UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN DOE, Plaintiff	)	CIVIL ACTION NO.: 3:16cv-30184-MGM
v.	)	
WILLIAMS COLLEGE, Defendant.	)	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

STACEY ELIN ROSSI, BBO# 681084
ROSSI LAW FIRM
P.O. Box 442
Hoosick Falls, New York 12090
(413)248-7622
berkshirelegal@gmail.com

Counsel for Plaintiff

November 12, 2018

TABLE OF CONTENTS

Page

LEGAL STANDARD 1

RESPONSE TO "FACTS" IDENTIFIED BY DEFENDANT 2

ARGUMENT 3

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON JOHN DOE'S TITLE IX CLAIM (COUNT I) 4

A. Selective Enforcement (aka Disparate Treatment)..... 4

B. Deliberate Indifference 5

C. Erroneous Outcome 5

1. Plaintiff has sufficient evidence to cast articulable doubt on the accuracy of the outcome reached 5

2. Plaintiff has made a prima facie case of discrimination to satisfy the first prong of the *McDonnell Douglas* burden-shifting framework 7

3. Plaintiff has evidence of "particular circumstances suggesting that gender bias was a motivating factor" and that the totality of Williams' actions were a pretext for discrimination 9

a. College history and culture 10

b. Statements and actions of College officials 10

c. Dean Sarah Bolton 10

d. Meg Bossong and panel training 11

e. Dean Marlene Sandstrom and Toya Camacho 12

f. Hearing Panelists Ninah Pretto, Steven Klass, and Aaron Gordon 12

g. Allyson Kurker 13

h. Impact of Bolton's and Bossong's bias and campus climate on Plaintiff's case 13

i. Evidence of pretext 14

II. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON JOHN DOE'S CLAIM THAT WILLIAMS COLLEGE BREACHED ITS CONTRACTUAL OBLIGATIONS CLAIM (COUNT II) 15

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON JOHN DOE'S CLAIM THAT WILLIAMS COLLEGE BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING (COUNT III) 18

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON JOHN DOE'S CLAIM THAT WILLIAMS COLLEGE VIOLATED ITS BUTY OF BASIC FAIRNESS (COUNT VI) 18

V. JOHN DOE IS ENTITLED TO PROCEED TO TRIAL ON HIS MASSACHUSETTS EQUAL RIGHTS ACT (M.G.L. C. 93 §102) CLAIM (COUNT IV) 19

VI. JOHN DOE IS ENTITLED TO PROCEED TO TRIAL ON HIS NEGLIGENCE CLAIM (COUNT V) 19

VII. JOHN DOE IS ENTITLED TO MAINTAIN HIS CLAIM FOR INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT (COUNT X) 19

VIII. CONCLUSION 20

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Ahern v. Shinseki,
629 F.3d 49 (1st Cir. 2010) …… 1

Back v. Hastings On Hudson Union Free Sch. Dist., 3
65 F.3d 107 (2d Cir. 2004) ……..…… 10, 13

Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines Ins. Co.,
220 F.3d 1 (1st Cir. 2000) …….. 17

Chadwick v. WellPoint, Inc.,
561 F.3d 38 (1st Cir. 2009) ……...……. 1

Cruz v. Mattis,
861 F.3d 22 (1st Cir. 2017) ……...……. 2

Doe v. Brandeis Univ.,
Case 15-cv-11557-FDS, Dkt. 49 (D. Mass 2016) ……..…..…… 15, 16, 18

Doe v. Brown Univ.,
166 F. Supp. 3d 177 2016 U.S. Dist. LEXIS 21027 (D.R.I. 2016) ……..…..….. 1, 5

Doe v. Brown Univ.,
Case No. 15-cv-00144-WES-LDA (D.R.I. 2018) ……. 9, 20

Doe v. Columbia Univ.,
831 F.3d 46 (2d Cir. N.Y. 2016) ……..……... 1, 5, 13, 14

Doe v. Cummins,
662 F. App'x 437 (6th Cir. 2016) ……... 5

Doe v. Rider Univ.,
Case No. 16-cv-04882-BRM ……. 5

Gomez-Gonzalez v. Rural Opportunities, Inc.,
626 F.3d 654 (1st Cir. 2010) ……..…. 2, 14, 15

Holcomb v. Iona College,
521 F.3d 130 (2nd Cir. 2008) ……..……. 10

McDonnell Douglas Corp. v. Green,
411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) ……..….. 1, 8

Federal Cases **Page(s)**

Morgan v. Hilti, Inc.,
108 F.3d 1319 (10th Cir. 1997) …… 2

Plummer v. Univ. of Houston,
860 F.3d 767 (5th Cir. 2017) …… 5

Prasad v. Cornell Univ.
5:15-cv-322 Doc. 32, Feb. 24, 2016 …… 10

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133, 120 S.Ct. 2097 (2000) …… 2

Sassaman v. Gamache,
566 F.3d 307 (2d Cir. 2009) …… 10

Scottsdale Ins. Co. v. Torres,
561 F.3d 74 (1st Cir. 2009) …… 17

Soto-Feliciano v. Villa Cofresi Hotels, Inc.,
779 F.3d 19 (1st Cir. 2015) …… 2

Yusuf v. Vassar Coll.,
35 F.3d 709 (2d Cir. 1994) …… 1, 5, 6, 8

Federal Statutes

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 …….. 1, 4-15

OCR Dear Colleague Letter, April 4, 2011,
http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf 20

Other Authorities

Fed.R.Civ.P. 56(c) …….. 1

https://www.merriam-webster.com/dictionary/ ……... 17

LEGAL STANDARD

Congress enacted Title IX to supplement the Civil Rights Act of 1964's ban on racial bias in the workplace and in universities. "Because the statutes share the same goals and because Title IX mirrors the substantive provisions of Title VI of the Civil Rights Act of 1964, courts have interpreted Title IX by looking to the body of law developed under Title VI, as well as the case law interpreting Title VII." *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714-715 (2d Cir. 1994). *Doe v. Columbia Univ.* applied by analogy the Title VII framework of shifting burdens of proof of biased intent:

> We also adopted Title VII's requirement of proof of discriminatory intent, and stated that "[a]llegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases." *Id.* at 714–15. *Yusuf* made clear that Title VII cases provide the proper framework for analyzing Title IX discrimination claims. We therefore hold that the temporary presumption afforded to plaintiffs in employment discrimination cases under Title VII applies to sex discrimination plaintiffs under Title IX as well.
>
> Thus, a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a minimal plausible inference of such discrimination. *Doe v. Columbia Univ.*, 831 F.3d, 46, 54-55, (2d Cir. N.Y. 2016)

See also Doe v. Brown Univ., 166 F.Supp. 3d 177, 184, 2016 U.S. Dist. LEXIS 21027, (D.R.I. 2016). As "smoking gun" proof of discrimination is rare, a plaintiff ordinarily uses circumstantial evidence to meet the test set out in *McDonnell Douglas*. *See Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 46 (1st Cir. 2009) ("[a] plaintiff is entitled to prove discrimination by circumstantial evidence alone.")

The First Circuit defines the employment discrimination framework from *McDonnell* as:

> In evaluating a claim of discriminatory hiring under Title VII, we apply the burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), where, as here, there is no direct evidence of discrimination. Under that framework, the plaintiff carries the initial burden of establishing a prima facie case of discrimination. *Id.* at 802. To establish a prima facie case, the plaintiff must show the following: (1) he is a member of a protected class; (2) he was qualified for the position to which he applied; (3) he applied to that position and was not hired; and (4) the position to which he applied was filled by a person possessing similar or inferior qualifications. *Ahern v. Shinseki*, 629 F.3d 49, 54 (1st Cir. 2010). If a plaintiff establishes a prima facie case, then the burden of production shifts to the employer, who must articulate a legitimate, nondiscriminatory reason for the challenged hiring decision. *Id.* If the employer articulates such a reason, then the burden of production

> reverts to the plaintiff, who must offer evidence tending to prove that the reason offered by the employer is a pretext for discrimination. *Id. Cruz v. Mattis*, 861 F.3d 22, 25 (1st Cir. 2017).

In describing the third element, pretext, the First Circuit in *Gomez-Gonzalez v. Rural Opportunities, Inc.*, 626 F.3d 654, 662 (1st Cir. 2010) stated:

> Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons. *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir.1997) (internal quotation marks and citations omitted).

See also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 146, 120 S.Ct. 2097, 2108 (2000) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination"); *Soto-Feliciano v. Villa Cofresi Hotels, Inc*., 779 F.3d 19, 29 (1st Cir. 2015) (citing and applying *Gomez-Gonzalez* to vacate district court summary judgment in favor of employer and remand for trial).

RESPONSE TO "FACTS" IDENTIFIED BY DEFENDANT

In Defendant's Response to Plaintiff's Statement of Material Facts (Dkt. 137), Defendant purports to identify material facts in dispute that would preclude Plaintiff's Motion for Partial Summary Judgment. Defendant's responses to Plaintiff's numbered paragraphs fall into five categories: (1) undisputed; (2) undisputed with an exception that is not material; (3) disputed, but the dispute is not material; (4) the document speaks for itself and/or the Court's interpretation will control; and (5) disputed, but Defendant's "evidence" is incompetent or mischaracterized:

Category	**Paragraphs**
Undisputed	3, 4, 6, 8, 9a, 9b, 9c, 11, 13, 14, 15, 16, 19, 20, 22, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 41, 42, 43, 45, 46, 48, 49, 50, 52, 54, 56, 60, 61, 62, 63, 64, 71, 72, 74, 75, 78, 80, 82, 83, 84, 85, 86, 88, 90, 93, 96, 97, 100, 101, 103, 106, 109, 113, 116, 124, 125, 126, 129, 130, 132, 133, 135, 137, 138, 139, 143, 144, 145, 146, 151, 154, 155, 156, 157, 158, 159, 160, 161, 162,

	164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 175, 176, 177, 178, 179, 181, 182, 183, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 218, 219, 220, 221, 222, 224, 227, 228, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 242, 243, 244, 245, 247, 248, 249, 251, 252, 254, 256, 258, 259, 260, 261, 262, 263, 265, 267, 26, 269, 271, 273, 274, 275, 277, 278, 279, 282, 284, 285, 286, 288, 289, 290, 291, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304
Undisputed with a non-material exception	38, 39, 51, 73, 115, 120, 201, 229, 246, 264, 287
Non-material dispute	7, 12, 17, 18, 21, 53, 58, 67, 77, 89, 102, 104, 105, 107, 110, 112, 114, 117, 121, 127, 128, 131, 134, 141, 147, 150, 152, 153, 163, 184 (WMS08347 does support the stated fact), 200, 216, 225, 241, 250, 253, 287, 292
Document speaks for itself and/or Court's interpretation will control	1, 2, ***5***, 10, 23, 24, ***29***, ***30***, ***40***, ***44***, 47, ***55***, ***57***, ***59***, ***65***, ***66***, ***68***, ***69***, ***91***, 92, 94, 95, 98, ***108***, 111, 118, 119, 123, ***140***, 142, 148, ***149***, 180, 208, 217, 223, 250, 255, 257, 266, ***270***, 272, 276, 282, ***283***, ***305***, ***306***, ***307***, ***308***, 309 (¶¶ bolded and italicized are disputed on the basis of purported immateriality)
Disputed, but with incompetent or mischaracterized evidence or with no evidence at all	70, 76, 79, 81, 87, 99, 122, 174, 226, 253, 257

In short, none of the "disputed facts" identified by Defendant preclude Plaintiff's Motion for Partial Summary Judgment. To the extent necessary, the asserted factual disputes are addressed below.

ARGUMENT

In addition to submitting a separate Statement of Material Facts ("PC-Fs") (Dkt. 133) that undercut the factual record on which Defendant's motion is based, Plaintiff presents sufficient evidence to convince a rational jury that Williams violated Title IX by (i) engaging in selective enforcement (disparate treatment); (ii) reaching an erroneous outcome when it found John Doe[1] responsible for violations of Williams' policies and the finding was motivated by gender bias; and (iii) failing to promptly respond to John's complaint about Smith's[2] assault, thus was deliberately indifferent. Plaintiff also presents more than sufficient evidence to convince a rational jury that

[1] Plaintiff is referred to as John Joe throughout the pleadings.
[2] John Doe's 2016 accuser, a Williams College employee, is referred to as Susan Smith throughout the pleadings.

Williams breached its contractual obligations, the covenant of good faith and fair dealing, and its duty of basic fairness. Plaintiff also presents sufficient evidence to raise genuine issues of material fact as to whether Williams violated the Massachusetts Equal Rights Act and was negligent.

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON JOHN DOE'S TITLE IX CLAIM (COUNT I).

A. Selective Enforcement (aka Disparate Treatment). Plaintiff has responded to Williams' arguments concerning selective enforcement/disparate treatment at pp. 8-9 of its Opposition to Defendant's Motion for Summary Judgment ("P. Opp.") (Dkt. 132). To further supplement its response, Plaintiff incorporates by reference Plaintiff's Statement of Material Facts ("PFs") (Dkt. 124) ¶ 76 which cited Bolton's email: "John has now made formal allegations of stalking and assault, and so we are going to have to investigate those. We became aware of those charges on March 13th. They refer specifically to incidents on December 5-6, 2015 and March 8, 2016." This email, ignored by Defendant in its Response to Plaintiff's Statement of Facts ("DC-Fs") (Dkt. 137) and its Opposition to Plaintiff's Motion for Partial Summary Judgment (D. Opp.) (Dkt. 136), belies Williams' arguments that John did not assert a complaint against Smith until April 2016; the March notice "only vaguely referenced an undescribed 'battery' by Smith"; and "when Doe made a formal complaint, the College promptly launched an investigation." DC-F ¶ 23; Dkt. 136 at 7.

Williams' argument that the complaint-counter-complaint charges are "not what this case is about" also falls short. This case is about a long history of the College treating John in a gender-biased manner starting in 2012. Williams singled out John and treated him, as a male accused of sexual assault, unequally and unfairly at every step. Without the different treatment along the way, including, but far from limited to, the constant encouraging by Bolton and Bossong for Smith to think of herself as a victim of John's as evidenced by their responses to Smith's pre-investigatory complaints combined with the failure of Williams to promptly address Smith's assault of John when on notice March 13, 2016, there would have be no occasion for Smith to assert a counter-complaint.

The undisputed facts provide sufficient evidence that Williams responded quite differently to John and Smith's reports of harassing/abusive conduct, as further discussed below.

B. Deliberate Indifference. Plaintiff made arguments relative to its deliberate indifference claim at p. 15 of its P. Memo (Dkt. 123) and responded to the College's arguments concerning same at p. 8 of its P. Opp. (Dkt. 132) which are incorporated by reference. There is evidence that the College's response to John's complaint was ineffective, thereby subjecting him to further harassment. The College's failure to promptly respond and then to facilitate Smith's counter-complaint with its aim at John's expulsion in the context of a seriously flawed investigation and hearing process lacking in equity and fairness was so severe, pervasive, and objectively offensive that it denied John equal access to education that Title IX is designed to protect. *See Doe v. Rider Univ.,* Case No. 16-cv-04882-BRM, Dkt. 42 and 61 (D.N.J.)

C. Erroneous Outcome. The elements of a Title IX "erroneous outcome" case are:

> A plaintiff making an erroneous outcome claim must first "allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding." Once the plaintiff has established doubt concerning the accuracy of the proceeding, they must next "allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." (citations omitted). The *Yusuf* court noted that "[s]uch 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." *Doe v. Brown University*, 166 F. Supp. 3d 177, 185 (D.R.I. 2016) citing *Yusuf, supra,* at 714-715.

The *Yusuf* standard has gained broad acceptance. *See Doe v. Cummins*, 662 F. App'x 437 (6th Cir. 2016); *Columbia, supra,* at 53; *Plummer v. Univ. of Houston*, 860 F.3d 767, 777 (5th Cir. 2017).

1. Plaintiff has sufficient evidence to cast articulable doubt on the accuracy of the outcome reached. Plaintiff's first evidentiary burden under *Yusuf* is to present evidence that is "sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding." *Yusuf, supra*, 714-15. The *Yusuf* court described that burden this way:

> [T]he pleading burden in this regard is not heavy. For example, a complaint may allege particular evidentiary weaknesses behind the finding of an offense such as a motive to lie on the part of a complainant or witnesses, particularized strengths of the defense, or other reason to

> doubt the veracity of the charge. A complaint may also allege particular procedural flaws affecting the proof. *Yusuf, supra, at* 715.

The Complaint (as verified by John Doe to the extent of his personal knowledge), which is replete with evidence that casts articulable doubt on the accuracy of the result of the outcomes reached in the succeeding stages of his case (biased training, biased investigation, biased report, biased hearing, and grossly flawed appellate process), supports a *prima facie* erroneous outcome claim. In reaching its erroneous decision, Williams overlooked key evidence that demonstrated consent was present during the sexual encounter two "different" policies with "not trivial" differences "substantive enough to have had significantly affected the outcome of the initial hearing; Smith did not express to John that she did not want to be having sex during the alleged September 2014 incident; and the applicable policy did not state that consent may not be inferred from silence or passivity.

Further, in reaching its erroneous decision, Williams disregarded the countless inconsistencies between and within Smith's statements, including: 1) In October 2014, Smith told her good friend Andrea Estrada, "she felt really uncomfortable when she and John had been having sex because 'it was a really different position…'"; 2) Sometime before the investigation, Smith told Ava Atri, "No, he's never done that. He doesn't do that" when asked whether John "ever physically abused or engaged in non-consensual sex with Smith"; 3) In May 2016, after the investigation commenced, Smith told Ava, that they had engaged in sex once when she was "really tired and not in the mood" and "didn't want to have sex"; 4) On May 20, 2016, at her first interview, Smith stated John simply "kind of just forced himself in, and it hurt"; 5) On June 15, 2016, at her second interview, Smith stated she "did not remember removing her clothes to have sex" and "just remembers lying on her stomach…confused about why they were having sex" and more; 6) In July 2016, Smith told Elanie Wilson that while "intoxicated and asleep, she awoke to John having sex with her"; and **in none of her interviews did Smith describe John forcing himself on her in the ordinary sense of the phrase.** Dkt. 123 at 10. (Neither did the Panelists as "John forced himself on Smith" is Defendant's

counsel's spin.) Smith's first recounting in October 2014, included nothing about drinking, sleeping, hurting from insufficient lubrication, restrained, forced, or being intoxicated and incapacitated. Smith did not believe that John was aware that she was crying; the reasonable inference is that the alleged "crying" was silent tears. Most importantly, in this earliest recounting, Smith did not claim that she was forced or "restrained." This was language used by Kurker to summarize Smith's depiction of the position in which she was lying on her stomach with John's hands on her shoulders.

Smith did not originally consider the alleged September 2014 incident to be non-consensual as evidenced by her earliest statement regarding the event to Andrea in October 2014 and by Ava's report: "At the time Smith didn't think it was a big deal and did not consider it non-consensual." Dkt. 124-20 at 13. As discomfort was not new to the couple because of Smith's lubrication issue and Smith's discernible pattern of exaggerating and evolving stories, the commonsensical inference to draw is that Smith's claim of this alleged event two years earlier is an amalgamation of various mundane and commonplace sexual experiences deliberately elevated to the status of non-consensual sex. Dkt. 124-28 at 9-11. Logic dictates that the more assumptions one makes, the more unlikely an explanation. Only an unfair and partial analysis of the evidence leads to a highly speculative conclusion that the alleged incident was anything more than simply uncomfortable sex.

Smith did **not** provide "testimony that she never indicated consent" contrary to what Defendant wants this court to believe despite any evidence whatsoever. Dkt. 124-20 at 13. This falsehood stands in diametric contradiction with the fact that the report the complete opposite conduct: "She kept telling herself, 'I don't want this right now' but couldn't [and **didn't] say anything**" and "During sexual intercourse, Smith did not express to John that she did not want to be having sex." Dkt. 124-20 at 11-12. What Smith **did** say regarding consent is that she "believ[ed] John knew she was not consenting because they had never had sex like that before: 'We never…just started out from behind." The report also stated that "Smith stated that she was unable to provide consent and that John should have known this because he saw how much alcohol she had consumed that night…" *Id.*

at 10. Also unsupported by evidence and misrepresented by Defendant is the claim that there was a complete absence of any evidence from John that Smith communicated consent. Consent was present by how Smith conducted herself as a willing participant as illustrated by the facts in the report which John did provide. Dkt. 132 at 14; Dkt.124-28 at 40-41; Dkt. 123 at 24, and Dkt. 132 at 14. There is also no evidence the Panel genuinely considered John's arguments about Smith's credibility.

Nor is there any evidence that the Panel carefully and impartially considered the facts on appeal but instead allowed the tail (policy) to wag the dog (facts). There is sufficient evidence in the record to convince a rational jury that the Panel worked backwards from the two "different" policies that had "not trivial" differences "substantive enough to have had significantly affected the outcome of the initial hearing." The Panelists [wrongfully] concluded - in stark contradiction with their instructions - that both policies were not different, i.e. that both required affirmative consent, nothing but affirmative consent, and consent could not be inferred from silence or passivity, so that they could "be consistent between the two and have the same outcome." Doubling down on their original finding, the Panel applied an incorrect understanding of consent as active participation: words (an action) or actions and incorrectly applied the standard that without either there can be no consent.

There is sufficient evidence in the record showing articulable doubt via these said evidentiary weaknesses plus Smith's motive and propensity to lie as well as procedural flaws that "affected the proof." *Yusuf, supra*, at 715. Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment ("P. Memo") (Dkt. 123) pp. 14-25, provides more evidence concerning Defendant's violation of Plaintiff's procedural rights. *See also* PC-F ¶ 126 and Dkt. 132 at 6-7. In these ways, the record contains more than enough evidence to satisfy Plaintiff's initial burden of production for an "erroneous outcome" case under *Yusuf.*

2. Plaintiff has made a prima facie case of discrimination to satisfy the first prong of the *McDonnell Douglas* burden-shifting framework. John satisfies his initial burden of production under the *McDonnell Douglas* framework as he provides evidence supporting his contentions that (1)

he is male, (2) he was not responsible for the violations for which he was sanctioned, (3) he was found responsible and sanctioned, (4) the outcome of the proceeding was not accurate, and (5) he has evidence of gender bias. *Doe v. Brown Univ.*, Case No. 15-cv-00144-WES-LDA, Dkt. 112-1, Feb. 9, 2018 at 5-6. As Plaintiff meets this initial burden, Defendant has the burden of articulating a non-discriminatory reason for the adverse action (in this case, finding John responsible). Williams' articulated reason is that Plaintiff was subject to a proper disciplinary proceeding. However, Plaintiff provided sufficient proof that the disciplinary proceeding was far from proper and was, in fact, grossly partial and unfair. Therefore, Defendant fails to meet its burden.

Assuming, *arguendo*, that Defendant met its burden, Plaintiff meets the burden that then shifts to him to prove that Williams' stated reason was a "pretext for discrimination," following *Yusuf*. Plaintiff presented evidence of statements and actions by pertinent college officials and patterns of decision making that also show the influence of gender. Plaintiff has also presented evidence to rebut Williams College's articulated reason for the adverse action against John that demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in its proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that Williams did not act for the asserted non-discriminatory reasons. This two-pronged argument is further explained below.

3. Plaintiff has evidence of "particular circumstances suggesting that gender bias was a motivating factor" and that the totality of Williams' actions were a pretext for discrimination. Williams articulated that its disciplinary process was a valid exercise of its authority, i.e. its non-discriminatory reason, Plaintiff's next burden is to provide evidence of "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Yusuf, supra,* at 715. Although Plaintiff rejects the idea that Williams validly exercised its authority, Plaintiff presents the following evidence that gender bias (as opposed to "anti-respondent" bias, which goes to unfairness, discussed below) was a motivating factor:

a. College history and culture. Plaintiff discusses relevant Williams' history and culture at PC-Fs ¶ 21(a-m).

b. Statements and actions of College officials. John's disciplinary case went through several stages (complaint, delay, follow up complaint by counsel, counter-complaint, "notice", investigation, "hearing", sanction, and appeal) and different College officials were involved in one or more of these stages. In other contexts, courts have found sufficient evidence of discrimination from intermediate stages. Gender-stereotypical remarks made during an investigation are sufficient evidence to require a trial. *See Sassaman v. Gamache,* 566 F.3d 307, 314-55 (2d Cir. 2009); *Holcomb v. Iona Coll.*, 521 F.3d 130, 143 (2d Cir. 2008); *Back v. Hastings*, 365 F.3d 107, 125-26 (2d Cir. 2004); *Prasad v. Cornell Univ.* 5:15-cv-322 Doc. 32, Feb. 24, 2016. In this case, Plaintiff presents even greater evidence of discriminatory bias suffused throughout the process than just a remark.

c. Dean Sarah Bolton. As Dean of the College, Bolton had a prominent role in John's cases. Bolton was the "single investigator" (investigator, judge, jury, and executioner) of John during May 2012 of his freshman year. In that case, Bolton alone decided that John was responsible for sexual misconduct and suspended him. John was incapacitated and his female accuser, Jane Roe[3], was not. Jane said, "**…if you are going to do that, I don't want to get pregnant**" [upon which John retrieved a condom]. PC-F ¶ 20(f). Jane's words indicated approval, i.e. consent. John was unaware of Jane's and the witnesses' statements until discovery in this case because in spring 2012, Williams gave John no notice and no hearing whatsoever. Contrary to Title IX, no sexual misconduct investigation and adjudication procedures were in place at the time. College policy did, however, provide, "A student charged with [] a breach will be informed by a dean of the alleged violation." Dkt 134 ¶¶ 7-8. Bolton breached the policy, suspending John whose accuser's friends

[3] John Doe's 2012 accuser is referred to as Jane Roe, a pseudonym.

were "concerned about her emotional well being" as Jane "has a history of being at risk" with "scars from cutting – goes back to high school." Dkt 134-1 at 5. This scenario set the stage for 2016.

Bolton had general supervisory authority over the entire process in the instant case up to the end of June 2016 despite her claim to John in April 2016 that she would recuse herself. But for the extremely unfair 2012 sexual misconduct case, the only disciplinary action against John before employee Smith's 2016 counter-complaint was one single chemistry problem set in 2014 that resulted in a failure grade and academic probation. Then came the numerous complaints by Smith in 2015 which started with a complaint that John had slighted Smith. Bolton's response was to tell Smith to be scared and upset with John and to allow Smith to take off from school. PC-F ¶ 27.

Smith complained to Bolton and Reyes about John in 2015 with the multitude of allegations presented in the investigative report, e.g. John forced her to stand outside in the cold, and on and on. When Smith emailed Bolton in the early morning hours of December 6, 2015 to report him for an honor code (academic complaint of plagiarism) violation and to tell her that John "taunted" her, Bolton's response was that she was sorry to hear John was continuing to cause her so much suffering. Later that day, when Smith recanted her honor code report against John, Bolton didn't believe Smith authored the email and had "grave concern for Smith's safety." PF ¶ 46. Bolton rushed to protect Smith, as she did Jane, and even went to great lengths to try to have John expelled in the honor code process by fabricating the absence of the one professor from the hearing. Instead of withdrawing from the case as she told John she would, Bolton remained actively involved in Smith's counter-complaint against John: "…I hope it will work ok." PF ¶ 89.

d. Meg Bossong and panel training. Alumna Bossong, Director of Sexual Assault Prevention and Response, has "responsibilities with respect to all aspects of the College's policies and programs on sexual assault, dating/domestic violence, and stalking as they relate to students" including panelist training. Dkt 54 ¶ 2. Bossong's training materials, in addition to being pro-complainant trauma-informed, contain anti-male bias that teaches panelists to believe males are

sexual offenders: "most people who stalk are male," stereotypical "Frank," and **hostile masculinity** combined with impersonal sex causes sexual aggression. Dkt. 54-1 at 5; Dkt. 124-66 at 38-40, 43, and 46. These fixed, stereotypical views concerning men such as "Frank" and "hostile masculinity" and how their combination causes sexual predation provide a gender-based motivation for the Panel to deny Plaintiff a fair hearing. Bossong has shown affinity for feminism ("love bell hooks") and believes men are most often the aggressor in heterosexual relationships. PF ¶ 104. She believes that "Title IX is being re-imagined as a due process measure for respondents, not as a measure to halt harassment in educational settings and prevent its recurrence." PF ¶ 101. NB: From February 2011 through June 2016, all but one respondent besides Smith at Williams has been male. Dkt. 127-4 at 6.

It was during Smith's employment - on December 7, 2015 - when Smith first met Bossong. Before meeting Smith and long before anyone heard John's side of the story, Bossong sided with the female, concluding that John was abusing Smith. PC-F ¶ 29 (b-c). On February 2, 2016, after John texted Smith, "good luck on Thursday," Bossong provided Smith a "safety plan" and set her up with Circle of 6, a police alert app. PF ¶ 48-50. On March 14, 2016, the day after Smith received the cease and desist letter from Plaintiff's attorney, Bossong advised Smith to call and make an appointment with the local domestic and sexual violence shelter. PF ¶ 65. The following day, Bossong encouraged Smith to leave campus indefinitely. PF ¶ 66. Evidence indicates that she and Bolton worked together on Smith's counter-complaint and that Bossong worked with Smith on her email asserting a counter-complaint against John. PF ¶¶ 87-89.

e. Dean Marlene Sandstrom and Toya Camacho. Bossong provided Sandstrom, her supervisor, guidance on the John-Smith case. Plaintiff addressed Camacho and Sandstrom's bias in favor of Smith in PFs ¶¶ 156-166, 180-195, 216-217, 234-235, 237-243, and 264-265.

f. Hearing Panelists Ninah Pretto, Steven Klass, and Aaron Gordon. The Hearing Panel denied John the presumption of innocence (or an absence of responsibility) because he was male and accused of non-consensual sex based on the College culture and gender-biased training.

g. Allyson Kurker. The investigative report was slanted against Plaintiff by the inclusion of Elanie and exclusion of Charles Chirinos. PF ¶¶ 158-164, 180-182, 187-190, 194-197, 226. The report was biased against John in a myriad of other ways. Dkt. 123 at 7-8.

h. Impact of Bolton's and Bossong's bias and campus climate on Plaintiff's case. The factual record to this point has presented gender-based bias and extensive engagement of Defendant, primarily Bolton and Bossong, with Smith through a gender-based perspective. An "impermissible bias of a single individual ay any stage of the [] process may taint the ultimate [] decision…even absent evidence of illegitimate bias on the part of the ultimate decision maker, so long as the individual shown to have the impermissible bias played a meaningful role in the … process. *Back v. Hastings, supra*.

Bossong, who trained the Panel, served on the Sexual Assault Prevention and Awareness group where she was exposed to feminists' demands, while reinforcing her own focused views on male aggression. Dkt. 124-6 at 32:4-22. This bias imbued not only the training but the College sexual misconduct policy. Bolton and Bossong were both named in substantial public criticism that Williams was mishandling sexual assault and retaliation, e.g. the case of female L.B who was allegedly assaulted by a male hockey player. PC-F ¶ 21. Bolton vocally responded to assure the public that Williams took the issue seriously. In this way, Bolton's initiative helped provide Bossong and Panelists with a frame in which to place this case before the Panel reviewed any of the evidence.

The factual record of the national media attention and the College's response provide an independent basis for a jury to infer discrimination based on the Second Circuit's *Columbia* decision, which held that a jury can infer discrimination from (1) "substantial criticism of the [college], both in the student body and in the public media, accusing the [college] of not taking seriously complaints of female students alleging sexual assault by male students," (2) College administration "cognizant of, and sensitive to, these criticisms," and (3) statements and actions by College leadership that support the inference that Williams' officials "were motivated to favor the

accusing female over the accused male, so as to protect themselves and the [college] from accusations that they had failed to protect female students from sexual assault." *Columbia, supra,* at 57-58. A reasonable jury would understand that decision-makers were motivated to adopt biased attitudes and favor the accusing female over the accused male in order to protect themselves from and refute accusations that Williams had mishandled a female student's charges of sexual assault by a male student. *See Columbia, supra,* at 56.

i. Evidence of pretext. As noted above (*see* pp. 1-2, *supra*) the First Circuit has held in the employment discrimination context that a fact finder can infer discriminatory intent without a "smoking gun" of direct evidence if the employer's articulated non-discriminatory explanation for its action features "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Gomez-Gonzalez., supra*, at 662. Defendant's egregiously false explanations of why it found John responsible for non-consensual sex meet this standard.

A jury would find it very difficult to understand why Williams reaffirmed its original decision without a new rationale in its outcome letter evidencing meaningful reconsideration of the case. The February 13, 2017 outcome letter provided the same rationale as before: "both the sexual position and roughness during the incident in question were unusual, and clear indicators that [John] did not have consent." The letter claimed that the Panel considered the appropriate policy version but then belied this assertion. Referring only to the one discrete term of "consent" and disregarding the complete policy, Sandstrom wrote, "Although the version of the policy in effect at the time did not use the term 'affirmative' consent, it used other language…to express the same concept." Nowhere did the appeal letter mention the rest of the policy which articulates substantive and relevant language: "Both parties have the obligation to communicate consent or the lack of consent." The weaknesses, implausibilities, inconsistencies, incoherencies, and contradictions described in Section

I(C) above and II and IV below combined with the fact that the Panel simply added language that would make the original decision look like a truly reconsidered decision. In short, Defendant's explanation for the Panel's decision to find John responsible for non-consensual sex defies belief, and "a reasonable factfinder could rationally find [it] unworthy of credence and hence infer that [Williams] did not act for the asserted non-discriminatory reasons." *Gomez-Gonzalez, supra.*

While these irrefutable facts of the sham appeal provide a sufficient reason for a reasonable jury to find the Panel's *post hoc* explanation unworthy of credence, there is even more compelling evidence of pretext, namely how the Panel sought to "be consistent between the two and have the same outcome." *See* I(C), *supra*. A reasonable jury could infer that the Panel already had predetermined John's guilt before the appeal took place.

In any event, no matter what exactly Williams' means by "language had been changed and added to and clarified but it didn't change the fundamentals of the policy itself," in its May 2018 deposition, contemporaneous statements (two "different" policies with "not trivial" differences "substantive enough to have had significantly affected the outcome of the initial hearing) provide even more basis for a reasonable jury to view the counter-factual *post hoc* explanations as pretextual and unworthy of belief. To conclude, the revisionist history that Williams presented to justify their actions, which has continued to this day in skewed fashion in Defendant's Statement of Undisputed Facts, is not only demonstrably false based on College policy and statements at the time, but also is so far off-base that a jury could find it to be a pretext for discrimination. There is sufficient evidence to convince a rational jury that Williams discriminated against John in violation of Title IX.

II. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON JOHN DOE'S CLAIM THAT WILLIAMS COLLEGE BREACHED ITS CONTRACTUAL OBLIGATIONS CLAIM (COUNT II).

This case is not analogous to *Yu v. Vassar College*, but *Doe v. Brandeis*, Case 15-cv-11557-FDS, Dkt. 49 (D. Mass 2016). As in *Brandeis*, here "were essentially no third-party witnesses to [][the] event[] in question, and there does not appear to have been any contemporary corroborating

evidence. The entire investigation thus turned on the credibility of the accuser and the accused." *Brandeis, supra,* at 67. In *Brandeis*, Doe's accuser, just like Smith, made the "historical" allegation of non-consensual sex after the long-term relationship deteriorated and ended. Also, as in *Brandeis*, a single individual acted as "the investigator, prosecutor, judge, and jury" in John's 2012 case where he was not afforded any notice or meaningful opportunity to respond in blatant disregard for the policy: "A student charged with such a breach will be informed by a dean of the alleged violation. Any student who is charged with an offense shall have a reasonable opportunity to make his or her defense in a respectful manner to a dean…" Dkt. 134 ¶ 8.

At the time of the alleged 2014 event, College policy did not include, "In the absence of affirmatively expressed consent, sexual activity is a violation of the code of conduct," the word "clearly" in the sentence defining the term consent, or "Consent may not be inferred from silence or passivity." Under the correct policy, "Both parties have the obligation to communicate consent or the lack of consent" and implied consent may be conveyed by silence or passivity in a manner just like that which was depicted by Smith who made no expression at all to John that she did not want to be having sex at that time. In an attempt to rewrite history, Defendant added speculative "facts" that are not in the record casting the scene in highly inflammatory terms not even included in the Panel's letters: "Smith stated that while she was lying face down in bed, Doe forced himself on her…" when in fact there is no evidence whatsoever as to how they wound up in the position nor at what point did intercourse commenced. Dkt. 126 at 11-12. Defendant furthers its revisionist history by claiming that the alleged "act" that "was performed to initiate sex", which was actually not evidenced in the report, but assumed by the Panel, was "the initiation of sexual intercourse without first discussing sex," an alleged omission. DC-F ¶ 250. This "fact" differs from Gordon's statement that the assumed "act" was "starting a sexual encounter from behind." Dkt. 124-69 at 76:9-18.

John did not know she was uncomfortable or did not want to be having sex. Since both parties had the obligation to communicate consent **or the lack of consent** and consent may have been

inferred from silence or passivity, John had a reasonable expectation that if Smith did not want to consent 1) she would communicate so and 2) absent such communication and based on her silence and passivity, consent was present.

Defendant conflates the pre-October 2014 policy with its later versions even further by trying to mislead this Court in its revisionist response to PF ¶ 123 which stated, "The Code of Conduct in effect at the time of the alleged incident, September 2014, did not require active, specific and clearly expressed consent for all sexual activity." Defendant, in continued insistence that the applicable policy contained provisions that are just simply absent, argues that the "Code required 'effective consent' that is 'communicated by words or conduct'; consent is not 'effective' if it is passive, unspecific, and not clearly expressed." DC-F ¶ 123. The terms *active, specific*, and *clearly expressed* are not employed in the pre-October 2014 policy. The very concept is not even employed in the pre-October 2014 policy because "effective consent" was undefined industry jargon just like the term "affirmative consent." Active, specific, and clearly expressed consent came later as part of the quiet policy panelists are trained in, i.e. not even in the written policy or training slides but verbally taught at trainings, relative to "affirmative consent." Dkt. 124-6 at 69:1-10.

Words of a contract must be given their common and ordinary meaning at the time the parties entered into the agreement. *Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines Ins. Co.*, 220 F.3d 1, 4 (1st Cir. 2000). The general interpretive rule is that ambiguous contractual terms are construed in favor of the weaker party. *Scottsdale Ins. Co. v. Torres*, 561 F.3d 74, 77 (1st Cir. 2009). To "clarify" is to make a statement less confusing and more comprehensible.[4] Williams admits that in October 2014, "there was a need for…clarification and certainty to the Williams community that [it] had an affirmative consent policy"; the new policy provided greater specificity; and "not everyone knows automatically what affirmative consent means." PFs ¶¶ 127 and 136. This does not

[4] https://www.merriam-webster.com/dictionary/clarify (Last accessed November 4, 2018)

comport with Defendant's ludicrous assertion that the pre-October 2014 policy "unambiguously prohibits engaging in sexual contact without 'effective consent'" which is just not defined no matter how many times Defendant says it is. D. Opp. at 11.

A reasonable expectation of Williams' promise of a "hearing" from a student's perspective is that the adjudication would involve some face-to-face credibility assessment. As Williams does not fulfill this obligation, Defendant also breached its duties in regard to the provision of a "hearing."

A finding that non-consensual sex allegedly occurred in September 2014 simply cannot be squared with a fair reading of all the evidence and the correct policy.

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON JOHN DOE'S CLAIM THAT WILLIAMS COLLEGE BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING (COUNT III).

Plaintiff has made its arguments relative to its good faith and fair dealing claim at pp. 26-27 of its P. Memo (Dkt. 123) and responded to the College's arguments concerning same at pp. 8-9 of its P.Opp. (Dkt. 132) which are incorporated by reference.

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON JOHN DOE'S CLAIM THAT WILLIAMS COLLEGE VIOLATED ITS BUTY OF BASIC FAIRNESS (COUNT VI).

Williams' obligation to provide basic fairness in its proceedings is separate from and in addition to its contractual obligation to follow the rules it set forth in its written policies. *Brandeis, supra*, at 60. "There are two principal threads to the 'fairness' inquiry. The first is procedural fairness - that is, whether the process used to adjudicate the matter was sufficient to provide the accused student a fair and reasonable opportunity to defend himself. The second is substantive fairness - that is, even if the procedure was fair, whether the decision was unduly arbitrary or irrational, **or tainted by bias or other unfairness**." *Id.* at 62.

Of all the ways in which Williams was biased and unfair to John, most egregious was the failure to afford him with any face-to-face credibility assessment at all. Another example of bias and unfairness was how Sandstrom supplied the language of the findings letter and interfered with

the Panel, an argument not "entirely beside the point." The two claims – Smith's retaliation for John's filing of his Title IX complaint and her false honor code reporting – if found by the Panel to be supported by the evidence would be two additional inconsistencies that Defendant would have to reconcile. The former would strike at the heart of the legitimacy of the investigation and the latter would go to the issue of Smith's propensity to lie. Both would cast articulable doubt.

A jury would find it difficult to understand why Williams had the same panel rehear the case on appeal and would easily conclude that it was for the purpose of bias. The contradictory statements about the appeal, e.g. two "different" policies with "not trivial" differences "substantive enough to have had significantly affected the outcome of the initial hearing ended up by the Panelists to be the same so that they could "be consistent between the two and have the same outcome," and other factors described in Section I(C) above demonstrate how biased and unfair the procedure at Williams was in John's case.

Plaintiff has made arguments relative to its basic fairness claim at p. 17-25 and 27-30 of its P. Memo (Dkt. 123) and responded to the College's arguments concerning same at pp. 8-10 of its P. Opp. (Dkt. 132) which are incorporated by reference. There is sufficient evidence to convince a rational jury that Williams' processes were both procedurally and substantively unfair to John.

V. JOHN DOE IS ENTITLED TO PROCEED TO TRIAL ON HIS MASS. EQUAL RIGHTS ACT (M.G.L. C. 93 §102) CLAIM (COUNT IV).

Plaintiff has responded to the College's arguments concerning Plaintiff's negligence claim at p. 15 of its P. Opp. (Dkt. 132) which is incorporated by reference.

VI. JOHN DOE IS ENTITLED TO PROCEED TO TRIAL ON HIS NEGLIGENCE CLAIM (COUNT V).

Plaintiff has responded to the College's arguments concerning Plaintiff's negligence claim at pp. 15-19 of its P. Opp. (Dkt. 132) which are incorporated by reference.

VII. JOHN DOE IS ENTITLED TO MAINTAIN HIS CLAIM FOR INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT (COUNT X).

Plaintiff has responded to the College's arguments about Plaintiff's claim for injunctive relief and declaratory judgment at p. 20 of its P. Opp. (Dkt. 132) which is incorporated by reference.

VIII. CONCLUSION.

When John enrolled at Williams in the Fall of 2011, he sailed into the calm before a storm. The storm was precipitated by the Dear Colleague Letter issued by the Department of Education Office for Civil Rights in Spring 2011 which mandated that schools adjudicate sexual misconduct fairly, impartially, and promptly under a preponderance of the evidence standard. (Dkt. 60 at 4-5.) Williams did not have any sexual misconduct investigation and adjudication procedures at all until 2013. The storm began in Spring 2014 when L.B. petitioned Williams Administration and President Falk, Bolton, and Bossong, resulting in alumni cancellation of fundraising events, local and national media attention, and an activation of the feminist community both on campus and across the country. Bolton invested the moral authority of her position in a campaign to change the culture, norms, and values of the College community regarding sexual assault. Williams endorsed and supported demands of student activists, namely in the adoption of an affirmative consent policy. Defendant's message to the College alumni and the community at large that Williams was tough on sexual assault created conditions where officials repeatedly violated principles of basic fairness in Plaintiff's case.

Williams' failure to presume John innocent - not responsible for non-consensual sex – burdened him with the task of proving his innocence. Administrators took particular actions calculated to confirm their belief that the female narrative was more credible. In presuming John guilty, Williams foreclosed the possibility of performing an objective and impartial investigation, making a finding of responsibility inevitable. *See Brown Univ., supra,* (15-cv-00144) Dkt. 112-1 at 73-74 and Dkt. 151-1 at Sec. IV(3) (decreeing Brown's investigation and procedures of Doe a breach of contract).

For all the foregoing reasons, and those set forth in P. Memo and P. Opp., this Court should grant Plaintiff's motion for partial summary judgment.

Date: November 12, 2018

JOHN DOE, PLAINTIFF

By: _____/s/ Stacey Elin Rossi_____
STACEY ELIN ROSSI (BBO# 681084)
ROSSI LAW FIRM
P.O. Box 442
Hoosick Falls, New York 12090
(413)248-7622
berkshirelegal@gmail.com

CERTIFICATE OF SERVICE

This document was served electronically upon all counsel of record by filing through the ECF system on November 12, 2018.

_/s/ Stacey Elin Rossi_____
STACEY ELIN ROSSI