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

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DEFENDANTS' PARTIAL MOTION TO DISMISS COUNTS I, II, III, V, VI, VII AND VIII OF PLAINTIFF'S SECOND AMENDED COMPLAINT AND TO DISMISS GOLDMAN AND GREEN IN THEIR INDIVIDUAL CAPACITIES

ORAL ARGUMENT REQUESTED

Defendants, The University of Michigan, The Board of Regents of the University of Michigan, Mary Sue Coleman, Tresa Pollock, Rachel S. Goldman in her official capacity, and Peter Green in his official capacity, hereby move this Court to partially dismiss Plaintiff's Second Amended Complaint ("Complaint") pursuant to Fed. R. Civ. P. 12(b)(6). Defendants Green and Goldman in their individual capacities hereby move this Court to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(5). The grounds for dismissal are as follows:

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, Rachel S. Goldman, and Tresa 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 ("ELCRA") (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) (Dkt. # 1).

2. On January 25, 2013, Plaintiff amended her Complaint. Plaintiff's First Amended Complaint added a defendant, Peter Green, clarified against which Defendants her various claims apply, and dropped three of her common law tort theories (Dkt. #8).

3. On March 4, 2013, Defendants moved to partially dismiss Plaintiff's First Amended Complaint (Dkt. # 12). In responding to Defendants' Motion, Plaintiff proposed filing a Second Amended Complaint purporting to cure her pleading defects (Dkt. #17, at 13). On May 17, 2013, this Court, *sua sponte*, ordered "that if Plaintiff wishes to file a Second Amended Complaint, she shall file a formal motion seeking leave to do so" (Dkt. # 19, at 2).

4. In lieu of such a motion, the parties stipulated to Plaintiff filing a Second Amended Complaint (Dkt. #22), which she did on June 7, 2013 (Dkt. # 23). The Second Amended Complaint ("Complaint") adds seven new paragraphs – Paragraphs 78-81 and 92-94 – and further clarifies against which Defendants her various claims apply. Plaintiff's 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 the Individual Defendants in their individual capacities and against Individual Defendants in their official capacities pursuant to *Ex Parte Young only*)
- Count IV – Due Process/Section 1983 (against all Defendants)
- Count V – First Amendment/Section 1983 (against the Individual Defendants in their individual capacities and against Individual Defendants in their official capacities pursuant to *Ex Parte Young only*)
- 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)

5. As set forth in Defendants' accompanying Brief, Counts I, II, III, V, 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.

6. Plaintiff's Complaint must also be dismissed against Defendants Green and Goldman in their individual capacities as they have not been served in that capacity.

7. Pursuant to Local Rule 7.1, on March 1, 2013, Defendants' counsel sought concurrence in the relief sought. The parties have been able to resolve some issues, but the relief sought in the instant motion was denied, making this motion necessary.

WHEREFORE, Defendants respectfully pray that this Honorable Court dismiss Counts I, II, III, V, VI, VII and VIII with prejudice and dismiss Goldman and Green in their individual capacities as set forth more fully in the attached Brief and award Defendants their costs and attorney fees incurred in this action.

Respectfully submitted,

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Dated: June 28, 2013

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,

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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 Materials 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 classmates' 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 Safety (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 sexual harassment by the individuals about whom she had already complained referenced above.[2] 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 the alleged 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).

[2] There is one post-December 21, 2009 reference to non-sexual harassment by her "harassers" in Plaintiff's Complaint, which was added in her Second Amended Complaint: "The harassers had no sympathy and would continue to taunt her by calling her names, including that she was 'batshit crazy'" (Complaint, ¶94).

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. As a consequence of her being "unwilling to work in a research setting with her harassers," Plaintiff asserts that she was "limited in her ability to search for an advisor" (Complaint, ¶ 78). She admits, however, that in February 2010, Goldman gave Plaintiff an appointment in her research group (Complaint, ¶ 77).

25. During this same time period (Winter 2010), Plaintiff claims that a *different* student – not one of the original students about whom she allegedly complained about earlier – inappropriately touched her and made comments about sex and other females (Complaint, ¶¶ 79-81).

26. Plaintiff makes *no* allegation that she ever complained about *this* student's actions to the University (*see* Complaint, ¶¶ 79-81).

27. She also asserts, "Throughout her career at the University, she did everything she could to avoid her male harassers" by avoiding various department events (Complaint, ¶ 92). Plaintiff specifically avoided events where food or drink was offered for fear of being drugged and then raped (Complaint, ¶¶ 93-94).

28. Plaintiff makes no allegation she ever complained about not being able to participate in department events or her fear of being drugged and raped at events offering food or drink (*see* Complaint, ¶¶ 92-94).

29. 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, ¶¶ 82-84).

30. 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, ¶ 85).[3]

31. 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, ¶¶ 96-98).

[3] 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, ¶¶ 89-91). One of the faculty members purportedly "expressed his opinion that such allegations were unbelievable" (Complaint, ¶ 90).

32. 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, ¶ 99).

33. In response, Plaintiff met with a representative from the Rackham Graduate School, who allegedly advised that Plaintiff's only option was to withdraw (Complaint, ¶ 101).

34. 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, ¶¶ 102-103).

35. On December 16, 2011, Plaintiff was "discontinued" from her Ph.D. program (Complaint, ¶ 108).

36. On February 13, 2012, after her withdrawal from the program, Plaintiff claims she met with other University officials to raise her "concerns[s]" (Complaint, ¶¶ 115-16).

37. 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, ¶¶ 111-13, 106 and n. 26).

38. 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, ¶ 113).

39. The University allowed Plaintiff to utilize the Office of Student Conflict Resolution process in March 2012 (Complaint, ¶ 117).

Respectfully submitted,

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Dated: June 28, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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Plaintiff,

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BRIEF IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS COUNTS I, II, III, V, VI, VII AND VIII OF PLAINTIFF'S SECOND AMENDED COMPLAINT AND TO DISMISS GOLDMAN AND GREEN IN THEIR INDIVIDUAL CAPACITIES

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FEDERAL CASES

ISSUES PRESENTED

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

Defendants assert 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.

Defendants assert 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.

Defendants assert 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.

Defendants assert that the answer is "Yes."

Plaintiff asserts that the answer is "No."

V. Whether Plaintiff's Complaint should be dismissed against Defendants Green and Goldman in their individual capacities for lack of service in such capacity.

Defendants assert 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 against the University of Michigan and The Board of Regents of the University of Michigan (together, "University"),[1] Mary Sue Coleman, Rachel S. Goldman, Tresa Pollock, and Peter Green (collectively "Defendants") arising out of her time as a student in the University's Department of Materials Science and Engineering.[2]

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

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

- Plaintiff alleged 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.

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[1] 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.

[2] While Plaintiff served all individuals in their official capacities, she failed to serve Goldman and Green in their individual capacities as discussed *infra.*

- Plaintiff alleged that she received funding through the Fall 2011 term but was discontinued from her Ph.D. program in December 2011.
- Plaintiff alleged that she withdrew from the University on February 13, 2012.
- Plaintiff alleged 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.

In her First Amended Complaint, Plaintiff claimed that Defendants' actions constitute hostile environment sexual harassment, sex discrimination, and retaliation in violation of Title IX and the Elliott-Larsen Civil Rights Act ("ELCRA"), constitutional violations of the due process clause, the equal protection clause, and the First Amendment, and invasion of privacy.

On March 4, 2013, Defendants moved to partially dismiss Plaintiff's First Amended Complaint on the grounds that she sought to hold Defendants liable for acts outside the applicable statute of limitations and that for those acts within the statute of limitations, she did not adequately state claims. In responding to Defendants' Motion, Plaintiff proposed filing a Second Amended Complaint purporting to cure her defects. On May 17, 2013, this Court, *sua sponte*, ordered, "if Plaintiff wishes to file a Second Amended Complaint, she shall file a formal motion seeking leave to do so." In lieu of such a motion, the parties stipulated to Plaintiff filing a Second Amended Complaint ("Complaint"), which she did on June 7, 2013. In total, the new pleading only adds 7 new paragraphs, now totaling 189 paragraphs.

Plaintiff's new "facts" do not save her claims. First, she adds *separate* incidents, unrelated to her initial claim of sexual harassment, by students other than those about whom she had already complained. She makes *no* assertion that she ever put the University on notice of these new incidents. Second, she discusses her avoidance of her "harassers" without noting any additional specific events of alleged sexual harassment, and only asserts they harassed her in an expressly *non-sexual way* – that her harassers called her names such as "batshit crazy."

Accordingly, The University of Michigan, The Board of Regents of the University of Michigan, Mary Sue Coleman, Tresa Pollock, Rachel S. Goldman in her official capacity, and Peter Green in his official capacity 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. Defendants Green and Goldman in their individual capacities also request the dismissal of Plaintiff's Complaint for lack of service.

STATEMENT OF ALLEGED FACTS[3]

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 Materials 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 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).

[3] 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 Second Amended Complaint are true.

Plaintiff alleges her problems with her male classmates continued in early 2008, and 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). She alleges that, in response to this incident, her parents called the University's Sexual Assault Prevention and Awareness Center ("SAPAC"), and she 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 Safety (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

Plaintiff does not allege any incidents of student-on-student sexual harassment relating to the allegations set forth above. Rather, her Complaint picks up nearly one year later, on December 23, 2009, when she 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). She also avers that, as a consequence of her being "unwilling to work in a research setting with her harassers," she was "limited in her ability to search for an advisor" (Complaint, ¶ 78). Plaintiff admits, however, that Defendant Goldman agreed to appoint Plaintiff in her research group in February 2010 (Complaint, ¶ 77), rendering the emergency funding unnecessary and her concern regarding finding a new research setting moot.

During this same time period (Winter 2010), Plaintiff claims that a *different* student – not one of the original students about whom she allegedly complained about earlier – inappropriately touched her and made comments about sex and other females (Complaint, ¶¶ 79-81). Plaintiff makes *no* allegation that she ever complained about *this* student's actions to the University (*see* Complaint, ¶¶ 79-81).

Plaintiff also asserts, "Throughout her career at the University, she did everything she could to avoid her male harassers" by avoiding various department events (Complaint, ¶ 92). Plaintiff alleges that she specifically avoided events where food or drink was offered for fear of being drugged and then raped (Complaint, ¶¶ 93-94). Moreover, Plaintiff generally asserts that her "harassers" continued to call her names, specifically noting that they called her "batshit crazy" (Complaint, ¶ 94). Plaintiff makes no allegation that she ever complained about not being able to participate in department events or her fear of being drugged and raped at events offering food or drink (*see* Complaint, ¶¶ 92-94). Nor does she allege that her "harassers" actually made statements or engaged in conduct that could be construed as sexual in nature.

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, ¶¶ 82-84). 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, ¶ 85).

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, ¶¶ 96-98). 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, ¶ 99). In response, Plaintiff met with a representative from the Rackham Graduate School, who allegedly advised Plaintiff that her only option was to withdraw (Complaint, ¶ 101). 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, ¶¶ 102-103).

Plaintiff alleges that on December 16, 2011, Plaintiff was "discontinued" from her Ph.D. program (Complaint, ¶ 108).

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, ¶¶ 111-112 and n. 26). Plaintiff believes that the letter was "sanctioned by Professor Goldman and perhaps others within the College of Engineering" (Complaint, ¶ 113).

The University allowed Plaintiff to utilize the Office of Student Conflict Resolution process in March 2012 (Complaint, ¶ 117).

ARGUMENT

A. Standard of Review

The Federal Rules of Civil Procedure permit courts to dismiss a complaint for insufficiency of process, unless the plaintiff shows "good cause for the failure" to effectuate

service. Fed. R. Civ. P. 4, 12(b)(5). In deciding a motion under Rule 12(b)(5), a court may consider uncontroverted affidavits to determine sufficiency of service. *Metro. Alloys Corp. v. State Metals Indus, Inc.*, 416 F. Supp. 2d 561, 553 (E.D. Mich. 2006) (Steeh, J.).

Motions under Rule 12(b)(6) 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). Such a motion 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 ELCRA 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) (Ex. 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); *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. 9, 2012) (Ex. 2); *Timmis v. Boston Scientific Corp.,* 2012 WL 2325383 (E.D. Mich. June 19, 2012) (Cox, J.) (Ex. 3).

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 sexual harassment alleged by Plaintiff about which she complained 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 ELCRA. *See, e.g., Garg, supra*; *Saline River Properties, LLC v. Johnson*

Controls, Inc., 823 F. Supp. 2d 670, 675-76 (E.D. Mich. 2011) (Cox, J.); *Steward v. New Chrysler*, 415 F. App'x 632, 639 n.4 (6th Cir. 2011). 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 period. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002); *Baar v. Jefferson County Board of Education*, 311 F. App'x 817 (6th Cir. 2009). Even if the doctrine were to apply to Title IX,[4] it cannot save Plaintiff's claim. No acts of sexual harassment linked to prior actions occurred within the limitations period. *Stanley v. Trustees of the California State University*, 433 F.3d 1129, 1136-1137 (9th Cir. 2006); *Brown v. Castleton State College*, 663 F. Supp. 2d 392, 400-402 (D. Vt. 2009) (similar).

To the extent Plaintiff may argue that intentional acts of deliberate indifference within the limitations period satisfy the continuing violations doctrine under *Morgan*, the Supreme Court expressly held in *Morgan* that "discrete acts," like retaliatory adverse actions, "that fall within the statutory time period do not make timely acts that fall outside the time period." 536 U.S. at 112. Moreover, discrete acts are separate from hostile environment claims. *Id.* at 115. Only timely acts relating to a hostile environment may be used to revive allegations of sexual harassment outside the statute of limitations. *See also Moore v. Murray State University*, 2013 WL 960320, at *5 (W.D. Ky. March 12, 2013) (dismissing Title IX claim for failing to allege student was "subjected to or experienced sexual harassment" after complaining) (Ex. 4).

Thus, the continuing violations doctrine does not save Plaintiff's time barred Title IX discrimination and harassment claims.

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[4] *Folkes v. New York College of Osteopathic Medicine*, 214 F. Supp. 2d 273, 288-289 (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).

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.[5] Plaintiff asserts that she reported concerns about harassment, but that they were ignored or, alternatively, were referred to "inadequate 'conflict resolution procedures'" (Complaint, ¶¶ 129, 166, 176). 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), 126, 163, 173). These assertions fail to state a claim as a matter of law.

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) (Ex. 5), 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

[5] Plaintiff also asserts, "the University held her to a higher standard than her male peers. Women, including Plaintiff, were treated different in the College of Engineering than her male peers" (Complaint, ¶ 131; *see also* Count VI). Other than this conclusory statement, she provides no specific facts regarding a purported "disparate treatment" claim, which should be dismissed. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Pungitore v. Barbera*, 506 F. App'x 40, 42-43 (2d Cir. 2012) (dismissing Title IX disparate treatment claim for failing to "plead facts supporting a plausible inference that bias was a motivating factor" in the alleged adverse actions). And, as noted above, the continuing violations doctrine does not apply to discrete acts outside the limitations period. *See supra*, at 10.

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, 115-116). *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 sexual harassment.[6]

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, ¶¶ 88-91) and cannot rely upon this incident. *See, Pahssen*, 668 F.3d at 363 ("Both the plain language of Title IX and controlling case law

[6] Plaintiff's newly pled facts in her Second Amended Complaint do not change this point. First, while she asserts that she was sexually harassed in the winter of 2010, she admits it was by a *different* student and makes no assertion that she ever put the University on notice of this alleged sexual harassment. *Pahssen*, 668 F.3d at 362. Second, Plaintiff alleges that her "harassers" continued to call her names, but only references an expressly non-sexual term: "batshit crazy." Third, Plaintiff asserts that she avoided public events for fear of seeing her "harassers" and for fear that they might drug her, but such assertions are not assertions of sexual harassment and, nonetheless, she makes no allegation that she complained about this to the University.

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.' Incidents involving third-party victims lack relevance unless the plaintiff can show that the incidents deprived *her* of such access") (emphasis in original, citations omitted).

2. Title IX and ELCRA Do Not Mandate Training.

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), 126, 163, 173), 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) (Ex. 6); *Preusser ex rel. E.P. 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) (Ex. 7). 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, ¶ 174). 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. *Iqbal*, 556 U.S. at 681 (citing *Twombly*). Moreover, her repeated citation to Department of Education Guidance for the notion that Title IX *mandates* certain complaint procedures and trainings wholly ignores that the Guidance speaks universally in terms of "may" and "can," not must. (*See, e.g.*, DOE, Dear Colleague Letter, April 4, 2011, at 2, Ex. 8) ("This letter concludes by discussing the proactive efforts schools *can* take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR *may* use to end such conduct, prevent its recurrence, and address its effects.") (emphasis added). It also ignores that the Guidance emphasizes the need for institutions to evaluate complaints of sexual harassment on an individual basis. (*See, e.g.*, DOE, Title IX: Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students or Third Parties, January 2001, at 7, 15, Ex. 9) ("Each incident must be judged individually" and "[w]hat constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances"). As such, Plaintiff simply recasts her disparate treatment claim into a disparate impact claim, without identifying a specific practice, statistics or any other facts 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 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.[7] To these events, however, Plaintiff has not pled any facts asserting that these

[7] 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. Finally, reporting stalking is also not a protected activity since it is not a complaint about being treated differently because of 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

complaints were causally connected to an adverse action. For example, though she asserts she 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. *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (four month lag is insufficient to establish causal connection); *Martin v. General Electric Co.*, 187 F. App'x 553, 561 (6th Cir. 2006) (eleven months between alleged protected activity and adverse action was insufficient to establish causality); *Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 675-76 (6th Cir. 2013) (multi-year gap is not enough). *See also Thomsen v. City College of San Francisco*, 2008 WL 5000221, at *3-4 (N.D. Cal. Nov. 21, 2008) (Ex. 10); *Chandamuri v. Georgetown University*, 274 F. Supp. 2d 71, 84-85 (D.D.C. 2003).

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, ¶ 134). Much of this is not, as a matter of law, protected activity.[8]

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discrimination"). To accept Plaintiff's theory would mean that every call to DPS to report potential criminal activity would be protected by Title IX and ELCRA.

[8] Plaintiff's stalking complaint occurred in February 2009 and is not protected activity. *Supra*, at 15 n. 7. The rest of her asserted "protected activities," participating in SAPAC and advocating change/training on policies, are not protected activities under Title IX. In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the Supreme Court held Title IX supports

The only alleged acts that *could* constitute protected activity after December 21, 2009 were: (1) complaining to Goldman, Rackham, and the Center for Education of Women in January 2010; and (2) meeting with Provost Hanlon on February 13, 2012 (Complaint, at ¶¶ 74, 115-16). 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," Plaintiff cannot identify any alleged retaliatory act that is causally connected to these complaints. Plaintiff 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, ¶¶ 115-16). At this point, all of the incidents she alleges were retaliatory had already occurred.[9]

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retaliation claims when "a funding recipient retaliates against a person *because* he complains of sex discrimination." *Id.* at 174 (emphasis in original). As this Court recently noted, "Complaints concerning unfair treatment in general which do not *specifically address discrimination* are insufficient to constitute protected activity." *Porubsky v. Macomb Community College*, 2012 WL 2803765, at *10-11 (E.D. Mich. July 10, 2012) (Cox, J.) (emphasis added) (Ex. 11). These "protected activities" are not specific complaints relating to any alleged incidents of sexual harassment. *See also, Johnson v. Honeywell Information Systems, Inc.*, 955 F.2d 409, 415-416, (6th Cir. 1992), *abrogated on other grounds by McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) (complaining about "the resistance of divisional managers to affirmative action goals" is not opposition to unlawful practices under ELCRA).

[9] Defendants anticipate Plaintiff will assert that in addition to her "termination," other acts of retaliation occurred after December 21, 2009: the "denial of emergency funding," acts by Goldman in 2010 and 2011; Goldman's revoking of her funding and withdrawal demand in September 2011; the decision to discontinue her from the materials sciences program; and Goldman's "maligning" of her academic reputation in a 2012 newspaper article. As with her termination, these other "acts" cannot be causally connected to her protected activities: (1) Pollock's termination and the denial of emergency funding occurred before her January 2010 complaint and she remained at the University; (2) Her allegations that Goldman retaliated against her by questioning her commitment and involvement with SAPAC are not discrete, retaliatory

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/§ 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: "The 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, ¶ 139). "To prove a violation of the equal protection clause under section 1983, [a plaintiff] must prove the same elements [-e.g., that he was treated differently than similarly situated employees-] as required to establish a disparate treatment claim under Title VII." *Singfield v. Akron Metropolitan Housing Authority,* 389 F.3d 555, 566-567 (6th Cir. 2004) (alterations in original). As discussed above, *supra* at 11 n. 5 & 13-14, Plaintiff's allegation of differential treatment fails to meet the *Twombly/Iqbal* standard. 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

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adverse actions; and (3) The alleged "maligning" of her academic reputation in a 2012 newspaper article occurred after her dismissal from the University.

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, ¶ 152). 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, ¶¶ 134, 156). She also contends that Defendants retaliated against her in the same manner as with her Title IX retaliation claim (Complaint, ¶¶ 134, 156). For the reasons cited above, she has again failed to draw a causal link between those acts and Defendants' alleged retaliatory acts.

G. Claims Against Green And Goldman In Their Individual Capacities Should Be Dismissed For Insufficient Service Of Process.

Plaintiff has not served Defendants Green and Goldman in their individual capacities pursuant to Fed. R. Civ. P. 4(e).[10] Serving individuals acting in their official capacities does not "suffice to bring them before the court in their individual capacities." *Ecclesiastical Order of the*

[10] Individual defendants must be served in one of the following ways: (1) "following state law for serving a summons," (2) "delivering a summons and a copy of the complaint to the defendant personally," (3) "leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there," or (4) "delivering a copy of each to an agent authorized by appointment or law to receive service of process." Fed. R. Civ. P. 4(e). Under state law, individuals may be served by "delivering a summons and a copy of the complaint to the defendant personally" or by "sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee." M.C.R. 2.105(A). Plaintiffs Green and Goldman authorized counsel to accept service on their behalf in their official capacities but did not authorize anyone to accept service in their individual capacities (Affidavits of Peter Green and Rachel Goldman, Exs. 12 and 13). This was communicated to Plaintiff's counsel when he was advised that Miller Canfield would accept service in their official capacities (Affidavit of Megan Norris, Ex. 14). The Returns of Service filed by Plaintiff's counsel indicate that Defendants Green and Goldman were not personally served; complaints were simply dropped off at the Office of General Counsel (Dkt. #7 and 16).

Ism of Am v. Chasin, 845 F.2d 113, 116 (6th Cir. 1988). *See also, Martin v. Detroit Prosecutor's Office*, 2007 WL 851307, at *5 n.5 (E.D. Mich. March 20, 2007) (Borman, J) (Ex. 15); *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 508-509 (2d Cir. 2006); *Alungbe v. Board of Trustees of Connecticut State University System*, 283 F. Supp. 2d 674 (D. Conn. 2003).

As Plaintiff failed to serve Green and Goldman in their individual capacities, and has no "good cause" excusing her failure, dismissal of her claims in such capacity is appropriate.

CONCLUSION

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

Respectfully submitted,

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Dated: June 28, 2013

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 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, Jennifer B. Salvatore at jsalvatore@nachtlaw.com, and Edward A. Macey at emacey@nachtlaw.com.

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