UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER DIBBERN,

Plaintiff,

v.

THE UNIVERSITY OF MICHIGAN, a domestic nonprofit corporation, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, a public constitutional body corporate, MARY SUE COLEMAN, President of The University of Michigan, an individual acting in her official capacity, RACHEL S. GOLDMAN, in her individual and official capacity, TRESA POLLOCK, in her individual and official capacity, and PETER GREEN, in his individual and official capacity,

Defendants.

Case No. 12-cv-15632

Hon. Sean F. Cox

DAVID M. BLANCHARD (P67190)
JENNIFER B. SALVATORE (P66640)
NACHT, ROUMEL, SALVATORE, BLANCHARD & WALKER, P.C.
Attorney for Plaintiff
101 North Main Street, Suite 555
Ann Arbor, Michigan 48104
(734) 663-7550
dblanchard@nachtlaw.com
jsalvatore@nachtlaw.com

MEGAN P. NORRIS (P39318)
DAVID G. KING (P73451)
MILLER, CANFIELD, PADDOCK AND STONE, PLC
Attorneys for Defendants The University of Michigan, The Board of Regents of the University of Michigan, and the Individual Defendants in their Official Capacities
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
(313) 963-6420
norris@millercanfield.com
kingd@millercanfield.com

DEFENDANTS' PARTIAL MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

Defendants The University of Michigan, The Board of Regents of the University of Michigan, Mary Sue Coleman, Rachel S. Goldman, Tresa Pollock, and Peter Green hereby move this Court to partially dismiss Plaintiff's First Amended Complaint ("Complaint") pursuant to Fed. R. Civ. P. 12(b)(1) and (6), for the following reasons:

1. On December 21, 2012, Plaintiff, Jennifer Dibbern ("Plaintiff"), filed a twelve-count Complaint against The University of Michigan and The Board of Regents of the University of Michigan (together, the "University"), Mary Sue Coleman ("Coleman"), Rachel S. Goldman ("Goldman"), and Tresa Pollock ("Pollock"), alleging five violations of federal law (Title IX sexually hostile educational environment, Title IX retaliation, the Equal Protection Clause, Due Process, and the First Amendment), three violations of Michigan's Elliott-Larsen Civil Rights Act (disparate treatment sex discrimination, disparate impact sex discrimination, and retaliation), and four violations of common law torts (negligence, breach of fiduciary duty, negligent infliction of emotional distress, and invasion of privacy).

2. On January 25, 2013, Plaintiff amended her Complaint. Plaintiff's First Amended Complaint adds a defendant, Peter Green ("Green"), clarifies against which Defendants her various claims apply, and drops three of her common law tort theories. Her remaining causes of action are as follows:

- Count I – Title IX – Sex Discrimination and Sexually Hostile Educational Environment (against the University and Board of Regents)
- Count II – Title IX – Retaliation for Reporting, Opposing, and Attempting to Remedy a Sexually Hostile Environment In the College of Engineering (against the University and Board of Regents)
- Count III – Equal Protection/Section 1983 (against all Defendants)
- Count IV – Due Process/Section 1983 (against all Defendants)
- Count V – First Amendment/Section 1983 (against all Defendants)

- Count VI – ELCRA: Sex Discrimination/Disparate Treatment/Hostile Environment (against all Defendants)
- Count VII – ELCRA: Sex Discrimination/Disparate Impact (against all Defendants)
- Count VIII – ELCRA: Retaliation (against all Defendants)
- Count IX – Invasion of Privacy (against all Defendants)

3. The parties have agreed to dismiss Counts III and V as to the University of Michigan and the Board of Regents of the University of Michigan with prejudice because they are barred by the 11th Amendment. The parties have further agreed to dismiss Counts III and V as to the individual Defendants in their official capacities except to the extent that prospective, non-monetary relief is granted pursuant to the doctrine set forth in *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). Defendants have agreed not to seek dismissal of Counts IV or IX at this time. As set forth in Defendants' accompanying Brief, Counts I, II, III, VI, VI, VII, and VIII – Plaintiff's claims for sexual harassment, sex discrimination, retaliation, and violation of equal protection -- fail as a matter of law. Therefore, Defendants' Partial Motion to Dismiss should be granted.

4. Pursuant to Local Rule 7.1, on March 1, Defendants' counsel sought concurrence for the instant Motion. Concurrence was granted to the extent discussed in paragraph 3 above but was denied as to the remaining claims, making this motion necessary.

WHEREFORE, Defendants respectfully request that this Court grant Defendants' Partial Motion to Dismiss as set forth more fully in the attached Brief.

Respectfully submitted,

/s/Megan P. Norris (P39318)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Defendants
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
norris@millercanfield.com

Dated: March 4, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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THE UNIVERSITY OF MICHIGAN, a domestic nonprofit corporation, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, a public constitutional body corporate, MARY SUE COLEMAN, President of The University of Michigan, an individual acting in her official capacity, RACHEL S. GOLDMAN, in her Individual and official capacity, TRESA POLLOCK, in her individual and official capacity, and PETER GREEN, in his individual and official capacity,

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NACHT, ROUMEL, SALVATORE, BLANCHARD & WALKER, P.C.
Attorney for Plaintiff
101 North. Main Street, Suite 555
Ann Arbor, Michigan 48104
(734) 663-7550
dblanchard@nachtlaw.com
jsalvatore@nachtlaw.com

MEGAN P. NORRIS (P39318)
DAVID G. KING (P73451)
MILLER, CANFIELD, PADDOCK AND STONE, PLC
Attorneys for Defendants The University of Michigan, The Board of Regents of the University of Michigan, and the individual Defendants in their official capacities
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
(313) 963-6420
norris@millercanfield.com
kingd@millercanfield.com

DEFENDANTS' STATEMENT OF FACTS NOT IN DISPUTE[1]

[1] For the purposes of this Motion only, Defendants assume – as they must under motions brought pursuant to Fed. R. Civ. P. 12(b)(6) – that the facts alleged in Plaintiff's Complaint are true.

Facts Occurring Before December 21, 2009

1. Plaintiff enrolled as a Ph.D. student in the University's Department of Material Science and Engineering ("Department") in the fall of 2007 (Complaint, ¶ 8).

2. Plaintiff alleges that from her "first day as a Ph.D. student" in the Department, she was the subject of student-on-student harassment on the basis of her gender (Complaint, ¶¶ 35-38).

3. According to Plaintiff, she reported the alleged sexual and gender-based harassment to her advisor, Defendant Pollock, in November 2007 (Complaint, ¶ 41).

4. Pollock allegedly dismissed Plaintiff's complaint, stating that boys can be "like that" and that Plaintiff should stay focused on her work (Complaint, ¶ 41).

5. Plaintiff claims that the harassment "escalated" to violence and threats of rape in the spring of 2008 (Complaint, ¶ 45).

6. In response to this incident, Plaintiff alleges that her parents called the University's Sexual Assault Prevention and Awareness Center ("SAPAC") crisis line and Plaintiff contacted the University's Counseling and Psychological Services ("CAPS") (Complaint, ¶¶ 46-48).

7. Plaintiff alleges that she took a brief leave of absence from the University and delayed her two final exams. (Complaint, ¶ 48).

8. Upon her return, Plaintiff allegedly raised her classmate's conduct with Pollock (Complaint, ¶¶ 48-49).

9. Plaintiff claims that during their meeting, Pollock dismissed the conduct, stating, "These things sometimes happen. We have to get over it and get back to lab. Don't let this ever happen again. It's important that we be in lab. We don't always get along with everyone" (Complaint, ¶ 49).

10. Plaintiff alleges that she was able to reschedule her final exams but takes issue with the timing, conditions, and grading process of one of her exams (Complaint, ¶¶ 54-56).

11. In the summer of 2008, another male classmate allegedly began stalking Plaintiff (Complaint, ¶ 57).

12. Plaintiff claims that this classmate "confessed" his love for Plaintiff and, in October and November 2008, began calling her late at night, waiting for her after classes, and following her (Complaint, ¶ 57).

13. Ultimately, this culminated in a December 2008 incident in Plaintiff's lab where the classmate allegedly confronted Plaintiff, refused to leave, and "forcibly pulled [Plaintiff]

against his body, squeezing her to the point that it caused her pain" (Complaint, ¶¶ 58-59).

14. Plaintiff claims that she asked Pollock to change her lab schedule because she did not want to be in lab late at night but that Pollock refused, stating "I need the results." (Complaint, ¶ 68).

15. In February 2009, Plaintiff allegedly reported her stalker to the Department of Public Service (Complaint, ¶ 70).

16. Plaintiff claims that in January 2009, she anonymously called the University's Office of Institutional Equity ("OIE") to "learn more about possible recourse and the process required for reporting her harassment" (Complaint, ¶ 60).

17. During this call, Plaintiff allegedly raised concerns about the attempted rape, the "persistent sexual harassment," Pollock's "get over it and get back to lab" comment, and her stalker (Complaint, ¶ 61).

18. Plaintiff claims that Anthony Walesby ("Walesby"), the University's Associate Vice Provost for Academic and Faculty Affairs and Senior Director took her anonymous call and that the person taking the call allegedly told Plaintiff that he needed "concrete proof" of her assertions since "people assume women false report this kind of stuff" (Complaint, ¶¶ 60, 62).

19. The person taking the anonymous call purportedly concluded the conversation by stating, "the truth is, there are some women who are overly sensitive . . . We know that [women] don't false report but some women can't take a joke" (Complaint, ¶ 66).

Facts Occurring After December 21, 2009

20. Outside of those facts above, Plaintiff does not allege any other incidents of alleged student-on-student harassment. Rather, her Complaint next picks up nearly **one year later,** on December 23, 2009. On this date, Plaintiff claims that Pollock terminated Plaintiff's appointment for the following semester, allegedly due to Plaintiff's "lack of commitment" to her degree (Complaint, ¶ 71).

21. In January 2010, Plaintiff allegedly raised her concerns regarding student-on-student harassment to (1) Defendant Goldman; (2) the Director of the Rackham Office of Graduate School Success and current Ombudsman, and (3) the University's Center for the Education of Women (Complaint, ¶ 74).

22. Plaintiff alleges that these employees and faculty members failed to understand how to respond to her report and instead just directed her back to her Department (Complaint, ¶ 76).

23. Plaintiff also claims that she was not allowed to apply for emergency funding after raising her concerns, despite a seeming willingness to provide such funds before she raised her concerns (Complaint, ¶ 75).

24. In the next month, February 2010, Goldman gave Plaintiff an appointment in her research group (Complaint, ¶ 77).

25. Plaintiff does not allege any additional events until April 2011, over a year later, when Goldman allegedly began retaliating against Plaintiff by, among other things, demanding that Plaintiff cease involvement with SAPAC and questioning Plaintiff's commitment to her academics. (Complaint, ¶¶ 78-80).

26. In response, Plaintiff claims that she quit SAPAC, stopped wearing SAPAC clothing and buttons, and stopped attempting to conduct a sexual harassment training program within the College of Engineering that she allegedly was developing with SAPAC (Complaint, ¶ 81).[2]

27. Over four months later, on August 30, 2011, Goldman informed Plaintiff that Goldman would no longer fund Plaintiff's fall term and that she would no longer serve as her advisor (Complaint, ¶¶ 89-91).

28. Goldman allegedly then emailed Plaintiff on September 16, 2011, informing her that Plaintiff's funding was canceled and that Plaintiff would have to withdraw from the term (Complaint, ¶ 92).

29. In response, Plaintiff met with a representative from the Rackham Graduate School, who allegedly advised that Plaintiff's only option was to withdraw (Complaint, ¶ 94).

30. In September 2011, Plaintiff allegedly also met with Defendant Green, the chair of the Department, who continued her funding through the end of the term (Complaint, ¶¶ 95-96).

31. On December 16, 2011, Plaintiff was "discontinued" from her Ph.D. program (Complaint, ¶ 101).

32. On February 13, 2012, after her withdrawal from the program, Plaintiff claims she met with other University officials to raise her "concerns[s]" (Complaint, ¶¶ 108-109).

33. Plaintiff alleges that in February 2012, the *Michigan Daily* published a letter to the editor penned by one of Plaintiff's fellow classmates; the letter allegedly contained "educational information only known to faculty" (Complaint, ¶ 104, 106 and n. 26).

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[2] Plaintiff claims that she was also was present with Engineering faculty members that same month who allegedly made comments concerning a prospective female student's decision not to attend the University due to "seemingly unwanted and harassing behavior directed at female students by male students at a graduate student party" (Complaint, ¶¶ 84-87). One of the faculty members purportedly "expressed his opinion that such allegations were unbelievable" (Complaint, ¶ 86).

34. It is Plaintiff's belief that the letter to the editor was "sanctioned by Professor Goldman and perhaps others within the College of Engineering" (Complaint, ¶ 106).

35. The University allowed Plaintiff to utilize the Office of Student Conflict Resolution process in March 2012 (Complaint, ¶ 110).

Respectfully submitted,

/s/Megan P. Norris (P39318)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Defendants
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
norris@millercanfield.com

Dated: March 4, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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DAVID M. BLANCHARD (P67190)
JENNIFER B. SALVATORE (P66640)
NACHT, ROUMEL, SALVATORE, BLANCHARD & WALKER, P.C.
Attorney for Plaintiff
101 North Main Street, Suite 555
Ann Arbor, Michigan 48104
(734) 663-7550
dblanchard@nachtlaw.com
jsalvatore@nachtlaw.com

MEGAN P. NORRIS (P39318)
DAVID G. KING (P73451)
MILLER, CANFIELD, PADDOCK AND STONE, PLC
Attorneys for Defendants The University of Michigan, The Board of Regents of the University of Michigan, and the Individual Defendants in their Official Capacities
150 West Jefferson, Ste. 2500
Detroit, Michigan 48226
(313) 963-6420
norris@millercanfield.com
kingd@millercanfield.com

BRIEF IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS

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ISSUES PRESENTED

I. Whether claims arising out of events which occurred prior to December 21, 2009 are time-barred.

Defendant asserts that the answer is "Yes."

Plaintiff asserts that the answer is "No."

II. Whether Plaintiff has failed to state a claim regarding her allegations of sex discrimination and sexual harassment where Plaintiff relies on time-barred events, training is not required by state or federal law, and Plaintiff fails to plead facts to show that a facially neutral policy burdened a protected class more harshly than others.

Defendant asserts that the answer is "Yes."

Plaintiff asserts that the answer is "No."

III. Whether Plaintiff has failed to state a claim regarding her allegation of retaliation where Plaintiff relies on time-barred events and Plaintiff's alleged actions fail to rise to the level of protected activity.

Defendant asserts that the answer is "Yes."

Plaintiff asserts that the answer is "No."

IV. Whether Plaintiff has failed to state a claim regarding violation of the Equal Protection Clause.

Defendant asserts that the answer is "Yes."

Plaintiff asserts that the answer is "No."

INTRODUCTION

After filing her original twelve-count Complaint on December 28, 2012, Plaintiff, Jennifer Dibbern ("Plaintiff"), filed a nine-count First Amended Complaint ("Complaint") against the University of Michigan and The Board of Regents of the University of Michigan (together, "University"),[3] Mary Sue Coleman ("Coleman"), Rachel S. Goldman ("Goldman"), Tresa Pollock ("Pollock"), and Peter Green ("Green") (collectively "Defendants") arising out of her time as a student in the University's Department of Materials Science and Engineering.

Plaintiff's 182 paragraph First Amended Complaint generally alleges as follows:

- Plaintiff alleges that she was sexually harassed between September 2007 and December 2008, that she complained about this harassment in February 2009, and that the University did not take sufficient measures to prevent the harassment in the first place or appropriately respond to her complaints.

- Plaintiff alleges that, in December 2009, Defendant Pollock advised Plaintiff that her research appointment for the following semester would be discontinued, but admits that Defendant Goldman did, in fact, agree to appoint Plaintiff to a position within Defendant Goldman's research group for the next semester.

- Plaintiff alleges that, in January 2010, she complained about student-on-student harassment against other students and that the University did not respond appropriately.

- Plaintiff alleges that Defendant Goldman began retaliating against her in April 2011 by questioning Plaintiff's commitment to her academics and instructing Plaintiff to cease her non-academic activities, including Plaintiff's involvement in SAPAC (the University's Sexual Assault Prevention and Awareness Center); that in August 2011 Defendant Goldman advised Plaintiff that she would not have funding for the following term and that Goldman would no longer serve as Plaintiff's advisor, and that on September 16, 2011; Plaintiff was advised that her funding was canceled and that she would have to withdraw from the term.

[3] Though Defendants must accept Plaintiff's Complaint as true, Defendants note that the Regents are the body corporate with the right of being sued. MCL § 390.4. Accordingly, any claim brought against the University and the Regents is analyzed as if brought just against the Regents. For simplicity, Defendants refer generally to the University and the Regents as the "University."

- Plaintiff received funding through the Fall 2011 term but was discontinued from her Ph.D. program in December 2011.
- Plaintiff withdrew from the University on February 13, 2012.
- Plaintiff alleges that, in February 2012, the *Michigan Daily* published a letter to the editor written by one of Plaintiff's classmates that allegedly included confidential academic information which only the faculty would know.

Plaintiff claims that Defendants' actions constitute hostile environment sexual harassment, sex discrimination, and retaliation in violation of Title IX and the Elliott-Larsen Civil Rights Act, constitutional violations of the due process clause, the equal protection clause, and the First Amendment, and invasion of privacy.

Plaintiff's claims of sexual harassment, sex discrimination, and retaliation fail on their face. Plaintiff seeks to hold Defendants liable for acts outside of the applicable statute of limitations. To the extent Plaintiff relies on acts within the statute of limitations, she has not adequately stated claims for these counts. Accordingly, Defendants request the dismissal of Counts I, II, III (remaining claims regarding the individual Defendants), V (remaining claims regarding the individual Defendants), VI, VII, and VIII.

STATEMENT OF ALLEGED FACTS[4]

A. Facts Outside of Three-Year Statute of Limitations Period

Plaintiff, Jennifer Dibbern, enrolled as a Ph.D. student in the University of Michigan's Department of Material Science and Engineering ("Department") in the fall of 2007 (Complaint, ¶ 8). Plaintiff alleges that from her first day as a Ph.D. student in the Department, she was the subject of student-on-student harassment on the basis of gender, including being told by fellow

[4] For the purposes of this Motion only, Defendants assume – as they must under motions brought pursuant to Fed. R. Civ. P. 12(b)(6) – that the facts alleged in Plaintiff's First Amended Complaint are true.

students that "real women aren't engineers" and that "engineering women are different – they're not normal . . . they aren't like real girls" (Complaint, ¶¶ 35-38). Plaintiff also claims that her classmates stated that she "had it easy because you're a woman in science" and that she was "less qualified but still able to get in [to her undergraduate program at MIT] because you're a girl" (Complaint, ¶ 37). Plaintiff's classmates also allegedly told her that they thought about her while masturbating (Complaint, ¶ 39).

According to Plaintiff, she reported the alleged harassment to her advisor, Defendant Tresa Pollack, in November 2007, but Pollack dismissed Plaintiff's concern, stating that boys can be "like that" and that Plaintiff should stay focused on her work (Complaint, ¶ 41).

Plaintiff alleges that her problems with her male classmates continued in early 2008, and Plaintiff claims that she documented a number of the offensive comments made prior to February 24, 2008, as well as an alleged offensive e-mail on March 28, 2008 (Complaint, ¶ 44 and n. 14). According to Plaintiff, in April 2008, after a March 2008 confrontation where a student slapped Plaintiff after she refused to give him a drink, the same student threatened to rape Plaintiff (Complaint, ¶¶ 45-46). Plaintiff alleges that, in response to this incident, her parents called the University's Sexual Assault Prevention and Awareness Center ("SAPAC"), and Plaintiff contacted the University's Counseling and Psychological Services ("CAPS") (Complaint, ¶¶ 46-48).

Following the April 2008 encounter, Plaintiff took a brief leave of absence from the University and delayed her two final exams (Complaint, ¶ 48). Upon her return, Plaintiff allegedly raised her classmates' conduct with Defendant Pollock, who purportedly dismissed Plaintiff's complaint, telling her, "These things sometimes happen. We have to get over it and get back to lab. Don't let this ever happen again. It's important that we be in lab. We don't always get along with everyone" (Complaint, ¶ 49).

Plaintiff was able to reschedule her final exams and received an A in her first course. However, she complains that the second exam was rescheduled with too little notice, that it was not taken under the regular conditions, and that the professor delayed her grade, which prevented her from applying to other graduate programs (Complaint, ¶¶ 54-56).

Plaintiff alleges that another male classmate began stalking her in the summer of 2008 (Complaint, ¶ 57). Ultimately, this culminated in a December 2008 incident in Plaintiff's lab where the classmate allegedly confronted Plaintiff, refused to leave, and forcibly pulled her against his body (Complaint, ¶¶ 58-59). Plaintiff claims that she wanted to change her lab schedule so that she would no longer be there late at night, but Defendant Pollock refused, stating, "I need the results" (Complaint, ¶ 68). In February 2009, Plaintiff reported her stalker to the Department of Public Service (Complaint, ¶ 70).

According to Plaintiff, in January 2009 she anonymously called the University's Office of Institutional Equity ("OIE") to learn more about possible recourse and the process required for reporting her harassment (Complaint, ¶ 60). During the call, Plaintiff allegedly raised concerns about the attempted rape, the "persistent sexual harassment," Defendant Pollock's "get over it and get back to lab" comment, and her stalker (Complaint, ¶ 61). Plaintiff alleges that Anthony Walesby, the University's Associate Vice-Provost for Academic and Faculty Affairs and Senior Director took the anonymous call, that the person who took the call allegedly told Plaintiff that he needed "concrete proof" of her assertions since "people assume women false report this kind of stuff" (Complaint, ¶¶ 60, 62). The person taking the call purportedly concluded the conversation by stating, "the truth is, there are some women who are overly sensitive . . . We know that [women] don't false report but some women can't take a joke" (Complaint, ¶ 66).

B. Facts Occurring After December 21, 2009

In her First Amended Complaint, Plaintiff does not allege any incidents of student-on-student harassment other than the allegations set forth above. Rather, her Complaint picks up nearly one year later, on December 23, 2009, when Plaintiff alleges that Defendant Pollock terminated her appointment for the following semester, citing Plaintiff's "lack of commitment" to her degree (Complaint, ¶ 71).

In January 2010, Plaintiff allegedly raised her concerns regarding student-on-student harassment to Defendant Goldman. Plaintiff also claims that she voiced her concerns to the Director of the Rackham Office of Graduate School Success and current Ombudsman, as well as the University's Center for the Education of Women (Complaint, ¶ 74). Plaintiff alleges that these employees and faculty members failed to understand how to respond to her report and instead just directed her back to her Department (Complaint, ¶ 76).

Plaintiff claims that she was not allowed to apply for emergency funding after raising her concerns (Complaint, ¶ 75). However, Defendant Goldman agreed to appoint Plaintiff in her research group in February 2010 (Complaint, ¶ 77), rendering the emergency funding unnecessary.

Plaintiff does not allege any additional events until April 2011, over a year later, when Defendant Goldman allegedly began retaliating against Plaintiff by, among other things, demanding that Plaintiff cease involvement with SAPAC and questioning Plaintiff's commitment to her academics (Complaint, ¶¶ 78-80). In response, Plaintiff claims that she quit SAPAC, stopped wearing SAPAC clothing and buttons, and stopped attempting to conduct a sexual harassment training program within the College of Engineering (Complaint, ¶ 81).

Over four months later, on August 30, 2011, Defendant Goldman informed Plaintiff that she would no longer fund Plaintiff's research beyond the fall term and that Defendant Goldman

would no longer serve as her advisor (Complaint, ¶¶ 89-91). Goldman then e-mailed Plaintiff on September 16, 2011, informing her that Plaintiff's funding was canceled and that Plaintiff would have to withdraw from the term (Complaint, ¶ 92). In response, Plaintiff met with a representative from the Rackham Graduate School, who allegedly advised Plaintiff that her only option was to withdraw (Complaint, ¶ 94). However, in September 2011 Plaintiff also met with Defendant Green, the Chair of the Department, who continued Plaintiff's funding through the end of the term (Complaint, ¶¶ 95-96).

Plaintiff alleges that on December 16, 2011, Plaintiff was "discontinued" from her Ph.D. program (Complaint, ¶ 101).

Plaintiff alleges that in February 2012, the *Michigan Daily* published a letter to the editor penned by one of Plaintiff's fellow classmates that contained "educational information only known to faculty" (Complaint, ¶¶ 104, 106 and n. 26). Plaintiff believes that the letter was "sanctioned by Professor Goldman and perhaps others within the College of Engineering" (Complaint, ¶ 106).

The University allowed Plaintiff to utilize the Office of Student Conflict Resolution process in March 2012 (Complaint, ¶ 110).

ARGUMENT

A. Standard of Review

Defendants bring this motion pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Such motions test the legal sufficiency of a complaint by evaluating the facts in a light most favorable to the plaintiff to determine whether the complaint states a valid claim for relief. *See Bower v. Federal Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996). A motion pursuant to Rule 12(b)(6) will be granted "if it appears beyond doubt that the plaintiff can

prove no set of facts in support of the claims that would entitle him or her to relief." *See Downie v. City of Middleburg Heights*, 301 F.3d 688, 693 (6th Cir. 2002).

B. Many Of Plaintiff's Claims Are Time-Barred.

The statute of limitations for each of Plaintiff's claims is three years. The statute of limitations for Plaintiff's claims of harassment, discrimination and retaliation under the Elliott-Larsen Civil Rights Act is three years from the date the cause of action accrues, *Garg v. Macomb County Community Mental Health Services*, 472 Mich. 263, 284 (2005), as is the statute of limitations for common law tort claims. MCL §600.5805(10). For purposes of §1983 and equal protection claims, federal courts "borrow" from the state statute of limitations applicable to personal injury actions, which is again three years. *Lillard v. Shelby County Board of Education*, 76 F.3d 716, 729 (6th Cir. 1996); *Wolfe v. Perry*, 412 F.2d 707, 714 (6th Cir. 2005). Plaintiff's action accrued on "the date when the plaintiff knew or through the exercise of reasonable diligence should have known" of the injury giving rise to her cause of action. *Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 184 (6th Cir. 1990); *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003).

Where the events at issue occurred outside the statute of limitations, the case must be dismissed. *See, e.g., Russell v. PBG Michigan, LLC*, 2006 WL 1408400 (Mich. App. May 23, 2006) (holding that trial court improperly denied summary disposition as to race discrimination and hostile environment harassment claims where harassment and discrimination occurred outside statute of limitations) (Exhibit 1). The Sixth Circuit and this Court have clearly ruled that where there is no actionable event within the statute of limitations, claims cannot survive. *See, e.g., Barrett v. Whirlpool Corp.*, 556 F.3d 502 (6th Cir. 2009) (claims of harassment and retaliation outside the limitations period dismissed as untimely); *Russell v. Ohio Department of Administrative Services*, 302 Fed. App'x 386 (6th Cir. 2008); *Vaughn v. Louisville Water Co.*,

302 Fed. App'x 337 (6th Cir. 2008); *Brown v. Metropolitan Government of Nashville and Davidson County*, 2012 WL 2861593 (6th Cir. Jan. 1, 2012); *Timmis v. Bush Scientific Corp.*, 2012 WL 2325383 (E.D. Mich. June 19, 2012) (Exhibit 2).

Plaintiff filed her Complaint on December 21, 2012. While Plaintiff alleges that she participated in SAPAC activities and raised concerns about the University's processes later on, all of the events of specific harassment alleged by Plaintiff occurred prior to December 21, 2009. Plaintiff's alleged complaints to Defendant Pollock, and Pollock's alleged inadequate responses, also occurred prior to December 21, 2009. Plaintiff's short leave of absence, the delay of her two final exams, and the circumstances surrounding the retaking of the second exam, also occurred prior to December 21, 2009. In addition, Plaintiff's anonymous call to the Office of Institutional Equity and the University's handling of that call occurred prior to December 21, 2009. In fact, Plaintiff's First Amended Complaint does not allege a single action between the time of her report of the stalker to the Department of Public Safety in February 2009 and Defendant Pollock's December 23, 2009 indication that she would terminate Plaintiff's position for the following semester (which was rendered moot by Defendant Goldman's agreement to give Plaintiff an appointment in her lab). All of the claims arising out of the events occurring prior to December 21, 2009, including Plaintiff's sexual harassment and sex discrimination claims arising out of those events, are time-barred.

Defendants anticipate Plaintiff will assert her Title IX claims are subject to the continuing violation doctrine. Michigan law does not recognize the continuing violations doctrine for claims brought under the Elliott-Larsen Civil Rights Act. *See, e.g., Garg, supra.* Federal law also rejects the continuing violations doctrine in discrimination and retaliation claims, and recognizes the doctrine in harassment claims only where there is ongoing harassment that links the actions prior to the limitations period to an action within the statute of limitations. *National*

Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002); *Baar v. Jefferson County Board of Education*, 311 Fed. App'x 817 (6th Cir. 2009). Even if the doctrine actually applies to Title IX,[5] it cannot save Plaintiff's claim. No acts of sexual harassment occurred within the limitations period. *Stanley v. Trustees of the California State University*, 433 F.3d 1129, 1136-37 (9th Cir. 2006) (affirming dismissal of a student's Title IX hostile environment claim on statute of limitations grounds and rejecting application of continuing violation where student did not allege any acts contributing to a sexually hostile environment during limitations period); *Brown v. Castleton State College*, 663 F. Supp. 2d 392, 400-402 (D. Vt. 2009) (similar). Thus, the continuing violations doctrine does not save Plaintiff's time barred Title IX discrimination and harassment claims.

C. Plaintiff's Remaining Allegations Of Sex Discrimination and Sexual Harassment Fail To State A Claim.

Plaintiff asserts that Defendants are liable for maintaining a sexually hostile environment under both Title IX (Count I) and ELCRA (Counts VI and VII) for failing to remedy student-on-student harassment. Plaintiff asserts that she reported concerns about harassment, but that they were ignored or, alternatively, were referred to "inadequate 'conflict resolution procedures'" (Complaint, ¶¶ 122, 159, 169). Relying on an April 4, 2011 "Dear Colleague" Letter published by the U.S. Department of Education, Plaintiff implies that Title IX and ELCRA require the University to conduct trainings on sexual/gender-based harassment (Complaint, ¶¶ 8, 13, 28, 29, 31(a), 119, 156, 166). These assertions fail to state a claim as a matter of law.

[5] *Folkes v. New York College of Osteopathic Medicine*, 214 F. Supp. 2d 273, 288-89 (E.D.N.Y. 2002) (questioning whether the continuing violation doctrine applies to Title IX claims since the Supreme Court has been "reluctan[t] to extend the reach of Title IX beyond that imposed by Congress"), citing *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

To establish a sexual harassment claim under Title IX, Plaintiff must prove, among other things, that the University had actual knowledge of the sexual harassment and was deliberately indifferent. *Pahssen v. Merrill Community School District*, 668 F.3d 356, 362 (6th Cir. 2012), citing *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). Similarly, under Michigan law, Plaintiff must show that she suffered continued harassment after the University had notice and failed to take prompt remedial action. *See, e.g., Johnson v. University of Michigan Regents*, 2004 WL 2873831, at *3 (Mich. App. Dec. 14, 2004) (Exhibit 3), citing *Chambers v. Trettco*, 463 Mich. 297, 311 (2000). As discussed more fully below, Plaintiff cannot make this showing here: she cannot identify a single act of harassment that occurred within the statute of limitations that occurred after she complained, nor can she show that the University "intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment." *Williams ex rel. Hart v. Paint Valley Local School District*, 400 F.3d 360, 367 (6th Cir. 2005). The acts on which Plaintiff relies are simply not actionable.

1. Plaintiff Cannot Rely On Continued Reports Of Pre-December 2009 Harassment.

To establish her harassment claims, Plaintiff is required to show that the University had "actual knowledge" of the sexual harassment and that the University was "deliberately indifferent" to it or failed to take "prompt and appropriate remedial action." Plaintiff's Complaint makes it clear, however, that while she raised "concerns" after December 21, 2009, she did so by complaining about the past – not ongoing – conduct. (Complaint, ¶¶ 74, 108-109). *See, e.g., Johnson, supra* (Plaintiff's ongoing complaints related to the University's handling of her initial complaint, not new or ongoing harassment). Nowhere does Plaintiff allege that her post-December 21, 2009 complaints contained an allegation of ongoing harassment.

Plaintiff alleges that in April 2011, a prospective student declined an offer to join the Department because of the behavior toward women made during a party the prospective student attended. According to Plaintiff, faculty members made negative comments regarding the prospective student at an April 2011 dinner. Plaintiff makes no allegation that she complained about these comments (*See* Complaint, ¶¶ 84-87). Plaintiff cannot rely upon this incident. *See*, *Pahssen*, 668 F.3d at 363 ("Both the plain language of Title IX and controlling case law demonstrate that an individual plaintiff generally cannot use incidents involving third-party victims to show severe and pervasive harassment…unless she can show how the accused school 'deprive[d] the plaintiff of access to the educational opportunities or benefits provided by the school'").

2. Title IX and ELCRA Do Not Mandate Training.

In addition, to the extent Plaintiff implies Title IX and ELCRA require the University to conduct trainings on sexual/gender-based harassment, (Complaint, ¶¶ 8, 13, 28, 29, 31(a), 119), they hold no such mandate. *See, e.g., Giffin v. Case Western Reserve University*, 181 F.3d 100 (6th Cir. 1999) (dismissing Title IX count under 12(b)(6) where student alleged university failed to provide an effective procedure for the resolution of complaints of sexual harassment and that Title IX requires recipients to promulgate a "consensual sexual relations" policy between faculty and students) (Exhibit 4); *Preusser v. Taconic Hills Central School District*, 2013 WL 209470 (N.D.N.Y. Jan. 17, 2013) (rejecting argument that school was "deliberately indifferent" by failing to implement anti-harassment or anti-bullying measures or programs, noting, "Courts have rejected this notion finding that '*actually* eliminating harassment is not a pre-requisite to an adequate response'") (citation omitted, emphasis in original) (unpublished) (Exhibit 5). The Department of Education guidance upon which Plaintiff relies neither speaks in nor provides any

citation for such absolutes. ELCRA does not require any conduct and no Michigan court has interpreted it to include such a mandate. As such, Plaintiff has not stated a claim.

3. Plaintiff Fails To Plead Facts To Show That A Facially Neutral University Policy Burdened A Protected Class More Harshly Than Others.

Plaintiff has not pled sufficient facts to show that "a facially neutral [University] policy burdened a protected class of persons more harshly than others." *Roberson v. Occupational Health Centers of America, Inc.*, 220 Mich. App. 322, 330 (1996). Rather, she generically pleads that the University's "maintenance of non-compliant policies . . . has a disparate impact on female students [and] created a sexually hostile environment" (Complaint, ¶ 167). Her statement that the "non-compliant policies . . . has a disparate impact on female students" is a conclusory statement that is not entitled to a presumption of truth under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plaintiff simply recasts her disparate treatment claim into a disparate impact claim without identifying a specific practice or alleging more harsh treatment burdening not just her, but all females. This is insufficient to state a claim.

D. Plaintiff's Remaining Retaliation Allegations Fail To State A Claim.

Counts II and VII of Plaintiff's First Amended Complaint assert retaliation in violation of Title IX and ELCRA. Title IX retaliation claims are analyzed under the same legal framework as retaliation claims brought under Title VII. *Nelson v. Christian Brothers University*, 226 F. App'x 448, 454 (6th Cir. 2007). Michigan courts also apply the Title VII framework to ELCRA retaliation claims. *Garg*, 472 Mich. at 273 (citation omitted). Absent direct evidence, a plaintiff may establish a *prima facie* case of retaliation by showing that: (1) the plaintiff engaged in a protected activity; (2) the defendant knew the plaintiff engaged in a protected activity; (3) the plaintiff was subjected to a materially adverse action; and (4) a causal connection exists between

the protected activity and the adverse action. *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 463 (6th Cir. 2001); *Frazier v. Fairhaven School Commission*, 276 F.3d 52, 67 (1st Cir. 2002). Circumstantial evidence, such as "very close" timing, may result in an inference of retaliation if a plaintiff can demonstrate that the protected activity was the significant factor for her termination. *See Lindsay v. Yates*, 578 F.3d 407, 418 (6th Cir. 2009), citing *Mickey v. Ziedler Tool and Die Co.*, 516 F.3d 516, 523, 525 (6th Cir. 2008) (two-day period was "very close" timing); *Spengler v. Worthington Cylinders*, 615 F.3d 481, 493-494 (6th Cir. 2010) (one month is not enough).

1. Plaintiff's Pre-December 21, 2009 Claims

As discussed above, any alleged retaliation occurring prior to December 21, 2009 is time-barred. Therefore, Plaintiff's November 2007 and Summer 2008 complaints to Defendant Pollock, her April 2008 contact with SAPAC and CAPS, being "given different tests," her anonymous complaint to OIE, and her February 2009 stalking report to DPS are all time-barred.

Even if these "activities" are not somehow time barred, the only events that could constitute protected activity are her alleged November 2007 and Summer 2008 complaints to Pollock.[6] To these events, however, Plaintiff has not pled any facts asserting that these complaints were causally connected to an adverse action. For example, though she asserts she

[6]Reports made to SAPAC and CAPS are confidential and thus cannot trigger notice requirements. The same is true with respect to her anonymous complaint to OIE. The very nature of complaining anonymously excludes providing notice. Reporting stalking is also not a protected activity since it is not a complaint about being treated differently because of her sex. *See, e.g., Jackson v. Birmingham Board of Education*, 544 U.S. 167, 178 (2005) ("Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination . . . ."). Rather, she just asserts that she "contacted the University's Department of Public Safety . . . to report her stalker." (Complaint, ¶ 70). To accept Plaintiff's theory would mean that every call to DPS to report potential criminal activity would be an activity protected by Title IX and ELCRA.

raised discrimination concerns with Pollock in November 2007 and Summer 2008, she provides no facts suggesting that the termination of her appointment in December 2009 – one to two years later – was connected to these complaints.

2. Plaintiff's Post-December 21, 2009 Claims

Plaintiff must demonstrate that she engaged in protected activity after December 21, 2009, that Defendants had knowledge of this activity, that she was subjected to a materially adverse action, and that there exists a causal connection between the protected activity and the adverse action. She claims that she engaged in protected activity by: (a) "reporting to advisors, teaching faculty, and others inside and outside the department; (b) reporting stalking to the University Department of Campus Safety; (c) engaging in collective action for graduate student training on sexual assault and sexual harassment; and (d) wearing SAPAC clothing and pins and actively supporting the work of SAPAC to the Engineering Faculty and Students" (Complaint, ¶ 127). None of these activities states a claim for unlawful retaliation.

Addressing Plaintiff's assertion that she engaged in protected activity by "reporting to advisors . . . ", Plaintiff only complained about sex discrimination at two general times after December 21, 2009. First, Plaintiff asserts that she complained about sex discrimination to Goldman, Rackham, and the Center for Education of Women in January 2010 (Complaint, ¶ 74). Assuming that such complaints are "protected activity," she cannot identify any alleged retaliatory act that is causally connected to these complaints. She admits that Pollock terminated her appointment **prior to** these alleged complaints (Complaint, ¶ 71) and admits that she was able to continue on in her program under Goldman's direction (Complaint, ¶ 75). Second, the only other time Plaintiff asserts that she raised concerns about alleged sex discrimination after December 23, 2009 was on February 13, 2012 when she met with University Provost Hanlon

(Complaint, ¶¶ 108-109). At this point, all of the incidents she alleges were retaliatory had already occurred.

For purposes of this motion, Defendants will assume that Plaintiff's departure from the University arose out of an adverse action. However, Plaintiff left the University in December 2011. This departure cannot be linked to Plaintiff's January 2010 complaint where almost two years passed between the protected activity and the alleged adverse action. *See, e.g., Milligan v. Board of Trustees of Southern Illinois University,* 686 F.3d 378, 390 (7th Cir. 2012) (affirming dismissal of student's Title IX retaliation claim where adverse action occurred six months after sexual harassment complaint). Therefore, Plaintiff's retaliation claims must be dismissed.

E. Plaintiff's Remaining Equal Protection And § 1983 Allegations Fail To State A Claim.

Count III is a 42 U.S.C. § 1983 claim alleging a violation of the Equal Protection Clause. It generally asserts that "[t]he conduct of students and faculty condoned and fostered by the University was intentional and was sufficiently severe or pervasive as to interfere unreasonably in Plaintiffs' (sic) educational activities" (Complaint, ¶ 132). To establish an equal protection clause claim, Plaintiff must establish, among other things, that Defendants intentionally treated her differently than other similarly situated students. *TriHealth, Inc. v. Board of Commissioners, Hamilton County, Ohio,* 430 F.3d 783, 788 (6th Cir. 2005). As to the University, she must also demonstrate that her harassment was the result of University custom, policy, or practice. *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 257 (2009). Plaintiff's Complaint is devoid of any reference to either similarly situated students or that such disparate treatment between her and the similarly situated students was a result of University custom, policy, or practice after December 21, 2009. She has therefore failed to state a claim.

F. Plaintiff's Remaining First Amendment/§ 1983 Allegations Fail To State A Claim.

Claims brought through § 1983 for First Amendment retaliation are similar to those brought under other statutory retaliation provisions. A plaintiff must show that she engaged in protected conduct, suffered an adverse action, and that there is a causal connection between the two. *See McGee v. Schoolcraft Community College*, 167 F. App'x 429, 438 (6th Cir. 2006). Here, Plaintiff asserts that she engaged in protected speech with her "reports of sexual assault and harassment to her faculty, advisors and others acting on behalf of the university" (Complaint, ¶ 145). Plaintiff's Complaint, however, fails to state such a claim. Just like her retaliation claims, all of the events that occurred prior to December 21, 2009 are time barred and thus cannot be used to support her claim. As to those acts that Plaintiff asserts support her claim within the statute of limitations, she cites to the same "protected activity" as she did with respect to her Title IX retaliation claim (Complaint, ¶¶ 127, 149). She also contends that Defendants retaliated against her in the same manner as with her Title IX retaliation claim (Complaint, ¶¶ 127, 149). For the reasons cited above, she has again failed to draw a causal link between those acts and Defendants' alleged retaliatory acts.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant Defendants' Partial Motion to Dismiss.

Respectfully submitted,

/s/Megan P. Norris (P39318)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Defendants
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
norris@millercanfield.com

Dated: March 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to David M. Blanchard at dblanchard@nachtlaw.com and Jennifer B. Salvatore at jsalvatore@nachtlaw.com.

/s/Megan P. Norris
Miller, Canfield, Paddock and Stone, P.L.C.
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
norris@millercanfield.com

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