UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER DIBBERN

Plaintiff,

v.

Case No. 12-15632

Hon. Sean F. Cox

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.

David M. Blanchard (P67190)
Jennifer B. Salvatore (P66640)
Edward A. Macey (P72939)
NACHT, ROUMEL, SALVATORE, BLANCHARD & WALKER, P.C.
Attorneys for Plaintiff
101 N. Main Street
Suite 555
Ann Arbor, MI 48104
(734) 663-7550
dblanchard@nachtlaw.com
jsalvatore@nachtlaw.com
emacey@nachtlaw.com

Megan P. Norris (P39318)
David G. King (P73451)
MILLER, CANFIELD, PADDOCK AND STONE, PLC
Attorneys for Defendants, The University of Michigan and for remaining Defendants in their official capacities only
150 West Jefferson, Ste. 2500
Detroit, MI 48226
(313) 963-6420
norris@millercanfield.com
kingd@millercanfield.com

PLAINTIFF JENNIFER DIBBERN'S RESPONSE IN OPPOSITION TO DEFENDANTS' SECOND PARTIAL MOTION TO DISMISS

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COUNTER STATEMENT OF ISSUES PRESENTED

I. **Whether Plaintiff may assert claims for retaliation arising out of adverse actions taken after December 21, 2009 (within the 3 year statute of limitations)?**

Plaintiff says, "Yes"

Defendants say, "No"

II. **Whether Plaintiff has sufficiently pled causation for retaliation claims under Title IX and ELCRA?**

Plaintiff says, "Yes"

Defendants say, "No"

III. **Whether Plaintiff's may assert claims for hostile educational environment under Title IX and ELCRA where harassment and other acts contributing to the claim continued *after* December 21, 2009 (within the 3 year statute of limitations)?**

Plaintiff says, "Yes"

Defendants say, "No"

IV. **Whether Plaintiff has properly alleged a disparate impact claim where a university maintains a legally inadequate peer-to-peer grievance system as a prerequisite to the university taking any affirmative action to remedy campus sexual harassment?**

Plaintiff says, "Yes."

Defendants say, "No."

V. **Whether Plaintiff has properly alleged an equal protection violation where a sexually hostile environment leads to unequal educational opportunities for female engineering graduate students?**

Plaintiff says, "Yes."

Defendants say, "No."

INTRODUCTION

The fundamental protection provided by Title IX, 20 U.S.C. § 1681 *et seq.*, prohibits a student from being excluded from participation in, being denied the benefits of, or being subjected to discrimination in any educational program. Plaintiff Jennifer Dibbern suffered all three: exclusion, denial of benefits, and discrimination, all within the relevant limitations period. Rather than fulfilling their legal obligations, Defendants punished Dibbern for being a woman, and for being harassed. They retaliated against her for trying to protect herself from discrimination and trying to eliminate a hostile environment in the University's engineering program.

Dibbern was subjected to relentless harassment from her peer graduate students at the University of Michigan's Material Science Engineering Department, yet despite constant complaints, the University failed to do anything to remedy the situation. The University's inaction and failure to properly respond during the limitations period is the central issue in the instant motion. That inaction occurred within and throughout the applicable limitations period, even if some of the harassment and notifications predated it. When Dibbern tried to turn to the University of Michigan for help, none was provided. When she complained to professors in the department, she was chastised for letting it affect her work and counseled to stop participating in a student organization dedicated to eliminating sexual assault on campus.

The University's failure to act forced Dibbern to regularly forego educational opportunities afforded to male classmates who were not subjected to harassment. Her primary focus throughout her time as a student was on avoiding her harassers and not on maximizing her education. She was forced to move apartments to avoid would-be assailants; she could not attend core classes; she could not participate in study groups; and she could not use the lab alone

without fear of assault. The University's deliberate inaction during the limitations period isolated her and physically prevented her from enjoying the basic benefits of the educational experience.

Eventually, the University and the individual defendants tried to use Dibbern's self-help mechanisms against her, withdrawing funding and advisors and taking away other benefits of a graduate school education. When she spoke out in the face of widespread harassment, she was kicked out of the program. Information known only to her professor appeared in a newspaper op-ed letter smearing Dibbern, and even acknowledging that her termination was tied to her involvement with the University's Sexual Assault Prevention and Awareness Center.

Presently before the Court is Plaintiff's Second Amended Complaint, which provides a detailed summary about the constant harassment she suffered, her inability to receive any help from the University, and the University's retaliation against her when she dared to stand up for herself. This complaint properly alleges all claims, including that Dibbern was subject to a hostile environment that persisted to the date she was kicked out of the program and that Dibbern suffered retaliation after December 21, 2009. For the reasons discussed below, Defendants' motion should be denied in its entirety.

STANDARD OF REVIEW

Defendants have moved to dismiss the claim pursuant to Rule 12(b)(5) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. In reviewing a complaint under Rule 12(b)(6), the Court must accept "all the Plaintiffs' factual allegations as true and construe[s] the complaint in the light most favorable to the Plaintiffs." *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) Dismissal on 12(b)(6) is appropriate where "the allegations in the complaint affirmatively show

that the claim is time-barred." *Id*. Defendants bear the burden of proving a statute of limitations defense. *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001).[1]

ARGUMENT

As demonstrated in the Second Amended Complaint, Dibbern continued to suffer direct peer-on-peer harassment inside the relevant statute of limitations. Defendants' statute of limitations argument regarding Plaintiff's retaliation claims are based on a misstatement of law and must be rejected.

There are two very distinct and clear statute of limitations standards to be applied in this case, as defined by *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002):

(1) For Discrete Retaliation Claims: "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Taylor v. Donahoe*, 452 Fed. Appx. 614, 619 (6th Cir. Mich. 2011) (citing *Morgan*, 536 U.S. at 114). Discrete acts that fall within the statutory period do not make those that fall outside the period timely. *Id*.

(2) For Hostile Environment Claims: in contrast, if "an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Taylor* at 619 (citing Morgan, 536 U.S. at 117).

[1] "The statute of limitations is an affirmative defense, see Fed. R. Civ. P. 8(c), and a plaintiff generally need not plead the lack of affirmative defenses to state a valid claim . . . For this reason, a motion under Rule 12(b)(6), which considers only the allegations in the complaint, is generally an inappropriate vehicle for dismissing a claim based upon the statute of limitations." *Cataldo v. United States Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012).

I. Plaintiff's Discrete Retaliation and Invasion of Privacy Claims Indisputably Arose Within the Limitations Period and Clearly Establish Causation

Plaintiff's action alleges retaliation by the University and individual defendants under Title IX (Count II), First Amendment/Section 1983 retaliation (Count V), and Elliot Larsen (Count VIII). Defendants' statute of limitations argument regarding these retaliation claims is without legal basis. In each instance the retaliatory adverse action occurred within the relevant statute of limitations and was directly linked by its own terms to Dibbern's protected conduct. To state a *prima facie* case of retaliation, Dibbern must allege that (1) she engaged in protected activity; (2) her employer knew about her exercise of protected rights; (3) the Defendants thereafter took adverse employment action against her; and (4) there was a causal connection between her protected activity and the adverse employment action or the retaliatory harassment. *See Morris v. Oldham Cnty. Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000) (Exhibit A).

A. Plaintiff's Retaliation Claims Accrued at the Time of the Adverse Actions – All During the Relevant Statute of Limitations

All of Plaintiff's retaliation claims are timely because they are all based on adverse actions that have taken place in the past three years since December 21, 2009. As Defendants admit, a claim "accrue[s] 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." (Defs' Br. at 8)(quoting (*Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, 184 (6th Cir. 1990)). In a retaliation claim, the injury is the adverse action taken in response to protected conduct, not the conduct itself. Defendants however repeatedly make unfounded statements such as stating that pre-2009 complaints "are all time-barred" and that "Plaintiff must demonstrate that she engaged in protected activity after December 21, 2009." (Defs' Br. at 15-16).

The Complaint is clear that Plaintiff repeatedly engaged in protected activity when she complained to Pollock before her funding was eliminated; complained to Goldman, actively participated in SAPAC activities; drafted a sexual assault training policy; actively tried to arrange sexual harassment training; joined a union to try and negotiate sexual harassment training; repeated her complaints to other school officials; and complained about stalking.[2] Defendants ignore that much of Plaintiff's protected activity actually occurred after December 2009, including her complaints to Goldman, participation with SAPAC, draft training, union participation, and complaints to other University administrators. Furthermore, while Defendants dispute whether all of these complaints would necessitate protected activity under all three retaliation theories, it is uncontested that some of Plaintiff's complaints constitute protected activity under all three retaliation claims. The newspaper article forming the basis of her invasion of privacy claim itself references Dibbern's association with SAPAC as a reason she was discontinued from the program. (Compl. ¶ 112).

Defendants regularly retaliated against Plaintiff, based on her efforts to avoid assault and harassment, her complaints, and her efforts to remedy violations of law, including a) the December 23, 2009 termination of her appointment by Professor Pollock (Compl ¶ 71); b) denial of emergency funding (Compl ¶ 75); c) day-to-day retaliation from Professor Goldman in 2010 and 2011 (Compl. ¶ 82-84); d) Professor Goldman revoking her funding and demanding that she withdraw from the program in September 2011 (Compl. ¶ 95-98); e) Department Chair Green and Rackham Graduate School Officials "discontinuing" Dibbern from the materials science

[2] Defendants make the completely unsupported statement that complaints about "stalking" by a member of the opposite sex is not protected activity. Dibbern was stalked by a man who had a sexual interest in her. This is core hostile environment activity, and complaints about its occurrence should be considered identical to reports of sexual assault, which are unquestionably protected activity. *See Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 736 (6th Cir. 2006) (finding report of sexual assault is protected activity).

engineering program (Compl. ¶ 104-09); and Goldman maligning Ms. Dibbern's academic reputation in a 2012 newspaper article (Compl. ¶ 110-13). These events and the associated claims all arose within three years of Plaintiff's initial complaint and are all timely injuries to be considered in this lawsuit. Each count itself is specific as to the underlying conduct AND the adverse actions giving rise to the claims.

B. Plaintiff's Discrete Retaliation Claims Allege Causation by Context, Temporal Proximity, and Direct Comments

Defendants' attempt to dismiss Dibbern's retaliation claims based on a purported failure to plead causation is equally flawed. Defendants ignore or downplay a series of protected activities that are properly pled in the complaint, and are also attempting to apply a summary judgment burden at the motion to dismiss stage, without the benefit of a developed record.[3]

For support, Defendants rely on cases that stand for the common-sense position that timing is not always enough for a retaliation complaint. These cases, however, are either summary judgment cases and thus not relevant to whether Dibbern has stated a "plausible" claim or cases where the Plaintiff submitted no additional allegations besides timing to supports a finding of retaliation. The three cases from the Sixth Circuit Defendants rely on at Part D.1 of their brief are all summary judgment cases. The two district court cases from outside the Sixth Circuit were dismissed because the plaintiff only alleged timing. *See Chandamuri v. Georgetown University*, 274 F. Supp. 2d 71, 85 (D.D.C. 2003) (discussing temporal proximity in the context of if it is the "only evidence of causation"); *Thomsen v. City College of San Francisco*, 2008 U.S. Dist. LEXIS 97174 (N.D. Cal. Nov. 21, 2008)(holding that timing was "too attenuated to establish causality on its own")(Exhibit B).

[3] Defendants' arguments are inapplicable to Plaintiff's First Amendment Retaliation claim. Under the First Amendment retaliation framework, causation is only considered at summary judgment. *See Thomas v. Eby*, 481 F.3d 434, 441-42 (6th Cir. 2007).

Plaintiff has documented abundant evidence that she was complaining to everyone and anyone about sexual harassment. She has also documented that she was successfully progressing in her program, and that the only purported deficiencies were on account of actions she had to take to protect herself from her harassers. Defendants took adverse actions against her by terminating her appointments on two occasions and improperly terminating her from the MSE Ph.D. program. Defendants were inclined to act in this otherwise unexplainable manner based on a retaliatory motive, or in the language of *Twombley*, that conclusion is plausible.

In addition, Plaintiff has come forward with allegations that she specifically reported the sexual harassment she suffered to both Professor Pollock (Compl. ¶¶ 41, 49) and to Professor Goldman. Pollock responded appallingly, including responding to reports of harassment by 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." Pollock then terminated her appointment based exclusively on incidents that were tied to Dibbern's harassment and self-help attempts to avoid her harassers. (Compl. ¶¶ 71, 72) Later, Goldman instructed her to stop participating in activities, including SAPAC and also tied her decision to withdraw as advisor Dibbern's experience of harassment and new disbelief. Finally, Defendants did nothing in response to Dibbern's repeated complaints. Instead, Defendant Green terminated her from the program entirely, again explicitly based on the harassment assaults and hostile environment she had endured earlier. (Compl. ¶ 102).

These allegations make clear that Dibbern is not relying on timing alone. As the Sixth Circuit recently held in reversing the grant of a 12(b)(6) motion on a retaliation claim: "If a reasonable court can draw the necessary inference from the factual material stated in the complaint, the plausibility standard has been satisfied." *Rhodes v. R & L Carriers, Inc.*, 491 Fed.

Appx. 579, 583 (6th Cir. 2012) (quoting *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012)). Here, based on the individual defendants' poor reactions to Dibbern's complaints, the lack of legitimate justification for her removal from the program, and the explicit reference to purported deficiencies caused by the harassment, the necessary inference can be made, and Defendants' motion to dismiss the retaliation claims must be denied.

II. Plaintiff's Hostile Environment Claims Are Timely as Continuing Violations

Plaintiff's action properly alleges discrimination and hostile environment under Title IX (Count I), and under State Law ELCRA (Count VI). Plaintiff has alleged a pattern of sexual harassment at the hands of fellow students that was long-standing and persistent and that denied her the benefits of a number of opportunities presented to other students through her termination from the program in December of 2011. This includes specific instances of sexual harassment less than three years before the filing of the initial complaint.

Despite repeated complaints to all manner of employees of the University, nothing was ever done to help Dibbern or to eliminate the pervasive hostile environment. Instead, she was forced into self-help remedies, including scheduling classes outside her department, attempting to avoid interaction with her peers, and moving multiple times for her own safety. Defendants now claim that they had no duty to do anything to help Dibbern and that her success at avoiding her harassers, which severely limited her educational experience insulate Defendants from liability.

A. The Hostile Environment Claim is Timely

Defendants do not contest that Dibbern has properly alleged harassment that is sufficiently severe and pervasive as to create a hostile environment. Instead, Defendants move to dismiss the hostile environment claims as untimely even though they acknowledge Dibbern has

alleged sexually hostile environment activity that occurred within three years of the original complaint. The hostile environment claims must be allowed to proceed under the continuing violations theory where Dibbern has clearly alleged the hostile environment remained throughout Dibbern's time as a student.

As Defendants acknowledge, Title IX claims are routinely analyzed under the same framework as Title VII claims. Under Title VII, a hostile environment claim is:

> composed of a series of separate acts that collectively constitute one unlawful employment practice . . . It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. *Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability*.

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002) (emphasis added). [4] Under Title VII, "an act contributing to the claim" has commonly been interpreted to require an additional act of sexual harassment. While Title VII and Title IX are often considered under the same rubric, for purposes of a hostile environment claim, Title IX should include many other relevant acts that "contribute to the claim."[5] For instance, since Title IX liability derives from

[4] Defendants reference the possibility that the continuing violations doctrine does not apply under Title IX, without expressly making the argument. However, Defendants rely on cases clearly applying the continuing violations doctrine to a claim of hostile environment. *See Stanley v. Trustees of the California State University*, 433 F.3d 1129, 1136 (9th Cir. 2006) (applying framework of Title VII and citing *Morgan* in Title IX context).

[5] *See e.g. Davis*, 526 U.S. at 642 (noting that liability for a school arises not from the harassment but "from an official decision … not to remedy the violation.") While Title VII and Title IX claims are generally analyzed under the same rubric, the language of the two statutes is not identical. Title IX does not import agency principles in the way that Title VII does. The Title IX focus is on the school's actions and not the individual instances of harassment. The University's deliberate indifference and ongoing reluctance to cure a hostile environment during the limitation period should satisfy the continuing violations doctrine in this context. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). Dibbern's continued denial of the full participation of the program was "an act contributing to the claim," where she was unable to attend events with her peers for fear of her own personal safety. Likewise withdrawing Dibbern's funding and

the institution's indifference, instances where a university ignored reports of harassment and professors denigrated those that reported harassment are all acts "contributing to the claim."

Since the instant matter presents with evidence of additional harassment within the limitations period *as well* as other contributing acts by the University (such as demeaning comments, and official acts and comments showing deliberate indifference), Plaintiff satisfies the narrower Title VII application as well. Not surprisingly given Defendants' incompetent response to Dibbern's complaints, the culture of harassment never ceased. Dibbern was harassed by a male student in the Winter 2010 term.

Specifically, while working under Professor Goldman in 2010, Dibbern worked in a lab with a student that would regularly engage in inappropriate and unwanted touching, hugging, and kissing of Dibbern. This harassment was consistent with what Dibbern was subjected to previously and constitutes one continuous hostile educational environment. The student would *constantly* touch, hug, tickle, poke, prod, and give "respirator kisses" to Dibbern, without her consent. In addition, this student regularly made comments about Dibbern's appearance, including what she was wearing and not wearing. He would make jokes and references about sex and discuss other female students, whether they were attractive, and what they were wearing. (Complaint ¶¶ 78-81). These incidents comply with any need to show at least one act contributing to the hostile environment claim within the statute of limitations and show, at a minimum, a clear continuing violation.

Defendant responds to these allegations by arguing that they come from a different student than the students who had previously harassed Dibbern about which she had

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discontinuing her program were likewise official decisions not to remedy the violation occurring during the limitations period.

complained.[6] This strengthens rather than diminishes Dibbern's hostile environment claim. It is evidence that Dibbern was subject to a hostile *environment*, not just isolated comments. In the analogous Title VII context, "the totality-of-the-circumstances test mandates that district courts consider harassment by all perpetrators combined when analyzing whether a plaintiff has alleged the existence of a hostile work environment." *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 509 (6th Cir. 2001). After being subjected to extremely gratuitous sexual harassment and reporting it to her professors, school administrators, and even the police, nothing had been done to alleviate the situation. In that environment, this student, who was friends with the original harasser, felt no compunction about engaging in his own harassment.[7]

In addition, professors even joked about a prospective student's concerns about the harassing environment. (Compl. ¶¶ 87-91). The prospective student had witnessed harassing behavior at a graduate student party. This event occurred in April of 2011, demonstrating that

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[6] In addition, the original harassers also continued to harass Dibbern, who they would call "batshit crazy" when they saw her. These comments, while not obviously sexual in nature, contributed to the sexually hostile environment. "[T]he conduct underlying a sexual harassment claim need not be overtly sexual in nature. Similarly, even though a certain action may not have been specifically racial in nature, it may contribute to the plaintiff's proof of a hostile work environment if it would not have occurred but for the fact that the plaintiff was African American." *Jackson v. Quantax Corp.*, 191 F.3d at 662. The comment "batshit crazy" was directed at Dibbern based on her responses to the constant course of harassment she was subjected to and was a part of the hostile environment.

[7]Defendant's defense is effectively that harassment was so widespread that when a new student started doing it, it somehow eliminates the continuing hostile environment caused by other students in the same program. This "defense" has no support in the case law. For support, Defendants merely cite in a footnote to the standard elements of a Title IX peer-to-peer sexual harassment claim. (Defendant's Br. at 12, n. 6). The requirement is that the funding recipient had "actual knowledge of the sexual harassment," which the University undoubtedly did following Dibbern's repeated reports. That a friend of the harassers started his own course of harassment is irrelevant because the conduct includes one continuing hostile environment of which the University was aware and which a jury must consider. "To consider each offensive event in isolation would defeat the entire purpose of allowing claims based upon a 'hostile work environment' theory, as the very meaning of 'environment' is 'the surrounding conditions, influences or forces which influence or modify.'" *Jackson v. Quantax Corp.*, 191 F.3d 647, 660 (6th Cir. 1999) (quoting Black's Law Dictionary 534 (6th ed. 1990)).

harassment continued within the relevant statute of limitations. "A plaintiff need only allege that she suffered a hostile . . . environment because of her gender, not that all of the offensive conduct was specifically aimed at her." *Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007); *Jackson v. Quantax Corp.*, 191 F.3d 647, 661 (6th Cir. 1999) (in the analogous racial hostile environment context, held that "the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor can impact the work environment" because "[e]vidence of racist conduct affecting African-American employees certainly mattered as to whether the work environment . . . was objectively hostile . . ., and evidence that [plaintiff] learned of these incidents clearly demonstrated that . . . she subjectively perceived that her work environment was one hostile to her"); *Berryman v. SuperValu Holdings, Inc.*, 669 F.3d 714, 722 (6th Cir. 2012) (Plaintiff must be permitted to produce evidence from co-workers to establish the hostile environment he was a victim of, even evidence he was unaware of).[8]

In addition, the Second Amended complaint establishes that the hostile environment continued throughout the time of her educational career. The thrust of a Title IX hostile environment claim is that the plaintiff must demonstrate that she was "'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.'" *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)(Exhibit C) (quoting 20 U.S.C. § 1681(a)). As the Supreme Court explained in *Davis*, the most obvious example would be where a student did not use school resources due to threats from a male

[8]In addition, the professors contributed to the hostile environment by defunding Dibbern, encouraging her to stop working with SAPAC, and questioning her commitment to the program based on her efforts to avoid harassment. *See Yedes v. Oberlin College*, 865 F. Supp. 2d 871, 878 (N.D. Ohio 2012) (denying defendant's summary judgment motion on statute of limitations grounds where plaintiff merely alleged that she was "dropped from the department email distribution list" and "excluded from other departmental activities and meetings and decisions" within the relevant statute of limitations).

student. *Id*. at 650-51. The Supreme Court went on to hold that this threshold did not have to be met where a plaintiff establishes sexual harassment "that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id*. at 651.

Here, on fear of being assaulted or harassed, Dibbern was actually deprived of access to educational opportunities, both before and after December of 2009. Following repeated harassment, Defendants did nothing to end the hostile environment. Dibbern remained in the same program and was forced to repeatedly confront her harassers through school functions. In addition, Dibbern was required to engage in "self-help" to prevent herself from seeing her harassers and potential assailants. This included taking different classes and staying away from opportunities provided at the school.

B. Plaintiff's ELCRA Hostile Environment Claim is Also Timely Under State Law Standards

The analysis for Dibbern's state law hostile environment claim under ELCRA is similar and also properly states a claim. Defendant asserts that Michigan does not recognize the continuing violations doctrine under ELCRA and cites *Garg v. Macomb Cty. Community Mental Health Servs.*, 472 Mich. 263 (2005). The University overreaches in its use of *Garg*. Even after *Garg*, it is "unclear whether and to what extent a trial court (or finder of fact) may consider evidence of . . . hostile conduct that occurs outside the period of limitations." *Hall v. Detroit Forming*, 2008 Mich. App. LEXIS 13 at *1-2 (Mich. Ct. App. May 30, 2008)(Exhibit D).

Dibbern easily satisfies the standard of *Garg*, particularly in her second amended complaint. Dibbern has alleged consistent sexual talk and belittling in the relevant statute of limitations. She has also alleged that she complained to various professors and other university officials about the hostile environment in the relevant statute of limitations. However, nothing

was done, and she continued to be subjected to the harassing behavior. In *Hall*, the Michigan Court of Appeals reversed a trial court's grant of summary disposition on the hostile environment claim. The court did not reach the continuing violations issue, finding sufficient allegations within the statute of limitations based on two comments. First, the owner stated that if people did not like the way he was running the company they could "go back and pick cotton." Second, the owner had made what he considered to be a joke that he trained his dogs to bite black men. *Id*. at *4. Based on just this evidence, the Court of Appeals reversed summary disposition.[9]

As one district court noted in a case involving the University of Michigan, the standard at Rule 12(b)(6) for a hostile environment claim are not high. *See Platt v. Univ. of Michigan*, 2010 U.S. Dist. LEXIS 31420 (E.D. Mich. March 3, 2010) ("At least one court has stated that, "[u]ltimately, to avoid dismissal under FRCP 12(b)(6), a plaintiff need only plead facts sufficient to support the conclusion that she was faced with 'harassment … of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse,' and 'we have repeatedly cautioned against setting the bar too high' in this context")(internal quotations omitted)(Exhibit E). Just the allegations in the Second Amendment Complaint occurring after December of 2009 by themselves are sufficient to state a claim for relief. Dismissal of the Elliott-Larsen Hostile Environment Claim is thus inappropriate.

C. Defendants Had Knowledge and Were Deliberately Indifferent to the Hostile Environment

[9] The Michigan Supreme Court declined review. Justice Markman dissented from the denial or review based on the court's handling of a failure to promote claim but agreed with the Court of Appeals on the hostile environment claim. *Hall v. Detroit Forming*, 2008 Mich. App. LEXIS 13 at *1-2 (Mich. Ct. App. May 30, 2008)(Exhibit D).

Defendants additionally argue that Plaintiff has failed to state a claim for sexually hostile environment apparently based on the idea that Plaintiff "cannot rely on continued reports of pre-December 2009 harassment" and that "Title IX and ELCRA Do Not Mandate Training." Defendants' arguments are distractions from the core argument of whether Plaintiff has sufficiently alleged a hostile environment. Under Title IX, a plaintiff needs to establish three prima facie elements for university liability for student-on-student harassment:

> (1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,
>
> (2) the funding recipient had actual knowledge of the sexual harassment, and
>
> (3) the funding recipient was deliberately indifferent to the harassment.

Pahssen v. Merrill Cmty. Sch. Dist., 668 F.3d 356, 362 (6th Cir. 2012). Liability arises from an official decision not to remedy the harassment. See *Davis*, 526 U.S. 629, 642 (1999). Plaintiff has satisfied this standard by pleading pervasive sexual harassment, repeated reports to members of faculty and the administration, and the completely inadequate response of the University. Dibbern's advisors effectively told her to toughen up. Other administrators merely sent her back to her professors. Not a single thing was done by any employee of the University in response to Plaintiff's reports. Defendants' failure to respond in any meaningful fashion exhibits deliberate indifference. These official decisions continued throughout the limitations period and right up to Dibbern being rejected from the program entirely, explicitly based on her earlier assaults.

Defendants' reference to the continued reporting of past incidents appears to be just a re-argument of its statute of limitations defense. Plaintiff's complaint unambiguously satisfies all three prongs both before and after specific events occurred, and "*an act contributing to the*

claim," the post-complaint harassment, unquestionably occurred within the relevant statute of limitations.

Defendants' reference to "training" is irrelevant at this stage of the proceedings. First, contrary to Defendants' position, Title IX does can require training in certain situations. (*See* Exhibit F, *April 4, 2011, OCR Dear Colleague Letter* - "In addition, depending on the extent of the harassment, the school *may need to provide training or other interventions* not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond.") (emphasis added). Defendants' emphasis on permissive language ignores the fact-specific context of Title IX's requirements as articulated by the DOL. Depending on the University's conduct, it may or may not require training. Not all schools may have to engage in training, but a school such as the University, which is allowing rampant sexual harassment to occur and is not providing appropriate responses, "plausibly" may have to engage in training to prevent the rampant abuse suffered by Dibbern from continuing.[10]

Second, Plaintiff makes no direct claim purely based on a lack of training or improper policies. Plaintiff alleges that she was subjected to a hostile educational environment and further alleges that she was discriminated against based on her gender. In support of demonstrating the substandard nature of Defendants' actions, she has highlighted a number of areas in which Defendants' policies and practices fall far short of what the Department of Education considers proper. The failure to enact appropriate policies is evidence of hostile environment and gender discrimination violations.

[10] Any Department of Labor position that such training is appropriate under its given regulations would be entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (Secretary's interpretation of Department of Labor's regulations is controlling unless "plainly erroneous or inconsistent with the regulation").

In *Patterson v. Hudson Area Schools* 551 F. 3d 438 (6th Cir. 2009), the Circuit Court reversed the lower court's grant of summary judgment, finding that the school's failure to take effective remedial action *including training*, created a genuine issue for trial on whether the school was deliberately indifferent to student-on-student sexual harassment.

> [W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

Id. at 446 (internal quotation omitted).

Thus, where an educational entity is on notice that its existing policies and practices (if any) are insufficient to remedy ongoing harassment, it is required by law to implement different more effective measures to address harassment. There is nothing in the law that excludes training as a means to prevent and remedy harassment. In fact, failure to make remedial training in light of a hostile environment is a Title IX violation and direct evidence of Defendant's deliberate indifference. (*See, e.g., Montana OCR letter*, attached as Exhibit G).

III. Plaintiff Has Stated a Disparate Impact Claim, Where Women - as the Overwhelming Victims of Campus Sexual Assault - Are Denied an Effective Means of Redress

Defendants make a cursory argument that Plaintiff has failed to state a claim demonstrating a disparate impact claim (Count VII). Plaintiff has pled that in detail a range of University policies that are not compliant with Title IX and which have a disparate impact women, even if facially neutral. As but one example, Defendants employ a broken system of dispute resolution policies that unfairly re-victimizes female victims of sexual harassment and assault.

Plaintiffs establish a prima facie case of disparate impact discrimination by (1) identifying a facially neutral practice and (2) demonstrating "through relevant statistical analysis" that the challenged practice adversely impacts the protected group. *Isabel v City of Memphis*, 404 F3d 404, 411 (6th Cir 2005); *see also Duranceau v Alpena Power Co,* 250 Mich. App. 179, 183 (2002) ("To avoid summary disposition under the disparate impact theory, plaintiff had to show that female employees were burdened on account of their gender by some facially neutral practice.")(applying ELCRA). Here, Defendants dispute resolution policy has the impact of discouraging reporting and allowing perpetrators to continue to enjoy the benefits of the university while victims are silenced. Even those victims who come forward are re-victimized in the procedure. As a result of this policy, women are denied full participation in the University's programs. These policies disadvantage women generally by forcing them to be subjected to sexual harassment and preventing them from receiving meaningful redress from improper actions from their male peers.

The University's existing policies, and the failure of those policies to conform to Department of Education recommendations, have a disparate impact on women. Women, who are much more frequent victims of sexual harassment and assault, are not provided with adequate mechanisms to hold perpetrators responsible for their actions. Thus, perpetrators go unpunished and remain in the school, while the women, like Dibbern, are forced into the shadows and left alone to deal with harassment and abuse.

IV. Plaintiff Has Stated a Claim for Disparate Treatment and a Section 1983 Claim for Equal Protection Based on Gender Discrimination

Plaintiff's Equal Protection claim is analyzed in the same fashion as the disparate treatment claim under Title IX or ELCRA and should rise and fall with those claims. *Smith v. City of Salem*, 378 F.3d 566, 576-77 ((6th Cir. 2004). Dibbern has pled numerous facts that

would allow a jury to find she was subject to disparate treatment. Dibbern was adequately performing as a graduate student, and yet was thrown out of the program because she was unwilling to silently accept the sexual harassment she suffered. Plaintiff pled: "the University held her to a higher standard than her male peers. Women, including Plaintiff, were treated different in the College of Engineering than their male peers"- supported by dozens of pages of detailed factual allegations that Dibbern was viewed differently and held to different standards than her male peers.

V. Plaintiff Properly Served Green and Goldman in Their Individual Capacities and If Not, the Court Should Grant Additional Time to Effectuate Service

Defendants Green and Goldman seek to dismiss the complaint against them in their individual capacity due to alleged improper service. As a preliminary matter, such an argument has been waived. Both Green and Goldman filed a motion to dismiss individual claims against them on March 4, 2013 and did not raise an insufficient service argument. (D/E #12). "By operation of the Federal Rules of Civil Procedure, a defendant who files a motion under Rule 12, yet fails to raise in that motion the defense of insufficient service of process, forever 'waives' that defense." *King v. Taylor*, 694 F.3d 650, 656 (6th Cir. 2012).

In addition, Defendants have been served. Green and Goldman authorized their counsel to accept service in their official capacity. Plaintiff hired a process-server who served the summons at the defendants' place of employment. Following this service, Plaintiff filed a Second Amended Complaint. Green and Goldman's counsel specifically said that she would accept service of the Second Amended Complaint in their individual capacity. (Exhibit H). Thus, even if service at their place of employment was insufficient under Fed. R. Civ. P. 4, Defendants were properly served with the Second Amended complaint in a timely fashion. Based on these events, Plaintiff considered Green and Goldman served.

If this Court disagrees and finds that Defendants did not waive the defense, Plaintiff respectfully requests additional time to serve the summons pursuant to Fed. R. Civ. P. 4(m). . "[W]here good cause is shown, the court has no choice but to extend the time for service . . . If, however, good cause does not exist, the court may, in its discretion, either dismiss the action without prejudice or direct that service be effected within a specified time." *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340 (6th Cir. 1996) Nothing is to be gained in this case by dismissal without prejudice – Plaintiff would merely re-file and serve. Thus, if Goldman and Green have not waived the defense and are not properly served, Plaintiff respectfully requests a 30-day extension of the summons to personally serve Goldman and Green.

CONCLUSION

Plaintiff was subject to a hostile environment both before *and during* the applicable statute of limitations. She was indisputably retaliated against during the limitations period. Defendants' other arguments are based on misstatements of the law or the record or assumptions made pre-discovery and must be rejected. Therefore, Defendants' motion should be denied.

Respectfully submitted,
NACHT, ROUMEL, SALVATORE,
BLANCHARD & WALKER, P.C.

/s/ David M. Blanchard
David M. Blanchard (P67190)
Attorney for Plaintiff
101 N. Main Street, Suite 555
Ann Arbor, MI 48104
(734) 663-7550
dblanchard@nachtlaw.com

Dated: August 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 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 the following attorneys of record: Megan Norris and David King.

Respectfully submitted,
NACHT, ROUMEL, SALVATORE,
BLANCHARD & WALKER, P.C.

/s/ David M. Blanchard
David M. Blanchard (P67190)
101 N. Main Street, Ste. 555
Ann Arbor, MI 48104
(734) 663-7550
dblanchard@nachtlaw.com

Dated: August 2, 2013