IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TESS HERMAN,	)	**CASE NO: 2:19-cv-00201**
Plaintiff,	)	**JUDGE MICHAEL H. WATSON**
v.	)	**MOTION FOR JUDGMENT ON THE PLEADINGS OF DEFENDANT, YUSUF KALYANGO, Ph.D**
OHIO UNIVERSITY, et al.,	)	
Defendants.	)	

Now comes defendant, Dr. Yusuf Kalyango ("Dr. Kalyango"), through counsel, and hereby respectfully moves this Court for an Order granting Dr. Kalyango judgment in his favor on the pleadings, pursuant to Fed.R.Civ.Proc. 12(c). A memorandum in support is attached hereto and incorporated herein.

Respectfully submitted,

s/Gregory A. Beck
Gregory A. Beck (0018260)
BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS
400 S. Main Street
North Canton, Ohio 44720
e-mail: beck@bakerfirm.com
Telephone: (330) 499-6000
Telecopier: (330) 499-6423
Counsel for Defendant, Yusuf Kalyango

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiff, Tess Herman, filed her complaint on January 20, 2019, alleging three federal claims against this defendant, Dr. Yusuf Kalyango, under 42 U.S.C. §1983, claiming sexual harassment, quid pro quo sexual harassment, and hostile environment and retaliation. These allegations arise from the plaintiff's voluntary resignation of her employment with co-defendant, Ohio University, following one constructive criticism email from Dr. Kalyango as to plaintiff's poor performance in one aspect of her employment. Based on the pleadings, and construing all material allegations in favor of the plaintiff, Dr. Kalyango is entitled to judgment on plaintiff's claims set forth in the complaint.

II. STATEMENT OF FACTS AS ALLEGED BY PLAINTIFF HERMAN

Plaintiff's brings her complaint against Dr. Kalyango for alleged violations of her right to equal protection based on grounds of sex. She claims Dr. Kalyango's alleged actions "caused [her] to lose educational benefits and opportunities..." *See* Complaint, Doc. #1, PAGEID #1-2. Plaintiff avers that she was a graduate student and Dr. Kalyango was a professor at Ohio University. *Id*. at PAGEID #2, ¶¶ 1, 4. However, the relationship between the plaintiff and Dr. Kalyango was more akin to supervisor/employee. Dr. Kalyango and the plaintiff were both employees of Ohio University. *Id*. at PAGEID #2-3, ¶¶ 5, 19. In fact, it is not alleged anywhere in the Complaint that Dr. Kalyango was plaintiff's professor for any graduate classes through Ohio University. Rather, Dr. Kalyango and others approved plaintiff's employment with the University through the Institute for International Journalism, including the YALI and SUSI programs. *Id*. at PAGEID #3, ¶¶ 12, 19.

Plaintiff's Complaint fails to set forth facts that rise to the level of sexual harassment or retaliation. The plaintiff was hired to work under Dr. Kalyango's supervision in March 2017. *Id*. at PAGEID #3, ¶19. She claims that throughout February, March and April 2017, Dr. Kalyango told the plaintiff she looked beautiful and invited her to movies, shopping and dinner. *Id*. at PAGEID #3, ¶¶ 13, 14, 15, 16. Plaintiff also suggests Dr. Kalyango would send her texts and other communication that was "often romantic, in nature, and were entirely unrelated to work." *Id*. at PAGEID #3, ¶¶ 20, 21, 22. Plaintiff claims she requested that Dr. Kalyango not send her texts between 9 pm and 9 am "unless it was work related." *Id*. at PAGEID #3,

¶ 17, 20, 21. Plaintiff does not allege that Dr. Kalyango violated this request.

Plaintiff's employment with Ohio University consisted of working with Dr. Kalyango "as a Program Assistant and Administrative Coordinator for the YALI Connect Camps 13 and 14." *Id*. at PAGEID #4, ¶24. The plaintiff's complaint fails to explain these international programs. However, attached to plaintiff's complaint is the Memorandum of Findings following Ohio University's investigation into plaintiff's sexual harassment complaint against Dr. Kalyango, which, while lacking in the substance to support discipline against Dr. Kalyango, sets forth a better picture of plaintiff's employment, as does Dr. Kalyango's cross-claim against the University. Essentially, Dr. Kalyango was the Director of the International Institute of Journalism at the EW Scripps School of Journalism, and ran both the Young African Leaders Initiative (YALI) Connect Camps and the Study of the U.S. Institute (SUSI) on Journalism & Media programs. *See* attachment to Complaint, PAGEID #27. Through YALI, the Institute for International Journalism "travels to various African nations to host future African leaders for a week of workshops, presentations and networking opportunities." *Id*. Through SUSI, the institute "hosts journalist scholars from around the world, visiting various locations in the United States." *Id*.

Two YALI Connect Camps (13 & 14) for summer, 2017 were held in South Africa. *See* attachment to Complaint, PAGEID #27. Plaintiff suggests that Dr. Kalyango was "intentionally unclear about the itinerary of the trip to Africa and what it would entail" for her. *See* Complaint, PAGEID #4, ¶25. She alleges this lack of clarity as it relates to what she calls a "side-trip to Rwanda," which was not part of a university or work trip. *Id*., PAGEID #4, ¶25; PAGEID #5, ¶34. She claims she did not know the purpose of the trip to Rwanda, but that Dr. Kalyango told her it was "something [the plaintiff is] interested in." *Id*., PAGEID #4, ¶26. In reality, in addition to the itinerary for the YALI Connect Camps presentations to take place in Pretoria, South Africa, a second set of itineraries also included the U.S. Department of State's follow-on YALI alumni engagement work (including the environmental journalism workshops for YALI alum) in Butare, Rwanda, as well as the Institute for International Journalism's international exchange work in the cities of Kigali and Kabgayi at the ICK University in Rwanda. *See* Answer and Cross Claim of Dr. Kalyango, Doc. #9, ¶12. The "side trip," funded by Dr. Kalyango according to the plaintiff, involved several

days in Rwanda, which were already proposed and planned prior to departing Athens, Ohio. *Id.* Although Dr. Kalyango had originally planned to have one of his children join him for the South Africa and Rwanda trips, ultimately his son's plans changed and an opening occurred which was filled by the plaintiff for one touristy activity, the Gorilla Trekking activity, which she gladly sought. *Id.* The plaintiff presented at the environmental journalism workshop in Butare, Rwanda, while Dr. Kalyango had multiple engagements over the course of five days in the town of Kabgayi and city of Kigali, Rwanda. *Id.* The plaintiff started preparing for her Rwanda part of the trip as early as the first week of May, 2017 with two Skype meetings and a conference call with the hosts in Butare, Rwanda. *Id.*

The plaintiff states that on May 28, 2017, Dr Kalyango "told Plaintiff Herman that the resort in Lake Kivu in Rwanda had only one room, and that he and Plaintiff Herman would have to stay in the room together, and that this was the only option." *See* Complaint, Doc. #1, PAGEID #5, ¶28. She acknowledged that Dr. Kalyango told her there was only one room available, and that he would "stay out of [plaintiff's] way." *Id.*, PAGEID #5, ¶34. The plaintiff did not stay in the same room with Dr. Kalyango, who in fact stayed at a separate hotel in Kigali, approximately 6 hours away from Lake Kivu. *Id.*, PAGEID #5, ¶35; *See*, also, Answer and Cross-Claim of Dr. Kalyango, Doc. #9, ¶18. The plaintiff also alleges that Dr. Kalyango bought her drinks while in South Africa and grabbed her hands, attempting to dance with her at a night club. *See* Complaint, PAGEID #6, ¶¶ 37, 42.

Plaintiff suggests that as a result of her rejection of her perceived advances by Dr. Kalyango, his "treatment towards Plaintiff Herman was aggressively retaliatory." *Id.*, PAGEID #6, ¶43. In support of this allegation, the plaintiff claims Dr. Kalyango "gave Plaintiff an angry look and acted with hostility towards her." *Id.*, PAGEID #7, ¶43. To give context to the situation, which the plaintiff's complaint fails to do, the plaintiff rebuffed the typical and expected work-related behavior for the lengthy travel home with the YALI program, which was used to inventory and reconcile expense documents so that the report could be promptly finalized upon return to the United States. *See* Answer and Cross-Claim of Dr. Kalyango, Doc. #9, ¶20. The plaintiff asked Dr. Kalyango to change her seat assignment for the return flight from South Africa so that she was not seated near Dr. Kalyango or in a position to go over the expense reports during the course of

the return flight. Dr. Kalyango obliged and changed her seat upon request. *Id*. at ¶22. Following the return to the United States, the plaintiff ultimately submitted a report to Dr. Kalyango itemizing, inventorying and reconciling the receipts and expenditures for the trip. Rather than consulting with Dr. Kalyango and reviewing the report with him to ensure that she had performed the task properly, the plaintiff left a bag of receipts and the report with another graduate student to deliver to Dr. Kalyango while she went home to Connecticut. *Id*. at ¶¶ 22-23. Dr. Kalyango reviewed the report, found it to be grossly inadequate and rife with errors. In his role as her supervisor and mentor for YALI, Dr. Kalyango tried to communicate in person with the plaintiff, only to find that she had left town and was unavailable. *Id*. at ¶24. Dr. Kalyango was required to spend over forty hours reviewing and correcting the financial expense report based on plaintiff's mistakes before completing the expense report in a manner that was satisfactory to those to whom he was accountable for the YALI Connect Camp program and the various funding agencies supporting that program. *Id*. at ¶25. On July 5, 2017, Dr. Kalyango sent an email advising the plaintiff of how the expense report should have been prepared and explaining the problems in the report she had prepared so that she could learn from her errors and do a better job in the future. *Id*. at ¶26.

Because the plaintiff refused to work with Dr. Kalyango on the return flight to the United States or during the 8-hour layover in New York, she claims she needed to meet with Dr. Kalyango to discuss expense reports and other final matters from the trip upon their return. *See* Complaint, PAGEID #7, ¶¶ 43, 46, 49. However, plaintiff claims Dr. Kalyango missed these meetings. *Id*. PAGEID #7, ¶¶ 45, 46, 47. The plaintiff glosses over her incompetence in preparing the final expense report, stating that through email, "Dr. Kalyango blamed Plaintiff Herman for the *expense report situation*. . ." *Id*. PAGEID #7, ¶49 (emphasis added). Plaintiff emailed a response to Dr. Kalyango on June 5, 2017, to which Dr. Kalyango replied in what plaintiff suggests was a "passive aggressive tone," taking the blame for plaintiff's poor performance. *Id*. PAGEID #7-8, ¶¶50-51. The plaintiff also claims Dr. Kalyango retaliated against her by "falsifying her performance evaluations" because they contain "internal discrepancies." *Id*., PAGEID #8, ¶¶ 52-55.

Significantly, the plaintiff did not suffer any adverse employment or educational actions. Rather, she claims it *appeared to her* that Dr. Kalyango had changed his mind about hiring the plaintiff as an

assistant for future YALI programs. *Id*. PAGEID #8, ¶56. The investigation report stated that Dr. Kalyango's criticism of the plaintiff's substandard work on the expense spreadsheets prompted the plaintiff to *believe* that Dr. Kalyango did not want the plaintiff to work on the *next* YALI program. *See* attachment to Complaint, PAGEID #28. After the above exchange of emails, the plaintiff quit her position as Program Assistant for the SUSI program. *See* Complaint, PAGEID #9, ¶¶ 58-60.

III. LAW AND ARGUMENT

A. Standard of Review

A motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) applies the same standard that governs a motion to dismiss under Fed.R.Civ.P. 12(b)(6). *See* Fed.R.Civ.P. 12(c); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006); *Zeigler v. IBP Hog. Mkt., Inc*., 249 F.3d 509, 511-12 (6th Cir. 2001). A defendant may test the legal sufficiency of a complaint by moving to dismiss under Rule 12(b)(6) or 12(c), by which the defendant implicitly concedes the truth of the pleaded facts for the purposes of the motion. *Rippy ex rel., v. Hattaway*, 270 F.3d 416 (6th Cir. 2001), citing *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). Under these rules, the complaint is viewed in the light most favorable to the plaintiff, the allegations in the complaint are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

To survive a motion to dismiss, a plaintiff must plead more than the bare assertion of legal conclusions. Rather, a plaintiff must plead enough factual matter that when taken as true, "state[s] a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "Plausibility requires showing more than the 'sheer possibility' of relief, but less than a 'probab[le]' entitlement to relief." *Fabian v. Fulmer Helmets, Inc*., 628 F.3d 278, 280 (6th Cir. 2010). Under *Twombly*, pleaded facts must be accepted by the Court, but conclusions should not be accepted unless they are plausibly supported by the pleaded facts. "[B]are assertions" may provide context to factual allegations, but are insufficient to state a clam for relief and must be disregarded. *Twombly*, 550 U.S. at 555.

In considering a motion for judgment on the pleadings, a court considers the pleadings, which consist

of the complaint, the answer, and any written instruments attached as exhibits. *See* Fed. R. Civ. P. 12(c); Fed. R. Civ. P. 7(a) (defining "pleadings" to include both the complaint and the answer); Fed. R. Civ. P. 10(c) (stating that "[a] copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes"); *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998). While the allegations in the complaint are the primary focus in assessing a Rule 12(c) motion, "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint[ ] also may be taken into account." *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008), quoting *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001).

Here, the plaintiff's complaint against Dr. Kalyango should be dismissed under Civ.R.Civ.P 12(c) as the pleadings fail to allege a plausible claim under 42 U.S.C. §1983.

B. Plaintiff's Claims Against Dr. Kalyango Under 42 U.S.C. §1983 Should Be Dismissed

As against Dr. Kalyango, the plaintiff has alleged three separate claims for relief under 42 U.S.C. §1983: In her fifth claim for relief, the plaintiff alleges sexual harassment in violation of the Fourteenth Amendment, pursuant to 42 U.S.C. §1983. (Doc. #1, Complaint, p. 20, PAGEID #20). She claims, "Under the Fourteenth Amendment, Plaintiff had the right as a public university student to personal security and bodily integrity and Equal Protection of Laws." *Id.* at ¶151. Plaintiff alleges that Dr. Kaylango "sexually harassed Plaintiff Herman while he was a state actor acting in his individual capacity under the color of state law." *Id*. at ¶152. In furtherance of her claims, the plaintiff suggests that Kalyango's conduct "constituted disparate treatment of females and had a disparate impact on female students and faculty members." *Id*. at ¶156. In her sixth claim for relief, the plaintiff alleges sexual harassment, quid pro quo, in violation of the Fourteenth Amendment, pursuant to 42 U.S.C. §1983. (Doc. #1, Complaint, p. 21, PAGEID #21). She claims Dr. Kalyango sexually harassed her, and that such harassment "included physical or verbal conduct of a sexual nature that was unwelcome" and that it "was reasonable for Plaintiff Herman to believe that her academic status and other benefits were conditioned on submitting to Defendant Kalyango's advances." *Id*. at ¶¶ 166, 167. In her seventh claim for relief, the plaintiff claims hostile environment and retaliation in

violation of the Fourteenth Amendment, pursuant to 42 U.S.C. §1983. (Doc. #1, Complaint, p. 22, PAGEID #22). The plaintiff suggests that she was subjected to a "hostile environment" before, during and after her trip to Africa, and because of such treatment, "she was forced to step down from her position with the Institute and associated programs and has lost educational opportunities and benefits at the University." *Id.* at ¶179.

To establish a clam under §1983 a plaintiff must prove that she has been deprived of a right secured by the Constitution or federal laws, by one acting under color of state law. *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1202 (6th Cir. 1984). Thus, the threshold inquiry for bringing a claim under section 1983 is "whether the plaintiff has been deprived of a right 'secured by the Constitution and laws." *Baker v. McCollan*, 443 U.S. 137, 140 (1979). Individuals will be "considered state actors for the purposes of §1983 only if their conduct that allegedly gave rise to the deprivation of [plaintiff's] constitutional rights may be 'fairly attributable to the State.'" *Marie v. Am. Red Cross*, 771 F.3d 344, 362 (6th Cir. 2014) quoting *Lugar v. Edmondson Oil Co., Inc*., 457 U.S. 922, 937 (1982).

1. Plaintiff Fails to State a Plausible Claim of Sexual Harassment in Violation of the Equal Protection Clause under §1983.

The Fourteenth Amendment's Equal Protection Clause "safeguards against disparate treatment of similarly situated individuals as a result of government action that either burdens a fundamental right, targets a suspect class, or has no rational basis." *Paterek v. Village of Armada, Mich*., 801 F.3d 630, 649 (6th Cir. 2015). Therefore, to establish a claim under the Equal Protection Clause, a plaintiff must prove that a state actor intentionally discriminated against her because of her membership in a class. *Purisch v. Tennessee Tech. Univ*., 76 F.3d 1414, 1424 (6th Cir. 1996). Proof of an equal protection claim against a public employer under §1983 requires a showing that the employer made an adverse employment decision with discriminatory intent and purpose. *Canton v. Harris*, 489 U.S. 378 (1989) (§1983 requires proof of intentional discrimination). Plaintiff's claims necessarily fail because she has failed to sufficiently allege that Dr. Kalyango made an adverse employment decision with discriminatory intent and purpose. Further, the plaintiff has failed to allege plausible claims of disparate treatment, quid pro quo harassment, hostile environment, or retaliation, and as such, Dr. Kalyango is entitled to judgment on the pleadings.

a. Disparate Treatment

The plaintiff claims that Dr. Kalyango was in a direct supervisory and evaluative role of her, and that he subjected her to sexual harassment which constituted "disparate treatment of females and had a disparate impact on female students and faculty members." (*See* Complaint, Doc. #1, PAGEID #20, ¶¶ 154-156). To state a plausible claim of disparate treatment, plaintiff must allege sufficient facts to show: (1) that she is within a protected class; (2) that she suffered an adverse employment or educational action; (3) that she was qualified for the position; and (4) that similarly-situated non-minority employees or students were treated more favorably. *See Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000).

Here, the plaintiff has failed to state a cognizable equal protection claim because she has not pleaded that, as a female employee or student, she was treated any differently than any similarly situated male employees or students. The plaintiff suggests, in a conclusory manner, that Dr. Kalyango burdened her fundamental rights of personal security and bodily integrity, but she fails to identify any similarly situated individuals who were treated differently. To be "similarly situated," the individual must be like plaintiff Herman in "all relevant respects." *See Sanders v. City of Hodgenville*, 323 F.Supp.3d 904 (W.D. Ky. 2018), quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.").

The plaintiff's bare allegations that it was "common knowledge" that "Defendant Kalyango show[ed] preferential treatment to certain individuals within the Institute – namely women to whom he is attracted" or that it was "well-known that if these women do not 'play his games' and rebuff his advances, these women are at risk of receiving disadvantageous, and possibly retaliatory treatment from Defendant Kalyango" is insufficient to state an equal protection violation claim under §1983. (*See* Complaint, Doc. #1, PAGEID #9, ¶61; PAGEID #12, ¶¶ 77, 81; PAGEID #13, ¶86). Plaintiff refers to Dr. Kalyango's "general strategy" or "proclivity" of making advances toward female graduate students, but does not allege any individuals, male or female, that received better treatment. (*Id.*, PAGEID #11-12, ¶¶ 74, 81). In fact, the only individual named by the plaintiff was a "witness," Bailey Dick, who had been neither an employee working for Dr. Kalyango at the time of his alleged disparate treatment nor his student, that claims Dr. Kalyango also treated Ms. Dick poorly, but does not allege any sexual harassment. (*Id.*, PAGEID #11, ¶75).

In this case, irrespective of the alleged sexual harassment, the plaintiff has failed to sufficiently allege that any other student who did not adequately perform her task would not also have been emailed a reprimand. Plaintiff's allegations, examined in their most favorable light, are insufficient to set forth a plausible equal protection violation against Dr. Kalyango.

b. Quid Pro Quo

The plaintiff claims Dr. Kalyango engaged in quid pro quo harassment of her, suggesting that her "academic status" was conditioned upon submitting to Dr. Kalyango's advances. (*See* Complaint, Doc. #1, PAGEID #21, ¶¶ 165-168). As set forth above, the plaintiff's role with the YALI program was as an employee of Ohio University, supervised by Dr. Kalyango. The complaint does not allege she partook in any graduate coursework with Dr. Kalyango as her professor. However, whether plaintiff's allegations are brought in the employee/employer or student/teacher context, they must fail.

To prevail in an action under 42 U.S.C. §1983 alleging quid pro quo sexual harassment against an individual as a violation of the equal protection clause of the Fourteenth Amendment, a plaintiff must assert and prove: (1) She was a member of a protected class; (2) she was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; and (4) her submission to the unwelcomed advances was an express or implied condition for receiving job or education benefits, or her refusal to submit to a supervisor's sexual demands resulted in a tangible job or educational detriment. *See Kauffman v. Allied Signal Inc.*, 970 F.2d 178, 186, (6th Cir. 1992), citing *Highlander v. KFC National Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *See*, also, *Petrone v. Cleveland State Univ.*, 993 F.Supp. 1119 (N.D. Ohio 1998).

A review of the plaintiff's complaint does not reveal that she was subjected to unwelcomed sexual harassment, that such harassment was based on sex, that she submitted to any unwelcomed advances on condition of receiving any benefits, or that a tangible job or education detriment occurred as a result of her refusal to submit to any sexual demands. Because the plaintiff does not allege each element of quid pro quo sexual harassment, she has failed to state a plausible claim against Dr. Kalyango. While some of the conduct asserted by the plaintiff may appear on its face to be mildly inappropriate for a student/professor or employee/supervisor relationship, none of it constituted requests for sexual favors. The *only* instance which could conceivably be construed as a sexual advance is Dr. Kalyango's suggestion that they share a room out

of necessity at the resort in Lake Kivu, Rwanda. Part of this alleged request was the statement by Dr. Kalyango that he would stay out of the plaintiff's way. The record does not show that Dr. Kalyango sought or demanded sexual favors from the plaintiff.

More importantly, there is no evidence that the plaintiff had to submit to Dr. Kalyango's alleged advances as an express or implied condition for receiving educational benefits or that her refusal to submit to such advances caused any educational or employment detriment. As alleged, the plaintiff *subjectively believed* that she would not be retained for *future* YALI programs, based upon Dr. Kalyango's disappointment with her performance on the expense report. Significantly, the plaintiff did not suffer any educational or employment damage at the behest of Dr. Kalyango. Thus, the plaintiff has failed to assert a plausible claim for quid pro quo sexual harassment under §1983.

c. "Hostile Environment"

Tellingly, in her seventh claim for relief, the plaintiff does not clarify whether her claims are brought in the context of a student/teacher or employee/employer relationship. The plaintiff attempts to blend the allegations and to create some sort of global "hostile environment." However, the facts alleged do not support a claim for either a hostile educational environment nor a hostile work environment.

Sexual harassment is a specialized type of equal protection, gender discrimination claim. A sexual harassment claim brought under §1983, and based upon a hostile environment created by a supervisor, involves four elements: a plaintiff must show that: (1) she was a member of a protected class; (2) she was subject to unwelcomed sexual harassment; (3) the harassment was based on her sex; and (4) the harassment created a hostile environment. *Williams v. Gen. Motors Corp*., 187 F.3d 553, 560 (6th Cir. 1999). To support a claim of hostile environment under §1983, a plaintiff must present evidence not only that she subjectively perceived the environment to be hostile or abusive, but also that the environment was objectively hostile and abusive, that is, that it was "permeated with 'discriminatory intimidation, ridicule, and insult,'. . . that is 'sufficiently severe or pervasive to alter the conditions'" of the plaintiff's educational or work environment. *See Hayut v. State Univ. of N.Y.*, 352 F.3d 733 (2d Cir. 2003), citing *Harris v. Forklift Sys*., Inc., 510 U.S. 17, 21 (1993).

There is both an objective and a subjective element to the existence of a hostile environment: "the conduct must be severe enough to create an environment that a reasonable person would find hostile or

abusive and the victim must subjectively regard that environment as abusive." *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 463 (6th Cir. 2000). In determining whether conduct is severe or pervasive enough to constitute a hostile work environment, a court should consider, among other factors, "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Bowman*, 220 F.3d at 463. Ultimately, whether a hostile work environment exists is a determination based on the totality of the circumstances. *Harris*, 510 U.S. at 23; *Williams*, 187 F.3d at 562. While the effect on a claimant's psychological well-being is relevant to the subjective component in the analysis, its presence, or absence, is not dispositive on the issue of severity, as "no single factor is required." *Hayut*, 352 F.3d 745. Finding harassment "pervasive" means that the challenged incidents are "more than episodic; they must be sufficiently continuous and concerted." *Id*., citing *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 577 (2d Cir. 1989).

When considering the viability of a sexual harassment claim, "it is important to distinguish between harassment and *discriminatory* harassment." *Bowman*, 220 F.3d at 464 (emphasis added). The Equal Protection Clause is not a general civility code. *See Id.* Although non-overtly sexual conduct *can* be considered in the hostile work environment analysis, such conduct should *only* be considered when the plaintiff has also alleged conduct that could evince animus toward the gender in question. *See Bowman*, 220 F.3d at 464 ("Bowman has not shown that the non-sexual conduct he complains of had anything to do with his gender. While he may have been subject to intimidation, ridicule, and mistreatment, he has not shown that he was treated in a discriminatory manner because of his gender.").

Here, the plaintiff has alleged the first element of her case because she is a woman and therefore a member of a protected class. However, as set forth above, none of the alleged behavior complained of was overtly sexual or based on gender, or indicative that the plaintiff perceived a hostile work or educational environment. The allegations are simply not severe or pervasive enough to rise to the level of a hostile or abusive environment. At best, the alleged conduct was isolated and/or sporadic. Rather, the allegations only show that the plaintiff was scrutinized for her performance on the expense report for the YALI program, and subsequently voluntarily resigned her position with the SUSI program.

2. Plaintiff Fails to State a Plausible Claim of Retaliation in Violation of the Equal Protection Clause as No Such Claim Exists.

In her seventh claim for relief, the plaintiff has alleged a claim of retaliation in violation of the Fourteenth Amendment under §1983, citing "the right as a public university student to personal security and bodily integrity and Equal Protection of Laws." *See* Complaint, PAGEID #22, §174. A retaliation claim is a claim that "government officials retaliated against the plaintiffs for exercising their constitutional rights." *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999). The essence of a retaliation claim is that the plaintiff engaged in conduct protected by the Constitution or by statute, that the defendant took adverse action against the plaintiff, and that the adverse action was taken because of the protected conduct. *Id*. at 386-87.

Here, the plaintiff does not allege that Dr. Kalyango retaliated against her for engaging in conduct protected by the Constitution. She merely alleges a §1983 equal protection violation, claiming Dr. Kalyango "subjected Plaintiff Herman to a hostile work environment and retaliation..." *See* Complaint, PAGEID #23, ¶176. As the Sixth Circuit has recently reaffirmed, "[a] 'retaliation claim does not . . . arise under the Equal Protection Clause.'" *Smith v. City of Inkster*, 644 F. App'x 602, 611 (6th Cir. 2016) (quoting *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 440 (6th Cir. 2005)); *see*, also, *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997) ("A pure or generic retaliation claim . . . simply does not implicate the Equal Protection Clause."); *Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989) ("Gray's right to be free from retaliation for protesting sexual harassment and sex discrimination is a right created by Title VII, not the equal protection clause); *Collins v. Allen*, No. 1:04-cv-572, 2006 U.S. Dist. LEXIS 61192, 2006 WL 2505928, at *2 (S.D. Ohio Aug. 29, 2006) ("[Plaintiff's] claim against [the defendant] is for retaliation, for which the equal protection clause does not provide a remedy."); *Brady v. O'Grady*, 2017 U.S. District LEXIS 50695 (S.D. Ohio March 31, 2017).

Thus, the plaintiff has failed to properly assert a plausible retaliation claim against Dr. Kalyango. Therefore, her retaliation claim must be dismissed, and defendant is entitled to judgment on the pleadings.

III. CONCLUSION

WHEREFORE, defendant, Yusuf Kalyango, respectfully moves this Court for the entry of judgment on the pleadings, dismissing the plaintiff's Complaint at her cost.

Respectfully submitted,

s/Gregory A. Beck
Gregory A. Beck (0018260)
BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS
400 S. Main Street
North Canton, Ohio 44720
e-mail: beck@bakerfirm.com
Telephone: (330) 499-6000
Telecopier: (330) 499-6423
Counsel for Defendant, Yusuf Kalyango

PROOF OF SERVICE

I hereby certify that on April 12, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Michael L. Fradin
Counsel for Plaintiff

Christopher E. Hogan
Counsel for Defendant, Ohio University

Reid T. Caryer
Ohio Attorney General's Office
Education Section
Counsel for Defendant, Ohio University

s/Gregory A. Beck
Gregory A. Beck (0018260)
Counsel for Defendant, Yusuf Kalyango