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.

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

ORAL ARGUMENT REQUESTED

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PLAINTIFF'S COUNTER STATEMENTS OF FACTS NOT IN DISPUTE AND MATERIAL AND DISPUTED FACTS

I. RESPONSE TO DEFENDANTS' STATEMENT OF FACTS NOT IN DISPUTE

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

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

3. Plaintiff **admits** that: Plaintiff reported the sexual and gender-based harassment to her advisor, Defendant Pollock, in November 2007 (Complaint, ¶41).

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

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

6. Plaintiff **admits** that: In response to this incident, Plaintiff's 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 **admits** that: Plaintiff took a brief leave of absence from the University and delayed her two final exams. (Complaint, ¶48).

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

9. Plaintiff **admits** that: During her meeting with Pollock, Pollock dismissed the conduct, stating, "These things something 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 **denies**: **Defendant's description as a misrepresentation of the allegations**: In fact, Ms. Dibbern had delayed her final exams because the night where her colleagues threatened to rape her, Ms. Dibbern needed to reschedule make-up examinations. Her professor told her that her "personal emergency" was "clearly a lie" and demanded that she sit for the examination the next day. Further, the conditions under which Ms. Dibbern took her make-up exam were starkly different from typical examination conditions in the Department. And Professor Ghosh delayed grading the exam which effectively prevented her opportunity to transfer out of the school. (Complaint, ¶ 54-56).

11. Plaintiff **admits** that: In the summer of 2008, another male classmate began stalking Plaintiff (Complaint, ¶57).

12. Plaintiff **admits** 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. Plaintiff **admits** that: Ultimately, harassment culminated in a December 2008 sexual assault in Plaintiff's lab where the classmate 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 **admits** that: Plaintiff 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. Plaintiff **admits** that: In February 2009, Plaintiff reported her stalker to the Department of Public Safety (Complaint, ¶70).

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

19. Plaintiff **admits** that: The person taking the anonymous call 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, ¶60).

20. Plaintiff **admits** that: On December 23, 2009, Pollock terminated Plaintiff's appointment for the following semester, allegedly due to Plaintiff's "lack of commitment" to her degree. (Complaint, ¶71).

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

22. Plaintiff **admits** that: That these employees and faculty members [(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] failed to understand how to respond to her report and instead just directed her back to her Department (Complaint, 76).

23. Plaintiff **admits** that: Plaintiff 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. Plaintiff **admits** that: In the next month, February 2010, Goldman gave Plaintiff an appointment in her research group (Complaint, ¶77).

25. Plaintiff **admits** that: Over a year later, when Goldman began retaliating against Plaintiff by, among other things, demanding that Plaintiff cease involvement with SAPAC and questioning Plaintiff's commitment to her academics (Complaint, ¶78-80).

26. Plaintiff **admits** that: In response, Plaintiff 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 was developing with SAPAC (Complaint, ¶81).

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

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

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

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

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

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

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

34. Plaintiff **admits** that: The letter to the editor was "sanctioned by Professor Goldman and perhaps others within the College of Engineering" (Complaint, ¶106).

35. Plaintiff **denies** Defendants' interpretation of Paragraph 110 of Plaintiff's Complaint as their statement is a misrepresentation of the well-pled facts. Plaintiff admits that: In March 2012, University officials offered Ms. Dibbern an OSCR hearing - only after learning that Ms. Dibbern was represented by counsel, after she had been removed from her program or study without due process, and after years of experiencing a sexually hostile environment at the University.

II. PLAINTIFF'S COUNTER STATEMENT OF MATERIAL AND/OR DISPUTED FACTS

For purposes of a Motion to Dismiss pursuant to Rule 12, Defendants must admit ALL factual allegations as reasonably pleaded in the First Amended Complaint. *Gunaskera v. Irwin*, 551 F. 3d 461, 466 (6th Cir. 2009) Defendants are required accept all factual allegations as pled in a light most favorable to the non-moving Party. *Id.* Plaintiff relies on her Amended Complaint as the definitive statement of undisputed facts for purposes of this motion. Moreover, there are additional facts as set forth in Plaintiff's Proposed Second Amended Complaint (Exhibit G) and also facts that may be developed in discovery (or pleaded) that would further undermine and foreclose Defendants' ability to prove the affirmative defense of statute of limitations.

36. From the fall of 2007 until being dismissed in December 2010, Plaintiff was enrolled as a Ph.D. student in the Materials Science and Engineering program. Throughout the entire time period from 2007 to 2010, Plaintiff was subject to a hostile environment that deprived her of equal educational opportunities. (Am. Compl. ¶8).

37. The hostile environment was manifested in several ways including:

Allegations Regarding Peer-on-Peer Sexual Assault:

38. In March 2008, the situation became physical when a male student slapped her twice when she refused to give the male student her drink at a coffee shop. (Am. Compl. ¶ 45). In April 2008, that student and two others threatened to rape Ms. Dibbern. (Am. Compl. ¶ 46).

39. A separate student began stalking Ms. Dibbern in 2008. He followed her into a university building and then grabbed her, forcibly pulled her against his body, and squeezed her to the point it caused pain. (Amen. Compl. ¶ 58-59).

40. While Ms. Dibbern does not detail additional instances of sexual harassment in her complaint, this was not the end of the story. Ms. Dibbern continued to be harassed in the MSE program into the spring of 2011. (See Proposed *Second* Amended Compl. ¶¶ 78-81) (Exhibit G). Specifically, in the winter 2010 term, she was working in a lab where she was to be instructed on operating a new instrument with another graduate student, a student who was friendly with the harassers and had observed their harassment in other settings. That student would regularly engage in inappropriate hugging, touching, and tickling of Ms. Dibbern. The inappropriate touching was constant. The student also told repeated sexual jokes and made constant comments about what Ms. Dibbern and other females were wearing. When she spoke with others about his inappropriate behavior, she was told that "Mike would be Mike." *Id.*

Allegations Regarding Pervasive Sexualized or Degrading Comments:

41. Dibbern was told that girls in engineering were not "real girls;" that she was less qualified; and got into Michigan just because she was a girl. (Am. Compl. ¶ 37).

42. These male students approved women engineering if they were "hot girls to study with who'd need me to help them pass, in exchange, you know as long as they look cute." (Am. Compl. ¶ 37).

43. Students repeatedly ignored her contributions in class or study groups, calling her "parts on the inside," which became a running "joke" used to ignore or negate anything Plaintiff said in study groups. (Am. Compl. ¶ 38).

44. The harassers told her that they masturbated with her in mind and would plan to call her at climax; they then would make jokes about calling her later. (Am. Compl. ¶39).

45. Harassment continued in the winter 2008 semester. Footnote 14 of the complaint details 16 separate comments that were documented in her personal journal of offensive and harassing conduct. While this harassment was scary in and of itself, the situation escalated when Ms. Dibbern refused the sexual advances of a fellow student. That student began encouraging and inciting harassment. (Am. Compl. ¶ 44).

46. Furthermore, harassment continued at the University, as detailed in the complaint regarding prospective students. (Am. Compl. ¶ 84-86).

Allegations Regarding Forced Academic Isolation:

47. Dibbern's self-isolation was a last resort until she was terminated from the program in December 2011. She was forced to avoid educational opportunities and/or her experience of them was severely altered. (Am. Compl., ¶33).

48. Ms. Dibbern was required to attend a weekly seminar with some of the students who harassed her regularly in previous years. (Am. Compl., ¶33).

49. The people involved in the threatened rape worked in the same building and regularly questioned her about why she was not around much anymore. (Am. Compl., ¶46, 58).

50. In passing her in the halls, they would call her "crazy." After she was dropped by her initial advisor in December 2009, she had to change her research focus just in order to avoid her harassers. (Proposed Second Am. Compl., ¶94).

51. Throughout her career at the University, she did everything she could to avoid her male harassers. Ms. Dibbern routinely avoided department events, dinners at Professors' houses, prospective student activities, and other networking events. If she thought one of her harassers would be there, she would avoid it.

52. Specifically, she avoided anything where food or drink was offered because the harassers, in discussing their plan to rape her, had discussed drugging her and then taking advantage of her. As a result, Ms. Dibbern was forced to avoid almost any event that served food and drink if she thought one of the harassers would be there. (Proposed Second Am. Compl. ¶ 93)

53. In addition, the rape threat also specifically referenced raping her in connection with the seminar series – including slipping something into her drink or raping her in an adjacent bathroom. Ms. Dibbern was forced to attend these seminars throughout her entire time in the program and was in fear during each and every one. The harassers had no sympathy and would continue to taunt her by calling her names, including that she was "batshit crazy." (Proposed Second Am. Complaint ¶ 94)

Allegations Regarding Faculty and Administration Comments Showing a Deliberate Disregard For the Hostile Environment:

54. In January 2009 Dibbern called the University's Title IX Director, Anthony Walesby who asked Ms. Dibbern if she had any email documentation because "if it is not in email, there's nothing we can do about it" and he needed "concrete proof." Mr. Walesby made comments including: "you know how it is," "people assume women false report this kind of stuff," and impressed upon Ms. Dibbern that the burden of proof is on the student and that OIE needs an iron-clad case in order to respond seriously. Further, Mr. Walesby stated even if an investigation were conducted, Ms. Dibbern would not be able to know what action was taken against the perpetrators. Mr. Walesby explained that he had no knowledge of anyone ever being suspended or asked to leave the University for this type of behavior. Mr. Walesby told Ms. Dibbern that if professors were disciplined, they would likely receive one week without pay. Mr. Walesby likened the punishment to a "one week unpaid vacation." (Am. Compl. ¶¶ 62,63).

55. In 2008 Ms. Dibbern had delayed her final exams because of the night where her colleagues threatened to rape her, Ms. Dibbern needed to reschedule make-up examinations. Ms. Dibbern rescheduled her missed exam in Professor Stein's course and earned the grade of "A" on the exam. Ms. Dibbern attempted to reschedule her exam in Professor Ghosh's course but had great difficulty in reaching him. When Ms. Dibbern

finally reached the professor he told her that her "personal emergency" was "clearly a lie" and demanded that she sit for the examination the next day. (Am. Compl. ¶54 et seq.).

56. On April 11, 2011, Ms. Dibbern received an unexpected phone call from Professor Goldman. Prof. Goldman had just left a Student Relations Advisory Council meeting where Title IX requirements were discussed following the publicity of investigations at other universities by the U.S. Department of Education. Prof. Goldman asked Ms. Dibbern if she had heard of Title IX and the investigations at "Harvard and Yale" Prof. Goldman said. "OCR was investigating the—I guess you'd call them perpetrators" . . . "I might have to report you whether you want me to or not." (Am. Compl. ¶79).

57. Within the next days, Prof. Goldman reprimanded Ms. Dibbern for her "tone" in an email written to lab partners. Prof. Goldman also questioned Ms. Dibbern's commitment to the graduate program and the amount of time that Ms. Dibbern spent in lab. Prof. Goldman instructed Ms. Dibbern to stop being involved in non-academic activities, stating specifically: "I know you have that SAPAC thing." Ms. Dibbern had started volunteering with SAPAC in the fall of 2010 because Ms. Dibbern felt that if she couldn't make herself safe within her Department, she could work to help make other women safe. Ms. Dibbern also worked with SAPAC to implement sexual harassment training for graduate students within the College of Engineering. (Am. Compl. ¶ 80).

58. In late April 2011, Ms. Dibbern attended an awards ceremony where she received a teaching award. At the ceremony, Ms. Dibbern sat at a table with professors from the MSE Department, including Professor Rachel Goldman, her advisor, and Professor Jinsang Kim and Professor Steven Yalisove. (Am. Compl. ¶ 84).

59. Prior to this dinner, a prospective student who visited the MSE Department denied the offer to join the program and cited the reason for her not attending the University of Michigan to be the seemingly unwanted and harassing behavior directed at female students by male students at a graduate student party she attended over the prospective students weekend. The letter which this student wrote explaining her reason not to commit to UM was pinned by members of the recruiting committee onto a wall in a communal workspace within the Department, and it was mocked by students. (Am. Compl. ¶ 85).

60. At the dinner, Professor Yalisove brought up the letter and asked Professor Goldman if she had seen it and then expressed his opinion that such allegations were unbelievable, stating in front of Ms. Dibbern, "Isn't that ridiculous?" "How could she have written that about our Department?" and calling the allegations "ludicrous." Professor Yalisove also stated that this student "is gonna learn" and that another school will have to "teach her how to behave." Professor Yalisove declared "nobody does stuff like that here" and "I can't believe she expects us to take stuff like that seriously." (Am. Compl. ¶ 86). No professor at the table protested or stopped Professor Yalisove from commenting about the letter. (Am. Compl. at 87).

61. Later in September 2011, Ms. Dibbern met in person with Defendant Peter Green, the Materials Science and Engineering Department Chair. At that meeting, Prof. Green

asserted that Prof. Goldman "has records" and then asked Ms. Dibbern about her first year in the program, the reason for incomplete grades in 2008, and her relationship with her first advisor, Prof. Tresa Pollock. Instead of addressing Ms. Dibbern's current work product and research, Prof. Green focused on the very same issues for which Prof. Pollock had cited the discontinuation of her funding in 2008 – all reasons related to the hostile education environment and sexual harassment she suffered in previous years. (Am. Compl. ¶95).

Allegations Regarding Retaliatory Action After December 21, 2009:

62. Defendants engaged in substantial retaliation after December 21, 2009. First, on December 23, 2009, Ms. Pollock terminated Ms. Dibbern's appointment due to a "lack of commitment," that included all reasons related to the harassment Ms. Dibbern suffered. (Am. Compl. ¶ 71). Following the termination of her appointment, Ms. Dibbern sought emergency funding. While the administration seemed willing to provide an application for funds that changed after Ms. Dibbern disclosed the harassment within the MSE program. (Am. Compl. ¶ 75).

63. Professor Goldman initially offered a position to Ms. Dibbern, but she turned on her after attending a Student Relations Advisory Council meeting where Title IX requirements were discussed. (Am. Compl. ¶ 79). She instructed Ms. Dibbern to stop being involved in protected activities, specifically her involvement with the campus's Sexual Assault Prevention and Awareness Center ("SAPAC") and organizing with the GEO. (Am. Compl. ¶ 80). On August 30, 2011, Ms. Goldman revoked Ms. Dibbern's funding and stated she did not believe her allegations of harassment. (Am. Compl. ¶ 89-91). The immediate revocation where she was performing her duties is contrary to MSE policy, which only allows revocation of funding where the student was fundamentally negligent in performing work and abandoned the job. (Am. Compl. ¶ 92).

Allegations of Retaliation against Ms. Dibbern for Protected Conduct:

64. On December 23, 2009, Ms. Pollock terminated Ms. Dibbern's appointment due to a "lack of commitment," that was solely based on reasons related to the harassment Ms. Dibbern suffered. (Am. Compl. ¶ 71). Even after a new advisor was secured, this termination result in a multi-year setback and delay of Dibbern's Ph.D. Candidacy. Pollack continued to advise other graduate students who had not made similar complaints or shared similar experiences. Following the December 2009 termination of her appointment, Ms. Dibbern sought emergency funding. While the administration seemed willing to provide an application for funds that changed after Ms. Dibbern disclosed the harassment within the MSE program. (Am. Compl. ¶ 75).

65. In January 2010, Ms. Dibbern reported the harassment she experienced to Defendant Rachel Goldman, the graduate program chair of the MSE department. Dibbern actively participated in the campus's Sexual Assault Prevention and Awareness Center ("SAPAC") and led an effort to institute mandatory sexual harassment training for all University graduate students. (Am. Compl. ¶ 16). In December of 2010, she wrote a sexual

harassment training proposal and attempted to introduce sexual harassment training within the College of Engineering, prompted by the student-on-student sexual and gender-based harassment she experienced from graduate students within her Department. (Am. Compl. ¶ 15). After Professor Goldman instructed her to stop participating in outside endeavors such as SAPAC, Ms. Dibbern turned to the Graduate Students' Union to try to negotiate sexual harassment training as part of a union contract.

66. In a second act of retaliation on August 30, 2011, Ms. Goldman revoked Ms. Dibbern's funding and stated she did not believe her allegations of harassment. (Am. Compl. ¶ 89-91). The immediate revocation where she was performing her duties is contrary to MSE policy, which only allows revocation of funding where the student was fundamentally negligent in performing work and abandoned the job. (Am. Compl. ¶ 92). Goldman had specifically instructed Ms. Dibbern to stop being involved in non-academic activities, including her involvement with the campus's Sexual Assault Prevention and Awareness Center ("SAPAC") and implicitly her organizing activities. (Am. Compl. ¶ 80).

67. After Ms. Dibbern refused to withdraw, The University and Defendant Green kicked Ms. Dibbern out of the program on December 11, 2011 without any due process such as a hearing or an appeal. (Am. Compl. ¶ 96, 101).

68. A letter appeared in *The Michigan Daily* written by a student of Professor Goldman. The letter included facts only Professor Goldman would know with respect to Ms. Dibbern's academic performance. (Am. Compl. ¶ 104). The letter suggested that the termination had been motivated by Ms. Dibbern's activity regarding SAPAC (Am. Compl. ¶ 105).

Respectfully submitted,
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Dated: April 19, 2013

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

ORAL ARGUMENT REQUESTED

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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'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"

III. **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."

IV. **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 eliminate a hostile environment where the University had failed to do so.

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 Ms. 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 Ms. 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, was forced to continually take classes outside of her field to avoid her harassers, and was forced to effectively hide from her harassers while attempting to continue a course of study where the harassers were

free to roam and continue their education unencumbered. The University's deliberate inaction during the limitations period isolated her and physically prevented her enjoyment of the basic benefits of the educational experience. 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.

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 refused to stand silently while such widespread harassment continued, she was kicked out of the program and information known only to her professor appeared in a newspaper op-ed letter smearing Ms. Dibbern, and even alleging that her termination was tied to her involvement with The University's Sexual Assault Prevention and Awareness Center.

On December 21, 2012, Ms. Dibbern came forward with a detailed complaint 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. Ms. Dibbern was subject to a hostile environment that persisted to the date she was kicked out of the program. Ms. Dibbern's retaliation claims all arose after December 21, 2009. Defendants' arguments to suggest the contrary do not hold up. Defendants' motion should be denied in its entirety.

STANDARD OF REVIEW

Defendants have moved to dismiss the claim pursuant to Rule 12(b)(1) 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)

"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) (Exhibit A). 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

Defendants' motion primarily raises a statute of limitations defense. This defense is an affirmative defense, and not surprisingly, Defendants rely on no cases where a motion to dismiss is granted in the hostile environment context. Plaintiff continued to be subjected to a hostile environment in the applicable statute of limitations, a fact Defendants would have elicited if they had engaged in discovery to prove their affirmative defense. 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 at issue in this case, as defined by *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (Exhibit B) and followed in the Sixth Circuit.

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[1] Defendants make no argument that the statute of limitations is "jurisdictional" and thus subject to a 12(b)(1) motion. In the analogous employment setting, the Sixth Circuit has held that statute of limitations arguments should be addressed pursuant to 12(b)(6) and not 12(b)(1). *See Forest v. United States Postal Serv.*, 97 F.3d 137, 139, n. 1 (6th Cir. 1996); *Boddy v. Dean*, 821 F.2d 346, 350 (6th Cir. 1987).

(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) (Exhibit C) (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).

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 D).

1. 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.[2] Defendants' brief is fixated on events that occurred before December 21, 2009 but ignores the black letter law on when a retaliation claim arises. As Defendants admit elsewhere in the brief, 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 7)(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 13-14). Defendants have made a knowing misstatement of the law. The issue for statute of limitations purposes is when the adverse action occurred. Not surprisingly, Defendants cite no cases for their incorrect statement of law.

Defendants' analysis of Plaintiff's claims are undermined by this fatal flaw.[3] It analyzes Plaintiff's protected activity "after December 21, 2009." The complaint is clear that Plaintiff repeatedly engaged in protected activity when she complained to Professor Pollock before her

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[2] The analysis at this stage for the Title IX, ELCRA, and First Amendment retaliation claims should be identical. Defendants make a separate argument for the First Amendment retaliation claim, but Defendants acknowledge that their arguments are the same as for the Title IX and ELCRA retaliation. Based on the arguments raised by Defendants at this stage, the claims should be treated identically, and all three claims should proceed to discovery.

[3] Defendants separate Plaintiff's retaliation claims into pre-December 2009 and post-December 2009 and then focus on the complaints, rather than the adverse actions. The focus needs to be on the adverse action, and Plaintiff has alleged numerous adverse actions that occurred after December 21, 2009.

funding was eliminated, complained to Ms. 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. The idea that she did not engage in protected activity that was known to all defendants before their adverse action is ludicrous.[4] The newspaper article forming the basis of her invasion of privacy claim itself suggests that Dibbern was discontinued with SAPAC. (Am. Compl. ¶¶ 111, 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. ¶ 78-80); d) Professor Goldman revoking her funding and demanding that she withdraw from the program in September 2011 (Compl. ¶ 89-92); e) Department Chair Green and Rackham Graduate School Officials "discontinuing" Dibbern from the materials science engineering program (Compl. ¶ 97-102); and Goldman maligning Ms. Dibbern's academic reputation in a 2012 newspaper article (Compl. ¶ 103-06). 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. (Am. Compl. ¶¶ 134,135, 155-157, 180,181).

[4] While Defendants' analysis of the statute of limitations issue is obviously flawed, they also ignore that much of Plaintiff's protected activity actually occurred after December of 2009, including her complaints to Goldman, participation with SAPAC, draft training, union participation, and complaints to other University administrators.

2. Plaintiff's Discrete Retaliation Clearly Allege Causation By Context, Temporal Proximity, and Direct Comments

Defendants continue their misleading arguments in an effort to dismiss Plaintiff's valid claims by arguing that Plaintiff cannot demonstrate causation due to an alleged time discrepancy between Ms. Dibbern's complaints and her dismissal from the program. First, Defendants are ignoring a series of protected activities that are pled in the complaint, and second, Defendants are attempting to apply a summary judgment burden at the motion to dismiss stage, without the benefit of a developed record.[5]

For support, Defendants only rely on one case from the Seventh Circuit, *Milligan v. Board of Trustees of Southern Illinois University*, 686 F.3d 378, 390 (7th Cir. 2012). That case was decided on summary judgment, not on a motion to dismiss. Not only was the procedural posture different, but the Seventh Circuit analyzed that unlike Dibbern, the plaintiff's sole evidence to demonstrate retaliation was timing. The Court merely held that a six month timeframe was insufficient on its own to create a genuine issue of fact.

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. And yet, Defendants constantly took adverse actions against her, including terminating her appointments on two occasions and improperly terminating her from the MSE Ph.D. program. It is certainly "plausible" that Defendants were inclined to act in this otherwise unexplainable manner based on a retaliatory motive.

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[5] 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).

In addition, Plaintiff has come forward with allegations that she specifically reported the sexual harassment she suffered to both Professor Pollock (Am. Compl. ¶¶ 41, 49) and to Professor Goldman. Professor 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." Ms. Pollock then terminated her appointment based exclusively on incidents that were tied to Ms. Dibbern's harassment and self-help attempts to avoid her harassers. See. (Am. Compl. ¶¶ 71, 72) Later, Professor Goldman directly 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." (Am. Compl. ¶¶ 96-98). Finally, Defendants did nothing in response to Ms. 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. (Am. Compl. ¶ 102).

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), under State Law ELCRA (Count VI). Title IX states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program. . ." 20 U.S.C. § 1681(a). 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.

Despite repeated complaints to all manner of employees of the University, nothing was ever done to help Ms. 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 Ms. Dibbern and that her success at avoiding her harassers, which severely limited her educational experience, somehow insulates Defendants from liability.

1. The Hostile Environment Claim is Timely

Defendants do not contest that Ms. Dibbern has properly alleged harassment sufficiently severe and pervasive as to create a hostile environment. Instead, Defendants move to dismiss the hostile environment claims as untimely. However, hostile environment claims must be allowed to proceed under the continuing violations theory where Dibbern has clearly alleged the hostile environment remained throughout Ms. 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). [6] Under Title VII, the "an act contributing to the claim" has commonly been interpreted to require an additional act of sexual harassment. In context of a Title IX continuing violation, however, there

[6] 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).

are many other relevant acts that may satisfy this requirement.[7] 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 will assume for the sake of argument that the narrower Title VII application will control.

The Amended Complaint, as drafted, satisfies this requirement at this stage of the litigation. Not surprisingly given Defendants' incompetent response to Dibbern's complaints, the culture of harassment never ceased, and the professors even joked about a prospective student's concerns about the harassing environment. (Am. Compl. ¶¶ 83-86). The prospective student had witnessed harassing behavior at a graduate student party. (Am. Compl. ¶ 85). This event occurred in April of 2011, demonstrating that 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). *Berryman v. SuperValu Holdings, Inc.*, 669 F.3d 714, 722 (6th Cir. Ohio 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). In addition, the professors contributed to the hostile environment by defunding Ms. Dibbern,

[7] *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). Ms. Dibbern's continued denial of the full participation of the program was "an act contributing to the claim." Likewise withdrawing Dibbern's funding and discontinuing her program were likewise official decisions not to remedy the violation occurring during the limitations period.

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).

More importantly, the 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)(Ex. E) (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 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, Ms. 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. Ms. Dibbern remained in the same program within the statute of limitations and was forced to repeatedly confront her harassers through school functions. In addition, Ms. 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. While not explicit in the amended complaint, the fact that these self-help measures continued until her termination from the program can be readily inferred. These allegations are sufficient at the pleading stage.

2. Defendant Also Cannot Prove the Affirmative Defense of Statute of Limitations Because the Record As Pled and to Be developed in Discovery Includes Conduct Within the Three-Year Period

A plaintiff has no duty under Federal Rule of Civil Procedure 8(a) to anticipate an affirmative defense. *See Jackson v. Schultz*, 429 F.3d 586, 589 (6th Cir. 2005). In order to state a claim, Plaintiff need not allege every instance of harassment. She could have stated a claim with the allegations without providing any dates, and the claim would have gone forward to discovery. Unfortunately, Defendants are attempting to use the thoroughness of Plaintiff's complaint against her.

This is not the case where Plaintiff has "pleaded herself out of court." In very rare circumstances, courts have found a complaint itself can prove an affirmative defense. As defendant's note, a "motion for dismissal pursuant to Rule 12(b)(6) will be granted if the... claim shows on its face that relief is barred by an affirmative defense." *Riverview Health Inst. LLC v. Medical Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010). But, in the context of Plaintiff's hostile environment claim, as opposed to a termination claim or a breach of contract claim that is based on a date certain,[8] there is no fixed endpoint in Plaintiff's complaint. Plaintiff has pled no

[8] In support of its motion, Defendants rely on a slew of cases that are considered at the summary judgment stage. *See, e.g., Barrett v. Whirlpool Corp.*, 556 F.3d 502 (6th Cir. 2009); *Russell v. Ohio Dep't of Admin. Services*, 302 F. App'x 386 (6th Cir. 2003); *Vaughn v. Louisville Water Co.*, 302 F. App'x 337 (6th Cir. 2008). The only Sixth Circuit decided case at the pleading stage relied on by Defendants is *Brown v. Metropolitan Gov't of Nashville and Davidson Cty*, 2012 U.S. App. LEXIS 14553(6th Cir. Jan. 9, 2012)(Exhibit F – unpublished cases). That case, however, was not a hostile environment case but was tied to an express demolition of his property which occurred outside the statute of limitations. *See also*, *Timmis v. Boston Scientific Corp.*, 2012 U.S. Dist LEXIS 84585 (E.D. Mich. June 19, 2012) (using documentary evidence provided by defendant to determine the date of discharge, which was

date certain that the harassment stopped, and as a factual matter, she remained subject to harassment within the statute of limitations.

3. Harassment Continued After December of 2009, Plaintiff Must Be Allowed to Amend Her Complaint, Should the Court Deem Pleading Necessary to Defeat an Affirmative Defense

Ms. Dibbern continued to be harassed even after she began working under Professor Goldman in 2010. Specifically, while under Professor Goldman, she worked in a lab with a male student. That student would regularly engage in inappropriate and unwanted touching, hugging, and kissing of Ms. Dibbern. This harassment was consistent with what Ms. Dibbern was subjected to previously and constitutes one continuous hostile educational environment.

In order to leave no doubt that Ms. Dibbern's complaint states a claim for continuously sexually hostile education environment; a proposed second amended complaint is attached. In that complaint, Ms. Dibbern details continued harassment she suffered while a student at the University. While Ms. Dibbern worked with him, throughout the winter 2010 term, he consistently engaged in sexual harassment. The student would *constantly* touch, hug, tickle, poke, prod, and give "respirator kisses" to Ms. Dibbern, without her consent. In addition, this student regularly made comments about Ms. Dibbern's appearance, including what she was wearing and not wearing. He would make constant jokes and references about sex and discuss other female students, whether they were attractive, and what they were wearing. (Ex. G, Proposed Second Amended Complaint ¶¶ 78-81). These incidents obviously 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. Should the court deem it necessary, Plaintiff will move for leave to amend, and no undue prejudice will result.

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outside the statute of limitations for an ELCRA claim) (Exhibit F -- unpublished cases). A hostile environment claim is different from the discrete actions referenced in *Brown* and *Timmis*.

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

The analysis for Ms. 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). Defendant 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 F – unpublished cases).

Ms. Dibbern easily satisfies the standard of *Garg*, particularly in her proposed second amended complaint. Ms. 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]

[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

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 F – unpublished cases). Just the allegations in the proposed 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.

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

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.[10]" 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 student-on-student harassment:

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 F – unpublished cases).

[10] Plaintiff pled several counts as both disparate treatment and hostile environment claims. While Defendants have sought dismissal of those entire claims, Defendants have made no arguments that Plaintiff failed to state a claim for disparate treatment. While sex discrimination is mentioned in subheading C of Defendants' brief, not a single argument following addresses the disparate treatment claims. The first sentence of the argument is "Plaintiff asserts that Defendants are liable for maintaining a sexually hostile environment..." (Def's Br. at 9). Therefore, since Defendants have identified no alleged deficiencies with Plaintiff's disparate treatment claims, those claims are not subject to the present motion.

(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 Ms. Dibbern 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 myriad responses. 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 argument. Its reference to "training" is irrelevant at this stage of the proceedings. First, contrary to Defendants' position, Title IX can require training in certain situations. *See* Exhibit H, *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). 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 that supports the hostile environment and gender discrimination claims. In the circumstances of this case, a reasonable fact finder will conclude that training is necessary for Title IX compliance.[11]

The cases referenced by Defendants are wholly irrelevant to this case and whether Plaintiff has stated a claim for relief. In *Giffin v. Case Western Reserve Univ.*, 181 F.3d 100 (6th Cir. 1999), the Court only held that it was "not aware of any authority that would authorize a private right of action under Title IX to challenge deficiencies in administrative policy." The school in *Preusser* had taken some remedial steps to eliminate race-based bullying, something that Defendants in this case did not do. The Sixth Circuit's more recent opinion in *Patterson v. Hudson Area Schools* is more directly on point. 551 F. 3d 438 (6th Cir. 2009). In *Patterson*, 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.

[11] *Patterson v. Hudson Area Schools*, 551 F.3d 438, 446 (6th Cir. 2009)(Exhibit I) "[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, quoting *Vance v. Spencer Cty Public School District*, 231 F.3d 253, 261 (6th Cir. 2000). Thus, where a district is on notice that its existing policies and practices are insufficient to remedy ongoing harassment, it is required by law to implement different measures to address harassment. There is nothing in the law that excludes training as a means to prevent and remedy harassment. Thus, while the failure to use training may not *per se* constitute a violation of Title IX, failure to train can be evidence of Defendant's deliberate indifference of its duty and thus support a claim for Title IX violation.

"[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, quoting *Vance v. Spencer Cty Public School District*, 231 F.3d 253, 261 (6th Cir. 2000). Thus, where a district 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. Thus, while the failure to use training may not *per se* constitute a violation of Title IX, failure to train in light of pervasive hostile environment can be a Title IX violation and evidence of Defendant's deliberate indifference.

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

Defendants make a cursory argument that Plaintiff has failed to state a claim demonstrating a disparate impact claim (Count VII). The Defendants' argument is not even developed and must be rejected. Plaintiff has clearly 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 Ms. Dibbern, are forced into the shadows and left alone to deal with harassment and abuse.

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

Defendants make a cursory argument that Count III of Plaintiff's complaint regarding equal protection fails to state a claim for relief because she has not established "that Defendants intentionally treated her differently than other similarly situated students." (Defs Br. at 15). Defendants have again misstated the law and what Plaintiff must plead and eventually prove. Defendants' argument, and citation to *TriHealth, Inc. v. Bd. of Commissioners, Hamilton Cty., Ohio*, 430 F.3d 783, 788 (6th Cir. 2005), is a reference to an equal protection "class of one"

claim. In such a case, Plaintiff would be attempting to prove that he or she was treated differently and that there was no rational basis for the discrimination. However, as Defendants are well aware, this is a gender-discrimination case, and Plaintiff is thus a member of a suspect class. Therefore, the Equal Protection claim is analyzed in the same fashion as the disparate impact claim under Title IX or ELCRA and should rise and fall with those claims. *See Smith v. City of Salem*, 378 F.3d 566, 576-77 (6th Cir. 2004) (gender-based equal protection claim to be analyzed like Title VII claim)(Exhibit J). Defendants have identified no legitimate distinction between a Title IX disparate treatment and an Equal Protection Claim based on gender and have made no argument anywhere in their motion why Plaintiff's complaint fails to state a claim for disparate treatment.[12] Therefore, Defendants' motion regarding Count III must also be denied.

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,
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Dated: April 19, 2013

[12] Defendant's brief also references the need to show a pattern or practice against the University. But, as Defendants reference elsewhere in their brief, they have asserted Eleventh Amendment immunity against Count III of the complaint, and Plaintiff is no longer pursuing an Equal Protection claim against the University (but only against individuals in their official capacity).

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 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: Megan P. Norris and David G. King.

Respectfully submitted,
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