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

Tess Herman,	:	
	:	
Plaintiff,	:	Case No. 2:19-cv-00201
	:	
v.	:	Judge Michael H. Watson
	:	Magistrate Judge Chelsey M. Vascura
Ohio University, *et al.*,	:	
	:	
Defendants.	:	

DEFENDANT OHIO UNIVERSITY'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Now comes Defendant Ohio University, through counsel, and hereby respectfully moves this Honorable Court, pursuant to Fed. R. Civ. Proc. 12(b)(6), for an order dismissing the claims against it in Plaintiff's Complaint (Doc. #1). A memorandum in support follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiff, Tess Herman ("Ms. Herman"), is a graduate student in Journalism and Environmental Studies at Defendant, Ohio University ("University"). Ms. Herman brings this action against the University and one of its faculty members, Yusuf Kalyango ("Dr. Kalyango"). With respect to the University, Ms. Herman alleges that it violated Title IX of the Education Amendments of 1972, 20 U.S.C. sec. 1681, *et seq.* ("Title") by being deliberately indifferent to Dr. Kalyango's known past harassment of other graduate students in the journalism program, which enabled him to subject Ms. Herman to hostile environment and *quid pro quo* harassment. There is no allegation that the University was deliberately indifferent to Ms. Herman's complaints about Dr. Kalyango. In fact, as set forth in the Memorandum of Findings attached to Ms. Herman's Complaint, the University promptly conducted a thorough investigation and has moved to de-tenure and dismiss Dr. Kalyango from employment at the University.[1]

At the outset, the University would like to make clear that in defending itself and discharging its duty of stewardship over public funds, it does not seek to diminish the fact that a University investigator found it more likely than not that Dr. Kalyango subjected Ms. Herman to behaviors that violated University policy. However, the University respectfully disagrees with the allegation that it was deliberately indifferent to her Title IX rights. On the contrary, upon

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[1] Currently, Dr. Kalyango has his own counsel (Doc. #6.), and the undersigned do not represent him in any respect, although he has filed a cross claim for indemnification. (Doc. #9.) Ms. Herman's Complaint sets forth three claims against him, under 42 U.S.C. §1983, for allegedly violating her right to be free from sex discrimination under the Fourteenth Amendment to the U.S. Constitution. The claims are analogous to the claims against the University, alleging sexual harassment (Count Five), "hostile environment" (Count Six) and retaliation (Count Seven). (Doc. #1, pgs. 20-23.)

learning of Ms. Herman's concerns, the University conducted a thorough investigation and has taken remedial action.

Therefore, for the reasons set forth below, the University respectfully moves this Honorable Court, pursuant to Civil Rule 12(b)(6), for an order dismissing the claims against it with prejudice because the Complaint fails to set forth well-pled allegations making it plausible that the University violated Ms. Herman's Title IX rights.

II. STATEMENT OF FACTS AS ALLEGED

The following overview is drawn from the Complaint and the Memorandum of Findings attached as Exhibit A thereto. (Doc. #1-1.) To avoid repetition, certain specific allegations are discussed in the argument section of this Memorandum.

Ms. Herman is a graduate student in both Journalism and Environmental Studies at the University. (Doc. #1, Complaint, par. 1.) Dr. Kalyango was the Director of the University's International Institute of Journalism at the University's E.W. Scripps School of Journalism. He helped run the Young African Leaders Initiative (YALI) and the Study of the United States Institute (SUSI). YALI is a program sponsored by the U.S. State Department, whereby the International Institute of Journalism travels to various African nations to host future African leaders for a week of workshops, presentations and networking opportunities. The YALI program for summer 2017 was held in South Africa. (Doc.#1, Complaint, par. 62 & Doc. #1-1, pg. 2.)

Dr. Kalyango and Ms. Herman met in February of 2017 at a party hosted by Dr. Kalyango. The two met several times after the party to discuss Dr. Kalyango's work and the YALI and SUSI programs. (Doc. #1, Complaint, par. 12 & Doc. #1-1, pg. 2.) Eventually, Ms.

Herman was asked to participate in the summer 2017 YALI program as a Program Assistant/Coordinator, an offer she accepted. (Doc. #1, Complaint, par. 24 & Doc. #1-1, pg. 2.)

Throughout the Spring of 2017, Ms. Herman and Dr. Kalyango would regularly socialize and communicate via email and text. The only indication in the Complaint that Ms. Herman may have found these interactions unwelcome occurred when Ms. Herman asked Dr. Kalyango not to text her between 9am and 9pm, unless it was work related. (Doc. #1, Complaint, pars. 17-17, 20, 27.)

The two were set to leave for the summer 2017 YALI program in South Africa on May 31, 2017. During preparations for the YALI program in South Africa, Dr. Kalyango invited Ms. Herman to take a personal side-trip to Rwanda with him on June 20 and 21, 2017, after the YALI program concluded. Dr. Kalyango was vague about the itinerary for the Rwanda excursion. On May 28, 2017, Dr. Kalyango informed Ms. Herman that they were to share a room while in Rwanda. Ms. Herman declined this invitation. Both the South Africa and the Rwanda trip went as scheduled, but Dr. Kalyango stayed in another city while the two were in Rwanda. (Doc. #1, Complaint, pars. 26-28, 34-36 & Doc. #1-1, pgs. 2-3.)

The Complaint alleges that in the wake of Ms. Herman's rejection of Dr. Kalyango, he became hostile to her, including refusing to meet with her to go over how to itemize expenses for the trip. The Complaint also alleges that Dr. Kalyango altered evaluations submitted by the YALI program participants to make him look better and her look worse. On July 5, 2017, Dr. Kalyango sent Ms. Herman an email critical of her work. Ms. Herman consulted University HR and responded to the criticisms in Dr. Kalyango's email. Finally, the Complaint alleges that Dr. Kalyango terminated Ms. Herman's employment in the YALI program, while the University investigation found that Ms. Herman interpreted the July 5 email as terminating her YALI

position and that Ms. Herman decided to resign from her upcoming SUSI position in response to Dr. Kalyango's criticism. (Doc. #1, Complaint, pars. 48-57 & Doc. 1-1, pg. 3.)

On July 6, 2017, the day after Dr. Kalyango's critical email, Ms. Herman went to the University's Office of Equity and Civil Rights Compliance (ECRC) and was interviewed for the purposes of initiating an investigation into whether Dr. Kalyango violated the University's Title IX policy. (Doc. #1-1, pg.3.) Ultimately, the University issued a 35-page Memorandum of Findings, finding that Dr. Kalyango had in fact harassed Ms. Herman and engaged in *quid pro quo* discrimination. (*Id*.) After multiple levels of review within the University, de-tenuring and dismissal proceedings were initiated by the University against Dr. Kalyango. This lawsuit followed. Notably, the Complaint does not seek to challenge the University's response to Ms. Herman's internal complaint about Dr. Kalyango.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv Inc. v. Treesh,* 487 F.3d 471, 476 (6th Cir.2007). But the court "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* "[L]egal conclusions masquerading as factual allegations will not suffice." *Eidson v. State of Tenn. Dept of Children's Servs.,* 510 F.3d 631, 634 (6th Cir.2007).

The Supreme Court explained in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) that "a plaintiff's obligation to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will

not do. Factual allegations must be enough to raise a right to relief above the speculative level...." *Id.* at 555. Dismissal is appropriate if the plaintiff has failed to offer sufficient factual allegations that make the asserted claim plausible on its face. *Id.* at 570. "[T]o state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory[.]" *LULAC v. Bredesen,* 500 F.3d 523, 527 (6th Cir.2007) (citing *Twombly*, 550 U.S. at 562).

Here dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is appropriate because the allegations against the University in the Complaint fail to allege a plausible violation of Title IX.

IV. LAW AND ARGUMENT

A. Plaintiff Fails to State a Plausible Title IX Deliberate Indifference Claim Against Defendant Ohio University

In Counts One through Three, Ms. Herman sets forth essentially identical causes of action against the University. (Doc. #1, pars. 91-130). Seeming to concede that the University responded appropriately to her report of harassment at the hands of Dr. Kalyango, she seeks to paper over this chasm with vague allegations about others. Thus, she claims that the University violated Title IX when it acted with deliberate indifference to prior acts of harassment by Dr. Kalyango against other individuals, and that indifference resulted in Ms. Herman being harassed by Dr. Kalyango (*i.e*. teacher-on-student harassment). As explained below, these redundant counts, whether taken singly or together, fail to state a Title IX claim against the University.

1. The Title IX Prima Facie Case

Title IX prohibits sex discrimination, including sexual harassment, in education programs that receive federal financial assistance. 20 U.S.C. § 1681(a); *Gebser v. Lago Vista Independent School Dist.,* 524 U.S. 274, 283 (1998). The University does not dispute that it receives federal financial assistance.

A university can be held liable for teacher-on-student sexual harassment under Title IX only when a student can demonstrate: (1) harassment so severe, pervasive, and objectively offensive that it can be said to deprive the student of access to the educational opportunities and benefits of the university; (2) an official of the university, that is, one who has authority to institute corrective measures, had actual knowledge of that harassment, and (3) the university was "deliberately indifferent" to the teacher's harassment. *Gebser at* 277; *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). To avoid liability, the university need not "purg[e]" itself of the harassment or offending teacher, or take "particular disciplinary action." *Davis* at 648. Instead, the university must merely respond to the known harassment "in a manner that is not clearly unreasonable." *Id.* at 649.

2. Defendant Ohio University is Not Liable to Ms. Herman for Prior Acts of Alleged Harassment by Defendant Kalyango Against Other Individuals

a. The University did not have Actual Notice Under Title IX

Ms. Herman claims that the University had actual knowledge of prior acts of misconduct perpetrated by Dr. Kalyango which suggested that he posed a risk of harassing female graduate students. She alleges further that the University's deliberate indifference to those prior incidents of misconduct enabled Dr. Kalyango to harass Ms. Herman. (Doc. # 1, pars. 95-97, 100, 108-113, 115, 119, 126-129). However, Ms. Herman's Complaint fails to offer specifics; instead, she alleges that Dr. Kalyango's misconduct was "common knowledge" within the University's journalism department, and the Institute for International Journalism in particular, that Dr. Kalyango sought out "personal, romantic, and possibly sexual relationships with female graduate students." (*Id.*, pars. 61, 63, 77, 81, 86).

The Complaint's "common knowledge" allegations are akin to constructive notice, *i.e.* the University should have known. Yet, the Supreme Court has expressly rejected the use of a constructive notice standard. Title IX liability only attaches if a recipient of federal funds had actual knowledge of the unlawful conduct and was deliberately indifferent to it. *Gebser,* 524 U.S. at 277.

More specifically, the Complaint fails to allege that "an appropriate official" had actual knowledge of a substantial risk of abuse to students in the university based on prior complaint of other students. *Hart v. Paint Valley Local Sch. Dist*., Case No. C2-01-004, 2002 WL 31951264, *6 (S.D. Ohio Nov. 15, 2002). Here, the Complaint does not identify a single student complaint against Dr. Kalyango prior to Ms. Herman's own. *See Hart* at *1-3.

Without specific allegations of prior discrimination by Dr. Kalyango, the Complaint's "common knowledge" allegations are too generalized to impose Title IX liability. *See Simpson v. Univ. of Colo.,* 372 F.Supp.2d 1229, 1235-36 (D. Colo. 2005) (holding that "the risk must remain focused . . . [t]he more a risk becomes generalized, the more that risk is likely to fall outside of the narrowly circumscribed scope of Title IX liability"); *Wyler v. Conn. State Univ. Sys.*, 100 F.Supp.3d 182, 191 (D. Conn. 2015) (finding no liability under Title IX based on unconfirmed rumors, and the intimations and suspicions of persons); *Gordon v. Ottumwa Community Sch. Dist.*, 115 F.Supp.2d 1077, 1082 (S.D. Iowa 2000) (stating that "actual notice 'requires more than a simple report of inappropriate conduct' on the part of a school employee") (internal citation omitted).

Yet, even if "common knowledge" allegations somehow support a showing of substantial risk, the Complaint would still fail to identify an appropriate University official who received actual notice of any prior discriminatory acts by Dr. Kalyango. Though the Complaint alleges

that journalism department faculty and students knew about Dr. Kalyango's propensities toward female graduate students, (Doc. #1, pars. 61, 63, 77, 81, 86), faculty and students aren't appropriate university officials for the purposes of imposing Title IX liability.

Courts have found that employees, including teachers, without disciplinary authority over the harasser are not "appropriate persons" under Title IX. *See Hill v. Cundiff*, 797 F.3d 948, 971 (11th Cir. 2015) (teacher's aide "not high enough on the chain-of-command" to be an appropriate person, noting that there was "[n]o evidence in the record [to] suggest[] teacher's aides at [the school] ha[d] the authority to discipline students for sexual harassment"); *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 457-58 (8th Cir. 2009) (finding that while principal was an appropriate person, for purposes of Title IX, teacher and guidance counselor did not have sufficient remedial authority to be considered "appropriate persons"); *Baynard v. Malone*, 268 F.3d 228, 238-39 (4th Cir. 2001) (In teacher-on-student sexual harassment, principal who lacked the authority by statute to fire his teachers was not an appropriate person because he was not "invested with the power to take corrective action on behalf" of the school district and thereby become the "proxy" for the funding recipient.).

The Complaint seeks to cure this clear infirmity by alleging certain faculty are "appropriate persons" because university policy suggests students may report harassment to them. (Doc. #1, pars. 39, 66-67). However, simply because faculty can receive reports does not make any one of them an "appropriate person". In *Ross v. University of Tulsa*, 859 F.3d 1280 (10th Cir. 2017), the Tenth Circuit found that a security guard's status as a mandatory reporter under the university's sexual harassment policy was insufficient to establish that person as an "appropriate person" under Title IX. In so ruling, the court rejected, as too broad, the plaintiff's

view that "anyone who participates in the initiation of a corrective process is an 'appropriate person.'" *Id.* at 1289.

Courts, like the Tenth Circuit, have underscored the fact that "merely passing on a report of sexual harassment to someone authorized to take corrective action is not the same as corrective action." *Id.* at 1290 (citing *Plamp* at 459 (recognizing that specified school personnel were authorized to report discriminatory conduct, "[b]ut that authority does not amount to an authority to take a corrective measure or institute remedial action within the meaning of Title IX")). Thus, the Complaint's "common knowledge" allegations don't satisfy the actual knowledge prong.

b. The University was not Deliberately Indifferent to Known Sex Discrimination

Just as the Complaint fails to aver plausible allegations of "actual knowledge," so too does it fail to contain well-pled allegations of fact setting forth a plausible claim of "deliberate indifference." Consequently, as further explained below, the Complaint fails to sufficiently allege a Title IX violation for discriminatory harassment.

Certainly, the Complaint alleges that, had the University acted appropriately before Ms. Herman met Dr. Kalyango, she would not have been subjected to his misconduct.[2] But that conclusion assumes the University had actual knowledge of at least *some* of the alleged prior

[2]With respect to the Complaint's allegations that Defendant Kalyango subjected Ms. Herman to conduct that violated the University's anti-discrimination policy adopted pursuant to Title IX, the University's Office of Equity and Civil Rights Compliance (ECRC) conducted an investigation and compiled a memorandum of findings that concluded that a preponderance of the evidence substantiated most of the allegations. (Doc. #1-1). The University wishes to preserve the argument that the ECRC's findings under its policy are analytically distinct from legal determinations under applicable law. For purposes of this Motion, however, the University assumes that Dr. Kalyango subjected Ms. Herman to harassment that would violate Title IX.

instances of discrimination perpetrated by Dr. Kalyango—such that the University could have responded with remedial measures to address the kind of harassment upon which Ms. Herman's legal claim is based. *Hart,* 2002 WL 31951264, at *6 citing *Crandell v. New York College of Osteopathic Med*., 87 F.Supp.2d 304, 320 (S.D.N.Y. 2000). However, as noted above, the Complaint fails to identify any specific incidents of prior harassment perpetrated by Dr. Kalyango and that an appropriate University official knew about them and was deliberately indifferent. Thus, the Complaint's allegations in this regard fail to state a Title IX claim against the University.

c. The University was not Deliberately Indifferent to Ms. Herman's Own Complaints About Defendant Kalyango

The Complaint also appears to allege that the University violated Title IX when it acted with deliberate indifference to harassment, whether characterized as quid pro quo or a hostile environment, between Ms. Herman and Dr. Kalyango. (Doc. #1, pars. 99-100, 114-115, 129). As explained below, this Title IX, current abuse, deliberate indifference claim also fails.

i. Ms. Herman's May 28, 2017, Conversation with Professor Jeremy Morris

In mid-March 2017, roughly three months before the YALI summer camp started, Dr. Kalyango corresponded with Ms. Herman about accompanying him on a side trip to Rwanda. Then, on May 28, 2017, two days before leaving for the summer camp, Ms. Herman learned that the side trip to Rwanda included sharing a hotel room with Dr. Kalyango. Ms. Herman understandably took a dim view of the proposal to share a room, declined Dr. Kalyango's invitation to do so, and ultimately did not share a hotel room with him. (Doc. #1, pars. 24-26, 28, 33-36.)

Also, on May 28, 2017, Ms. Herman contacted Professor Jeremy Morris, a philosophy professor at the University, about Dr. Kalyango wanting to share a hotel room with her. Professor Morris expressed concern and suggested that Ms. Herman contact Jenny Klein, the Assistant Dean in University College. There is no allegation in the Complaint that Ms. Herman contacted Assistant Dean Klein. (*Id*., pars. 66-68).

Ms. Herman's conversation with Professor Morris fails to state a prima facie Title IX deliberate indifference claim against *the University*. First, the events Ms. Herman described to Professor Morris—being informed of, but not actually, sharing a hotel room with Dr. Kalyango—do not amount to legally-actionable discriminatory harassment. While inappropriate and unwelcomed, nothing Ms. Herman said to Professor Morris suggests that Dr. Kalyango altered her educational environment as a result of her refusal to share a hotel room with him. *See Papelino v. Albany Coll. of Pharm. of Union. Univ*., 633 F.3d 81, 89 (2d Cir. 2011) (quid pro quo sexual harassment requires a tangible school-related consequence, such as a change in a grade).

In addition, the information Ms. Herman shared with Professor Morris does not show that she was subjected to a sexually hostile environment. That is to say that, while totally inappropriate, the invitation was not so severe, pervasive, and objectively offensive that it can be said to have deprived Ms. Herman of access to the educational opportunities and benefits of the University. *See Papelino* at 89 (delineating elements of Title IX hostile environment); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("isolated incidents (unless extremely serious) will not amount to discriminat[ion].") (internal quotation marks omitted); *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 23 (1993) (for hostile environment theory courts consider various factors including "the frequency of the discriminatory conduct; its severity; whether it is

physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance.").

Even if, at the motion to dismiss stage, Ms. Herman's allegations sufficiently allege sexual harassment, her conversation with Professor Morris does not amount to actual notice of such harassment to *the University*. As explained in section IV.A.2.a. above, Professor Morris—a rank-and-file faculty member, not even within the same department as Dr. Kalyango—is not an "appropriate person" with authority to institute corrective measures. *Gebser,* 524 U.S. at 277. Since Professor Morris's knowledge cannot be imputed to the University, the University never actually knew of Dr. Kalyango's purported harassment. Consequently, Ms. Herman's allegations fail to show that the University violated Title IX. *See Gebser* at 290-291 (imposing liability if anyone other an appropriate university official receives notice runs the "risk that the [university] would be liable in damages not for its own official decision but instead for its employees' independent actions.").

ii. Ms. Herman's June 2017 Conversation with Professor Judy Millesen

On June 10, 2017, a little over one week into the YALI summer camp program, Dr. Kalyango bought Ms. Herman multiple drinks at two different South African bars. He also tried to dance with Herman. (Doc. 1, ¶ 37).

"Soon thereafter," Ms. Herman "approached Judy Millesen, a professor at Ohio University, supervisor of the Africa trip[.]" Ms. Herman told Professor Millesen about "Kalyango's inappropriate and forward conduct." Professor Millesen purportedly responded that enduring Dr. Kalyango's misconduct and bad behavior was an unfortunate part of the job, that she had learned to go along with his requests, and that Ms. Herman should do whatever he says if she wanted to stay on the job. (*Id.*, ¶¶ 38-41).

Just as Ms. Herman's conversation with Professor Morris failed to state a prima facie Title IX deliberate indifference claim against *the University*, so too does her conversation with Professor Millesen. The events Ms. Herman described to Professor Millesen do not amount to quid pro quo sexual harassment or a hostile environment. Nothing Ms. Herman said to Professor Millesen indicates that Dr. Kalyango actually altered her educational environment. Yet, even if, at the motion to dismiss stage, Ms. Herman's allegations sufficiently allege sexual harassment, Ms. Herman's conversation with Professor Millesen does not amount to actual notice of unlawful harassment to the University. As explained in section IV.A.2.a. above, Professor Millesen is not an "appropriate person" with authority to institute corrective measures. Since Professor Millesen's knowledge cannot be imputed to the University, it never actually knew of Dr. Kalyango's purported harassment. Consequently, the Complaint's allegations in this regard fail to show that the University violated Title IX.

iii. Ms. Herman's July 5, 2017, Conversation with the University's Human Resources Department

The Complaint alleges that on July 5, 2017, Dr. Kalyango emailed Ms. Herman terminating her from any future work with the YALI summer camp. That same day, Ms. Herman contacted the University's Human Resources department, presumably about the email. Human Resources advised Ms. Herman to respond to the email and defend herself. (Doc. #1, pars. 57-58).

The very next day, July 6, 2017, Ms. Herman met with the University's ECRC and, for the first time, informed the University's Title IX Coordinator about the extent of Dr. Kalyango's alleged misconduct. (Doc. #1-1.) The ECRC immediately opened an investigation. The University subsequently compiled a memorandum of findings and concluded that the

preponderance of the evidence developed during the investigation substantiated most of Ms. Herman's allegations. (*Id*.)

Since her report, Ms. Herman has not raised the specter of further harassment at the hands of Dr. Kalyango, and the University has been given no reason to believe that its "efforts to remediate [were] ineffective." *See Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000) (if "a school district has knowledge that its remedial action is inadequate or ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior"); *Soper v. Hoben,* 195 F.3d 845, 855 (6th Cir.1999) ("prompt and thorough response by school officials" was not clearly unreasonable). Consequently, the Complaint fails to allege a plausible claim that the University's response to her July 6, 2017, complaint was "clearly unreasonable in light of the known circumstances." *See Davis*, 526 U.S. at 648. Therefore, the Complaint fails to state a Title IX deliberate indifference claim against the University.

B. The Complaint Fails to Allege a Cognizable or Plausible Claim of Retaliation Under Title IX

Count Four of Ms. Herman's Complaint purports to allege a claim of retaliation in violation of Title IX against the University. (Doc. #1, pars. 132-149.) However, these allegations make plain that, if anything, Count Four is simply a rehash of Counts One through Three, with a new label. Thus, for the same reasons Counts One through Three fail to state a claim, Count Four similarly fails to state a claim. Alternatively, Count Four should be dismissed as duplicative. Finally, to the extent Court Four is deemed to set forth a distinct cause of action for retaliation under Title IX, it should be dismissed for failure to state a claim.

The face of the Complaint fails to allege the basic elements of such a retaliation claim, including that Ms. Herman complained of harassment or participated in proceedings under Title IX and the University retaliated against her as a result. Instead, it echoes Count One's *quid pro*

quo harassment claim in that it alleges that Ms. Herman suffered adverse educational or employment actions because she spurned Dr. Kalyango's advances, not because he knew that she had complained about him and then took adverse action against her for that reason. For example, paragraph 43 of the Complaint and the heading just above make clear that Ms. Herman believes her refusal to intensify her relationship with Dr. Kalyango caused him to be hostile toward her. (Doc. #1, pg. 6, par. 43.)

1. The Elements of a Retaliation Claim under Title IX

The United States Supreme Court recognized a cause of action for retaliation under Title IX in *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167 (2005). There, a high school physical education teacher and girls' basketball coach alleged that the board of education removed him from his coaching position after he complained about unequal athletic opportunities. The question before the Supreme Court was whether the private right of action under Title IX recognized in *Cannon v. University of Chicago,* 441 U.S. 677 (1979) extends to claims of retaliation. *Jackson,* 544 U.S. at 178. Concluding that retaliation in response for complaining about sex discrimination was itself a species of sex discrimination and noting that the Department of Education's Title IX regulations had interpreted Title IX to prohibit retaliation for decades, a majority of the Court ruled that retaliation claims were actionable under Title IX. The Court outlined the nature of the claim, "[t]o prevail on the merits, [the coach] will have to prove that the Board retaliated against him because he complained of sex discrimination." *Id.* at 184.

In the wake of *Jackson*, the Federal Circuit Courts of Appeal, including our Sixth Circuit, have ruled that claims for retaliation under Title IX are analyzed under the standards developed under federal law for Title VII cases. *Nelson v. Christian Bros. University,* 226 Fed. Appx. 448, 454 (6th Cir. 2007); *Gordon v. Traverse City Area Pub. Sch.,* 686 Fed. Appx. 315, 320 (6th Cir.

2017) (internal citation omitted). These authorities make clear that retaliation claims are separately codified or regulated and compliment Title IX's and Title VII's protections against disparate treatment claims, focusing on the protected activities of making complaints or participating in proceedings.

As under Title VII, retaliatory intent under Title IX can be proven with either direct or indirect evidence. Where, as here, there is no direct evidence of retaliatory intent, the well-known *McDonnell-Douglas* burden shifting method is employed. Accordingly, to create an inference of retaliatory intent, using the *McDonnell-Douglas* proof scheme, a plaintiff must show that: (1) she engaged in a protected activity; (2) this exercise of protected rights was known to the defendant; (3) the defendant thereafter took adverse action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse action. *See Gordon, supra* at 320; *see also Varlesi v. Wayne State Univ.,* 643 Fed. Appx. 507 (6th Cir. 2016); *Elmore v. Bellarmine Univ.,* 2018 U.S. Dist. LEXIS 52564, *11-12. If a plaintiff establishes a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-retaliatory reason for its actions. *See id.* If the defendant carries this burden of production, the plaintiff then bears the burden of proof to demonstrate that the defendant's articulated reason is pretextual and but for the protected activity, the adverse action would not have occurred. *See id.*

2. The Absence of Essential Elements of a Title IX Retaliation Claim

Viewed through the prism of applicable law, Court Four of the Complaint bears little resemblance to a proper retaliation claim. Most notably, there is no allegation that Ms. Herman engaged in protected activity, the University knew about it and because of it retaliated against her. Instead, Count Four is a cacophony of legal boilerplate, sounding in harassment, failure to train, and even negligence. In fact, the only non-conclusory allegation that remotely suggests

potential retaliation alleges that Dr. Kalyango retaliated against Ms. Herman for a reason that is not specified. (Doc. #1, par. 134.e.) Even when this allegation is read in the context of the entire complaint, it adds nothing beyond the *quid pro quo* allegation in Count One—namely, that Dr. Kalyango lashed out after Ms. Herman spurned his advances.

Because Count Four is duplicative of Count One (and should be dismissed for the same reasons), and because Count Four fails to set forth well-pled allegations going to all the elements of a retaliation claim under Title IX, it should be dismissed with prejudice, pursuant to Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim.

V. CONCLUSION

Counts One through Four of the Complaint, which are all the claims asserted against the University, fail to state plausible Title IX violations against it. Therefore, they should be dismissed with prejudice, pursuant to Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim, and the University should be dismissed from this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will also send such notification to:

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