364406

Footnotes

1 The Court refers to the other Emerson student as "the assailant," instead of by name, given the nature of the allegations, that the assailant is not a party to this litigation, and the practice of other courts in similar situations. E.g., Theriault v. Univ. of S. Me., 353 F. Supp. 2d 1, 5 (D. Me. 2004).

2 The text of the April 16, 2012 conversation was:
Assailant: Youuuu
Doherty: meeee?
Assailant: Come have sex with me
Doherty: you're in new york
Assailant: No I'm in my room
Doherty: you said you were in new york
Assailant: Ya I too a buss home
Doherty: are you drunk? Hahaha
Assailant: So drunk come over
Doherty: hahahaha
are you sure?
Assailant: Yes
Doherty: what room are you again?
Assailant: 1304 prow
Doherty: ok be there soon
Doc. No. 103-7 at 3-4 (all misspellings and other errors in original).

3 The text of the April 26, 2012 conversation was:
Doherty: I really need to talk toy ou
to you*
Assailant: whats up
Doherty: do you remember what happened that night that i came over last?
Assailant: Vaguely
Doherty: [Assailant], by definition you raped me
Assailant: what?
Doherty: im not gonna do anything about it
but
do you not remember?
Assailant: i remember us having sex ...
Doherty: after the sex
Assailant: not really no
Doherty: well, by definition, you anally raped me ... [Assailant]?
Assailant: What
Doherty: did you get my last im?
Assailant: yes
i dont know what to say to that
Doherty: im not gonna do anything
i just wasnt sure if you remembered
remembered*
do you remember that part at all?
Assailant: no
i just
that's not me
you know thats not me

Doherty: it was because you were drunk
i know, that's why im not gonna do anything about it
i just wanted to let you know so that you dont drink that much again
Assailant: im so sorry
Doherty: its ok
Assailant: no it's definitely not
Doherty: well like
what do you want me to say?
Assailant: i don't know
what do you want ME to say
Doherty: you said you were sorry
i've been sexually assaulted before in the past
and he didnt say he was sorry
so sorry means a lot to me
Assailant: ok
i dont want to make excuses
but you know that's not the kind of person i am
Doherty: no, i know
Assailant: i combined drinking with a lot of anger and sadness and i guess thats what
i got
Doherty: yeah
just promise me you'll try and keep your drinking at a safer level not just for my sake, but for yours you know?
Assailant: yeah i know
Doherty: you dont have to worry about me hating you or anything
because i dont
i know that the guy that did that wasnt you
it was really just a lot of alcohol and other shit
Assailant: it's been a long few weeks
and thats not an excuse
i just want you to know
Doherty: no, i understand
it has been for me, too
i didnt mean to upset you ...
but i just needed to say something
Assailant: ok

Doc. No. 103-7 at 4-8 (all misspellings and other errors in original).

4 Arno noted that one of Doherty's witnesses knew of the incident but did not know Doherty said she had not consented, and another witness was not aware of the incident. Doc. No. 103-24 at 2.

5 Doherty and Emerson disagree over the characterization of her interactions with the assailant, but the basic facts are not in dispute and, where they are, the Court accepts Doherty's facts.

6 The Court agrees with Defendants that a rescuer theory of liability does not apply in light of Emerson's statutory obligation. See Mullins v. Pine Manor, 449 N.E.2d 331, 336 (Mass. 1983).

7 Additionally, Doherty affirmed at her deposition that she knew in April 2012 that she could have reported her rape to Emerson. See Doc. No. 103-2 at 14 ("Q. At that time in April 2012, did you have an understanding that you could have reported it to Emerson College? A. Yes."). This fact undermines Doherty's assertion that the information Emerson provided its students did not adequately inform her of her rights pursuant to Title IX.

8 As Doherty concedes, Emerson was not "obligated to eradicate sexual assault or alcohol use from campus," Doc. No. 111 at 15, and the question here is not whether Emerson offered the best possible education on these matters, Fitzgerald, 504 F.3d at 174.

9 To the extent Doherty is arguing that the instruction to contact the Emerson police was inadequate to the point of deliberate indifference because she was not told that she could contact the Emerson Police if she heard from others that the assailant was on campus (rather than if she saw him there herself), her argument fails. The letter following the second Conduct Board hearing stated that Doherty should "please let the College's Chief of Police or Dean of Students know immediately if the Respondent fails to comply with these terms so that we can take prompt and immediate

action." Doc. No. 103-58 at 4. Nothing in that instruction limited what Doherty could report to her own sightings of the assailant on campus.

10 The Court does not understand Doherty to be asserting that Emerson's security procedures were inadequate, such that Emerson negligently caused her rape.

11 Doherty has not advanced a developed argument under Massachusetts law supporting an extension of recognized Massachusetts common-law duties to create any of the particularized duties she advances.

12 To be clear, what the assailant did to Doherty was "extreme and outrageous"; it was "beyond all possible bounds of decency and utterly intolerable in a civilized community." In dismissing Doherty's claims against Emerson and Arno, the Court is neither questioning nor minimizing the assault Doherty suffered in April 2012.

2000 WL 1299515
Only the Westlaw citation is currently available.
Superior Court of Massachusetts.

Jacquelyn ERICKSON,
v.
Kentaro TSUTSUMI.

No. CA199801842B.
|
May 17, 2000.

MEMORANDUM OF DECISION AND ORDER ON THIRD PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SMITH.

***1** Plaintiff Jacquelyn Erickson ("Erickson") filed this action against Defendant Kentaro Tsutsumi ("Tsutsumi") for personal injuries resulting from an automobile accident. Tsutsumi filed a third-party complaint against the Trustees of Boston College ("Boston College") seeking contribution and indemnification. Boston College seeks summary judgment on both counts of the third-party complaint. For the following reasons, the motion is *ALLOWED.*

BACKGROUND

The following facts are undisputed. In the fall of 1997, Erickson was a Boston College freshman living at Hardey Hall on the Newton campus of the school. (Erickson Deposition at 7-8.) Erickson had just completed the two week tryout period for the women's novice crew team and was one of those selected to be a member. (*Id.* at 11-12.)

The daily practices were held at the Rowing House ("Boathouse") located across from the campus on Nonantum Road in Newton, Massachusetts, a four-lane highway with a posted speed limit of 40 miles per hour. (Boston College Answer to Interrogatory No. 3; Tsutsumi Deposition at 18-19.) Practices were held at 2:30 p.m., 3:45 p.m. and 5:30 p.m., to provide all students an opportunity to attend whichever practice fit into their class schedule. (Boston College Interrogatory Answer No. 3.) As part of the team's physical conditioning, the coach required the team members to run or ride their bikes to the Boathouse. (Erickson Deposition at 15, 21.) Boston College did not provide transportation to and from the Boathouse for those participating in the crew team practices. (Boston College Interrogatory Answer No. 5.) Coaches and senior members of the team warned the freshmen to be careful crossing Nonantum Road. (*Id.* at No. 6.)

At approximately 7:00 p.m. on October 1, 1997, Erickson was returning to her dormitory with a group of team members after practice. (Tsutsumi Deposition at 14; Erickson Deposition at 24-25.) While her teammates were standing on the sidewalk, Erickson stepped off the curb on Nonantum Road and was struck by Tsutsumi, passing by in his car. (Erickson Deposition at 24-25.) Erickson suffered a broken arm as a result of the accident. (Beth Israel Deaconess Medical Center Discharge Summary.) Nonantum Road has no traffic lights or crosswalks near the scene of the accident. (Tsutsumi Deposition at 19.)

Erickson sued Tsutsumi for negligence. Tsutsumi, in turn, impleaded Boston College seeking indemnification and contribution. Tsutsumi claims that Boston College is partially responsible for Erickson's injuries because it conducted the crew team practices in an unreasonably hazardous manner. Boston College now moves for summary judgment against both claims.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues of material fact in dispute and where the moving party is entitled to judgment as a matter of law. See *Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes,* 369 Mass. 550, 553 (1976); Mass.R.Civ.P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, "and the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary

judgment." *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). "A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial" and dictates the court grant summary judgment in favor of the moving party. *Kourouvacilis v. General* Motor *Corp.*, 410 Mass. 706, 711 (1991), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

I. Contribution.

***2** General Laws c. 231B, § 1 provides that "where two or more persons become jointly liable in tort for the same injury to [a] person ... there shall be a right of contribution among them ..." If the plaintiff has no cause of action against the third-party defendant, there is no right of contribution. *Berube v. Northampton*, 413 Mass. 635, 639 (1992). In order for Tsutsumi to survive a summary judgment motion, he must show that Boston College had a duty to Erickson and breached that duty.

Boston College, Tsutsumi argues, owed a duty of reasonable care to Erickson because she is a student of the school-a duty that was breached, according to Tsutsumi when Boston College held practices that forced the team members to cross a dangerous roadway in the evening hours and required that the students run while doing so. Tsutsumi relies on *Mullins v. Pine Manor College*, 389 Mass. 47 (1983), a case where the college was liable for damages resulting from the rape of a student on campus. The *Mullins* court grounded the duty of care in the idea of "existing social values and customs" and the well-recognized concept that a voluntary undertaking must be assumed with reasonable care. *Mullins*, 389 Mass. at 51-52. Neither of those situations exist here.

The *Mullins* court recognized that colleges have a long-standing history of providing dormitory rooms to students and instituting security measures to ensure their safety. The "existing social values and customs" militate against a finding of a duty in the instant case however. *Id.* at 51. First, Tsutsumi has provided no evidence that other colleges provide security staff or crossing guards to ensure each student traverses the city streets safely when they are participating in an extracurricular activity. Second, unlike *Mullins*, where the student was required to live in the dormitory, participation on the crew team was not a requirement of Erickson to attend Boston College. It cannot be said that colleges "of ordinary prudence customarily exercise care to protect the well-being of their [athletic] students against the [hazards of crossing a busy street in order to attend a team practice]." *Id.* Erickson does not have a cause of action under "the existing social values and customs" analysis because there is no community consensus imposing such a duty on the Commonwealth's colleges.

The result is the same under the voluntary undertaking analysis. "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." *Id.* at 53. Unlike in *Mullins*, where the school undertook to provide students with protection from the criminal acts of third parties as part of its security service, Boston College did not undertake to protect the participants in the crew practices from hazards going to or coming from the Boathouse. The result may have been different if, for example, Boston College had from the outset provided a crossing guard to enable the team members to cross Nonantum Road and the guard was, on this particular day, absent when this accident occurred. But those are not the circumstances of this case. Tsutsumi presents no evidence that Boston College ever gratuitously or for consideration undertook the duty to protect the team members from the risks associated with crossing Nonantum Road, therefore Erickson has no claim under the voluntary assumption of duty analysis.

***3** Even though Boston College argues that it owed Erickson no duty of care at the time of her accident, Tsutsumi asserts that a duty arose out of the special relationship between the parties because Erickson was a student at Boston College and that duty extended beyond the Boathouse because of the requirement that as part of their physical conditioning, the students had to run back to the campus. Under our case law, a special relationship may be imposed when "a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so." *Irwin v. Ware*, 392 Mass. 745, 756 (1984) (and cases cited) (identifying property ownership as one of the factors upon which foreseeability may be based).

In order to find a special relationship here, Boston College had to reasonably foresee that it would be expected to chaperone each and every member of the crew team across Nonantum Road at the beginning and

end of all of the practice times held daily at 2:30 p.m., 3:45 p.m. and 5:00 p.m. While it is true that the special relationships upon which the common law will base tort liability change as the expectations of a maturing society evolve, this Court cannot say that our society has evolved to the point of imposing such a duty on the colleges located in Massachusetts. Tsutsumi has put forth no evidence showing that the nature of the relationship between Boston College and Erickson was sufficient to impose a duty resulting from a special relationship. Therefore, summary judgment is proper on Tsutsumi's claim of contribution.

II. Indemnification.

Indemnification is permitted when there is 1) an express contract; 2) a contractual right implied from the nature of the relationship between the parties; and 3) a tort based right where there is a great disparity of fault of the parties. See *Araujo v. Woods Hole*, 693 F.2d 1, 2 (1982). None of those circumstances are present in the case at bar, as Tsutsumi conceded at oral argument. Therefore, summary judgment on the claim of indemnification is appropriate.

ORDER

For the reasons stated above, it is hereby *ORDERED* that Boston College's Motion for Summary Judgment is *ALLOWED* and final judgment shall issue dismissing the third-party complaint.

All Citations

Not Reported in N.E.2d, 2000 WL 1299515

End of Document

32 Mass.L.Rptr. 584
Superior Court of Massachusetts,
Suffolk County.

James JAH
v.
NAPHCARE, INC., et al[1].

No. 14–CV–2420–B.
|
March 31, 2015.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS ANDREA J. CABRAL, SUFFOLK COUNTY SHERIFF'S DEPARTMENT AND THE COMMONWEALTH'S MOTION TO DISMISS

DENNIS J. CURRAN, Associate Justice.

INTRODUCTION

***1** The core of this lawsuit is a claim for medical malpractice arising from the medical treatment and care of James Jah while he was incarcerated at the Suffolk County House of Corrections.

Specifically, Mr. Jah's claims emanate from the medical treatment he received from Dr. Colleen Collins, the medical director for the House of Corrections and an employee of Naphcare, Inc., the correctional facility's independent medical contractor. Mr. Jah alleges that Sheriff Cabral, the Sheriff's Department and the Commonwealth negligently selected and supervised Naphcare, Inc. and Dr. Collins "whose substandard care had previously caused a fatal delay in the medical transfer of another HOC inmate."[2] Sheriff Cabral, the Sheriff's Department, and the Commonwealth have moved to dismiss all claims against them.

For the following reasons, the defendants' motion is **ALLOWED** in part and **DENIED** in part.

I. *BACKGROUND*

The events underlying this lawsuit began on July 27, 2012, when a member of the correctional infirmary staff prescribed Bactrim to Mr. Jah for the purpose of treating an infected wound on his right elbow. Bactrim is a strong antibiotic that is known to pose a "high risk" for inducing Stevens–Johnson Syndrome (SJM) and/or Toxic Epidural Necrolysis (TEN), both of which require immediate hospitalization in a burn unit.[3]

Within one or two days of receiving his first dose of Bactrim, Mr. Jah began to suffer known symptoms of SJS and TEN. His condition worsened, but Dr. Collins and her medical staff gave him additional doses of Bactrim. On August 1, 2012, Mr. Jah was admitted to the infirmary and treated by Dr. Collins after he collapsed on the floor about 42 hours after Dr. Collins and/or the infirmary staff first became aware of his symptoms. Dr. Collins described Mr. Jah's condition as a reaction to Bactrim. But instead of transferring Mr. Jah to a hospital burn unit, Dr. Collins monitored him in the infirmary where his condition continued to decline. He was eventually transferred to the Boston Medical Center, and then to Massachusetts General Hospital's burn unit.

Sheriff Cabral, the Sheriff's Department and the Commonwealth were not direct participants in these events; instead, Mr. Jah claims that they failed to exercise due care in the retention and supervision of Naphcare, Inc. and Dr. Collins after Dr. Collins' substandard care previously caused a fatal delay in the medical treatment of another patient. Mr. Jah also alleges that the Suffolk defendants were deliberately indifferent to his serious medical needs in violation of 42 U.S.C. § 1983, and they were grossly negligent. The Suffolk defendants have moved to dismiss all of these claims.

II. *DISCUSSION*

A. *STANDARD OF REVIEW*

A motion to dismiss for failure to state a claim permits "prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." *Harvard Crimson, Inc. v. President & Fellows of Harvard Coll.*, 445 Mass. 745, 748 (2006). In evaluating the sufficiency of a complaint under Mass. R. Civ. P. 12(b)(6), the court must accept as true the allegations of the complaint, as well as any reasonable inferences to be drawn from them in the plaintiff's favor. *See* *Sisson v. Lhowe*, 460 Mass. 705, 707 (2011); *Eyal v. Helen Broad Corp.*, 411 Mass. 426, 429 (1991). A plaintiff's obligation to provide the grounds of relief requires more than labels and conclusions. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (citation omitted). Factual allegations must be enough to raise the right to relief above the speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007).

B. *42 U.S.C. § 1983 CLAIMS*

2** Mr. Jah does not now dispute that his section 1983 claims against the Commonwealth, the Sheriff's Department, and Sheriff Cabral in her ***official capacity must be dismissed. Indeed, section 1983 only offers a remedy against "person[s]" who violate a claimant's civil rights. 42 U.S.C. § 1983. The United States Supreme Court has held that states and state employees are not "persons" within the meaning of section 1983, and thus, cannot be sued in their official capacity. *Will v. Michigan Dep't State Police*, 491 U.S. 58, 71 (1989); *contra* *Hafer v. Melo*, 502 U.S. 21, 23 (1991) ("[S]tate officials sued in their individual capacities are 'persons' for purposes of § 1983.").

Mr. Jah, however, contends that he has stated a plausible claim under section 1983 against Sheriff Cabral in her ***personal capacity.*** This court does not agree.

Sheriff Cabral was not a direct participant in Mr. Jah's treatment; rather, Mr. Jah's section 1983 claim is based on a theory of "supervisory liability." Supervisory liability can arise "if a responsible official supervises, trains, or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation." *Camilo–Robles v. Zapata*, 175 F.3d 41, 44 (1st Cir .1999). "Deliberate indifference is a stringent standard of fault, requiring proof that a [state] actor disregarded a known or obvious consequence of his action." *Clancy v. McCabe*, 441 Mass. 311, 318 (2004), *quoting* *County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 410 (1997).

Respondeat superior is not an available theory of supervisory liability under section 1983; instead, liability must be based on the supervisor's own acts or omissions. *See* *Whitfield v. Melendez–Rivera*, 431 F.3d 1, 14 (1st Cir.2005). The supervisor must have condoned or tactically authorized her subordinate's unconstitutional conduct. *Id.*

Mr. Jah provided only one factual allegation to meet the stringent standard of "deliberate indifference": Sheriff Cabral allowed Dr. Collins to be retained by Naphcare, Inc. even though Dr. Collins's "substandard care had previously caused a fatal delay in the medical transfer of another HOC inmate." Thus, Mr. Jah alleges that Sheriff Cabral was on notice of the risk posed by Dr. Collins and by failing to mitigate or eliminate that risk, she was deliberately indifferent to future harm posed to Mr. Jah.

The complaint is completely devoid of any detail surrounding this prior incident. It alleges no facts to demonstrate that Sheriff Cabral failed to respond adequately to Dr. Collins' prior substandard treatment. *See* *Farmer v. Brennan*, 511 U.S. 825, 844 (1994) (even if prison officials are aware of risk, they cannot be deliberately indifferent if they responded reasonably to risk, even if the harm was ultimately not avoided). Standing alone, it surely does not show that Sheriff Cabral made a conscious, deliberate choice to "overlook [ ] a clear risk of future unlawful action." *See* *Camilo–Robles*, 175 F.3d at 44. Even if Sheriff Cabral was on notice of the prior incident, there is no factual support for the inference that she condoned Dr. Collins's alleged substandard treatment of Mr. Jah. *See* *Whitfield*, 431 F.3d at 14.

***3** Sheriff Cabral may only be held to account for her own acts or omissions. *See id.* The leap from Dr. Collins's substandard care on one prior occasion to a claim that Sheriff Ms. Cabral violated Mr. Jah's civil rights is too great for this court to make. The claim for relief under section 1983 is speculative.

At this procedural stage, Mr. Jah is required to disclose sufficient factual allegations in the four corners of his

complaint to support a plausible claim. When the Supreme Judicial Court adopted a more stringent pleading standard in 2008, it did so for the very reason that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Iannacchino*, 451 Mass. at 636, *citing* *Bell Atl. Corp.*, 550 U.S. at 561–565 (retiring the "no set of facts" standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

Accordingly, Mr. Jah's section 1983 claims against the Sheriff's Department, the Commonwealth, and Sheriff Cabral in her official *and* personal capacity must be dismissed.

C. *NEGLIGENCE CLAIMS*

Mr. Jah also asserts the following two claims of negligence against Sheriff Cabral, the Sheriff's Department, and the Commonwealth: 1) negligent selection/supervision of Naphcare, Inc. and Dr. Collins; and 2) gross negligence.

The defendants argue, and Mr. Jah does not now dispute, that both negligence claims against Sheriff Cabral must be dismissed. The Massachusetts Tort Claims Act, which is the exclusive remedy for negligence claims against public employers and employees, provides that public employees acting within the scope of their employment are not liable for their negligent acts.[4] G.L. c. 258, § 2. The Act also immunizes public employees from claims of gross negligence. *See* *McNamara v. Honeyman*, 406 Mass. 43, 46 (1989) ("[W]e conclude that a public employee is immune from a claim arising out of gross negligence ... under [G.L. c. 258,] § 2."). Accordingly, both negligence claims against Sheriff Cabral are dismissed.

In addition, the court finds that the gross negligence claims against the Sheriff's Department and the Commonwealth must also be dismissed. Gross negligence is "substantially and appreciably higher in magnitude in than ordinary negligence ... [i]t amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected." *Davis v. Walent*, 16 Mass.App.Ct. 83, 92 (1983), *quoting* *Altman v. Aronson*, 231 Mass. 588, 591 (1919). It "is very great negligence, or the absence of slight diligence, or the want of even scant care ... it is a heedless and palpable violation of legal duty respecting the rights of others." *Zavras v. Capeway Rovers Motorcycle Club*, 44 Mass.App.Ct. 17, 20 n. 4 (1997), *citing* *Altman*, 231 Mass. at 591–592.

***4** As with Mr. Jah's claim for supervisory liability, this court is presented with only one fact to support a claim of gross negligence against the Commonwealth and the Sheriff's Department: that they were responsible for the selection, hiring and supervision of Naphcare, Inc. and they failed to exercise due care when they retained Dr. Collins after her care caused a fatal delay in the medical treatment of another patient. This is simply not enough to plausibly state that the defendants were reckless and/or grossly negligent.

All is not lost for Mr. Jah with respect to the moving defendants. While the complaint does not contain a factual basis for the higher degree of culpability required for gross negligence, it is sufficient to state a plausible claim for negligent selection/supervision against the Sheriff's Department and the Commonwealth. Under this theory, an employer may be subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor. Restatement (Second) of Torts § 411. The tort of negligent selection of an independent contractor appears to be a viable claim in Massachusetts, although there has been little discussion of it. *See, e.g.*, *Wright v. Kelleher*, 2008 Mass.Super. LEXIS 323 at *11–12 (Mass.Super.Ct.2008) (Agnes, J.). In contrast to the standards of deliberate indifference and gross negligence, the selection of an independent contractor is measured by ordinary "reasonableness."

The fact that Dr. Collins previously caused a fatal delay in the medical transfer of another inmate, if accepted as true, supports the inference that either the Suffolk defendants knew of Dr. Collin's prior substandard care of an inmate, or should have known and investigated it. While this alone was not enough to show that Sheriff Cabral was "deliberately indifferent" for purposes of a section 1983 claim, it is sufficient to state a plausible claim for negligence.[5] The reality is that inmates lose the ability to choose their own medical provider once they pass through that steel prison grate, and consequently, are wholly dependent on the state for proper medical treatment. Here, the Suffolk defendants owe a duty to inmates to ensure that they receive proper care and medical treatment. *See* *Estelle v. Gamble*, 328 U.S. 97, 103 (1976). Implicit in this duty is the obligation to select and supervise appropriate and qualified persons to administer such treatment.

The Suffolk defendants argue that Mr. Jah's complaint should be dismissed because it does not allege that they maintained control over Naphcare, Inc.'s operations. It is sufficient, however, that the complaint states the defendants were responsible for the selection, hiring and supervision of Naphcare and Dr. Collins. The extent of their control can be developed through discovery. In any event, control in cases involving Restatement (Second) of Torts § 411 is ordinarily a factual issue to be resolved by the jury. *McNamara v. Massachusetts Port Auth.*, 30 Mass.App.Ct. 716, 718 n. 3 (1991).

***5** For these reasons, the defendants' motion is **ALLOWED** as to the section 1983 claims against the Suffolk defendants, the gross negligence claims against the Suffolk defendants, and the negligent selection/supervision claim against Sheriff Cabral.

The defendants' motion is **DENIED** as to Mr. Jah's claim of negligent selection/supervision against the Suffolk County Sheriff's Department and the Commonwealth.

All Citations

Not Reported in N.E.3d, 32 Mass.L.Rptr. 584, 2015 WL 1530876

ORDER

Footnotes

1 Colleen Collins, M.D.; Andrea J. Cabral, the former Sheriff of the Suffolk County Sheriff's Department; the Suffolk County Sheriff's Department; and the Commonwealth of Massachusetts.

2 Mr. Jah also alleges gross negligence and civil rights violations of 42 U.S.C. § 1983 against the defendants, which will be discussed in greater detail. Naphcare, Inc. and Dr. Collins are not parties to the present motion to dismiss; thus, where the court refers to the "Suffolk defendants" or "defendants" it is referring to the moving defendants: Sheriff Cabral, the Sheriff's Department, and the Commonwealth.

3 These are potentially fatal conditions that involve desquamation and skin sloughing.

4 Mr. Jah rightfully does not argue that the selection and supervision of Naphcare, Inc. and Dr. Collins was outside the scope of Ms. Cabral's employment.

5 Indeed, "[d]eliberate indifference is a state-of-mind requirement that goes beyond negligence." *Farmer,* 511 U.S. at 834, 837.

MAI-AJAH KEEL, Plaintiff,
v.
DELAWARE STATE UNIVERSITY BOARD OF TRUSTEES; CANDY YOUNG, in her individual capacity; PAULA DUFFY, in her individual capacity; and RANDOLPH JOHNSON, in his individual capacity, Defendants.

C. A. No. 17-1818-MN-MPT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

October 29, 2019

REPORT AND RECOMMENDATION

I. INTRODUCTION

Presently before the court is a motion to dismiss an amended complaint for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6). The first amended complaint (the "First Amended Complaint") was filed subsequent to an order that dismissed Plaintiff Mai-Ajah Keel's ("Keel" or "Plaintiff") original complaint without prejudice.[1] Defendants Delaware State University Board of Trustees, Candy Young, Paula Duffy, and Randolph Johnson (collectively, "Defendants") now move to dismiss Plaintiff's First Amended Complaint, which was corrected by the Plaintiff, and will be referred to herein as the "Corrected First Amended Complaint."[2]

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II. BACKGROUND

A. Parties

Plaintiff was a student at Delaware State University ("DSU"), a public university located in Dover, Delaware from fall 2011 until her graduation on December 21, 2015.[3] Defendant DSU Board of Trustees ("Trustees") is "the official governing body of [DSU] and is charged with operating and governing [DSU] . . . ."[4] Defendant Candy Young ("Young") was "the Director of the Title IX Office at [DSU]."[5] Defendant Paula Duffy ("Duffy") is "the Director of the Office of Judicial Affairs at [DSU]," who as alleged by Plaintiff as responsible for "overseeing any judicial proceedings relative to alleged violations of [DSU] policies, regulations, and rules and sanctions issued by the judicial body."[6] Defendant Randolf Johnson ("Johnson") is "the Director of Bands at [DSU]," whom Plaintiff claims "is responsible for overseeing all band activities . . . including . . . supervision, direction, and insuring the safety of all band participants."[7]

B. Procedural Background

On December 19, 2017, Plaintiff instituted her action against Defendants asserting discrimination on the basis of gender in violation of 20 U.S.C. § 1681 (Title IX) against the DSU Trustees, and as against Young, Duffy, and Johnson for violating 42 U.S.C. § 1983 (the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution).[8] Defendants moved to dismiss the original Complaint on

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February 20, 2018, and subsequently, Magistrate Judge Fallon issued a Report and Recommendation recommending dismissal with prejudice, on the bases that Plaintiff's claims were barred by the statute of limitations, and for failure to state a claim.[9] Subsequent to Plaintiff's objections and Defendants' response, Judge Maryellen Noreika overruled Plaintiff's objections and adopted the Report and Recommendation granting Defendants' motion to dismiss. However, in a footnote Judge Noreika stated that "it is not entirely certain that Plaintiff cannot allege facts sufficient to survive a motion to dismiss pursuant to Rule 12(b)(6),

and thus will grant the motion without prejudice."[10]

With this opportunity, Plaintiff filed an Amended Complaint on March 25, 2019.[11] This court notes the following: Plaintiff's First Amended Complaint, as it relates to the 42 U.S.C. § 1983 cause of action, dismissed a defendant that was in the original Complaint and added another defendant.[12] Plaintiff later corrected the First Amended Complaint by dismissing the newly added defendant and included a defendant who was in the original Complaint.[13] In light of this correction, the First Amended Complaint will be referred to herein as the "Corrected First Amended Complaint."

C. Factual Background

Plaintiff alleges that approximately two years after enrolling at DSU, on or about November 22, 2013, Jason Faustin ("Faustin"), another student, sexually assaulted her

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in his dorm room.[14] A few days after the alleged assault, Keel reported the incident to Dr. Brian Stark, DSU's criminology professor.[15] Thereafter, Keel was referred to Dr. Pauline Meek in DSU's counseling services department who held a mediation session between Keel and Faustin, despite Keel telling Dr. Meek that she was fearful of encountering Faustin on campus.[16] During the mediation, Faustin apologized to Keel and agreed not to contact her anymore. Keel, however, alleges that "Faustin continued to hug, touch, and attempt to talk to [her], in violation of his agreement at the mediation."[17] Plaintiff alleges that harassment by Faustin continued and she informed Dr. Meek, who took no action.[18]

Keel alleges that because DSU did not prevent Faustin from harassing her, she reported Faustin to the DSU Police Department (the "DSUPD") on August 22, 2014, and again on February 5, 2015.[19] During an interview with Sargent Joi Simmons of the DSUPD, Faustin admitted that Keel told him "'no' and 'stop' several times."[20] An investigation of Faustin's conduct by the DSUPD revealed that he "allegedly sexually assaulted at least three other women in a similar manner to his assault of Keel."[21] Ultimately, Faustin was arrested.[22] Plaintiff contends that Simmons reported to DSU administrators that "she was concerned that . . . a hostile environment existed for

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victims on campus."[23] Keel alleges that she continued to experience a hostile environment on campus, by being called derogatory names and was fearful of being physically assaulted by other students.[24] Not only does Keel assert a hostile campus environment, she further claims that DSU's Assistant Band Director Lenny Knight ("Knight") harassed her by his comments that he was tired of people not showing up because of "'bullshit'" and "'drama.'"[25] Plaintiff alleges that Knight also "berated" her for "'making big things out of little things.'"[26]

In March 2015, DSU held a hearing to adjudicate Keel's report of Faustin's conduct. "[T]he hearing panel found Faustin 'not responsible' for raping Keel."[27] Shortly thereafter, Keel appealed the decision. As a result of Keel's appeal, Faustin was found "'responsible'" for sexual assault, and was suspended for the DSU 2015-2016 academic year.[28] In its finding, DSU noted:

> Having been found responsible for the sexual assault and rape of the complainant [Keel], the respondent [Faustin] is in violation of the General Standards of Conduct and Decorum and has exhibited violent behavior by sexually assaulting and raping the

> complainant. (Delaware State University, Division of Student Affairs Student Judicial Handbook, p. 5) Furthermore, the complainant has a right to continue her education and feel as though she is matriculating in a safe and secure environment. The complainant is now a senior. Removing the respondent for at least the 2015-2016 academic year will provide the complainant with the opportunity to do so.[29]

Keel alleges that DSU assured her that Faustin would not be on campus, and if he

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were, DSU would provide her a police escort.[30]

Even though DSU supposedly banned Faustin from campus during the 2015-2016 academic year, Plaintiff asserts that it allowed Faustin on campus throughout the Fall 2015 semester to participate in the academic program.[31] During this time, Plaintiff alleges that on one occasion, she "noticed" that Faustin was in her advisor's office.[32] Plaintiff contends that despite Faustin's purported suspension, he was permitted on campus that day to take a final exam.[33] Keel further maintains that Faustin was often seen on campus by her friends.[34] According to Keel, she was never informed when he was on campus nor provided an escort.[35]

Following Keel's alleged encounter with Faustin in her advisor's office, she reported this incident to the Title IX and the Judicial Affairs offices.[36] Keel alleges that neither accepted responsibility for the enforcement of the sanction against Faustin.[37] Furthermore, Keel alleges that "[s]he was . . . constantly vulnerable to additional harassment by Faustin up until the day she graduated and left campus on December 21, 2015."[38] Following her graduation, Keel alleges that on or about January 13, 2016, DSU readmitted Faustin to the school in violation of its own sanction.[39]

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III. STANDARD OF REVIEW

A. Fed. R. Civ. P. 12(b)(6)

FED. R. CIV. P. 12(b)(6) permits a party to move to dismiss a complaint for failure to state a claim upon which relief can be granted. The purpose of a motion under Rule 12(b)(6) is to test the sufficiency of the complaint, not to resolve disputed facts or decide the merits of the case.[40] "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."[41] A motion to dismiss may be granted only if, after "accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to the plaintiff, plaintiff is not entitled to relief."[42] While the court draws all reasonable factual inferences in the light most favorable to a plaintiff, it rejects unsupported allegations, "bald assertions," and "legal conclusions."[43]

To survive a motion to dismiss, plaintiff's factual allegations must be sufficient to

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"raise a right to relief above the speculative level . . . ."[44] Plaintiff is therefore required to provide the grounds of his or her entitlement to relief beyond mere labels and conclusions.[45] Although heightened fact pleading is not required, "enough facts to state a claim to relief that is plausible on its face" must be alleged.[46] A claim has facial plausibility when a plaintiff pleads factual content sufficient for the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[47] Once adequately stated, a claim may be supported

by showing any set of facts consistent with the allegations in the complaint.[48] Courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint, and matters of public record when reviewing a motion to dismiss.[49]

B. Statute of Limitations

Undisputed by the parties is that causes of action under Title IX and 42 U.S.C. § 1983 are subject to Delaware's statute of limitation's for personal injuries, which is two years.[50] In her memorandum granting the Defendants' motion to dismiss the original Complaint, Judge Noreika commented as follows on the Court's authority to decide a

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statute of limitations issue under a Rule 12(b)(6) motion:

> The statute of limitations is an affirmative defense that a defendant must usually plead in his answer. *Stephens v. Clash*, 796 F.3d 281, 288 (3d Cir. 2015) (citing *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014)). Nevertheless, the Third Circuit "permit[s] a limitations defense to be raised by a motion under Rule 12(b)(6) . . . if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Id.* (internal quotation marks omitted). Thus, "a district court may grant a motion under Rule 12(b)(6) raising a limitations defense if 'the face of the complaint demonstrates that the plaintiff's claims are untimely." *Id.* (citing *Schmidt*, 770 F.3d at 249 (internal quotations omitted)).[51]

IV. ANALYSIS

A. Statute of Limitations

The relevant date in this case to analyze the statute of limitations defense is December 19, 2015, two years prior to December 19, 2017, the date on which Plaintiff filed her original Complaint.[52] The issue is whether the continuing tort doctrine applies, which would permit Plaintiff to bring the actions set forth in her Corrected First Amended Complaint.[53] The Court's memorandum opinion addressed the law as to the operation and application of the continuing-violation doctrine:

> [T]he continuing-violation doctrine . . . is generally recognized under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., to provide that discriminatory acts that are not individually actionable may be aggregated to make out a hostile environment claim. *Doe v. Mercy Catholic Med Ctr*., 850 F.3d 545,566 (3d Cir. 2017). These acts can occur at any time if they are linked in a pattern of actions continuing into the limitations period. *Id.* All alleged acts, however, must be part of the same unlawful practice, meaning they involved "similar conduct by the same individuals, suggesting a persistent, ongoing pattern." *Id.* (citing *Mandelv. M&Q Packaging Corp*.,706 F.3d 157, 165 (3d Cir. 2013)). The continuing-violation doctrine "is an 'equitable exception to the

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> timely filing requirement.'" *Cowell v. Palmer Twp*., 263 F.3d 286, 292 (3d Cir.2001)

(quoting *West v. Phila. Elec. Co.*, 45 F.3d 744, 754 (3d Cir.1995)). Under the doctrine, "when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period." *Montanez v. Sec'y Pennsylvania Dep't of Corr.*, 773 F.3d 472, 481 (3d Cir. 2014)(quoting *Cowell*, 263 F.3d at 292). "[T]he court will grant relief for the earlier related acts that would otherwise be time barred." Cowell,263 F.3d at 292. The doctrine, however, focuses on "continual unlawful acts, not continual ill effects from an original violation." *Weis-Buy Servs., Inc. v. Paglia*, 411 F.3d 415, 423 (3d Cir.2005) (quoting *Cowell*, 263 F.3d at 293). Only defendants'"affirmative acts" count. *Tearpock-Martini v. Borough of Shickshinny*, 756 F.3d 232, 235 (3d Cir. 2014)(quotingCowell,263 F.3d at 293). "[A] government official's refusal to undo or correct [a] harm [caused by the official's unlawful conduct] is not an affirmative act for purposes of establishing a continuing violation." *Tearpock-Martini*, at 236 n. 8.[54]

Plaintiff submits that the continuing tort doctrine applies because she was "vulnerable to additional harassment by Faustin" due to DSU's alleged deliberately indifferent conduct "by failing to take action to mitigate Keel's vulnerability to additional harassment, . . ." until her graduation on December 21, 2015.[55] Plaintiff alleges that DSU readmitted Faustin on or about January 13, 2016, thereby demonstrating "that DSU acted with deliberate indifference by failing to take action to mitigate Keel's vulnerability to additional harassment, a duty owed under Title IX."[56] As correctly noted by Defendants, however, "Plaintiff does not allege any harm related to this [allegation], nor does she allege that she even ever saw the Respondent [Faustin] herself,"[57] except for a single incident *prior* to December 19, 2015 when she saw Faustin in her advisor's office around September 2015.[58] The continuing-violation doctrine focuses on "continual unlawful acts,

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not continual ill effects from an original violation."[59] Here, because the facts alleged by Plaintiff do not show that Defendants acted with "deliberate indifference" within the two years following Keel's alleged sexual assault, the Title IX and the 42 U.S.C. § 1983 Equal Protection claims, are time-barred.

B. Plaintiff's IX Claim

A primary dispute in this matter is whether DSU acted with "deliberate indifference" in responding to Keel's alleged sexual assault.[60] The law regarding claims brought under Title IX was set forth in the memorandum opinion rendered by the district court judge in her decision on the original Complaint:

> Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A public-school student may bring suit against a school under Title IX for student-on-student sexual harassment, "but only where the [school] acts with deliberate indifference to known acts of

> harassment in its programs or activities" and "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis Next Friend LaShonda D. v. Monroe Cty. Bd of Educ.*, 526 U.S. 629, 633 (1999).
>
> Deliberate indifference requires a response (or failure to respond) that is "clearly unreasonable in light of the known circumstances." *Id* at 648; *see also Mercy Catholic Med Ctr.*, 850 F.3d at 566. To establish deliberate indifference, a plaintiff must show that the school knew about the plaintiff's sexual assault and ensuing harassment and failed to respond adequately. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1989) ("[W]e hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."); *see also Terrell v. Delaware State Univ.*, C.A. No. 09-464 (GMS), 2010 WL 2952221, at *2 (D. Del. July 23, 2010). "To establish deliberate
>
> Page 12
>
> indifference, a plaintiff must show that the school made an official decision not to remedy the sexual harassment." *Terrell*, 2010 WL 2952221, at *2 (citing *Gebser*, 524 U.S. at 290). "Deliberate indifference claims impose a significant burden on the plaintiff and consequently rarely proceed beyond a motion to dismiss." *Saravanan v. Drexel Univ.*, 2017 WL 5659821, at *7 (E.D. Pa. Nov. 24, 2017); *see also T.B. v. New Kensington-Arnold Sch. Dist.*, 2016 WL 6879569, at *7 (W.D. Pa. Nov. 22, 2016) ("The deliberate indifference standard sets a high bar for a plaintiff seeking to recover under Title IX.").[61]

Plaintiff argues that DSU acted with deliberate indifference by failing to implement "any protective measures from the time Keel made her report to the time that Faustin was suspended."[62] Furthermore, Plaintiff alleges that she was "actually harassed by other students and faculty on campus as a result of making her report, which DSU failed to address entirely."[63] In support of her deliberate indifference argument, Plaintiff relies heavily upon *Joyce v. Wright State Univ.*, 2018 U.S. Dist. LEXIS 1000780, (S.D. Ohio June 15, 2018).[64] Plaintiff's reliance upon *Joyce v. Wright State Univ.* is misplaced.

In *Joyce*, the court "held that the defendant's failure to implement *any* interim safety measures for three days, especially given its knowledge that the perpetrator had sexually harassed or assaulted multiple women . . . created a question of fact sufficient to defeat the defendant's motion to dismiss."[65] Here, as emphasized by Defendants and consistent with Plaintiff's own allegations, when she reported her sexual assault,

> DSUPD conducted a criminal investigation of Plaintiff's claims, which resulted in the

> Respondent's arrest; DSU's Title IX office conducted its own investigation and held disciplinary hearings, which resulted in the removal of the Respondent from campus for the remainder of Plaintiff's tenure at the University; and Plaintiff was offered counseling services, which she utilized . . . .[66]

While the court does not disagree with her claim that greater protective measures could have been taken by DSU to ensure her safety, the standard Plaintiff must meet to succeed on a Title IX claim requires a showing that DSU "acted with deliberate

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indifference to known acts of harassment."[67] As previously noted, "[d]eliberate indifference requires a response (or failure to respond) that is "clearly unreasonable in light of the known circumstances."[68] Here, DSU responded to Plaintiff's allegations in a manner that was not "clearly unreasonable." Therefore, for the foregoing reasons, Plaintiff's Title IX claim should be dismissed.

C. Plaintiff's 42 U.S.C. § 1983 Equal Protection Claim

In Plaintiff's Corrected First Amended Complaint, she alleges that Defendants Young, Duffy, and Johnson violated the Equal Protection Clause of the Fourteenth Amendment.[69] Plaintiff seeks compensatory damages for physical injury, emotional pain, suffering, mental anguish, and other non-pecuniary losses.[70] In Plaintiff's opposition to Defendants motion to dismiss, she asserts that she made no new allegations in her First Amended Complaint, which became her Corrected First Amended Complaint, that are relevant to her 42 U.S.C. § 1983 Equal Protection claim.[71] Because Plaintiff alleges no new facts regarding this claim and Judge Noreika held that Plaintiff's "general statements and the underlying allegations in the Complaint on which they are based" as insufficient to adequately state an Equal Protection claim,[72] this claim also should be dismissed. Similarly, and as found in the district court judge's memorandum addressing Plaintiff's original Complaint, because she fails to allege a

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violation of her Equal Protection rights, the issue of the application of qualified immunity raised by Defendants need not be addressed.[73] For this defense to exist, a complaint must first show that there was a violation of a constitutional right.[74]

V. RECOMMENDED DISPOSITION

Consistent with the findings herein, it is recommended that:

Defendants' motion to dismiss (D.I. 27) be granted on the grounds that the Corrected First Amended Complaint is time barred and, alternatively, for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6).

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), FED. R. CIV. P. 72(b)(1), and D.Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served a copy of this Report and Recommendation.[75] These objections and response to the objections are limited to ten (10) pages each.

The parties are directed to the Court's standing Order in Non-*Pro Se* matters for Objections Filed under FED. R. CIV. P. 72, dated October 9, 2013, a copy of which is available on the Court's website, www.ded.uscourts.gov.

Date: October 29, 2019

/s/ Mary Pat Thynge
UNITED STATES MAGISTRATE JUDGE

Footnotes:

1. D.I. 24 at 1.

2. D.I. 27 at 1-2.

3. D.I. 30 at 1-2, 12.

4. D.I. 23 at 1; D.I. 30 at 1.

5. D.I. 30 at 1.

6. D.I. 23 at 1-2; D.I. 30 at 1-2.

7. D.I. 30 at 2.

8. D.I. 1 at 1-16.

9. D.I. 19 at 1-13; D.I. 28 at 1.

10. D.I. 23 at 1; D.I. 28 at 1.

11. D.I. 25 at 1-16.

12. *Id.* at 15.

13. D.I. 30 at 15.

14. D.I. 28 at 2; D.I. 31 at 2.

15. D.I. 31 at 2.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 3 (quoting D.I. 30 ¶ 24).

21. D.I. 31 at 3.

22. *Id.*

23. *Id.*

24. *Id.* at 3.

25. *Id.* (quoting D.I. 30 ¶ 28).

26. *Id.* (quoting D.I. 30 ¶ 28).

27. D.I. 31 at 3-4 (quoting D.I. 30 ¶ 36).

28. *Id.* at 4 (quoting D.I. 30 ¶ 37).

29. D.I. 30 at 9-10.

30. D.I. 31 at 4.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 5.

36. D.I. 31 at 5.

37. *Id.*

38. *Id.*

39. D.I. 30 at 12.

40. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993).

41. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (internal quotations and citations omitted); *see also Twombly*, 550 U.S. 544, 563 n.8 ("[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.").

42. *Maio v. Aetna, Inc.*, 221 F.3d 472, 481-82 (3d Cir. 2000) (citing *In re Burlington*, 114 F.3d at 1420).

43. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted); *see also Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997) (rejecting "unsupported

conclusions and unwarranted inferences") (citations omitted); *see generally Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("It is not . . . proper to assume [the plaintiff] can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged.").

[44.] *Twombly*, 550 U.S. at 555 (citations omitted); *see also Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007) (citing *Twombly*, 550 U.S. at 555).

[45.] *See Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

[46.] *Id.* at 570; *see also Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) ("In its general discussion, the Supreme Court explained that the concept of a 'showing' requires only notice of a claim and its grounds, and distinguished such a showing from 'a pleader's bare averment that he wants relief and is entitled to it.'") (quoting *Twombly*, 550 U.S. at 555 n.3).

[47.] *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556).

[48.] *Twombly*, 550 U.S. at 563 (citations omitted).

[49.] *See, e.g., Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir.1993) (citations omitted).

[50.] *See* D.I. 33 at 1; D.I. 23 at 6. *See also*, 10 *Del C.* § 8119.

[51.] D.I. 23 at 7.

[52.] D.I. 1 at 16.

[53.] D.I. 31 at 7.

[54.] D.I. 23 at 7-8.

[55.] D.I. 31 at 7-9.

[56.] D.I. 31 at 9; D.I. 30 at 12; D.I. 28 at 4-5.

[57.] D.I. 28 at 4 (citing Am. Compl. ¶ 42).

[58.] D.I. 30 at 10.

[59.] *Weis-Buy Servs., Inc.*, 411 F.3d at 423 (quoting *Cowell*, 263 F.3d at 293).

[60.] D.I. 28 at 6; D.I. 31 at 15.

[61.] D.I. 23 at 10-12.

[62.] D.I. 31 at 17.

[63.] *Id.*

[64.] D.I. 14-18.

[65.] D.I. 31 at 17 (citing *Joyce v. Wright State Univ.*, 2018 U.S. Dist. LEXIS 100780, at *17 (S.D. Ohio June 15, 2018)) (emphasis added).

[66.] D.I. 33 at 9.

[67.] *Davis Next Friend LaShonda D. v. Monroe Cty. Bd of Educ.*, 526 U.S. 629, 633 (1999).

[68.] *Id* at 648; *see also Mercy Catholic Med Ctr.*, 850 F.3d at 566.

[69.] D.I. 30 at 15.

[70.] *Id.*

[71.] D.I. 31 at 1.

[72.] D.I. 23 at 15.

[73.] D.I. 23 at 16 (citing *Torisky v. Schweiker*, 446 F.3d 438, 442-43 (3d Cir. 2006).

[74.] *Id.*

[75.] FED. R. CIV. P. 72(b)(2).

2001 WL 1678766
Only the Westlaw citation is currently available.
United States District Court, S.D. Iowa, Davenport Division.

Alison MURRELL, Plaintiff,
v.
MOUNT ST. CLARE COLLEGE, CLINTON, IOWA
Defendants.

No. 3:00-CV-90204.
|
Sept. 10, 2001.

MEMORANDUM OPINION AND ORDER

PRATT, J.

***1** Plaintiff, Alison Murrell, brings this action in diversity against Defendant, Mount St. Clare College, asserting breach of implied warranty of habitability, negligence, and negligent misrepresentation. Defendant moves for summary judgment, and for the reasons set forth below, the Court grants the Defendant's motion.

I. Facts

In the fall of 1997, Alison Murrell ("the Plaintiff") enrolled at Mount St. Clare College ("Mount St. Clare" or "the College") in Clinton, Iowa. At that time, Mount St. Clare College published erroneous crime statistics pursuant to the federal Student Right-To-Know and Campus Security Act, 20 U.S.C. § 1092(f), which stated that no "rape" had been reported on campus in the school years between 1995 and 1998. The College was later forced to publish an amended version of those statistics which revealed one rape reported in the 1994-95 school year and one rape in the 1995-96 school year.[1]

The Plaintiff has testified that when she chose to attend Mount St. Clare she did not personally review the crime statistics of Mount St. Clare College or any other institution of higher learning. She also asserted that she made the decision to attend Mount St. Clare when she was 18 years old. In deposition, the Plaintiff also could not recall any other college that had admitted her. The Plaintiff testified that her parents' contribution to her decision was to pressure her to attend college and that they looked favorably on Mount St. Clare because of the size of the community and the school.

After the Defendant's motion for summary judgment, the Plaintiff's parents filed an affidavit with the Court along with the Plaintiff's resistance to summary judgment, asserting that "the safety and security of the college which she would attend was one, among many, factors which our family considered at the time Alison left for college." Despite the fact that the Plaintiff's father has worked in the field of college security, he did not assert that he or his wife ever noted Mount St. Clare's crime statistics or relied upon them in encouraging Alison to attend Mount St. Clare.

In September, 1998, the Plaintiff was a second-year student at Mount St. Clare and resided in Durham Hall, a dormitory owned and operated by the College. Residents of the College's dormitories are issued secure keys which are necessary to gain entrance into the dormitories. Guests must show identification and be escorted by a resident when visiting a residence hall. The guest is required to remain in the presence of that resident during the time of his/her visit. Male access to the female side of the dormitory and vice versa is prohibited on Fridays and Saturdays between 2:00 AM and 8:00 AM and midnight through 8:00 A.M. the rest of the week. The College holds mandatory security meetings for the dormitory residents. Residents are required to follow the security guidelines outlined in their student handbooks which include locking their doors at all times and never propping open doors. Any student caught propping open doors to the outside is subject to a $300 fine; however, students have testified that certain doors separating the male and female sides of Durham Hall were frequently propped open at the time of the Plaintiff's residency in Durham Hall.

***2** In the very early morning hours of September 13th, 1998, the Plaintiff agreed to allow the guests of a fellow student, J.D. Wilson, to stay the evening in her room while she stayed with Mr. Wilson. In the early afternoon of that same day, the Plaintiff claims that she repelled several advances from one of the guests, Seneca Arrington, and that she asked the guests to leave her room

so that she could shower and get dressed. When Mr. Arrington and his fellow guest left, the Plaintiff began to prepare for a shower without locking her door. The Plaintiff claims that Mr. Arrington re-entered her room at that time and raped her.

II. Summary Judgment Standard

The purpose of summary judgment is to "pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir.1992), *cert. denied*, 507 U.S. 1030 (1993). Summary judgment "allows courts and litigants to avoid full-blown trials in unwinnable cases, thus conserving the parties' time and money and permitting courts to [conserve] scarce judicial resources." *Id.*

The precise standard for granting summary judgment is well-established and oft-repeated: summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir.1994). The Court does not weigh the evidence nor make credibility determinations, rather the court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *cited in* *Handeen v. Lemaire*, 112 F.3d 1339, 1345 (8th Cir.1997); *Anderson*, 477 U.S. at 248. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is genuine issue for trial. Fed.R.Civ.P. 56(c), (e); *Celotex*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis added). An issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material.... Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

III. Discussion

A. Implied Warranty of Habitability

***3** "An implied warranty of habitability exists in all oral or written leases of a dwelling, which includes houses, condominiums, and apartments." *Estate of Vasquez v. Hepner*, 564 N.W.2d 426, 429 (Iowa 1997).

> Under this warranty, "the landlord impliedly warrants at the outset of the lease that there are no latent defects in *facilities and utilities* vital to the use of the premises for residential purposes and that these essential features shall remain during the entire term in such condition to maintain the habitability of the dwelling. Further, the implied warranty ... in the lease situation is a representation there neither is nor shall be during the term a violation of applicable housing law, ordinance or regulation which shall render the premises unsafe, or unsanitary and unfit for living therein."

Id. (quoting *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972)) (emphasis added). In order to find a violation of the implied warranty of habitability, the plaintiff must demonstrate the existence of a latent defect or a material violation of the housing code. *Id.*

The analysis with respect to the Plaintiff's claim against Mount St. Clare stops here. The Plaintiff has alleged no latent defect in her housing accommodations. The Plaintiff has admitted that her lock worked. Nor has the Plaintiff alleged any violation of any applicable housing codes. Instead, the gravamen of the Plaintiff's claim is that Mount St. Clare provided inadequate security services to protect her. While there is Iowa case law to support this type of claim in negligence (see *infra* Section B), there is no duty to provide security services beyond a working lock under the implied warranty of habitability.

In *Brichaceck v. Hiskey,* 401 N.W.2d 44 (Iowa 1987), the Iowa Supreme Court upheld a district court's rejection of a claim under the implied warranty of habitability against a landlord who provided no security services and a lock to the plaintiff's apartment door that failed to bar burglary. "The landlord is not an insurer against every conceivable act of a third party and his responsibility is limited to providing reasonable security." *Id.* at 47.

In this case, the Plaintiff does not allege any physical defects whatsoever. The Plaintiff alleges that security services were lax and that other students propped open doors; however, the Plaintiff always retained the ability to lock the door to her quarters. Moreover, the Plaintiff has not cited any instance of a person, who was not a known guest of a resident, entering Durham Hall and menacing her or any other residents in any way. "[A] landlord is only liable for injuries resulting from a hidden or latent defect if the landlord knew or should have known of the defect." *Estate of Vasquez,* at 430 (citing *Knapp v. Simmons,* 345 N.W.2d 118 (Iowa 1984)). In this case, the College had taken measures to discourage residents from propping open doors and had no reason to foresee that the disregard of this regulation was creating a condition so dangerous it rendered Durham Hall inhabitable.

B. Negligence

***4** The Plaintiff's negligence claims stem from four discernable alleged duties owed by Mount St. Clare College. The Plaintiff claims that 1) Mount St. Clare had a duty to protect her arising out of their special relationship with her, 2) Mount St. Clare had a duty to control third parties who posed a foreseeable threat, 3) Mount St. Clare had a duty to warn her of any defects in their security, and 4) Mount St. Clare had a duty not to misrepresent its crime statistics to her, inducing her to enroll in the school.

1. Duties Arising Out of a Special Relationship

The Iowa Supreme Court has held that a landlord does owe a special duty of care to its tenants that includes "taking protective measures guarding the entire premises and the areas peculiarly within the landlord's control against the perpetuation of criminal acts." *Tenney v. Atlantic Assoc.,* 594 N.W.2d 11, 21 (Iowa 1999) (quoting *Kline v. 1500 Mass. Ave. Apartment Corp.,* 439 F.2d 477, 482 (D.C.Cir.1970)). This duty arises though, from a landlord's duty "to protect its tenants from reasonably foreseeable harm." *Id.* at 17. Indeed, in *Tenney,* the landlord-defendant had failed to change the locks to a new tenant's apartment, keep track of who had keys to the tenant's locks, or secure the master keys that would open those locks. *Id.* at 12. These lapses resulted in an unknown intruder entering the tenant's apartment and raping her. *Id.*

The *Tenney* decision also cites to the broader holding of *Kline,* which held that the landlord's duty to protect tenants arises out of the realities of "modern day apartment living." *Kline* at 481. In *Kline,* a duty was imposed on the landlord where "the landlord [had] notice of repeated criminal assaults and robberies, [had] notice that these crimes occurred in the portion of the premises exclusively within his control, [had] every reason to expect like crimes to happen again, and [had] the exclusive power to take preventive action." *Id.*

The facts of this case do not indicate that such a duty arose for Mount St. Clare College. While there is evidence of some past crimes on campus, including sexual assaults, there is no evidence that these crimes occurred in the portion of the premises exclusively within the College's control. A college, or any other kind of landlord, is incapable of foreseeing an acquaintance rape that takes place in the private quarters of a student or tenant, unless a specific student or tenant has a past history of such crimes.

In *Freeman v. Busch, et al.,* 150 F.Supp.2d 995 (S.D.Iowa 2001), a plaintiff, a non-student, sued Simpson College for damages arising out of her being date raped by her former boyfriend, a student, while the plaintiff was unconscious from alcohol consumption at a party in the college's dormitory. She claimed the dormitory's resident assistant failed to seek medical assistance on her behalf and instead left her with the offending ex-boyfriend, thus breaching the college's special duty to protect her. The Court held that no such special duty existed.

> ***5** A college is an educational institution, not a custodian of the lives of each adult, both student and non-student, who happens to enter the boundaries of its campus. A contrary result 'would directly contravene the competing social policy of fostering an educational environment of student autonomy and independence.'

Id. at 1002 (quoting *Univ. of Denver v. Whitlock,* 744 P.2d 54, 62 (Colo.1987)). The facts of this case are slightly different, in that the plaintiff/victim in this case,

Ms. Murrell, was a student and the alleged perpetrator, Mr. Arrington, was a guest. Nonetheless, the same fundamental principle applies: a college cannot foresee the intentional torts of all students and non-students on campus, and cannot insure that they will not occur. *See Tenney* at 17 ("A duty of care arising out of a landlord-tenant relationship ... does not make the landlord an insurer."). Hence, the College did not breach its special duty to protect the Plaintiff.

2. Duty to Control Third-Parties

The Plaintiff also argues that the College had a duty to control the conduct of a third person so as to prevent them from intentionally harming others. The Plaintiff cites to Section 318 of the Restatement (Second) of Torts, which imposes a duty upon a possessor of land to prevent licensees from causing harm. The Plaintiff fails to note that there are two necessary elements to this claim: (a) the owner knows or has reason to know that he/she has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control. Restatement (Second) of Torts § 318.

In this case, Mount St. Clare had no way of knowing of the necessity to control Seneca Arrington. "One may assume that others will obey the law." *Freeman* at 1003 (citing *Roadway Express, Inc. v. Piekenbrock*, 306 N.W.2d 784, 786 (Iowa 1981)). In order for Mount St. Clare to insure that students bring guests into the dorms that are unlikely to pose a threat, the College would have to prohibit guests altogether, or screen them intensively. This would result in exactly the type of contravention of student autonomy and independence that the Court insisted on avoiding in *Freeman. Id.* at 1002. Thus, the Plaintiff's negligence claim alleging the College's duty to control Mr. Arrington fails, and it is unnecessary to explore whether Mr. Arrington was even technically a licensee of the College, or the student who invited him into Durham Hall, J.D. Wilson.

3. Duty to Warn

The Plaintiff also pleads in her complaint that the College failed in its duty to warn her of "the risk to physical safety inherent at its educational institution and, further, failed to warn Plaintiff of the risks to personal safety inherent in the dormitory in which the Plaintiff was living." Under Iowa law, the duty to warn "is predicated upon *superior knowledge*, and arises when one may reasonably foresee danger of injury or damage to another less knowledgeable unless warned of the danger." *Lovick v. Wil-Rich*, 588 N.W.2d 688, 693 (Iowa 1999) (emphasis added).

***6** In this case, the College could not possibly have superior knowledge of the danger Seneca Arrington posed to the Plaintiff, who chose to house Mr. Arrington in her room the previous evening in direct violation of the College's regulations. Once again, to expect a college or university to obtain even a significant level of knowledge about its students' guests would impose a custodial role that is usually inconsistent with a college or university's mission of educating students who are adults. Mount St. Clare already took measures above and beyond other colleges to separate male and female students after hours and track guests in its dormitories. It is not for the Court to determine whether institutions of higher learning should take stricter measures to control the college-age students they house, or more lax measures. It is a decision for these institutions, their students, and parents. Therefore, the Court must reject the Plaintiff's claim that the College breached a duty to warn her about the harm that she encountered.

4. Negligent Misrepresentation

"Courts have never found a need to treat negligent misrepresentation as a separate basis for liability when the interference consists of personal or property damage." *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 123 (Iowa 2001) (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 105, at 725-26 (5th ed.1984)). In *Freese v. Lemmon*, 210 N.W.2d 576, 580 (Iowa 1973), the plurality of the Iowa Supreme Court adopted the rule in the Restatement (Second) of Torts § 311(1) on negligent misrepresentation that leads to physical injury: "[o]ne who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results...." *Id.*

At least one court has held on behalf of an injured college student on this basis. In *Duarte v. State of California*, 88 Cal.App.3d 473 (Cal.Ct.App.1979), the mother of a student raped and murdered in a state university dormitory was allowed to bring a claim for negligent misrepresentation, where the mother alleged that she relied on the university's assertion that their dormitories

were safe when she chose to house her daughter there instead of a private residence. The mother also alleged that the university "was aware there was a chronic pattern of violent assaults, rapes and attacks on female members of the university community, and that this pattern was escalating." *Id.*

Mount St. Clare College admits that it misreported its crime statistics at the time that the Plaintiff decided to enroll there. The reportage of accurate crime statistics is a clear duty imposed on the College by the federal Student Right to Know and Campus Security Act and it was breached. Mount St. Clare College's misrepresentation was, to some extent, more serious than that of the defendant/university in *Duarte*, because the misrepresentation was an explicit false report of crime statistics in violation of federal law.

***7** In two other important ways though, the Plaintiff's case falls short of the claim alleged in *Duarte.* The Plaintiff was unable to show that she relied in any way on the misrepresentation, testifying that she did not look at crime statistics in making her decision to attend Mount St. Clare. Furthermore, the Plaintiff's father, himself a former college security officer, failed to state that he relied on the misreported crime statistics in sending his daughter to Mount St. Clare, even in an affidavit filed after Mount St. Clare argued in their motion for summary judgment that the Plaintiff did not rely on the misrepresentation. Without any showing or claim of reliance, the misrepresentation claim must fail.

The Plaintiff's negligent misrepresentation claim also fails because it does not demonstrate that the College's misrepresentation proximately caused the sexual assault on the Plaintiff. Even if the Plaintiff or someone in her family did peruse the falsely reported crime statistics, they would have only been misled about the existence of one sexual assault in the 1995-1996 school year, two years before the Plaintiff enrolled. Thus, the Plaintiff has not offered any evidence that her enrollment at Mount St. Clare made her in any way more likely to have an acquaintance sexually assault her than if she had attended any other institution or none at all. Consequently, the Plaintiff's misrepresentation claim fails on this ground as well.

IV. Order

The Court hereby grants the Defendant's motion for summary judgment.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2001 WL 1678766

Footnotes

1 No representations were made about the 1994-95 school year in the erroneous statistics cited by the Plaintiff. The Plaintiff also claims a "[f]orcible sexual assault" took place in September of 1997, but the only evidence of that in the record is the claims of students that they read about a certain rape allegation in the newspaper.

2019 WL 652527
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Jane ROE, Plaintiff,
v.
The PENNSYLVANIA STATE UNIVERSITY and John Doe, Defendants.

CIVIL ACTION No. 18-2142
|
Filed 02/15/2019

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MEMORANDUM

ROBERT F. KELLY, Sr. J.

***1** Plaintiff Jane Roe ("Roe") was a student at Defendant The Pennsylvania State University ("Penn State") from August 2012 to August 2015, and August 2016 to May 2018. The two periods of time essentially function as two separate chapters of the case, with the former involving claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. § 951 *et seq.*, and breach of contract. The latter period, which is at issue for purposes of the instant motions, involves claims under Title IX of the Education Amendments Act of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*, 42 U.S.C. § 1983, the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), breach of contract, and negligence or, in the alternative, assault and battery.

Presently before the Court are Penn State and Defendant John Doe's ("Doe") Motions to Dismiss. Penn State seeks dismissal of Roe's Title IX and Section 1983 claims for failure to state a claim. Doe seeks dismissal of the negligence and alternative assault and battery claims on the basis that the Court does not have supplemental jurisdiction over them. For the reasons that follow, Penn State and Doe's Motions are granted.

I. BACKGROUND

Roe enrolled as an undergraduate student at Penn State in August 2012 and began working for Penn State's University Police as a Student Auxiliary Officer in August 2013.[1] (Am. Compl. ¶¶ 38-39.) On August 22, 2015, she obtained a leave of absence from Penn State to enter the military. (*Id.* ¶ 282.) In the fall of 2016, Roe re-enrolled at Penn State to complete her studies and resumed her position with the University Police.[2] (*Id.* ¶ 287.)

When Roe returned to Penn State, she "caught up" with another auxiliary officer, Doe, whom she had known since August 2013 because the two worked the same shift and detail. (*Id.* ¶¶ 288-89.) Doe told Roe that two female auxiliary officers previously filed complaints against him that accused him of sexual misconduct. (*Id.* ¶ 292.) Roe alleges, upon information and belief, that Penn State had actual knowledge of the two prior complaints filed against Doe; that the two prior complaints were filed with an appropriate person at Penn State who had authority to investigate and take remedial action; that Penn State did not properly investigate the two prior complaints; and that Penn State did not discipline Doe. (*Id.* ¶¶ 293-95.) Doe told Roe that the two sexual misconduct complaints were investigated and that the two female auxiliary officers were lying. (*Id.* ¶¶ 296-97.) Roe claims that she believed Doe "because she did not know the female Auxiliary Officers very well and because [she] and Doe were friends." (*Id.* ¶ 298.) Doe also told Roe that he liked her more than a friend, but the feelings were not reciprocated, as Roe told him that she was happy with her three-year relationship with her boyfriend. (*Id.* ¶ 299.)

***2** On January 27, 2017, Roe was working until 9:00 p.m. and invited Doe and another co-worker, Frank Piotrowski ("Piotrowski"), to come over to her apartment after the shift for some drinks. (*Id.* ¶ 300.) Piotrowski declined

Roe's invitation, but Doe accepted. (*Id.* ¶ 301.) Roe had invited Doe to her apartment to socialize on prior occasions. (*Id.* ¶ 290.) After Roe invited Doe and Piotrowski to her apartment, she claims she later learned "that while she was changing in another room, Doe pulled handcuffs from his duffle bag and told Officer Piotrowski what he planned to do to [her]." (*Id.* ¶ 302.) Roe told Doe that he would need to arrange for a ride home because they would be drinking, to which the latter stated that his roommate would pick him up. (*Id.* ¶ 303.)

The two "ordered pizza and drank vodka" at Roe's apartment. (*Id.* ¶ 304.) When the pizza arrived, Roe left her drink unattended while she paid for the pizza. (*Id.*) She alleges she had "a few shots of vodka that Doe poured for her" as they ate pizza and talked. (*Id.* ¶ 305.) She further claims that Doe did not appear to be drinking as much vodka as she, even though he kept pouring shots for her. (*Id.*)

During the early morning of January 28, 2017, Roe became incapacitated. (*Id.* ¶ 306.) She alleges Doe carried her to her bedroom and engaged in sexual intercourse with her without her knowledge or consent. (*Id.*) When Roe awoke in the morning, she learned that Doe had sex with her and that he did not use a condom. (*Id.* ¶ 307.) Even though Roe was visibly upset, Doe told her to "stop crying" and to "get over it." (*Id.* ¶ 309.) After Doe eventually left Roe's apartment, she later went to Mount Nittany Medical Center to be examined because she was bleeding and in pain. (*Id.* ¶ 311.) Because Doe told her that he did not use a condom, the nurses gave Roe HIV medication. (*Id.* ¶ 313.) This medication made Roe sick, which she claims caused her to fail a physical exam for the military and subsequently set her military career back. (*Id.* ¶ 314.)

That same day, Roe reported the incident to Piotrowski, who filed an anonymous Title IX complaint on behalf of Roe. (*Id.* ¶¶ 318-19.) Penn State opened a Title IX investigation within two days. (*See id.* ¶¶ 320-21(a).) Roe and her attorney met with Penn State's former Title IX coordinator, Paul Apicella, on January 30, 2017. (*Id.* ¶ 321(a).) On February 10, 2017, Roe and her attorney met with Penn State's new Title IX coordinator, Chris Harris ("Harris"), who stated the investigation into Roe's complaint should take approximately sixty days. (*Id.* ¶ 321(b).) The following month, Roe and her attorney again met with Harris, who stated that Doe wanted to submit a polygraph examination. (*Id.* ¶ 321(c).) Roe objected to Doe's polygraph submission. (*Id.*)

In April 2017, Harris informed Roe that he was working on his investigative report. (*Id.* ¶ 322.) The following month, he told Roe he had completed a draft report and was including Doe's polygraph examination results. (*Id.* ¶ 323.) Roe met with Harris on May 25 and June 24, 2017 to review the report. (*Id.* ¶ 324-25.) On August 7, 2017, Roe met with Harris to review an updated report. (*Id.* ¶ 326.) During that meeting, Harris informed Roe he had met with Doe three times over the summer. (*Id.*) On August 15, 2017, Harris indicated that he submitted his investigative report to the Office of Student Conduct for review. (*Id.* ¶ 327.)

On October 12, 2017, Karen Feldbaum ("Feldbaum"), the Interim Senior Director of the Office of Student Conduct, issued two major charges to Doe: (1) nonconsensual intercourse (charge code number 2.05); and (2) sexual misconduct involving an incapacitated person (charge code number 2.07), which is defined as "engaging in sexual activity with a person who is unable to give reasonable consent due to incapacitation resulting from substance abuse, captivity, sleep, or disability." (*Id.* ¶ 328.) Feldbaum issued the following sanctions to Doe: indefinite expulsion with August 15, 2018 being the first time Penn State would consider re-enrollment; a favorable psychiatric evaluation prior to readmission; and required counseling prior to readmission. (*Id.* ¶ 329.)

***3** Doe contested the charges. (*Id.* ¶ 330.) A hearing was then scheduled before a Title IX decision panel, which was composed of a group of faculty and staff authorized to review Title IX allegations, determine whether a violation of the Student Code of Conduct was committed, and assign sanctions in response to violations. (*Id.* ¶¶ 332-33.) The hearing took place on November 28, 2017, at which Roe spoke for approximately ten minutes. (*Id.* ¶ 334.) The Title IX panel did not ask her any questions. (*Id.*) Doe spoke for approximately forty-five minutes. (*Id.* ¶ 336.) During the hearing, Roe objected to Doe's introduction of the polygraph examination. (*Id.* ¶ 335.) The panel also allowed Doe to submit new information over Roe's objection, "including alleged hearsay statements made by a State College detective and police officer that they did not believe Plaintiff, that Plaintiff was lying about the January 28, 2017 Incident, and that the State College Police were not going to press charges against Doe and had cleared Doe of any wrongdoing." (*Id.* ¶¶ 335, 337.) Roe alleges Penn State did not allow her to present witness testimony or cross-examine Doe at the hearing. (*Id.* ¶ 339.)

Later that day, Feldbaum informed Roe that the Title IX panel completed their review and determined that Doe would not be charged with any violations of the Code of Conduct. (*Id.* ¶ 340.) On December 5, 2017, the panel issued a decision that Doe did not violate charge numbers

2.05 (non-consensual intercourse) or 2.07 (sexual misconduct involving an incapacitated person) of Penn State's Code of Conduct. (*Id.* ¶ 341.) Roe submitted an appeal of the Title IX panel's decision and also requested a new panel for a hearing. (*Id.* ¶¶ 345-46.) On January 5, 2018, Penn State denied both requests. (*Id.* ¶ 347.)

Roe alleges Doe was on a leave of absence between January 2017 and May 2018, during which she alleges she did Doe's job duties at the University Police. (*Id.* ¶¶ 350-51.) She alleges that even though Doe was paid at a higher hourly rate than she, Penn State continued to pay her the same lower hourly rate. (*Id.* ¶ 352.)

After fulfilling all jurisdictional prerequisites, Roe filed suit in this Court against Penn State, the Pennsylvania State University Board of Trustees (the "Board of Trustees"), and Doe on May 21, 2018. Doe filed a motion to dismiss based on lack of subject matter jurisdiction, and Penn State and the Board of Trustees filed a motion to dismiss several counts for failure to state a claim. Roe filed a nine-count Amended Complaint in response to Penn State and the Board of Trustees' motion, which omits the Board of Trustees as a defendant. The following counts are directed against Penn State: hostile work environment in violation of Title VII (Count I); retaliation in violation of Title VII (Count II); hostile work environment and retaliation in violation of the PHRA (Count III); violations of Title IX (Count IV); a violation of the Equal Protection Clause of the Fourteenth Amendment under 42 U.S.C. § 1983 (Count V); a violation of the Equal Pay Act of 1963 (Count VI); and breach of contract (Count VII). The following counts are directed against Doe: negligence (Count VIII); and, in the alternative, assault and battery (Count IX).

On September 7, 2018, Doe again filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, contending that he should be dismissed from the action because the Court lacks supplemental jurisdiction over the state law claims asserted against him. On September 24, 2018, Penn State filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the Title IX and Section 1983 claims should be dismissed for failure to state a claim.

II. LEGAL STANDARD

A. Rule 12(b)(1)

A party may challenge a court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). "At issue in a Rule 12(b)(1) motion is the court's 'very power to hear the case.' " *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) (footnote omitted) (quoting *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). A motion filed under Rule 12(b)(1) may take two forms: (1) a facial attack, where the party contesting subject matter jurisdiction attacks the face of the complaint; or (2) a factual attack, where the existence of subject matter jurisdiction is attacked as a matter of fact. *See id.* n.3. "A facial attack concerns an alleged pleading deficiency[,] whereas a factual attack concerns the actual failure of a plaintiff's claims to comport factually with the jurisdictional prerequisites." *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015) (internal quotation marks and alterations omitted); *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014).

***4** When a party files a Rule 12(b)(1) motion that mounts a facial attack to subject matter jurisdiction, a court may consider only "the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (citations omitted). In reviewing a factual attack, on the other hand, a court "may consider evidence outside the pleadings," *id.*, but there is "no presumptive truthfulness attache[d] to plaintiff's allegations," *Mortensen*, 549 F.2d at 891.

B. Rule 12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). In deciding a motion to dismiss under Rule 12(b)(6), courts must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the nonmovant." *Davis v. Wells Fargo*, 824 F.3d 333, 341 (3d Cir. 2016) (quoting *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014)) (internal quotation marks omitted). However,

courts need not "accept mere[ ] conclusory factual allegations or legal assertions." *In re Asbestos Prods. Liab. Litig. (No. VI)*, 822 F.3d 125, 133 (3d Cir. 2016) (citing *Iqbal*, 556 U.S. at 678-79). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Twombly*, 550 U.S. at 555. Finally, we may consider "only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon [those] documents." *Davis*, 824 F.3d at 341 (quoting *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010)) (internal quotation marks omitted).

III. DISCUSSION

A. Penn State's Motion to Dismiss the Title IX and Section 1983 Claims

1. *Title IX*

Title IX provides, with certain exceptions, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). "Although Title IX does not expressly permit private enforcement suits, the Supreme Court has found an implied private right of action for individuals to enforce Title IX through monetary damages actions." *Hill v. Cundiff*, 797 F.3d 948, 968 (11th Cir. 2015) (citing *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979)).

The Supreme Court has held that allegations of teacher-on-student and student-on-student harassment are actionable under Title IX. *See* *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643, 646-47 (1999) (student-on-student harassment); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (teacher-on-student harassment). To recover under Title IX based on student-on-student harassment, the Supreme Court in *Davis* held that "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). Moreover, "schools can only be liable for 'deliberate indifference to known acts of peer sexual harassment,' " meaning "that 'the [funding] recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.' " *Raihan v. George Washington Univ.*, 324 F. Supp. 3d 102, 108 (D.D.C. 2018) (quoting *Davis*, 526 U.S. at 648). Accordingly, a plaintiff must prove five elements to recover under Title IX based on student-on-student harassment:

> ***5** First, the defendant must be a Title IX funding recipient. Second, an "appropriate person" must have actual knowledge of the alleged discrimination or harassment. Third, the discrimination or harassment—of which the funding recipient had actual knowledge under element two—must be "severe, pervasive, and objectively offensive." Fourth, the plaintiff must prove "the funding recipient act[ed] with deliberate indifference to known acts of harassment in its programs or activities." Fifth, the plaintiff must demonstrate the discrimination or harassment "effectively barred the victim's access to an educational opportunity or benefit."

Hill, 797 F.3d at 970 (internal citations omitted) (alterations in original) (citing *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1293, 1298 (11th Cir. 2007)).

In this case, Roe attempts to hold Penn State liable under three Title IX theories: (1) a pre-assault claim, for which she seeks to hold Penn State directly liable for the alleged assault based on Penn State's deliberate indifference; (2) a post-assault claim, where she claims Penn State was deliberately indifferent when it failed to provide an adequate response to her complaint of sexual assault; and (3) an erroneous outcome claim, where she contests the outcome of the Title IX disciplinary proceeding on the basis of it being infused with gender bias.

a. Pre-Assault Claim

Roe's pre-assault claim attempts to hold Penn State liable for her sexual assault on the theory that it was deliberately indifferent to the two prior sexual misconduct complaints made against Doe. Penn State moves to dismiss the pre-assault allegation on the basis that Roe fails to plead: (1) an appropriate person had actual knowledge of the two prior misconduct complaints made against Doe; (2) Penn State acted deliberately indifferent to those two prior complaints of sexual misconduct; and (3) she was effectively barred equal access to an educational opportunity or benefit. Because it is clear that Roe again fails to allege a deprivation of equal access to a Penn State educational opportunity or benefit, we need not discuss Penn State's first two arguments.

To sufficiently plead an actionable Title IX violation, the plaintiff must allege that the gender-based harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[ ] of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. In discussing this element, the Supreme Court in *Davis* noted that "[t]he most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources." *Id.* However, physical exclusion is not necessary to demonstrate that students have been deprived of an educational opportunity on the basis of their gender. *Id.* When physical exclusion is lacking, "courts consider whether the harassment 'had a concrete, negative effect' on the plaintiff's 'ability to receive an education.' " *Nungesser v. Columbia Univ.*, 244 F. Supp. 3d 345, 367 (S.D.N.Y. 2017) (citations omitted). "Examples of such negative effects include a drop in grades, missing school, being forced to transfer schools, or mental health issues requiring therapy or medication." *Id.* at 368 (citations omitted).

In *Davis*, the Supreme Court also took special care to state that in the context of student-on-student harassment, private damages are limited only in cases where there is a "systemic effect of denying the victim equal access to an educational program or activity." *Davis*, 526 U.S. at 652. In fact, the Court questioned whether a single incident of harassment could ever have such an effect, noting that

> ***6** [a]lthough, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.

Id. at 652-53.

Penn State moves to dismiss Roe's Title IX pre-assault claim on the basis that she fails to allege a deprivation of equal access to Penn State's educational opportunities or benefits following the assault. (Penn State's Mem. Law Supp. Mot. Dismiss 16-17.) In response, Roe points to the following allegations in her Amended Complaint: (1) after the alleged assault, she was forced to miss approximately one week of classes and needed to seek medical treatment, (Am. Compl. ¶ 382); the HIV medication she took made her sick, causing her not to pass a physical exam for the military which she claims set her military career back, (*id.* ¶ 314); since the alleged assault she has nightmares, feels anxiety when alone, and has trouble trusting others, (*id.* ¶ 315); she was constantly reminded of Doe while at work because she saw his name on the University Police employee list, (*id.* ¶ 316); the alleged assault negatively impacted her health, studies, relationships, and career, (*id.* ¶ 317); and she repeatedly had to answer the same questions regarding the incident during interviews with Harris, which exacerbated her mental health condition, (*id.* ¶ 321(d)). Based on the high bar that Title IX sets for recovery, we are constrained to agree with Penn State that Roe fails to allege a systemic denial of equal access to educational opportunities or benefits.

To illustrate just how high a bar Title IX sets, we consider several cases in which courts have deemed certain allegations or evidence insufficient to constitute a denial of equal access. In *Nungesser*, the plaintiff (a male) was accused of raping another student at Columbia University. *Nungesser*, 244 F. Supp. 3d at 351. After a seven-month investigation and hearing on the matter, the plaintiff was found "not responsible." *Id.* The plaintiff pleaded that the student who accused him of rape then undertook a course of conduct to have him expelled or have him leave the university. *Id.* at 352. In furtherance of that alleged purpose, the student, among other things, carried her mattress around campus to raise awareness of sexual assault (which was her senior thesis and for which she received class credit); instigated others to file false accusations against the plaintiff; started spreading rumors

to motivate others to join her campaign against the plaintiff; and encouraged the president of a co-ed fraternity to notify its alumni that an alleged rapist was among their members. *See id.* at 351-52. The plaintiff filed suit against Columbia University, alleging a violation of Title IX on the basis that the university was deliberately indifferent to gender-based harassment by his accuser, which the university condoned. *Id.* at 362.

The court went to great lengths to detail the plaintiff's allegations that the above actions had a sufficient deprivation of access to educational opportunities. For instance, the plaintiff alleged that because his accuser (supported by her followers) carried around her mattress during a series of at least twenty "collective carry" events, he completely avoided being on campus unless absolutely necessary, and he alleged he was fearful to access campus resources such as the dining hall, athletic center, libraries, and center for career education. *Id.* at 358. In his complaint, the plaintiff also described what occurred on the "National Day of Action," in which several of his accuser's supporters brought mattresses and pillows to one of his classes and stared at him throughout the entire class. *Id.* at 359. Some of the supporters took his picture, and the entire event made him fearful to participate in class discussions. *Id.* He even alleged he took the class on a "pass/fail" basis to avoid having his poor performance affect his grade point average. *Id.* The plaintiff also alleged other deprivations of access to educational opportunities as a result of his accuser's actions, including: a professor telling him to drop out of a course to "make everything easier for everyone in the class"; feeling discouraged from attending a number of on-campus career events because Columbia refused to support him; missing the second half of a final exam because he suffered from sleep deprivation, depression, and feelings of isolation; and being "psychologically unable" to take the exam for his General Physics course. *See id.* at 358-60.

***7** Despite the plaintiff's specific allegations, the court rejected the notion that any of the above assertions deprived him of equal access to Columbia's educational opportunities. *Id.* at 371. Although the court responded to each of the plaintiff's purported denials of equal access specifically, it ultimately concluded that he did not "allege that his grades dropped significantly, that he suffered mental health issues that required therapy or medication, that he was unable successfully to complete a course, that he was delayed or prevented from graduating ... or that he missed a significant number of classes as a result of [those] events." *Id.* at 370-71. Therefore, the court found the plaintiff failed to plausibly plead a deprivation of access to educational opportunities within the meaning of Title IX. *Id.* at 371.

Similarly, in *Hawkins v. Sarasota County School Board*, the parents and guardians of three eight-year-old female students brought an action under Title IX based on sexual harassment the students suffered at school. 322 F.3d 1279, 1280-81 (11th Cir. 2003). The girls stated the harassment caused them to fake being sick on four or five occasions to avoid going to school, and their parents testified that the students cried more frequently, appeared anxious, and were reluctant to go to school. *Id.* at 1281.

In discussing whether the harassment caused a deprivation of equal access to an educational program or activity, the court stated the harassment must have a "systemic" effect of denying the victim equal access, meaning "that gender discrimination must be more widespread than a single instance of one-on-one peer harassment and that the effects of the harassment touch the whole or entirety of an educational program or activity." *Id.* at 1289 (footnote omitted). In affirming the district court's grant of summary judgment in favor of the defendant, the Eleventh Circuit held that the "record ... reflect[ed] no concrete, negative effect on their ability to receive an education or the enjoyment of equal access to educational programs or opportunities." *Id.* Even though the students testified they were upset about the harassment and that they faked being sick on four or five occasions to avoid going to school, the court held such evidence fell short of demonstrating a systemic effect of denying equal access to an educational opportunity or program. *Id.*

In *Gabrielle M. v. Park Forest-Chicago Heights, Illinois School District 163*, a five-year-old female student brought a Title IX action based on sexual harassment she faced by another student at school. 315 F.3d 817, 818 (7th Cir. 2003). Several months after the harassment started, the plaintiff's parents took her to the pediatrician because she was experiencing bedwetting, insomnia, nightmares, and loss of appetite. *Id.* at 820. The doctor referred the plaintiff to a counselor, who diagnosed her with acute stress disorder and separation anxiety due to the harassment she experienced at school. *Id.*

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the defendant, concluding that even though the plaintiff was diagnosed with some psychological problems, there was no evidence the plaintiff was denied access to an education. *Id.* at 823; *but see* *Davis*, 526 U.S. at 653 (concrete, negative

effect on education when fifth-grade plaintiff alleged drop in grades, discovery by her father of a suicide note, and a sexual battery conviction for the harasser); *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000) (plaintiff effectively denied education where several boys intimidated her from seventh to ninth grade, resulting in a diagnosis of depression and withdrawal from school); *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1248-49 (10th Cir. 1999) (plaintiff with cerebral palsy and developmentally disabled, who was sexually assaulted multiple times by another student, deprived of access to educational opportunities because she became a danger to herself, had to leave school to enter a psychiatric hospital, and became homebound as a result of her experience at the school).

***8** Roe's allegations in this matter fall well short of Title IX's high bar to recovery. She alleges she was required to take HIV medication following the alleged assault, which set her military career back because she failed a physical exam. However, Roe fails to provide any nexus between her military career and a Penn State educational benefit or opportunity. *See Nungesser*, 244 F. Supp. 3d at 370 (questioning whether attending on-campus career events is an educational benefit or opportunity for purposes of Title IX). She further alleges she was constantly reminded of Doe while at work because she saw his name on the employee list, but she does not allege it had any impact whatsoever on her ability to work as an auxiliary officer. Indeed, following the alleged assault, it appears Roe continued to work as an auxiliary officer uninterrupted from January 2017 until she graduated in May 2018, and she was even promoted to Lieutenant in March 2018.[3] Regarding her allegations that the alleged assault caused her to have nightmares, trouble trusting others, and anxiety when alone, and that having repeatedly to answer Harris' questions during interviews exacerbated her mental health condition, she likewise fails to allege there was any effect on her ability to access Penn State's educational opportunities or benefits. *See Gabrielle*, 315 F.3d at 823 (no denial of access even though plaintiff was diagnosed with "some psychological problems").

Roe also claims the alleged assault "negatively impacted [her] health, her studies, her relationships, and her career." (Am. Compl. ¶ 317.) This conclusory statement is insufficient to overcome a motion to dismiss. *See Nungesser*, 244 F. Supp. 3d at 369 (stating plaintiff's allegation that "his academic experience suffered" did not suffice for purposes of defendant's motion to dismiss). But even if we were to construe liberally Roe's allegation of a negative impact on her studies to mean a decline in her grades, the Supreme Court has held "that a mere 'decline in grades' " is insufficient to survive a motion to dismiss. *Davis*, 526 U.S. at 652.

Finally, Roe alleges she was forced to miss approximately one week of classes following the alleged assault. However, she does not plead that her absence interrupted her ability to learn the course material or that it affected her grades in any way. *See Nungesser*, 244 F. Supp. 3d at 370-71 (plaintiff failed to plead deprivation of equal access because there were no allegations of significant grade decline, that he was unable to successfully complete a course or was delayed from graduating, or that he missed a significant number of classes). Moreover, the Supreme Court has held that in cases of a single incident of student-on-student sexual harassment, there must be a "*systemic* effect of denying the victim equal access to an educational program or activity." *Davis*, 526 U.S. at 652 (emphasis added). Roe's allegation of missing one week of classes falls short of a "systemic effect" of denial of equal access to Penn State's educational opportunities or benefits. *See Hawkins*, 322 F.3d at 1289 (students faking sick to avoid going to school falling "short of demonstrating a systemic effect of denying equal access to an educational opportunity or activity").

In concluding that Roe has failed to allege a denial of equal access to Penn State's educational opportunities or benefits, we by no means downplay the significant effect that sexual assault has on individuals. There can be no question that victims of sexual assault endure enormous amounts of pain. Nevertheless, we are constrained to agree with Penn State that Roe's pre-assault claim fails because she has not alleged a deprivation of equal access to an educational opportunity or benefit, which is the actionable injury within the meaning of Title IX.

Roe's Amended Complaint in this matter is extraordinarily detailed, constituting fifty-seven pages and 417 paragraphs. It is telling that following the alleged assault, she fails to detail a single instance about how she was deprived of access to Penn State's educational benefits or opportunities, such as dropping classes (or elongating her enrollment at Penn State), withdrawing from Penn State, stopping her employment as an auxiliary officer, or otherwise changing her educational activities. Roe responded to Penn State's initial motion to dismiss with the Amended Complaint, where she added the aforementioned putative allegations of deprivations of equal access. Although she requests leave to amend in the event we find her current allegations insufficient, we believe further amendment would be futile given the length and detail of the Complaint and Amended Complaint. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). Accordingly,

Roe's pre-assault claim under Title IX is dismissed with prejudice.

b. Post-Assault Claim

***9** Roe also pleads a violation of Title IX based on Penn State's deliberate indifference in responding to her complaint of sexual assault, contending the length of time between her complaint and the investigation being completed was unreasonable. For Roe adequately to plead a violation of Title IX, she must meet the five elements stated above. We need not discuss all of the elements, however, because it is abundantly clear that Roe fails to plead "severe, pervasive, and objectively offensive" harassment that caused a deprivation of equal access to educational benefits or opportunities.

The District of Columbia's decision in *Raihan* provides insight regarding a post-assault claim of deliberate indifference. There, the plaintiff alleged another student engaged in sexual activity with her without her consent. *Raihan*, 324 F. Supp. 3d at 105. Two and a half years after the incident, the plaintiff filed a formal complaint with the university. *Id.* An investigation and hearing ensued, which resulted in a hearing panel finding her assailant to have committed "Sexual Misconduct – (1) Sexual Violence," and recommended suspension as the appropriate sanction. *Id.* at 106. An official outcome letter was later sent to the plaintiff, but the sanction given to her assailant was a "deferred suspension" because the individual was graduating at the end of the semester. *Id.* at 107. After the university's decision, the plaintiff encountered the other student once at the school gym (where he worked), and his employment there effectively denied her access to that facility. *Id.*

The court first found that the university's alleged deliberate indifference did not cause the plaintiff to experience "severe, pervasive, and objectively offensive" harassment. *Id.* at 113. The court reasoned that the plaintiff saw her assailant once at the gym and reported nothing notable about the encounter. *Id.* at 112. Further, in the two and a half years following the assault, the plaintiff made no allegations of harassment or limitation on her educational opportunities. Given those facts, the court rejected the plaintiff's position that her "self-imposed exile from the University gym for a matter of weeks before her graduation" effectively denied her equal access to educational benefits or opportunities. *Id.* at 113.

In this matter, Roe pleads absolutely no facts showing she was subjected to "severe, pervasive, and objectively offensive" harassment following her assault. After Piotrowski filed an anonymous Title IX complaint on her behalf, the university opened an investigation within two days. And even though the investigation took longer than expected, Roe does not allege a single incident where she was subjected to additional harassment as a result of the delay. After the alleged assault in January 2017, Roe does not allege any encounters with Doe until the Title IX hearing in November 2017. In fact, Doe was not even an auxiliary police officer between January 2017 and May 2018, as he was on a leave of absence.

Lastly, unlike the plaintiff in *Raihan*, who alleged she could not access the university's gym because her attacker worked there (which the court deemed insufficient under Title IX), Roe fails to plead a single allegation about being denied equal access to Penn State's educational opportunities or benefits as a result of the lengthy investigation. Although Roe alleges she was constantly reminded of Doe because his name remained on the University Police employee list, she fails to claim it caused any effect on her ability to be an auxiliary police officer.

Because Roe fails to plead any harassment or denial of equal access to an educational benefit or opportunity based on Penn State's alleged deliberate indifference in responding to her complaint of sexual assault, Roe's post-assault claim under Title IX fails. Given the length and detail of her Complaint and Amended Complaint, we find any further amendment would be futile. *See* *Burlington*, 114 F.3d at 1434. Accordingly, Roe's post-assault claim is dismissed with prejudice.

c. Erroneous Outcome Theory

***10** Roe's final Title IX claim is under an erroneous outcome theory, in which she claims the Title IX hearing was infused with gender bias such that it produced a flawed outcome in favor of Doe.

A plaintiff proceeding on an erroneous outcome theory is attacking the university disciplinary proceeding on the grounds of gender bias and asserts that he or she "was innocent and wrongly found to have committed the offense." *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). "[T]o state a claim upon which relief can

be granted under an erroneous outcome theory, a plaintiff must allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Doe v. The Trustees of the Univ. of Pa.*, 270 F. Supp. 3d 799, 822-23 (E.D. Pa. 2017) (internal quotation marks omitted) (quoting *Harris v. Saint Joseph's Univ.*, No. 13-3937, 2014 WL 1910242, at *4 (E.D. Pa. May 13, 2014)). "Such allegations might include, *inter alia*, statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Yusuf*, 35 F.3d at 715. "[A]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Id.*

Penn State moves to dismiss the erroneous outcome claim on the basis that Roe merely pleads conclusory allegations of gender bias and does not allege particular circumstances necessary to establish that gender motivated Penn State's Title IX process. (Penn State's Reply Br. 2.) Roe argues that she has alleged sufficient facts to show impermissible gender bias during the Title IX hearing, such as the favorable treatment Doe was given. We agree with Penn State that Roe's erroneous outcome claim should be dismissed.

At the outset, we question whether an erroneous outcome claim is even available to a plaintiff such as Roe. Typically, cases involving an allegation that a Title IX procedure was flawed with impermissible gender bias are brought by individuals who have been accused and found responsible for committing misconduct. *See, e.g.*, *Doe v. Cummins*, 662 F. App'x 437 (6th Cir. 2016); *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016); *Yusuf*, 35 F.3d at 709; *Doe v. Syracuse Univ.*, 341 F. Supp. 3d 125 (N.D.N.Y. 2018); *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573 (E.D. Va. 2018); *Powell v. Saint Joseph's Univ.*, No. 17-4438, 2018 WL 994478 (E.D. Pa. Feb. 20, 2018); *Trustees of the Univ. of Pa.*, 270 F. Supp. 3d at 799; *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048 (S.D. Ohio 2017); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748 (D. Md. 2015); *Doe v. Washington & Lee Univ.*, No. 14-52, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015); *Doe v. Univ. of Mass.-Amherst*, No. 14-30143, 2015 WL 4306521 (D. Mass. July 14, 2015); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774 (S.D. Ohio 2015); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014). The very basis of an erroneous outcome claim is that "the plaintiff contends that he is 'innocent and [was] wrongly found to have committed the offense.' " *Trustees of the Univ. of Pa.*, 270 F. Supp. 3d at 822 (alteration in original) (quoting *Yusuf*, 35 F.3d at 715).

***11** In this case, Roe does not claim she is innocent and wrongly found responsible for an offense. Rather, Roe was the alleged victim of sexual assault, not the target of the Title IX disciplinary hearing. Accordingly, her erroneous outcome claim fails as a matter of law.

Nevertheless, even if such a claim were available to Roe, we agree with Penn State that Roe has failed to plead particular circumstances necessary to show gender bias was a motivating factor during the Title IX process. Examples of such circumstances include "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Yusuf*, 35 F.3d at 715. Notably, "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Id.*

In this case, Roe merely pleads that the Title IX process was flawed and includes conclusory allegations of gender bias. She fails to allege any statements by members of the Title IX panel, statements by other Penn State officials, or patterns of decision-making that tend to show gender discrimination. Therefore, even assuming an erroneous outcome claim is available to Roe, her theory fails as a matter of insufficient pleading as well.

2. *Section 1983 (Equal Protection Clause)*

Penn State also seeks dismissal of Roe's Section 1983 claim, under which she claims a violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, and it is applicable to Penn State through 42 U.S.C. § 1983, *see, e.g.*, *Yan Yan v. Penn State Univ.*, 529 F. App'x 167, 173 (3d Cir. 2013).

To state a claim under § 1983 for a violation of the Equal Protection Clause by Penn State, Roe must meet the requirements to establish municipal liability under *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). *See* *S.K. v. N. Allegheny Sch. Dist.*, 168 F. Supp. 3d 786, 812 (W.D. Pa. 2016) (citing *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009); *Hill*, 797 F.3d at 977). To establish municipal liability, a plaintiff must prove that " 'action pursuant to official municipal policy' caused the[ ] injury." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (citing *Monell*, 436 U.S. at 691). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.* at 61 (citations omitted). Thus, liability cannot be established on the basis of *respondeat superior*, but rather is limited to instances where the government itself supported a violation of the plaintiff's constitutional rights. *See* *S.K.*, 168 F. Supp. 3d at 813 (citations omitted).

Penn State argues that Roe's equal protection claim fails because there are no facts to indicate she was discriminated against on the basis of her gender, and that it took a gender-neutral position in addressing the allegations of sexual harassment and misconduct. (Penn State's Mem. Law Supp. Mot. Dismiss 18.) Roe responds by pointing out instances where she alleges she was discriminated against on the basis of her gender, such as when Doe was allowed to submit new information during the Title IX hearing, the fact that she was not permitted to present witness testimony or cross-examine Doe, and that she spoke for only ten minutes during the hearing, whereas Doe spoke for approximately forty-five minutes. (Pl.'s Mem. Law Opp'n Penn State's Mot. Dismiss 27.)

***12** We agree with Penn State that Roe fails to plead a claim under the Equal Protection Clause. As we noted above, Roe must establish municipal liability under *Monell* to establish an equal protection violation. *See* *S.K.*, 168 F. Supp. 3d at 812. To do so, she must allege that an official municipal policy caused the injury, which includes "decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick*, 563 U.S. at 61.

In this case, Roe has attached Penn State's Student Code of Conduct to her Amended Complaint, which details the protocols for Title IX allegations.[4] (*See* Am. Compl., Ex. A ("Code of Conduct") at 6-9.) In support of her equal protection claim, Roe argues the Code of Conduct is not sex-neutral because it "does not permit female victims to challenge any decision not to charge a male student accused of sexual misconduct." (Pl.'s Mem. Law Opp'n Penn State's Mot. Dismiss 27.) When a Title IX allegation is made, the Code of Conduct provides that "[i]f the acquired information does not reasonably support charges, then the case will be closed without charges, and both parties will be notified." (Code of Conduct at 7.) Roe's argument fails because the Code of Conduct is clearly gender-neutral. As Penn State points out, just as a female would not be able to challenge a decision not to charge a male of sexual misconduct, the plain language of the Code of Conduct would not allow a male to challenge such a decision either. Moreover, Roe's argument is strange because Doe *was* charged with two violations of the Code of Conduct. To the extent Roe claims Doe was given favorable treatment during the Title IX hearing, it is clear that none of the conduct is attributable to an official policy of Penn State. *See* *Connick*, 563 U.S. at 60 ("[U]nder § 1983, local government's are responsible only for 'their *own* illegal acts.... They are not vicariously liable under § 1983 for their employees' actions."). Accordingly, Roe's claim under the Equal Protection Clause fails, and it is dismissed with prejudice. *See* *Burlington*, 114 F.3d at 1434 (listing futility as a ground for denying leave to amend).

B. Doe's Motion to Dismiss for Lack of Subject Matter Jurisdiction

We next address Doe's Motion to Dismiss for Lack of Subject Matter Jurisdiction, in which he claims the Court lacks supplemental jurisdiction over the state law claims of negligence or, in the alternative, assault and battery, asserted against him.[5] For the following reasons, Doe's Motion is granted, and he is dismissed from this action without prejudice.

***13** Under 28 U.S.C. § 1367(a), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." There are three requirements that must be met for a court to exercise supplemental jurisdiction: (1) "[t]he federal claim must have substance

sufficient to confer subject matter jurisdiction on the court"; (2) "[t]he state and federal claims must derive from a common nucleus of operative fact"; and (3) "[b]ut if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). "The test for a 'common nucleus of operative facts' is not self-evident." *Lyon v. Whisman*, 45 F.3d 758, 760 (3d Cir. 1995).

The parties do not dispute that we have proper federal question jurisdiction over Roe's Title VII, Title IX, Section 1983, and Equal Pay Act claims. Rather, Doe argues there is no common nucleus of operative fact between Roe's state law claims against him and any of Roe's federal claims. (Doe's Mem. Law Supp. Mot. Dismiss 8.) In particular, he argues that "[t]he only nexus between the federal claims and the state claims against Defendant John Doe is that Plaintiff and Doe were both students at Penn State and both were employed by Penn State's police department." (*Id.*) In response, Roe argues that she pleads facts in support of her state law claims against Doe that derive from the same set of facts that form the basis of her Title IX and Section 1983 claims against Penn State. (Pl.'s Mem. Law Opp'n Doe's Mot. Dismiss 14) ("Plaintiff's Title IX and Section 1983 claims against Penn State and Plaintiff's negligence (Count VIII) and assault and battery (Count IX) claims against Defendant Doe all arise from the January 28, 2017 Incident."). Indeed, Roe's Amended Complaint specifically groups the factual allegations together with a heading that states, "facts relevant to Plaintiff's Title IX, Section 1983, and all common law claims." (Am. Compl. at 37) (emphasis omitted). Thus, she effectively concedes that the state law claims against Doe supplement only the Title IX and Section 1983 claims against Penn State, and that none of the other federal claims have any relation to those state law claims.

The Court has already dismissed with prejudice Roe's Title IX and Section 1983 claims against Penn State. Therefore, because Roe admits that the remaining federal claims in the action, Title VII and the Equal Pay Act, have no relevance to the negligence and assault/battery claims against Doe, there can be no "common nucleus of operative fact" sufficient for the Court to exercise supplemental jurisdiction. Accordingly, Doe's Motion is granted, and he is dismissed from this action without prejudice.

IV. CONCLUSION

For the reasons noted above, Penn State and Doe's Motions are granted. Roe's claims against Penn State under Title IX and Section 1983 are dismissed with prejudice, whereas her negligence and assault/battery claims against Doe are dismissed without prejudice.

An appropriate Order follows.

All Citations

Slip Copy, 2019 WL 652527

Footnotes

1 We take the facts alleged in the Amended Complaint as true, as we must when deciding a motion under Federal Rule of Civil Procedure 12(b)(6). *See* *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (citation omitted).

2 A substantial number of allegations between August 2013 and August 2015 form the basis of Roe's Title VII, PHRA, and breach of contract claims. Because resolution of the instant motions relates to allegations between August 2016 and May 2018, we recount only those facts.

3 The fact that Roe did Doe's job duties between January 2017 and May 2018, without being paid the same rate as Doe, forms the basis of her Equal Pay Act claim. (Am. Compl. ¶¶ 350-54.)

4 Roe also relies on Penn State's "AD85 Sexual and/or Gender-Based Harassment and Misconduct (Including Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking, and Related Inappropriate Conduct) (Formerly Discrimination, Harassment ...)" in her Amended Complaint. (Am. Compl. ¶ 18.) Pursuant to Policy AD85, Penn State will discipline students who violate Policy AD85 in accordance with the Student Code of Conduct. (*Id.* ¶ 28.)

5 As the Court noted above, a motion to dismiss for lack of subject matter jurisdiction can take the form of either a facial or factual attack. Here, Doe is attacking the basis of supplemental jurisdiction on the face of the pleading, and both parties agree as well. Accordingly, we consider only "the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould*, 220 F.3d at 176.

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 18-2603

WENDELL TANG, M.D., AS REPRESENTATIVE OF THE ESTATE OF LUKE TANG

vs.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, CATHERINE R. SHAPIRO, CAITLIN CASEY, PH.D., MELANIE NORTHROP, MSW, LICSW, AND DAVID ABRAMSON, MD

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Plaintiff Wendell Tang brings this action as the representative of the estate of his son, Luke Tang, who committed suicide at and while attending Harvard University as an undergraduate. The defendants, the President and Fellows of Harvard College and its employees Catherine Shapiro and Caitlin Casey (collectively, "Harvard") and David Abramson ("Abramson") move to dismiss the negligence claims on the grounds that the complaint fails to state a claim. Harvard also moves to dismiss the punitive damages claims.

In consideration of the parties' memoranda of law and oral arguments, and for the reasons that follow, Defendants' motions to dismiss are **DENIED**.

DISCUSSION

Because it is evaluating the legal sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the Court will accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. See, e.g., Berish v. Bornstein, 437 Mass. 252, 267 (2002); Nader v. Citron, 372 Mass. 96, 98 (1977).

As of April, 2015, Luke Tang ("Luke") was an undergraduate freshman at Harvard. On or about April 11, 2015, Luke attempted suicide in a dormitory at Harvard. Harvard became aware of the attempt, and on or about April 22, 2015, Harvard transferred Luke to McLean Hospital ("McLean") for in-patient care. Luke remained as an in-patient at McLean for approximately seven days. While at McLean, it was noted that Luke believed philosophically that suicide can make sense. Clinicians at McLean described Luke as immature, a contrarian, stubborn and lacking full insight.

On or about April 29, 2015, Luke was discharged from McLean. On the same day, Luke met with Melanie Northrop, a Harvard employee. Professionals at McLean had recommended that Luke undergo weekly therapy "with someone who can appreciate his intellectualization, and can monitor him closely because he has a nonchalant and suboptimal appreciation for the gravity of his suicide attempt." Northrop discussed with Luke how he might make use of such treatment. Luke told Northrop that he planned on going on a week-long retreat on May 17, 2015 and would then leave for China and thereafter return to Harvard. Northrop told Luke that he would need to speak with his therapist about a support plan in China and that he would be expected to continue his treatment when he returned to Harvard.

On or about May 1, 2015, Luke entered into a contract ("the Contract") with Harvard and defendant Catherine Shapiro, Harvard's Resident Dean of Freshmen. Luke's acceptance of the Contract was as a condition of his continued enrollment at the university. The Contract was prepared by Northrop, Shapiro, and defendant David Abramson, a Harvard employee working in Harvard University Health Services. The Contract[1] states, in relevant part:

[1] Although the Court's evaluation of a motion to dismiss is generally controlled by the allegations within the complaint, the Court may consider a contract referenced by the plaintiff in the complaint, as is the case here. See Maram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 & n.4 (2004) (Rule 12(b)(6) motion considers facts alleged in complaint and "uncontested documents of record").

> I'm so very glad you are well enough to be back on campus. As we have discussed, the events that resulted in your hospitalization in McLean caused a great deal of sincere concern about your safety and/or well-being and the appropriateness of your continued residence and enrollment at the College. After considering all of the issues presented, and in consultation with Melanie Northrop, MA, MSW, LICSW, and Dr. David Abramson at Harvard University Health Services ("HUHS"), the College had decided to permit you to reside on campus and remain enrolled in the College under the terms and conditions set forth in this letter, which will serve as a contract between us... [W]e need to be sure that you are taking appropriate steps to address the problems that you have been experiencing ...
>
> You are expected to follow the recommendations of your treatment team. These include attending sessions regularly and actively participating in your treatment...
>
> You hereby agree that all members of your treatment team have permission to communicate with each other ... and your ... Dean [Caitlyn Casey] if concerns arise....
>
> If any House Master, House Dean, Freshmen Dean or other College official asks you to be evaluated, you will comply with that request immediately...you may decline to pursue the treatment plan recommended to you...If you cannot meet these conditions, then the College will need to re-evaluate whether you may continue to be enrolled in residence...
>
> [A]s a matter of your safety, the College will contact your parents if you fail to meet the conditions set forth in this letter, including, for example, if you stop attending appointments with your treatment team...

As of May 1, 2015, Harvard sought to ensure that Luke took appropriate steps to address the problems related to his attempted suicide and suicidal ideation, and that he followed the recommendations of his treatment team, including regularly attending sessions and actively participating in treatment.

On May 8, 2015, Luke met with Northrop and reported that he had met with one of the members of his treatment team for an in-take but that he declined to schedule a follow-up appointment. Northrop discussed with Luke that he was "essentially not in treatment" and that Harvard expected him to be in treatment. Luke expressed a desire for a new therapist. Northrop

explained that with five business days left before Luke left campus, it might be challenging to find a new person but that it was very important for him to be engaged in ongoing treatment.

Luke met with Northrop again on May 15, 2015. Luke was still skeptical of the value of treatment. Northrop urged Luke to follow-up with his house dean on his return to Harvard in September. In addition, Northrop reported that as of then, another Harvard employee, defendant Shapiro, had expressed a concern that Luke had no plan for ongoing therapy over the summer and that Shapiro intended to contact Luke's parents about this.

On May 16, 2015, Luke left Harvard.

In August 2015, Luke returned to Harvard and moved into Lowell House on the campus at Harvard. Defendant Caitlin Casey was the dean of Lowell House.

On September 12, 2015, Luke committed suicide in Lowell House.

Luke underwent no mental health counseling between May 16, 2015 and September 12, 2015.

The complaint alleges that defendants Shapiro, Casey and Abramson had a special relationship with Luke and voluntarily assumed a duty of care by designing the Contract and taking other steps. The complaint further contends, among other things, that Harvard owed a duty of reasonable care and/or voluntarily assumed a duty to Luke to take reasonable measures to protect Luke from self-harm, and breached their duty of care and/or assumed duty of care by "[f]ailing to initiate suicide prevention protocols", "[d]esigning a contract ...which failed to provide reasonable safety for Luke" and "[f]ailing to ensure that Luke ...complied with the terms and conditions of the Contract" and failed to "ensure that all applicable policies, practices, procedures and/or protocols of Harvard which related to Luke's situation were reasonably and

appropriately followed and enforced." In the counts for punitive damages, no further facts are alleged to support Plaintiff's claims of gross negligence and recklessness.

ANALYSIS

A motion to dismiss for failure to state a claim upon which relief may be granted under Mass.R.Civ.P. 12(b) (6) permits "prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." Harvard Crimson, Inc. v. President & Fellows of Harvard Coll., 445 Mass. 745, 748 (2006). To survive a motion to dismiss, a complaint must set forth the basis for the plaintiff's entitlement to relief with "more than labels and conclusions." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

Even though it was decided after the events at issue in this case, the parties agree that the Supreme Judicial Court's decision in Dzung Duy Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436 (2018), sets out the relevant standards against which the present motions must be measured. Nguyen involved a suicide of a student at a university, and established the circumstances under which a university has a duty of care to prevent a student from committing suicide and the steps that should be taken when that duty is implicated:

> [W]e conclude that a university has a special relationship with a student and a corresponding duty to take reasonable measures to prevent his or her suicide in the following circumstances. Where a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide, the university has a duty to take reasonable measures under the circumstances to protect the student from self-harm. ...
>
> It is important to understand the limited circumstances creating the duty. It is definitely not a generalized duty to prevent suicide. Nonclinicians are also not expected to discern suicidal tendencies where the student has not stated his or her plans or intentions to commit suicide. Even a student's generalized statements about suicidal thoughts or ideation are not enough, given their prevalence in the university community. The duty is not triggered merely by a university's

> knowledge of a student's suicidal ideation without any stated plans or intentions to act on such thoughts.
> ...
>
> Reasonable measures by the university to satisfy a triggered duty will include initiating its suicide prevention protocol if the university has developed such a protocol. In the absence of such a protocol, reasonable measures will require the university employee who learns of the student's suicide attempt or stated plans or intentions to commit suicide to contact the appropriate officials at the university empowered to assist the student in obtaining clinical care from medical professionals or, if the student refuses such care, to notify the student's emergency contact. In emergency situations, reasonable measures obviously would include contacting police, fire, or emergency medical personnel. By taking the reasonable measures under the circumstances presented, a university satisfies its duty.
>
> We stress that the duty here, at least for nonclinicians, is limited. It is created only by actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide. It also is limited to initiating the university's suicide prevention protocol, and if the school has no such protocol, arranging for clinical care by trained medical professionals or, if such care is refused, alerting the student's emergency contact. Finally, the duty is time-bound. Medical professionals may, for example, conclude that the student is no longer a suicide risk and no further care or counselling is required.

Nguyen, 479 Mass. at 453, 455, 456-57. Nguyen also recognized that a plaintiff could also state claims based on a defendant's voluntary assumption of a duty of care as well as for reckless or grossly negligent conduct. Id. at 460.

The parties agree that in April, Harvard became aware of Luke's suicide attempt, and that Harvard then had a duty under Nguyen to take appropriate action. Harvard argues, however, that Nguyen requires nothing more of it than to show that it took one of the three steps outlined in the case: (1) "initiating the university's suicide prevention protocol," or (2) "if the school has no such protocol, arranging for clinical care by trained medical professionals", or (3) "if such care is

refused, alerting the student's emergency contact." Harvard's simplistic interpretation of Nguyen is erroneous.[2]

In the first place, while Nguyen establishes and defines a university's circumscribed duty in a case such as this, it does not insulate a university from potential liability for failing to properly discharge the limited duties it imposes. Put simply, Harvard's argument to dismiss this case reduces Nguyen to a check-box, and that once a university checks one of the three boxes – a protocol, or if there is none, clinical care, or if that is refused, reaching an emergency contact – its duty ends regardless of how well or poorly the university fulfils its duty. That interpretation cannot be correct. Nguyen allows universities to satisfy its responsibility to suicidal students by "initiating the university's suicide prevention protocol," but inherent in any such response is that the protocol is appropriate. If that were not so, all that a university would have to do to avoid liability under Harvard's theory is to draft something – anything – it can label a "protocol" and "initiate" it under appropriate circumstances (whatever initiation may mean), and thereby not only completely eliminate liability, but foreclose any discovery concerning the appropriateness of the protocol or even any questions about whether it was properly followed. This reading would undermine Nguyen's intent to create some avenue for relief, limited though it may be, in cases involving student suicide.

In the second place, the alleged facts here are not as clear as Harvard would have them. Nguyen sets out a set of sequential, not alternative, steps: if there is a protocol, it must be triggered, and if not, clinical care must be provided, and if that care is refused, an emergency

[2] Harvard asserted in its memorandum, but did not press at argument, that Luke no longer posed a suicide risk in September, after he returned from China, and that Harvard's duty under Nguyen had ceased by then. See Nguyen, 479 Mass. at 457 ("the duty is time-bound. Medical professionals may, for example, conclude that the student is no longer a suicide risk and no further care or counseling is required"). The Court thus does not separately analyze this argument, but notes that it is inherently fact-bound.

contact must be contacted. The Complaint alleges that Harvard "[f]ail[ed] to initiate suicide prevention protocols," which read generously means that there was a protocol in place but that it was not triggered, which would potentially describe a violation of Nguyen even if Harvard offered in-patient mental health care, as it allegedly did. The complaint also alleges that the contract between Luke and the school reflected a voluntary assumption of care, another theory that Nguyen does not preclude.

As to Abramson's motion to dismiss, he contends that the complaint does not allege a physician-patient relationship, but one is unnecessary under Nguyen. He also contends that there is no special relationship between himself and Luke since they never met, but the Contract shows that Abramson was aware of Luke's suicide attempt and was involved in taking steps through the Contract to address it. Cf. Nguyen, 479 Mass. at 147 (finding no special relationship with two university employees because "[t][here was no evidence that [the employees] had actual knowledge of Nguyen's plans or intentions to commit suicide"). At this point, the complaint cannot be said to have failed to allege a plausible theory against Abramson.

Harvard also moves to dismiss the reckless or grossly negligent claims. These theories allege wrongs of a higher magnitude than simple negligence. Gross negligence is "very great negligence, or the absence of slight diligence, or the want of even scant care." Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 19–20 (1997), quoting Altman v. Aronson, 231 Mass. 588, 591–592 (1919). As Altman explained:

> Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability

> which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence.... It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injury.

Id. Reckless conduct involves "a failure to act, if there is a duty to act.... Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another. The risk of death or grave bodily injury must be known or reasonably apparent, and the harm must be a probable consequence of the defendant's election to run that risk or of his failure reasonably to recognize it." Sandler v. Commonwealth, 419 Mass. 334, 336–337 (1995) (citations omitted).

In his opposition to the instant motions, Plaintiff does not argue those elements of the complaint that support these theories, but instead contends that he should be allowed discovery to support them. Plaintiff has it backwards – before discovery commences, the complaint must outline a plausible theory, taking all of its factual allegations as true. See Iannaccino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (complaint must set forth allegations "plausibly suggesting (not merely consistent with) an entitlement to relief"). Here the complaint alleges negligence – that Harvard failed to take reasonable steps in light of Luke's suicide attempt – not that Harvard failed to take any steps, intentionally ignored Luke's plight, or was indifferent to the risks posed by Luke's suicide attempt. However, because "[t]he line between gross negligence and ordinary negligence is often difficult to draw," Belina v. Pelczarski, 333 Mass. 730, 733 (1956), cited in Williamson-Green v. Equipment 4 Rent, Inc., 89 Mass. App Ct. 153, 158 (2016), and in an abundance of caution, the Court rejects Harvard's motion to dismiss these counts.

ORDER

For the foregoing reasons, Defendants' motions to dismiss are **DENIED**.

MDRicciuti J

MICHAEL D. RICCIUTI
Justice of the Superior Court

Date: September 9, 2019

1996 WL 1185104
Only the Westlaw citation is currently available.

Superior Court of Massachusetts.

Kathleen M. WILLIAMSON, et al.[1]

v.

Alan BERNSTEIN, et al.[2]

No. 951471.

|

Feb. 20, 1996.

MEMORANDUM AND ORDER ON MOTION TO DISMISS BROUGHT BY FITCHBURG STATE COLLEGE AND COMMONWEALTH OF MASSACHUSETTS

McHUGH.

I. INTRODUCTION

***1** In this action, Plaintiff, Kathleen Williamson, seeks to recover damages from her former psychology professor, defendant Alan Bernstein ("Bernstein"), Fitchburg State College ("the College"), and the Commonwealth of Massachusetts ("the Commonwealth"). Plaintiff claims that Bernstein negligently provided educational and therapeutic counseling services to her and then induced her to engage in sexual relations with him. Plaintiff's husband and two children allege loss of consortium and parental society respectively. The College and the Commonwealth have moved to dismiss the counts of the Complaint pertaining to them (Counts 8-16) claiming that the plaintiffs have failed to state a claim on which relief can be granted and that, in any event, the claims they have stated are barred both by principles of sovereign immunity and by the "public duty" rule.

II. BACKGROUND

Read as it must be in the light most favorable to the plaintiffs, the complaint alleges that from approximately September of 1993 through April of 1994, plaintiff was enrolled at the College. During this time, Bernstein was a tenured professor of psychology teaching at the College. Bernstein was also a psychological therapist. Bernstein had an oral or written contract with the College to provide specified teaching services to the College and its students for a specified remuneration.

In the fall of 1993, the plaintiff was enrolled in Bernstein's General Psychology course. During the first session of the course, Bernstein explained that the course could be emotionally upsetting and invited his students to speak individually and privately with him if they became upset by classroom discussions. Bernstein thereafter conducted discussions of sexual abuse of women.

After the first and subsequent classes, the plaintiff went to Bernstein's office to speak with him regarding the class topics. During one of these meetings, the plaintiff disclosed to Bernstein her history of childhood sexual abuse. After listening to plaintiff's disclosures, Bernstein undertook to provide therapeutic counseling for her. Bernstein never informed plaintiff that he was not qualified to provide therapy or that the therapy sessions were beyond the scope of his teaching responsibilities. The therapy sessions lasted from September of 1993 through April of 1994.

During Bernstein's therapy sessions, plaintiff told him of intimate details of her childhood sexual abuse, the impact it had had on her life and the difficulties she was encountering in her marriage. Bernstein "regressed" the plaintiff to the point of being a child again to help her recall details of the sexual abuse. Plaintiff reposed trust and confidence in Bernstein and Bernstein encouraged what turned out to be her growing dependency on him. For instance, Bernstein told plaintiff that her husband did not understand her or her problems and he provided her with the name of a divorce attorney so she could divorce her husband. Bernstein further encouraged plaintiff to isolate herself from her family and to keep their relationship secret.

***2** During the spring of 1994, the plaintiff's emotional condition deteriorated. Bernstein, however, advised her not to seek assistance from the College counseling center

but to rely instead upon him for counseling. Around this time, Bernstein also initiated a sexual relationship with plaintiff.

Sometime in the spring of 1994, plaintiff was hospitalized. Thereafter, she filed a complaint against Bernstein with the College. Upon receipt of the complaint, the College began an investigation into Bernstein's conduct.

III. DISCUSSION

1. Applicable Law

When evaluating the sufficiency of a complaint pursuant to Mass.R.Civ.P. 12(b)(6), the court must accept as true the well pleaded factual allegations of the complaint, as well as any inference which can be drawn therefrom in the plaintiff's favor. *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429, 583 N.E.2d 228 (1991), and cases cited. The complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Nader v. Citron*, 372 Mass. 96, 98, 360 N.E.2d 870 (1977), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); see also *Charbonnier v. Amico*, 367 Mass. 146, 152, 324 N.E.2d 895 (1975); *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 89, 390 N.E.2d 243 (1979).

A complaint is not subject to dismissal if it could support relief under any theory of law. Whitinsville, *supra* at 89. Further, a complaint should not be dismissed simply because it asserts a novel theory of liability. *New England Insulation Co. v. General Dynamics Corp.*, 26 Mass.App.Ct. 28, 522 N.E.2d 997 (1988); *Jenkins v. Jenkins*, 15 Mass.App.Ct. 934, 444 N.E.2d 1301 (1983); *Bell v. Mazza*, 394 Mass. 176, 183, 474 N.E.2d 1111 (1985).

2. The Complaint

As stated, the College and the Commonwealth are moving to dismiss counts 8 through 16 of the complaint as it pertains to them. Plaintiff, the College and the Commonwealth agree that Counts 10 and 13, alleging violations of the Fair Educational Practices Act, G.L.c. 151C, should be dismissed.

The seven remaining counts of the complaint make the following allegations: Count 8, against the College, alleges negligent breach of fiduciary duty. Count 9, also against the College, alleges negligent entrustment, failure to warn, and negligent hiring and/or supervision of Bernstein. Count 11 is against the Commonwealth for negligent breach of fiduciary duty via the actions of the College and Bernstein. Count 12, against the Commonwealth, alleges liability for negligence of the College and Bernstein. Finally, Counts 14 through 16 are against both the College and the Commonwealth and seek recovery for loss of consortium and parental society on behalf of the plaintiff's husband and two minor children.[3]

A. Claims against the College: Counts 8, 9, 14-16

***3** Because it is a state agency or institution, the College itself may be sued under c. 258.[4] Moreover, the so-called "public duty rule" embodied in c. 258, § 10(j) does not bar plaintiffs' claims against the College. In pertinent part, § 10(j) provides that "[t]he provisions of sections one to eight, inclusive, shall not apply to: ... (j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the ... tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer." Bernstein, an employee of the College, was not a "third-person" within the meaning of § 10(j). To the extent that Bernstein's activities were outside the scope of his employment, plaintiff's claims against the College for the consequences of that activity cannot succeed because c. 258, § 2 authorizes recovery only for acts or omissions within the scope of an employee's employment. But to conclude that a person acting outside the scope of his or her employment is consequently a "third person" for purposes of applying the "public duty" rule would needlessly complicate the statute and engage § 10(j) in a mission for which it was not designed.

Inapplicability of the "public duty" rule is not dispositive of plaintiff's claims for negligent breach of fiduciary duty (count 8) and negligent entrustment, failure to warn, and negligent hiring and/or supervision (count 9).

Count 8 alleges that the College had a fiduciary relationship with plaintiff because of her status as a student. She further alleges that the College breached that fiduciary duty by failing to investigate Bernstein's conduct when the College knew or should have known that he was acting in an unprofessional manner. The insurmountable difficulty with Count 8 lies in plaintiff's assertion that a fiduciary relationship existed between her and the College because she was a student there. A fiduciary relationship may spring from a special relationship or arise when one person places particular trust and confidence in another. *Hawkes v. Lackey*, 207 Mass. 424, 432, 93 N.E. 828 (1911). The relationship between students and universities is generally contractual rather than fiduciary,[5] *Maas v. Corporation of Conzaga University*, 27 Wash.App. 397, 618 P.2d 106, 108 (Wash.App.1980); see *Zumbrun v. University of Southern California*, 25 Cal.App.3d 1, 101 Cal.Rptr. 499, 504 (1972), and plaintiff has cited no cases suggesting otherwise. Moreover, plaintiff does not allege that she placed any trust or confidence in the College for any particular purpose so as to create a fiduciary relationship out of the particular facts of her interaction with the College.

To be sure, plaintiff does allege that she placed trust and confidence in Bernstein and it may well be that she will be able to prove the existence of a fiduciary relationship with him. If so, however, that relationship springs from his performance of activities the complaint itself alleges he was not authorized to perform as an employee of the College, i.e., undertaking to provide therapeutic services and engaging in sexual relations. Bernstein's conduct of those activities does not therefore give rise to a fiduciary relationship between plaintiff and the College. See *Wang Laboratories, Inc. v. Business Incentives, Inc.*, 398 Mass. 854, 859, 501 N.E.2d 1163 (1986); Restatement (Second) of Agency § 235.

***4** Count 9, alleging negligent hiring and/or supervision, negligent failure to warn and negligent entrustment, stands on a different footing. That count does state a claim on which relief may be granted.[6] This is not simply a claim that the College is liable for Bernstein's acts or omissions.[7] Instead, it is a claim the College knew or should have known of the danger Bernstein allegedly posed to plaintiff or to students like plaintiff and failed to prevent those dangers from coming to pass or warn plaintiff so that she could look out for herself in informed fashion.

B. CLAIMS AGAINST THE COMMONWEALTH: COUNTS 11, 12, 14-16

Count 11 seeks what amounts to respondeat superior from the Commonwealth for the alleged breaches of fiduciary duty by Bernstein and the College. There is no fiduciary duty running from the College and thus that part of Count 11 must fall.

On the facts the complaint alleges, however, plaintiff may be able to prove both the existence of a fiduciary duty running from Bernstein to her and a breach of that duty. If she does, then the question becomes whether she can recover from the Commonwealth for that breach. For several reasons, I am of the opinion that she cannot.

The Commonwealth's limited consent to suit embodied in G.L.c. 258 disclaims liability where the state employee's acts were intentional. G.L.c. 258, §§ 2, 10(c). In this case, the essence of plaintiff's claim that Bernstein had, and breached, a fiduciary duty to plaintiff is that he manipulated his role as teacher and then as therapist and induced her to have sexual relations with him. Both the manipulation and the sexual relations clearly were intentional acts.[8]

In addition, under G.L.c. 258, § 2 the Commonwealth is liable only for those of Bernstein's acts or omissions that were within the scope of his employment. The parties agree that whether an employee is acting within the scope of employment is determined by an analysis of three principal factors, i.e., whether the actions amounted to the type of act the employee was hired to perform, whether the actions were performed within authorized limits of time and space, and whether the employee's actions were motivated, at least in part, by a purpose to serve the employer. *Wang Laboratories, Inc. v. Business Incentives, Inc., supra*, 398 Mass. at 859, 501 N.E.2d 1163.

Whatever plaintiff may be able to prove with respect to when and where therapeutic and sexual acts were performed, plaintiff simply cannot prove that they were the type of acts Bernstein was employed to perform or that he performed them in his employer's interests. The complaint itself states that he was not authorized to perform the therapeutic services. Moreover, the very nature of the conduct she alleges precludes proof that Bernstein was acting to further his employer's interests in that regard or that he was doing what the employer engaged him to do. The complaint, after all, alleges that Bernstein misrepresented his role at the College to plaintiff, that he encouraged her to keep their counseling, and presumably sexual, relationship secret from the

College and that he advised her not to utilize the College's counseling services to assist her. It is simply impossible to conjure a scenario in which manipulation, secrecy and induced sexual relations by a teacher could ever be undertaken in the interests of a College or amount to the type of duties the College hired the teacher to perform.

***5** Beyond that, the public employer in this case, as stated above, is the College. The "public employer" liable for Bernstein's acts or omissions therefore is the College, not the Commonwealth. It is true that c. 258, § 1 defines a "public employer" as "the commonwealth and ... any agency ... which exercise direction and control over any public employee." Although the point does not seem to have been addressed squarely in decided cases, use of the word "and" in the definition is designed to make the definition inclusive, not to create two "public employers" every time an agency employee commits a tort.

Count 12 seeks what amounts to *respondeat superior* recovery from the Commonwealth for the negligent acts or omissions of Bernstein and the College. To the extent that Count 12 seeks recovery for the acts or omissions of the College, it does not state a claim on which relief can be granted. G.L.c. 258 provides for what amounts to *respondeat superior* liability for the acts of Commonwealth employees, not Commonwealth agencies like the College. There is no other waiver of sovereign immunity under which the Commonwealth itself can be sued for the acts or omissions of one of its agencies. To the extent that Count 12 seeks recovery for unintentional, negligent acts or omissions of Bernstein, it does not state a claim against the Commonwealth because the Commonwealth is not Bernstein's employer.

ORDER

For the foregoing reasons, it is hereby ORDERED that
1. Defendants' motion to dismiss Count 8 of the Complaint is ALLOWED;

2. Defendants' motion to dismiss Count 9 of the Complaint is DENIED;

3. Defendants' motion to dismiss Count 10 of the Complaint is ALLOWED by agreement;

4. Defendants' motion to dismiss Count 11 of the Complaint is ALLOWED;

5. Defendants' motion to dismiss Count 12 of the Complaint is ALLOWED.

6. Defendants' motion to dismiss Counts 14 through 16 of the Complaint is ALLOWED in part and DENIED in part so as to make the surviving portions of said Counts congruent with 1-5 of this Order.

All Citations

Not Reported in N.E.2d, 1996 WL 1185104

Footnotes

1 Steven J. Williamson, Sean K. Williamson and Paige Williamson, both minors, by Kathleen M. Williamson, their mother and next friend.

2 Fitchburg State College and Commonwealth of Massachusetts Executive Office of Education.

3 Counts 14 through 16 also state claims for loss of consortium against the defendant Bernstein.

4 G.L.c. 258, § 2 provides that "[p]ublic employers shall be liable for injury ... caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment ..." "Public employers" are defined in G.L.c.258, § 1 to include "the commonwealth and ... and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof ..." Fitchburg State College is a state institution of higher learning, organized under G.L.c. 73, § 19. In addition, the College is dependent on the Legislature for its operating budget. G.L.c. 73, §§ 11, 12. Its employees are considered state employees. G.L.c. 73, § 16. The College therefore may be sued under c. 258. See *Robinson v. Commonwealth,* 32 Mass.App.Ct. 6, 7-9, 584 N.E.2d 636 (1992) (the University of Massachusetts is a state "agency" for purposes of the Massachusetts Tort Claim Act presentment requirements and its employees are considered state employees).

5 It should be noted that the duty found in *Mullins v. Pine Manor College,* 389 Mass. 47, 449 N.E.2d 331 (1983), was premised upon two theories: a duty to use reasonable care to provide security to urban college students because of community consensus and social norms, and the voluntary undertaking of a duty. *Id*. at 50-56. *Mullins* did not establish a special relationship or a fiduciary relationship between colleges and students.

6 To be sure, proof at trial may be difficult. To succeed on the negligent hiring and/or supervision claim plaintiff will be required to show that the college knew or should have known that Bernstein was likely to behave in the alleged manner, that the college knew or should have known of his unprofessional conduct and failed to act or that there were steps which the college should have taken which would have detected and prevented plaintiff's injuries. The claim regarding a duty to warn will encounter the rule that there is no duty to warn of unforeseeable dangers, or to warn of every conceivable occurrence. See *Anthony H. v. John G.,* 415 Mass. 196, 612 N.E.2d 663 (1993); *Lindberg v. Gilbert,* 346 Mass. 762, 190 N.E.2d 105 (1963); *Morse v. Homer's Inc.,* 295 Mass. 606, 4 N.E.2d 625 (1936). The claim for negligent entrustment, novel in this context at the outset, will require proof that Bernstein was unfit for contact with students like plaintiff and that the college knew or should have known of that unfitness. See *Leone v. Doran,* 363 Mass. 1, 292, 292 N.E.2d 19 (1973). Problems of proof, however, are problems for later. Now the court is simply concerned with whether "it appears certain that the complaining party is not entitled to relief under any state of facts which could be proved in support of the claim." *Rae v. Air-Speed, Inc*., 386 Mass. 187, 191, 435 N.E.2d 628 (1982).

7 At least parts of that claim would have insurmountable difficulties. See pp 8-9, *infra*.

8 To the extent that plaintiff's claim is that Bernstein had a fiduciary relationship to her simply by virtue of his position as her teacher, plaintiff fares no better. There is no more support for the proposition that an individual teacher is a fiduciary for his or her students then there is for the proposition that the institution itself is a fiduciary. Even if some support for that far-ranging principle did exist, the fact remains that the allegations of this complaint reveal that the breaches of the fiduciary relation spring, not from negligence, but instead from Bernstein's allegedly predatory intentional conduct.

Certificate of Compliance with Rules

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); 16(f) (reproduction of statutes, rules, regulations); 16(h) (length of briefs); 18 (appendix to briefs); and 20 (form of briefs, appendices, and other papers).

Pursuant to Mass. R. App. P. 20(a)(2)(A), this brief uses 12-point Courier New, a monospaced font with 10 characters per inch, and the non-excluded portions total approximately 47 1/4 pages.

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Certificate of Service

In accordance with Mass. R. App. P. 13(d), I affirm under the penalties of perjury that on November 12, 2019 I caused a copy of the Brief of the Appellees in *Helfman v. Northeastern University, et al.*, Case No. SJC-12787, pending before the Supreme Judicial Court, to be served upon counsel for the plaintiff-appellant, Morgan Helfman, whose mailing and email addresses are below, via the efileMA electronic filing system.

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