IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

DR. MUKUND VENGALATTORE	:	
	:	CIVIL ACTION NO.: 3:18-CV-01124
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CORNELL UNIVERSITY, ET AL.	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO CORNELL UNIVERSITY'S MOTION TO DISMISS (DOC. 41)

September 16, 2019

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5210
N.D. N.Y. Bar Roll # 700434

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Regulations

Plaintiff, by his attorney Caleb Kruckenberg, New Civil Liberties Alliance, files this Memorandum in Opposition to Cornell University's Motion for a Ruling on the Pleadings and Summary Judgment (Doc. 41).

INTRODUCTION

Dr. Mukund Vengalattore was subjected to a fundamentally unfair and gender and racially biased disciplinary proceeding that falsely branded him as someone who committed sexual misconduct with a student and then lied about it. Cornell never disputes that this process was unfair, and never denies the rampant procedural irregularities, numerous discriminatory comments lodged at Dr. Vengalattore, or the devastating impact that its finding has had on his professional and personal life. Instead, Cornell engages in evasion, claiming that this case is really about tenure, and wrongly trying to litigate factual disputes in a pre-discovery motion. Cornell's motion is procedurally improper, factually unsupported and legally unfounded. It should be denied entirely.

ARGUMENT

I. CORNELL'S MOTION IS PREMATURE

Cornell's motion is premature because the Federal Defendants have not yet filed an answer and no discovery has occurred. Neither a motion under Rule 12(c) nor Rule 56(a) is appropriate.

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A motion under Rule 12(c) may only be filed "[a]fter the pleadings are closed[,]" and "[i]f a case has multiple defendants, all defendants must file an answer before a Rule 12(c) motion can be filed." *Horen v. Bd. of Educ. of Toledo City*, 594 F. Supp. 2d 833, 840-41 (N.D. Ohio 2009); *accord Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

Summary judgment is warranted only "if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a). A fact is "material" for purposes of this inquiry, if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"[S]ummary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Id.* "[S]ummary judgment should only be granted if *after discovery*, the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which [it] has the burden of proof." *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) (internal quotation omitted). "Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Id.*

"A party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing '(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303 (2d Cir. 2003) (internal quotation omitted). "[W]hen a party facing an adversary's motion for summary judgment reasonably advises the court that it needs discovery to be able to present facts needed to defend the motion, the court should defer decision of the motion until the party has had the opportunity to take discovery and rebut the motion." *Comm. Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 386 (2d Cir. 2001).

Cornell's motion should be denied for this reason alone. Assuming the motion is seen as one under Rule 12(c), it is premature because not all defendants have filed an answer.

If, however, this Court construes the motion as one for summary judgment, it should be denied as premature because no discovery has commenced. Undersigned counsel has submitted an affidavit consistent with Rule 56(f), and a related affidavit from Dr. Vengalattore, setting out the

disputed facts that he has not yet had an opportunity to develop through discovery. (Attachment A (Rule 56(f) Affidavit); Attachment B (Affidavit of Dr. Vengalattore). He has also submitted a statement of disputed facts. (Attachment C.) These submissions demonstrate that there is a factual dispute about whether Cornell adhered to Policy 6.4 in its disciplinary process against Dr. Vengalattore, whether it provided him with the grievance procedures set out in Article XVI, Section 10, of the Cornell University Bylaws, whether Dean Gretchen Ritter's disciplinary finding was in fact false, whether Dr. Vengalattore suffered adverse employment consequences from the finding, and whether Dr. Vengalattore distributed Dean Ritter's defamatory finding outside of the university, contributed to news accounts before filing the lawsuit or maintained a website disseminating the information. (Attachment B, ¶¶ 10-12, 15-24, 29-32, C.) These documents also explain that discovery is needed to determine the precise nature of the federal funding Cornell has received for the purposes of providing employment and concerning to whom it has relayed Dean Ritter's defamatory findings. (Attachment A, C.) As discussed below, these disputed or undeveloped facts are material as they may determine the validity of the arguments raised by Cornell. Thus, this is not one of the "rarest of cases" where summary judgment can be decided before Dr. Vengalattore has been "afforded the opportunity to conduct discovery." *See Hellstrom*, 201 F.3d at 97.

II. NONE OF DR. VENGALATTORE'S CLAIMS ARE PRECLUDED BY PRIOR LITIGATION

Cornell next argues that "Counts I-III of the Amended Complaint" cannot be litigated here because they "are barred both on *res judicata* and collateral estoppel grounds." (Doc. 41-1, 3, 8.) On the contrary, Cornell has not met its burden of proving that these claims are precluded because the issues presented here are not *identical* to those actually decided by the state courts.

"The preclusive effect of a state court judgment in a subsequent federal lawsuit" depends on "the preclusion law of the State in which judgment was rendered." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). Under New York law, "[t]he preclusive effect of a

judgment is determined by two related but distinct concepts—issue preclusion and claim preclusion—which collectively comprise the doctrine of 'res judicata.'" *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 N.Y.3d 64, 72 (N.Y. 2018).[1] "Issue preclusion, also known as collateral estoppel, bars the relitigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Id.* (internal quotation omitted). "While issue preclusion applies only to issues actually litigated, claim preclusion … more broadly bars the parties or their privies from relitigating issues that were or *could have* been raised in that action." *Id.* (internal quotation omitted).

Cornell's vague assertion of "*res judicata*" (Doc. 41-1, 3), does not preclude any of Dr. Vengalattore's claims. The Second Circuit has held that an Article 78 proceeding does not bar a later lawsuit for damages "even though it arose out of the same operative facts as the Article 78 proceeding." *Leather v. Eyck*, 180 F.3d 420, 425 (2d Cir. 1999). "[U]nder New York law, the form of relief being sought is an element of the litigant's claim" and a "plaintiff could not have sought damages in [a] prior Article 78 proceeding." *Id.* This suit for damages *could not* have been brought under Article 78 and thus is not precluded. *See id.*

Dr. Vengalattore sought only a renewed tenure process in the Article 78 proceeding, whereas here he seeks damages, which were not available before. (*See* Doc. 31, 101 ("Prayer for Relief").) Thus, his suit is not barred by claim preclusion. *See Leather*, 180 F.3d at 425.

Issue preclusion also fails. New York law requires that "an issue of fact or law actually [be] litigated and resolved in a valid court determination essential to the prior judgment." *Paramount*

[1] Cornell is not clear which doctrine it has invoked. It says without elaboration in its introductory statement that Dr. Vengalattore's "claims here are barred both on *res judicata* and collateral estoppel grounds," (Doc. 41-1, 3), but then substantively argues only "collateral estoppel." (Doc. 41-1, 9.) As set out below, neither is applicable. Furthermore, to avoid confusion, this brief refers to issue preclusion and claim preclusion wherever possible.

Pictures Corp., 31 N.Y.3d at 72. Or, as set out by the Second Circuit when applying New York law,

> (1) the issues of both proceedings must be identical, (2) the relevant issues must have been *actually litigated* and decided in the prior proceeding, (3) there must have been full and fair opportunity for the litigation of the issues in the prior proceeding, and (4) the issues must have been necessary to support a valid and final judgment on the merits.

Leather, 180 F.3d at 426 (internal quotation omitted).

"The burden [] is 'on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose *was actually decided in the first proceeding*.'" *Id.* (internal quotation omitted.)[2] "Issue preclusion will apply only if it is quite clear that these requirements have been satisfied, lest a party be precluded from obtaining at least one full hearing on his or her claim." *Colon*, 58 F.3d at 869 (internal quotation omitted).

A. The Issues Presented Here Are Not Identical with Those Litigated in the Prior Proceeding

Under the first element of the test, the issues "must be *identical*." *Leather*, 180 F.3d at 426. Such "[i]dentity of issues" exists when "the legal theory in both actions is the same and [] there are no significant factual differences between them." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 457 (N.Y. 1985). By contrast, issues are "discrete and not identical" if they rely on identical facts but present a different legal theory. *Sneddon v. Koeppel Nissan, Inc.*, 46 A.D.3d 869, 870-71 (2d Dept. 2007). "If a new context changes the legal analysis, then the issue may not be sufficiently 'identical' to bind a party to a decision in the prior action." *Mahmood v. Research in Motion Ltd.*, 905 F. Supp. 2d 498, 502 (S.D.N.Y. 2012), *aff'd by* 515 F. App'x 891 (Fed. Cir. 2013) (unpublished).

Cornell's argument that "there is no serious dispute that both the tenure denial and the misconduct determination were directly challenged in Vengalattore's unsuccessful Article 78

[2] "The party asserting issue preclusion bears the burden of showing that the identical issue was previously decided, the party against whom the doctrine is asserted bears the burden of showing the absence of a full and fair opportunity to litigate in the prior proceeding." *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995).

proceeding" (Doc. 41-1, 9), is wrong. Indeed, Cornell never explains why it thinks Counts I-III rely on an "identical issue" actually resolved in the state court litigation. (*See* Doc. 41-1, 8.) [3]

The claims litigated and decided in the Article 78 proceeding, which was a challenge to Cornell's application of its tenure review process, involved very different issues from those presented here, which is a challenge to the constitutionality of the separate sexual misconduct investigation. The Article 78 proceeding challenged *only* the process used in his *tenure determination* and asked the court to order Cornell "to conduct a *de novo* review of Petitioner's tenure application." (Attachment D (Memorandum of Law), 37.)[4] The claim was "whether Cornell and its agents failed to substantially comply with Cornell's rules, or exercised their discretion under the rules in an arbitrary and capricious manner" in their "tenure review." (Attachment D, 4.)

To be sure, Dr. Vengalattore also sought expungement of Cornell's preliminary "findings that [Dr. Vengalattore] engaged in a romantic or sexual relationship" "because such finding was made in violation of University policy." (Attachment D, 49.) Cornell, for its part, argued that it had followed its applicable policies. (Attachment D, 50.) But neither party addressed whether the preliminary findings had resulted either from a disciplinary process pervaded by gender or racial bias, had violated constitutional due process guarantees, or was defamatory. (*See id.*).

Justice Rich decided only Dr. Vengalattore's first claim and vacated the "previous tenure determination" and returned the matter "to Cornell University for a de novo tenure review order." (Attachment E (Decision and Order), 6.) He held Cornell's "*tenure determination*" process was

[3] Cornell apparently raises its preclusion claim *only* against Counts I-III, as it makes no argument at all that Count IV is also "based upon" the defects in the process used in the disciplinary proceeding. (*See* Doc. 41-1.) As it is Cornell's burden to prove preclusion, this lack of argument decides the issue. *See Colon*, 58 F.3d at 869.

[4] Cornell has omitted relevant pleadings and the Supreme Court's initial decision, which are relevant to the preclusion issue. (Attachment D, E.) Dr. Vengalattore has attested to the accuracy of these omitted but essential documents. (Attachment B, ¶¶ 4, 7-8.)

"flawed, secretive, [and] unfair," such that it "violated Professor Vengalattore's due process rights to such an extent as to be arbitrary and capricious." (Attachment E, 5 (emphasis added).)

Concerning the sexual misconduct allegation, Justice Rich noted that "Dean Ritter withheld imposition of sanctions pending the outcome of the tenure appeal," but opined that Dr. Vengalattore would be "entitled to due process and a hearing on the matter, which would establish the facts and either clear him or lead to sanctions against him." (Attachment E, 3, 4.) The court did not rule on expungement because only the tenure review process had been at issue, and the court ordered Cornell to disregard the accusation in the tenure review process. (Attachment E, 4.)

Lest there be any confusion about what had been decided, Dr. Vengalattore moved to clarify or amend the court's order concerning his request for expungement.

The motion was denied on January 24, 2017 because "Justice Rich's November 23, 2016 Decision granted the request for the de novo tenure review and outlined a procedure to be followed" but "did not specifically expunge the October 6, 2015 finding." (Doc. 40-1, 1.) The court said, "In review of the record as well as the Decision, it is clear that Justice Rich had a full opportunity to review the Petitioner's tenure process as well as the Workplace Policy and Labor Relations investigation and its findings. The Court fashioned a remedy that opens the Petitioner's dossier for new and appropriate submissions and made a specific exclusion of a particular letter. The Court chose not to apply one of the remedies directly requested." (Doc. 40-1, 2.)

Only *after* the trial court made clear that it had not ruled on the disciplinary investigation did Cornell issue the sanctions that are at issue in this case. On February 6, 2017, Dean Ritter sent a letter informing Dr. Vengalattore that his "internal [tenure] appeal has concluded," and that "it [wa]s time to follow through o[n] [her] earlier commitment to impose additional sanctions," based on her October 6, 2015, findings. (Doc. 31, ¶ 637.) Dean Ritter imposed a sanction of "suspension without pay for a period of two weeks," effective June 1, 2017. (Doc. 31, ¶ 638.)

Meanwhile Cornell appealed the *tenure decision* and on March 30, 2018, the Third Department reversed the lower court and ruled that Cornell had not acted arbitrarily or capriciously during the tenure process. The court held: "Supreme Court erred in annulling the University's determination to deny petitioner tenure." (Doc. 40-14, 7.) The Court said, "[N]either the sexual misconduct allegations raised by the graduate student nor her May 2014 letter improperly influenced the tenure decision." (Doc. 40-14, 7.) But "the parties remaining contentions [we]re academic." (Doc. 40-14, 8.)

The only issue *decided* by the New York Courts was whether the tenure review process was arbitrary and capricious. And the only issues *presented* to the New York Courts were whether either the tenure review process or the preliminary sexual misconduct determination had been "made in violation of University policy." (Attachment D, 50.) The latter question was never decided as the courts determined the tenure process had complied with New York procedural law. (Doc. 40-14, 7.)

Counts I-III do not, in any way, depend on whether the tenure review process was "arbitrary and capricious," which was the sole issue decided in the prior litigation. Count I alleges that "Cornell discriminated against Plaintiff Dr. Vengalattore because of his sex" in the unfair disciplinary process, applying its policies and procedures in a gender-biased manner that "suggest that gender bias was a motivating factor in the erroneous outcome" of the investigation. (Doc. 31, ¶¶ 663, 668, 670.) This claim was never presented to the state court, nor did the courts address discrimination in any way.

Count II alleges that Cornell discriminated against Dr. Vengalattore based on his race "by applying an unfair, unreliable and partial process against him in resolving Roe's complaints against him" and by applying "its policies and procedures in a racially-biased manner." (Doc. 31, ¶¶ 686, 691, 693.) Racial bias was never at issue in the state court proceedings, and plainly is not "identical" with the tenure issue already decided.

Finally, Count III raises a federal constitutional claim based on Cornell's use of "a flawed investigation that failed to comport with the basics of due process." (Doc. 31, ¶ 718.) And while this

claim relies, in part, on the fact that the inadequate investigation resulted in Dean Ritter's "false" findings, it involves protections provided by the Fourteenth Amendment to the U.S. Constitution not provisions of New York state law. (*See* Doc. 31, ¶¶ 699, 713.) This constitutional claim was never at issue in the prior proceeding.

To be sure, Counts I-III rely, in part, on Cornell's failure to follow any kind of fair procedure in its *disciplinary* process against Dr. Vengalattore, but those specific claims rely on distinct violations never presented before in the state court discussion of the *tenure* process. The only issue decided by the state court was whether the "tenure decision" was arbitrary and capricious. (Doc. 40-14, 7.) The *only* similar issue—that Cornell's sexual misconduct determination had been "made in violation of University policy"—was never decided. (*See* Attachment D, 50; Doc. 40-14, 7.). Contrary to Cornell's insistence that the "three statutory counts are premised on … Cornell's May 2016 decision to deny Vengalattore tenure," (Doc. 41-1, 1), *none* of those claims relies in any way on the validity of the tenure decision. (*See* Doc. 31, ¶¶ 658-721.)[5]

B. The Issues Presented Here Were Not Actually Decided Before

"For preclusion purposes, an issue is actually litigated when 'properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" *Kret v. Brookdale Hosp. Med. Ctr.*, 93 A.D.2d 449, 458 (2d Dept. 1983), *aff'd by* 61 N.Y.2d 861 (N.Y. 1984) (quoting Restatement, Judgments 2d, § 27, comment d). Issue preclusion requires that the issue had "*been necessarily decided* in the prior proceeding." *Id.* at 455. As the U.S. Supreme Court has explained, preclusion rests only on prior "decisions, not [] failures to decide." *Bravo-Fernandez v. United States*, 137 S.Ct. 352, 360 (2016).

Even *if* the broad issue of the disciplinary proceeding's fairness were "identical" to the much narrower claims presented here, that issue was not litigated and determined by the state courts. Dr.

[5] The correctness of the tenure decision is nowhere raised in this action.

Vengalattore *asked* Justice Rich to expunge the preliminary "findings that [Dr. Vengalattore] engaged in a romantic or sexual relationship" "because such finding was made in violation of University policy" (Attachment D, 49), and Justice Rich declined to rule on the expungement request. Supreme Court issued a clarifying order noting Justice Rich did not order expungement because he had ordered a new tenure review with the "exclusion of a particular letter" referencing the alleged sexual misconduct. (Doc. 40-1, 2.) The Appellate Division did not address this issue either, calling it "academic" in light of its decision concerning the "tenure decision." (Doc. 40-14, 8.) Because the only issue actually "determined' by the state courts was the "tenure decision" and the unfairness of the disciplinary process was not "actually litigated," this issue cannot be precluded.[6]

C. Dr. Vengalattore Never Had a Full and Fair Opportunity to Challenge the Constitutionality of the Disciplinary Proceeding

Finally, "the party against whom the doctrine is asserted" must have "had a full and fair opportunity to litigate the issue in the first proceeding." *Colon*, 58 F.3d at 869, 871.

The Second Circuit has said that "there is a substantial question as to whether, under New York law, collateral estoppel should ever apply to fact issues determined" in a prior administrative hearing and "reviewed for substantial evidence in an Article 78 proceeding." *Id.* at 870. This is because certain administrative proceedings, like prison disciplinary hearings, suffer from "procedural laxity" that makes their determinations unreliable. *Id.* And the state courts only review the factual determinations with a deferential "substantial-evidence review." *Id.* Furthermore, a litigant has been denied the "opportunity to litigate his claim fully and fairly before a neutral arbitrator" if the original administrative proceeding occurs before a biased hearing officer. *Id.* at 871.

[6] Cornell's only effort to avoid this conclusion is its inaccurate assertion that "there is no serious dispute that both the tenure denial and the misconduct determination were directly challenged in Vengalattore's unsuccessful Article 78 proceeding, and those challenges were necessarily decided—*all in Cornell's favor*." (Doc. 41-1, at 9.) That statement is not faithful to the opinions of the state courts. The validity of the "misconduct determination" was never decided by any court.

Even if Cornell had carried its burden of showing it "is quite clear" that his claims are precluded, because Dr. Vengalattore never had a full and fair opportunity to challenge the process used by Cornell, his claims should be allowed here. *See id.* at 869. The Article 78 proceeding was a highly deferential review of Cornell's tenure decision. The applicable law required the court to be "extremely reluctant to invade or sanction invasion of the province of academic authorities," and "circumscribe[d]" its review "to whether the university failed to substantially comply with its internal rules and whether its decision was arbitrary or capricious or made in bad faith." (Doc. 40-14, at 4 (citing *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 658, 660 (N.Y. 1980), *Matter of Chu v. Jones*, 151 A.D.3d 1341, 1342 (3d Dept. 2017)). The Court was required to accord "[d]eference" to the "university's discretion," and "not substitute its judgment for that of a university." *Id.* (internal quotation omitted). New York courts are also required to uphold administrative determinations in Article 78 proceedings if there is merely a "rational basis" for the decision. *N.Y. Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (N.Y. 1991). Factual determinations can only be reviewed for the existence of "substantial evidence to support the finding," even if the record would "have supported a contrary conclusion." *Acosta v. Wollett*, 55 N.Y.2d 761, 762-63 (N.Y. 1981).

Constrained by these limits, Dr. Vengalattore never had a full and fair opportunity to assess the constitutionality of the underlying disciplinary process, even had he tried to litigate it. The Article 78 proceeding only reached Cornell's *tenure* decision, and even then, under such a deferential standard as to deny him any meaningful review. Given the "procedural laxity" of the underlying determination, the deferential review, and the bias of the original decisionmakers, just as the court in *Colon* recognized, Dr. Vengalattore lacked a "full and fair opportunity" to present *any* claim in the Article 78 proceeding that precludes the claims here. *See* 58 F.3d at 870-71.[7]

[7] In the course of making its argument, Cornell says Dr. Vengalattore "was represented by counsel throughout the [disciplinary] process." (Doc. 41-1, at 4.) This is false. (Attachment B, ¶ 33.)

III. DR. VENGALATTORE'S FEDERAL CLAIMS SHOULD NOT HAVE BEEN BROUGHT IN STATE COURT

Cornell next argues that Dr. Vengalattore is barred from raising his current claims because proceedings under New York "Article 78 [are] the only proper vehicle for such academic and disciplinary challenges" even if they raise federal discrimination claims. (Doc. 41-1, 10.) In support, Cornell cites *Purcell v. N.Y. Inst. of Tech.*, No. 16-cv-3555, 2017 WL 9485684, at *7-8 (E.D. N.Y. Aug. 4, 2017), claiming that Article 78 is the exclusive forum for these federal claims. (Doc. 41-1, 10.)

This argument was rejected by the Second Circuit, which reversed the district court in *Purcell* just days after Cornell filed its motion. As the Court said,

> [T]he court below held [that] the exclusive remedy for Purcell's alleged wrongs was an Article 78 Proceeding brought in New York state court.
>
> Respectfully, this was error. Purcell has raised federal claims in federal court. Absent a plain indication to the contrary we presume that the application of a federal act is not dependent on state law. … However strongly New York may feel about the need to defer to academic decision-making, and however justified its decision to funnel all related state claims into Article 78 proceedings may be, New York cannot nullify a federal right or cause of action it believes is inconsistent with its local policies.

Purcell v. N.Y. Inst. of Tech., 931 F.3d 59, 64 (2d Cir. 2019).

The Second Circuit's holding is fatal to Cornell's argument. This federal court is the proper place for Dr. Vengalattore to bring his federal claims.

IV. DR. VENGALATTORE HAS STANDING TO CHALLENGE THE DISCIPLINARY PROCESS CORNELL USED AGAINST HIM

Cornell next argues that Dr. Vengalattore lacks standing to challenge the disciplinary process because there is no "justiciable case or controversy under Article III" related to Dr. Vengalattore's "claims premised on the University's purported mishandling of a 'Policy 6.4 investigation.'" (Doc. 41-1, 11-12.) It seems that Cornell has a factual dispute about whether it applied its Policy 6.4 to Dr. Vengalattore at all, rather than some other internal policy. (Doc. 41-1, 11.) And, according to

Cornell, "Because Vengalattore was not investigated or disciplined under Policy 6.4, no justiciable controversy exists." (Doc. 41-1, 12.)

Cornell's argument is perplexing. Whether it adhered to its unfair Policy 6.4, or simply disregarded that policy entirely in favor of a different and even more unfair policy, has no bearing at all on whether its conduct violated federal antidiscrimination laws, constitutional limits or resulted in a defamatory finding. (*See* Doc. 31, ¶¶ 658-733.) It is of no moment how Cornell describes the process. Each of these four claims alleges that Cornell deviated from its written policies in a discriminatory way. (*See* Doc. 31, ¶¶ 670, 693.) While it is certainly ironic that Cornell's "Title IX Policy" (Policy 6.4) also happened to *violate* Title IX because it discriminated against Dr. Vengalattore, what description Cornell chooses to use is utterly irrelevant to his discrimination and constitutional claims. *Whatever* policy Cornell used, Dr. Vengalattore has standing to claim discrimination and due process violations.[8]

V. DR. VENGALATTORE HAS STATED VIABLE CLAIMS UNDER TITLE IX, TITLE VI, THE FOURTEENTH AMENDMENT AND NEW YORK LAW

A. Cornell Violated Title IX Through Its Gender-Biased Disciplinary Process

1. Title IX Claims May Be Brought Separately from Title VII Claims

Title IX provides that "[n]o person in the United States shall, on the basis of sex … be subjected to discrimination under any education program or activity receiving Federal financial

[8] Cornell's argument also improperly relies on a factual dispute that, even if this argument were meritorious, would preclude a ruling at this stage of the proceeding. Dr. Vengalattore has alleged Cornell proceeded on Policy 6.4, and Cornell disagrees. (*Compare* Doc. 31, ¶ 577 ("In the report, the investigators premised their authority to conduct the investigation on Cornell's 'Romantic and Sexual Relationships Between Students and Staff' policy, set forth in the Cornell University Faculty Handbook, effective September 18, 1996, and Policy 6.4.") *with* Doc. 41-1, 11 ("Vengalattore was not investigated or disciplined under Policy 6.4.").) Cornell also did not follow the other policy it claims was applicable, so Cornell's factual argument rests on shaky ground. (*See* Doc. 31, ¶ 670 ("The investigators refused to follow the more protective procedures set out in the Faculty Handbook and the Campus Bylaws while investigating Plaintiff Dr. Vengalattore for allegedly violating the romantic and sexual relationships policy[.]").)

assistance." 20 U.S.C. § 1681(a). Title IX further prohibits any covered entity from discriminating "in employment … whether full-time or part-time" "on the basis of sex." 34 C.F.R. § 106.51(a)(1).

Title IX's "broad directive" that no "person" may be discriminated against based on sex encompasses "employees as well as students." *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 520 (1982). Because § 1681(a) "neither expressly nor impliedly excludes employees from its reach," a court must interpret it as "covering and protecting these 'persons,'" for Congress easily could have substituted "'student' or 'beneficiary' for the word 'person' if it had wished to restrict" § 1681(a)'s scope. *Id.* at 521. Thus, Title IX may certainly be *enforced* by the Department of Education for discrimination against employees. *Id.*

Title VII, by contrast, makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2.

"Title VII, however, is a vastly different statute from Title IX[.]" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). "Title IX is a broadly written general prohibition on discrimination" with an "implied" cause of action, while "Title VII spells out in greater detail the conduct that constitutes discrimination in violation of" the "express" cause of action. *Id.*

The Supreme Court has therefore allowed a high school "employee" to pursue a private Title IX retaliation claim, because, if funding recipients were "permitted to retaliate freely," "individuals" who witness sex discrimination would be "loath to report it" and "all manner of Title IX violations might go unremedied." *Id.* at 171, 180. Despite Title VII's "range" and "design as a comprehensive solution" for "invidious discrimination in employment," a private-sector employee "clearly is not deprived of other remedies" and is not "limited to Title VII in his search for relief." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975).

The First, Third, Fourth and Sixth Circuits have all expressly held that Title IX and Title VII have concurrent applicability and that Title VII does not displace Title IX employment discrimination claims. *See Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 563 (3d Cir. 2017); *Ivan v. Kent St. Univ.*, 92 F.3d 1185 (table), 1996 WL 422496, at *3 n. 10 (6th Cir. 1996) (unpublished); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 205-06 (4th Cir. 1994); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988). This follows from "four guiding principles." *Doe*, 850 F.3d at 562. "*First* private-sector employees aren't 'limited to Title VII' in their search for relief from workplace discrimination." *Id.* (quoting *Johnson*, 421 U.S. at 459). "*Second* it is a matter of 'policy' left for Congress's constitutional purview whether an alternative avenue of relief from employment discrimination might undesirably allow circumvention of Title VII's administrative requirements." *Id.* "*Third* the provision implying Title IX's private cause of action, 20 U.S.C. § 1681(a), encompasses employees, not just students[.]" *Id.* (citing *North Haven*, 456 U.S. at 520). "*Fourth* Title IX's implied private cause of action extends explicitly to *employees* of federally-funded education programs who allege sex-based *retaliation* claims under Title IX." *Id.* (citing *Jackson*, 544 U.S. at 171).

The Second Circuit has also strongly implied its agreement with these decisions. While ultimately reserving the "issue of whether there is a private right of action for employment discrimination under Title IX," the court in *Summa v. Hofstra Univ.*, 708 F.3d 115, 131, 131 n. 1 (2d Cir. 2013) took care to recognize "that the First and Fourth Circuits have recognized such a right of action" and "that the U.S. Department of Justice recognizes such a cause of action." Indeed, *Summa* cited a district court opinion, *Henschke v. New York Hosp.-Cornell Med. Ctr.*, 821 F. Supp. 166, 172 (S.D. N.Y. 1993) (Preska, J.), to support the DOJ's position on this score. *See id.* Other district courts in this Circuit have allowed private rights of action by an employee under Title IX. *See, e.g.*, *Pejovic v. State Univ. of New York at Albany*, No. 117-cv-1092, 2018 WL 3614169, at *3 (N.D. N.Y. July 26, 2018) (McAvoy, J.); *Kohlhausen v. SUNY Rockland Cmty. Coll.*, No. 7:10–cv–3168, 2011 WL

1404934, *9 (S.D. N.Y. Feb.9, 2011); *AB v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144, 153 (S.D. N.Y. 2004) (Robinson, J.) (collecting cases). The great weight of authority therefore permits an employee to file a private right of action against his employer under Title IX.

In response Cornell relies on five district court opinions that have concluded that "no private right of action exists under Title IX for claims of employment discrimination." (Doc. 41-1 at 14 (citing *Philpott v. New York*, 252 F. Supp. 3d 313, 318 (S.D. N.Y. 2017) (Hellerstein, J.); *Carter v. City of Syracuse Sch. Dist.*, No. 5:10-cv-690, 2012 WL 930798, at *4 (N.D. N.Y. Mar. 19, 2012) (Scullin, J.), *vacated in part by* 656 F. App'x 566 (2d Cir. 2016) (unpublished); *Gardner v. St. Bonaventure Univ.*, 171 F. Supp. 2d 118, 126 (W.D. N.Y. 2001) (Arcara, J.); *George v. Liverpool Cent. Sch. Dist.*, No. 97-cv-1232, 2000 WL 1499342, *13 (N.D. N.Y. Sept. 29, 2000) (Mordue, J.); *Burrell v. City Univ. of New York*, 995 F. Supp. 398, 408 (S.D. N.Y. 1998) (Sweet, J.)).) Cornell urges this Court to follow these district court opinions instead of the majority of the Circuit Courts who have weighed in on this controversy. (Doc. 41-1 at 14.)

As Cornell argues, these decisions stand for the proposition that a person raising a Title IX claim "seeks to bypass the congressionally-established Title VII remedial processes, and avoid the consequences of his failure to timely assert an employment discrimination claim pursuant to those processes." (Doc. 41-1 at 14.). This language appears to come from a decision from the Fifth Circuit, which is one of the only Circuit Courts to conclude that Title VII provides the "exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *See Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995). According to these courts, allowing any private Title IX claim to proceed would "disrupt" Title VII's "carefully balanced remedial scheme for redressing employment discrimination." *Id.* at 754.

But as the Third Circuit recently held, that line of argument does not withstand scrutiny. *See Doe*, 850 F.3d at 562. The Supreme Court has long held that Title IX's "broad directive" that no

"person" may be discriminated against based on sex encompasses "employees as well as students" notwithstanding "policy" arguments that the scope of the protection might be too broad. *See North Haven*, 456 U.S. at 520. The authority Cornell relies on "did not address the Supreme Court's decisions … rejecting 'policy'-based rationales" about what Congress *ought* to have meant by enacting Title IX. *Doe*, 850 F.3d at 563. Furthermore, that line of argument arose "a decade before the Supreme Court handed down *Jackson*, which explicitly recognized an employee's private claim." *Id.* Given the Supreme Court's apparent acceptance of an employee's Title IX claim in that case, "the continued viability of *Lakoski*" and related authority is in "question." *Id.* After all, the Court has long insisted that "private-sector employees aren't 'limited to Title VII' in their search for relief from workplace discrimination." *Id.* (quoting *Johnson*, 421 U.S. at 459). Thus, a private right of action under Title IX is consistent with Supreme Court precedent.

2. Dr. Vengalattore Need Not Have Exhausted Any Remedies Under Title IX

Cornell next wrongly asserts that Dr. Vengalattore failed to "exhaust all administrative remedies" prior to filing his Title IX claim, which it thinks "is an independent bar to his claim." (Doc. 41-1, 15.) Title IX has no exhaustion requirement, and thus this argument is irrelevant. In any event, Dr. Vengalattore *did* exhaust available remedies, and Cornell's factual disagreement cannot be resolved at this stage of the case.

"[R]equirements of administrative issue exhaustion are largely creatures of statute." *Sims v. Apfel*, 530 U.S. 103, 107 (2000). "Title IX has no administrative exhaustion requirement and no notice provisions. Under its implied private right of action, plaintiffs can file directly in court, … and can obtain the full range of remedies[.]" *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009); *see also Summa*, 708 F.3d at 131 ("Title VII provides an administrative procedure by which an individual claiming harassment or retaliation must first pursue administrative remedies before the EEOC prior to seeking judicial relief … while Title IX does not.")

Dr. Vengalattore is not required to exhaust *any* remedies prior to bringing his Title IX claim. Because the right of action is implied rather than statutory, Dr. Vengalattore had no administrative prerequisites to filing in this Court. *See Fitzgerald*, 555 U.S. at 255.

The authority Cornell relies on is irrelevant. Noting that some "claims of discriminatory practices" require administrative exhaustion prior to being filed. (Doc. 41-1 at 15 (quoting *Gertler v. Goodgold*, 107 A.D.2d 481, 489 (1st Dept. 1985) and citing *Matter of Postol v. St. Joseph's Coll.*, 8 A.D.3d 289, 290 (2d Dept. 2004))), Cornell conveniently omits the fact that this line of authority refers to breach of contract claims, which had contractual requirements of exhaustion. *See Postol*, 8.A.D.3d at 290 (professor was "contractually bound" to exhaust grievances prior to seeking court review of tenure decision); *Gertler*, 107 A.D.2d at 483, 489 ("breach of contract" complaint going to "internal decision of the university" was barred for failure to exhaust). These decisions have no bearing on these federal claims.

In any event, Dr. Vengalattore *did* exhaust his available remedies. Cornell asserts as a factual matter that Dr. Vengalattore was required by "[u]niversity bylaws (currently Article XVII, Section 10)" to appeal his discipline under "grievance procedures" that it suggests were available to him. (Doc. 41-1, 15 n. 6.) Cornell "refused to follow the more protective procedures set out in the Faculty Handbook and the Campus Bylaws while investigating Plaintiff Dr. Vengalattore" and refused to comply with "Article XVI, Section 10, of the Cornell University Bylaws" in imposing discipline. (Doc. 31, ¶¶ 641, 669, 670, 693.) Dr. Vengalattore has also affirmed that he "was prohibited from using Defendant Cornell's grievance process applicable to faculty to appeal or in any way challenge the investigators' report or Dean Ritter's findings and sanctions." (Attachment B, ¶ 15.) Thus, even if exhaustion were at issue, then it would rely on a factual dispute that cannot be resolved at this stage of the proceedings.

B. Dr. Vengalattore Has Alleged Violations of Title VI

1. Cornell Received Federal Funding with a Primary Objective of Providing Employment

Cornell attacks Dr. Vengalattore's Title VI claim because it thinks that "he has failed to adequately plead that Cornell was a recipient of federal funds aimed *primarily* at funding employment." (Doc. 41-1, 16.) Cornell is wrong because the pleading is sufficient and Cornell merely disagrees with the facts alleged.

Title VI limits claims for discrimination to recipients of federal funding "where a primary objective of the Federal financial assistance is to provide employment[.]" 42 U.S.C. § 2000d-3. "[F]or a claimant to recover under Title VI against an employer for discriminatory employment practices, a threshold requirement is that the employer be the recipient of federal funds aimed primarily at providing employment." *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 276 (2d Cir. 1981).

This standard requires that the federal funds at issue have "*a* primary purpose" of providing some form of employment and there be a "logical nexus between the use of federal funds and the practice toward which [a plaintiff's] lawsuit" is directed." *Id.* 276-77 (emphasis added). However, "[t]he statute is clear that this objective need not be exclusive; providing employment need only be a primary goal." *Rogers v. Bd. of Educ. of Prince George's Cty.*, 859 F. Supp. 2d 742, 751 (D. Md. 2012) (citing *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 421 (4th Cir. 2005).) "[T]here is no requirement that a plaintiff plead that he was an intended beneficiary of the federally-funded program in which defendants are alleged to have participated." *Grimes v. Superior Home Health Care of Middle Tenn., Inc.*, 929 F.Supp. 1088, 1092 (M.D. Tenn. 1996) (internal citation omitted). The statute only requires that federal funding serve *a* purpose of providing *some* employment, not only the *plaintiff's* employment. *See Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 674-75 (8th Cir. 1980) ("[I]n [private] suits

charging employment discrimination under title VI, *one* of the purposes of the federal financial assistance must be to provide employment.") (emphasis added).

Thus, it is sufficient for pleading purposes that a plaintiff allege that the federal funding at issue was "for the express purpose of creating jobs and maintaining existing ones." *Rogers*, 859 F.Supp.2d at 752. A plaintiff merely needs to allege that federal funds "were provided for the purpose of facilitating employment" to "adequately ple[a]d facts to support [a] Title VI claim." *Sims v. Unified Gov't of Wyandotte Cnty./Kansas City*, 120 F.Supp.2d 938, 956 (D. Kan. 2000). "Moreover, the vast majority of courts faced with the issue of whether an entity receives federal financial assistance within the meaning of the civil rights laws have concluded that the resolution of the issue requires inquiry into factual matters outside the complaint and, accordingly, is a matter better suited for resolution after both sides have conducted discovery on the issue." *Id.* at 955.

Here, Dr. Vengalattore has adequately pled that Cornell received funding with a primary purpose of providing employment. Most critically, at this early stage of the case before any discovery has been conducted, Dr. Vengalattore has alleged, "At all relevant times herein, Defendant Cornell received significant amounts of federal funding aimed primarily at providing employment." (Doc. 31, ¶ 677.) Moreover, he alleged, "At all relevant times herein, Defendant Cornell received significant amounts of federal funding whose purpose was to create jobs and maintain[] existing ones at the university," and "At all relevant times herein, Defendant Cornell received significant amounts of federal funding aimed at expanding job opportunities at the university and elsewhere." (Doc. 31, ¶¶ 678-79.) These allegations, by themselves, suffice to plead this element of a Title VI claim. Indeed, this very language has been held to state the required facts. *See Rogers*, 859 F.Supp.2d at 752 (plaintiff sufficiently pled federal funding at issue was "for the express purpose of creating jobs and maintaining existing ones"); *Sims*, 120 F.Supp.2d at 956 (plaintiff sufficiently pled that federal funds "were provided for the purpose of facilitating employment").

While these allegations would suffice, particularly where Dr. Vengalattore has had no opportunity to investigate Cornell's receipt and use of federal funding, the Amended Complaint provides much more additional support. Dr. Vengalattore provided numerous "[e]xamples" of "federal funding given to Defendant Cornell for the purpose of providing employment" and "federal funding given to Defendant Cornell for the purpose of providing employment to Plaintiff Dr. Vengalattore and his team." (Doc. 31, ¶ 680.) Dr. Vengalattore has pointed to more than $4.5 million in federal funding to the University specifically designed "to cultivate the next generation of highly trained US graduate students who meet the growing needs of biotechnology employers," "to increase the size of the science, technology, engineering and mathematics (STEM) workforce" for "women, Blacks and Hispanics," to help eliminate "large gender differences in occupational retention among STEM graduates in early career," to improve "training opportunities" and employment for students studying STEM fields, and to "improve 'vocational' opportunities for 'people of all ages with physical and mental disabilities.'" (Doc. 31, ¶ 680.) And with respect to Dr. Vengalattore specifically, Cornell received nearly $6.5 million in federal funding "to conduct his research and employ appropriate staff to do so." (Doc. 31, ¶ 682.) Cornell does not dispute this, and has even provided documents related to some of those grants, showing that Dr. Vengalattore was given federal awards providing wages and salaries for multiple graduate students (Docs. 40-37, 40-38, 40-39), and received a total of $843,114 from a different federal award to fund salaries necessary to his work (Doc. 40-40).

In response, Cornell ignores the direct allegations that it "received significant amounts of federal funding aimed primarily at providing employment," "received significant amounts of federal funding whose purpose was to create jobs and maintain[] existing ones at the university," and "received significant amounts of federal funding aimed at expanding job opportunities at the university and elsewhere," and simply quibbles, *factually*, with what it believes to be the true purpose

of the illustrative examples of federal funding listed by Dr. Vengalattore. (*See* Doc. 41-1, 17.) With respect to the "[e]xamples" of "federal funding given to Defendant Cornell for the purpose of providing employment," Cornell argues that these funds "were intended to bolster Cornell's *educational offerings and programs* in particular ways, which in turn would make graduates of those programs more competitive in the marketplace *after they graduate*." (Doc. 41-1, 17.) Cornell also asserts that these examples cannot suffice because they "amount to less than one tenth of one percent of the operating revenues Cornell receives each year." (Doc. 41-1 at 17.)

Cornell's arguments are misplaced because they boil down to a factual dispute about what it does with federal funds and how significant those funds are to the University. While Cornell seems to disagree that the more than $4.5 million dollars in federal funding it received generally, or the more than $6.5 million dollars in grants Dr. Vengalattore received were *really* "for the purpose of providing employment" by improving "training opportunities" "employment," and "vocational opportunities" as alleged in the Amended Complaint (Doc. 31, ¶¶ 677-82), that factual dispute means that this Court cannot grant summary judgment, particularly without the benefit of discovery. *See Hellstrom*, 201 F.3d at 97.

In any event, the legal standard argued by Cornell is incorrect. Cornell's argument is premised on the view that federal funding cannot have a primary purpose of providing employment if the funding serves other purposes or is a small part of the University's total budget. (Doc. 41-1, 17.) "The statute is clear that this objective need not be exclusive; providing employment need only be a primary goal." *Rogers*, 859 F. Supp. 2d at 751. Thus, even if federal funding was mostly intended for a different purpose, it would meet the statutory requirement if it also served a separate purpose of funding employment. *See id.* at 745, 753 (federal funding of a total of $100 million had primary purpose of both "increasing student achievement" and, with respect to $6 million, "provid[ing]

employment"). The examples listed by Dr. Vengalattore therefore indicate a sufficient employment purpose to satisfy the statutory requirement.

2. Dr. Vengalattore Has Sufficiently Alleged Discriminatory Intent in the Disciplinary Proceeding

Dr. Vengalattore has adequately alleged that he suffered racial discrimination at the hands of an agent of Cornell university. Cornell argues that he "failed to adequately plead that any decisionmaker at Cornell was influenced by his national origin when those decisionmakers took the employment actions Vengalattore now seeks to challenge in this case." (Doc. 41-1, 16.) But Cornell ignores the fact that the decisionmakers were aware of, and did nothing to refute, discriminatory conduct by their agents prior to making their determination.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. In order to make out a claim under this statute, a "plaintiff must show, inter alia, that the defendant discriminated against him on the basis of race, that that discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions." *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001) (internal quotation omitted). Under Title VI, "an actionable 'discriminatory purpose … implies more than intent as volition or intent as awareness of consequences … [it] implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.' " *Clyburn v. Shields*, 33 Fed. Appx. 552, 555 (2d Cir. 2002) (unpublished) (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979)).

"[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts[.]" *Washington v. Davis*, 426 U.S. 229, 242 (1976). Discriminatory intent may be proven

(among other ways) by departures from procedural norms, a history of discrimination against others similarly situated, or by circumstantial evidence, such as a pattern of conduct inexplicable on grounds other than race. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Discriminatory intent can also be shown by "the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge." *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 502-03 (2d Cir. 2009) (internal citation and quotation marks omitted).[9] Similarly, at least in the context of sex discrimination, the Second Circuit recently held: "(1) Where a university (a) takes an adverse employment action against an employee, (b) in response to allegations of sexual misconduct, (c) following a clearly irregular investigative or adjudicative process, (d) amid criticism for reacting inadequately to allegations of sexual misconduct by members of one sex, these circumstances support a prima facie case of sex discrimination." *Menaker v. Hofstra Univ.*, --- F.3d ----, 2019 WL 3819631, at *12 (2d Cir. Aug. 15, 2019).

Discriminatory intent of subordinates may also be imputed to ultimate decisionmakers. *Id.* Under a "cat's paw" theory, "the *intent* of the agent is imputed to the employer" who "ultimately accomplishes or effects the adverse employment action." *Id.* at *10.[10] "In other words, the agent manipulates an employer into acting as a mere conduit for his discriminatory intent." *Id.* (internal

[9] *Leibowitz* was a Title VII case, but courts have traditionally used the analysis for intentional discrimination interchangeably between Titles VI, VII and IX. *See, e.g.*, *Fitzgerald*, 555 U.S. at 258 ("Congress modeled Title IX after Title VI of the Civil Rights Act of 1964 and passed Title IX with the explicit understanding that it would be interpreted as Title VI was."); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994) ("courts have interpreted Title IX by looking to the body of law developed under Title VI, as well as the caselaw interpreting Title VII").

[10] "The term 'cat's paw' derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Judge Posner in 1990." *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011).

quotation omitted). Liability exists "where the employer was negligent because it acted at the agent's behest when it knew or should have known of the agent's discriminatory motivation." *Id.* Courts have recognized, therefore, that an alleged harasser may influence an employer's decision to fire an employee, see *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1565 (11th Cir. 1987), or that an employer may fail to conduct an independent investigation and thereby act as a conduit for the harasser's discriminatory intent, see *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996).

Here, Dr. Vengalattore has alleged facts supporting Cornell's discriminatory intent both through its violation of procedural norms and clearly irregular disciplinary process and through the decisionmakers' refusal to contradict the discriminatory language used by other employees and graduate students concerning Dr. Vengalattore during the investigation. Cornell deviated significantly from its required investigative process, refusing "to follow the more protective procedures set out in the Faculty Handbook and the Campus Bylaws," and "disregarded certain provisions of Policy 6.4." (Doc. 31, ¶ 693.) This by itself can raise an inference of discriminatory intent. *See Village of Arlington Heights*, 429 U.S. at 265-66; *Menaker*, 2019 WL 3819631, at *12. But more significantly, the *investigators* themselves displayed racial bias against Dr. Vengalattore by "[i]gnoring witness complaints that Roe had used inappropriate racial comments in the lab" "even after being directed to stop," and failed to investigate Roe or even adopt an adverse inference based on her discriminatory statements. (Doc. 31, ¶ 693.) And not only were these racially charged statements relayed to Dean Ritter, they followed a statement from a professor in Dr. Vengalattore's parallel tenure proceeding accepting allegations of unprofessional conduct because of the generalized perceptions about "men" from the "Indian sub-continent, where perhaps the culture between advisor and protégé is different." (Doc. 31, ¶ 693.) "Dean Ritter did not object to this racial characterization of Plaintiff Dr. Vengalattore and his students," and instead adopted the proposed findings of both the professor and the investigators, which had been built on a discriminatory

foundation. (Doc. 31, ¶ 693.) These criticisms "of the plaintiff's performance in ethnically degrading terms" certainly show discriminatory intent, *Leibowitz*, 584 F.3d at 502, and the ultimate decisionmakers "knew or should have known of the agent's discriminatory motivation" because it had been conveyed to them and they did nothing about it. *Menaker*, 2019 WL 3819631, at *10. Dr. Vengalattore has therefore adequately pled a Title VI violation.

Cornell's argument that "the Amended Complaint reveals no specific facts from which one can even begin to infer bias-motivated actions on the part of either of these decisionmakers" ignores the relevant law. (Doc. 41-1, 19.) Cornell acknowledges that a physics professor and Roe herself made racially biased comments about Dr. Vengalattore, which were conveyed to Dean Ritter and the provost, but tries to suggest that this bias should not be held against these decisionmakers. (Doc. 41-1, 19.) But because they "did not object to this racial characterization of Plaintiff Dr. Vengalattore and his students" (Doc. 31, ¶ 693), this bias is imputed to the decisionmakers. *Menaker*, 2019 WL 3819631, at *10. Moreover, Cornell's argument does not explain away its highly irregular rejection of its procedural norms that should have governed the investigation.

C. Cornell Is Liable Under Section 1983

1. Cornell Was a State Actor Because It Applied Its Unconstitutional Disciplinary Process at the Behest of the Department of Education

A § 1983 plaintiff must allege facts showing that each defendant acted under color of a state "statute, ordinance, regulation, custom or usage," 42 U.S.C. § 1983, and private parties, thus, are not generally liable under the statute. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838-42 (1982). Private activity can be attributed to the state, when, for example, the entity is controlled by the state (the "compulsion test"). *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012).

In determining whether a party is a state actor, the "ultimate issue" is whether "the alleged infringement of federal rights [is] fairly attributable to the State?" *Rendell-Baker*, 457 U.S. at 838.

(internal citation omitted). "What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001). It is a "necessarily fact-bound inquiry," *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982) "that requires more than what plaintiff can possibly plead absent discovery." *K.H. by Humphrey v. Antioch Unified Sch. Dist.*, 18-cv-07716, 2019 WL 2744721, at *5 (N.D. Cal. July 1, 2019).

The Supreme Court has recognized that a private school can be a state actor if it "is subject to governmental coercion or encouragement." *Brentwood Academy*, 531 U.S. at 295. And the Second Circuit has long acknowledged that this can take the form of a government forcing a private school to adopt a particular disciplinary process. *See Coleman v. Wagner Coll.*, 429 F.2d 1120, 1125 (2d Cir. 1970); *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968). Indeed, in *Coleman* the court considered whether a New York state statute "was intended to coerce colleges to adopt disciplinary codes embodying a hard-line attitude toward student protesters," and whether that would constitute state action. 429 F.2d at 1125 (internal quotation omitted). The court concluded that such coercion would qualify as state action such that the school "should be held responsible for the implementation of this policy," and remanded for further factfinding to determine if "New York ha[d] indeed undertaken to set policy for the control of demonstrations in all private universities." *Id.*

Dr. Vengalattore has adequately alleged that Cornell is a state actor because of coercion from the Department of Education in adopting the unfair disciplinary process it used against him. Without the benefit of any discovery, this is sufficient for this Court to deny Cornell's motion. Dr. Vengalattore explained that "[t]hrough the 2001 Guidance, the 2011 DCL and the 2014 Q & A, Defendant ED coerced Defendant Cornell to revise its campus disciplinary policies, and its policies for adjudicating faculty complaints." (Doc. 31, ¶ 703.) The Department "coerced" Cornell "to remove appropriate protections for fear of" "aggressive enforcement actions against schools who chose to provide procedural protections in campus disciplinary proceedings." (Doc. 31, ¶ 704.) This

led Cornell to amend its policy "to avoid an enforcement action by Defendant ED," even citing the "the 2011 DCL as a reason" for the change. (Doc. 31, ¶¶ 705-06.) Cornell "referenced the 2001 Guidance and the 2014 Q & A in justifying the investigatory methods it used against Plaintiff Dr. Vengalattore." (Doc. 31, ¶ 707.) This shows that the Department set forth guidance documents that were intended to coerce schools like Cornell to violate the due process rights of students and faculty.[11] Thus, just as *Coleman* recognized, the Department's effort "to coerce [Cornell] to adopt disciplinary codes" meant that Cornell's compliance was state action. 429 F.2d at 1125.[12]

2. Dr. Vengalattore Has a Protected Liberty Interest in His Reputation

Cornell next argues that Dr. Vengalattore's due process claim is invalid because it merely "asserts that Cornell lacked a legitimate basis to deny him tenure, or find him responsible for violating the University's Romantic Relationships Policy" rather than a "deprivation of any federal right." (Doc. 41-1, 22.) On the contrary, this claim establishes that Cornell wrongly deprived Dr. Vengalattore of his cognizable liberty interest in his reputation without due process.

A plaintiff can state a "valid claim" for a deprivation of procedural due process under the Fourteenth Amendment by asserting that he (1) "possessed a cognizable liberty interest, and (2) that the defendants deprived h[im] of that same liberty without providing process adequate to justify their actions." *Velez v. Levy*, 401 F.3d 75, 87 (2d Cir. 2005). A person has a "liberty interest" in his good name and can maintain a cause of action—commonly referred to as a "stigma plus" claim—when a state actor has wrongly accused him of misconduct and he has suffered a tangible injury

[11] Cornell denies these factual allegations. (Doc. 40, ¶ 44). Thus, there is a material factual dispute about whether the Department coerced Cornell to adopt the procedures at issue. Just as in *Coleman*, the proper course is therefore to allow discovery. *See* 429 F.2d at 1125.

[12] Cornell cites a number of district court opinions from other jurisdictions rejecting similar theories of state action and urges this Court to follow suit. (*See* Doc. 41-1, 21.) *Coleman*, which is still the law of this Circuit, forecloses that approach because it recognized the validity of the coercion theory. *See* 429 F.2d at 1125.

from that accusation. *Id.* To make out such a claim a plaintiff must allege: "(1) the utterance of a statement about h[im] that is injurious to h[is] reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden in addition to the stigmatizing statement." *Id.* (internal quotation omitted). Because "a free-standing defamatory statement is not a constitutional deprivation, but is instead properly viewed as a state tort of defamation, the 'plus' imposed by the defendant must be a specific and adverse action clearly restricting the plaintiff's liberty—for example, the loss of employment." *Id.* at 87-88 (internal quotation omitted).

Dr. Vengalattore has made out a stigma plus claim based on Cornell's publication of Dean Ritter's defamatory statement following the investigation, and the resulting tangible harm to his employment and research prospects. Dean Ritter falsely determined that "Dr. Vengalattore was involved in a sexual relationship with his former graduate student over a period of several months while also serving as her graduate advisor and [] that he lied to the investigators in this case when he denied having the sexual relationship[.]" (Doc. 31, ¶¶ 712-13.) Had "Cornell employed an appropriate investigation in this matter," it "would have determined that the statement was false and that Plaintiff Dr. Vengalattore did not engage in any sexual relationship with Roe and was not untruthful during the investigation." (Doc. 31, ¶ 714.) Instead, this false determination was "communicated to [Dr. Vengalattore's] prospective employers," and as a result, "Dr. Vengalattore has been unable to find suitable academic employment despite being fully qualified." (Doc. 31, ¶ 717.) These allegations make out all of the necessary elements of a stigma plus claim, and they plainly show how Dr. Vengalattore's liberty interest in his reputation was harmed by Cornell's failure to provide him with basic due process protections. *See Velez*, 401 F.3d at 87.[13]

[13] Yet again, Cornell denies these facts entirely. (*See* Doc. 40, ¶ 44.) This presents a material factual dispute that precludes summary judgment.

D. Cornell Defamed Dr. Vengalattore

Under New York law "[t]he elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*." *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2d Dept. 2007) (internal quotation omitted).

A court must "consider whether the contested statements are reasonably susceptible of a defamatory connotation." *Davis v. Boeheim*, 24 N.Y.3d 262, 268 (N.Y. 2014) (internal quotation omitted). A court looks at statements in their "immediate context" as well as "the larger context in which the statements were published, including the nature of the particular forum." *Brian v. Richardson*, 87 N.Y.2d 46, 51 (N.Y. 1995). "The dispositive inquiry, under either Federal or New York law, is whether a reasonable reader could have concluded that [the statements were] conveying facts about the plaintiff." *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152 (N.Y. 1993) (internal quotation omitted).

Dean Ritter falsely claimed in a letter, which has been sent to 10 identified universities, that Dr. Vengalattore was "involved in a sexual relationship with your former graduate student over a period of several months while also serving as her graduate advisor," "violated the university's 'Romantic and Sexual Relationships' policy by engaging in such conduct" and "lied to the investigators in this case" through his "denial of a sexual relationship." (Doc. 31, ¶¶ 723-24.) These statements were false because "Dr. Vengalattore was not involved in a sexual relationship with his former graduate student over a period of several months while also serving as her graduate advisor, did not violate Defendant Cornell's "Romantic and Sexual Relationships" policy, and did not lie to the investigators in his case." (Doc. 31, ¶ 725.) These statements were defamatory *per se*, and Cornell

acted with the requisite mens rea in making these false statements. (Doc. 31, ¶¶ 726-30.) Thus, he has adequately pled defamation under New York law. *See Salvatore*, 45 A.D.3d at 563.

Cornell responds by raising a host of factual arguments that cannot be resolved without the benefit of discovery, and a barrage of undeveloped legal asides. None of these arguments has merit.

First, Cornell objects that Dr. Vengalattore has not proven, without any discovery having taken place, that it published the defamatory letter, and instead insinuates without evidence that Dr. Vengalattore himself did so. (Doc. 41-1, 22-23.) Cornell objects that Dr. "Vengalattore offers no basis to conclude that Cornell was the source of this "republication"" and claims instead that "*he himself disseminated this allegedly defamatory document* in various ways, more than a year *before* this lawsuit was filed." (Doc. 41-1, 22-23.) Cornell also cites to two newspaper articles, which Dr. Vengalattore did not write, and an unverified document with no attribution, that allegedly show he distributed Dean Ritter's defamatory statements to others outside the University. (Doc. 41-1, 22-23.)

Cornell's assertions are false. Cornell distributed the defamatory statement to 10 outside universities. (Doc. 41-1, ¶ 724.) Dr. Vengalattore did not distribute Dean Ritter's defamatory statement to any recipient other than his counsel, did not contribute to the news articles, and did not maintain the website at issue. (Attachment B, ¶¶ 20-24.) Without having conducted any discovery that would allow Dr. Vengalattore to gain access to information that only Cornell possesses—when and how it distributed the defamatory letter—it is impossible to resolve this factual dispute.

Even if Dr. Vengalattore *had* sent the letter to certain outside parties, this hardly absolves Cornell of defaming him by sending the letters to 10 identified universities. The "privilege" element of defamation that Cornell references means only that the statement was "published without privilege or authorization to a third party" by the defendant. *Salvatore*, 45 A.D.3d at 563. Cornell did so by sending the defamatory letter to at least 10 universities where Dr. Vengalattore hoped to

obtain future employment. (*See* Doc. 31, ¶ 724.) This publication was not authorized by Dr. Vengalattore, and, as pled, harmed his employment and research prospects. (Doc. 31, ¶ 731.)

Next, Cornell changes tack and preposterously argues that Dean Ritter's letter was "undeniably true" (Doc. 41-1, 23), even though Dr. Vengalattore "was not involved in a sexual relationship with his former graduate student over a period of several months while also serving as her graduate advisor, did not violate Defendant Cornell's 'Romantic and Sexual Relationships' policy, and did not lie to the investigators in his case" (Doc. 31, ¶ 725), because Dean Ritter "*did find*" him responsible, even if he actually was not. (Doc. 41-1, 23-24.) Cornell's argument absurdly parses Dean Ritter's letter in a way that would make it meaningless. Defamatory statements are read to see if "the contested statements are reasonably susceptible of a defamatory connotation" *Davis*, 24 N.Y.3d at 268, and looking to the "immediate" and "larger context in which the statements were published." *Brian*, 87 N.Y.2d at 51. The obvious meaning of Dean Ritter's statement is obviously defamatory to a reasonable observer. There is no other rational interpretation. And, of course, those assertions are false. (Doc. 31, ¶ 725.)[14]

Cornell has also tried to cast Dean Ritter's letter as merely "her *opinion* as to whether that evidence was sufficient to conclude that Vengalattore had engaged in misconduct" (Doc. 41-1, 24), but this argument fails for the same reason as its falsity argument. "Distinguishing between fact and opinion is a question of law for the courts, to be decided based on what the average person hearing or reading the communication would take it to mean." *Davis*, 24 N.Y.3d at 269 (internal citations and quotation marks omitted). This looks to three factors: "(1) whether the specific language in issue

[14] Cornell essentially acknowledges as much in its Answer, taking pains to say that it "denies any allegation or implication that plaintiff was not properly found responsible for violating the University's Policy prohibiting Romantic and Sexual Relationships Between Students and Staff." (Doc. 40, ¶ 43.) Cornell also repeats that Dr. Vengalattore "was determined after investigation to have lied to the Cornell investigators." (Doc. 40, ¶ 100.)

has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal … readers or listeners that what is being read or heard is likely to be opinion, not fact." *Id.* If the context of a statement suggests that it was "spoke[n] with authority" and "based on facts," then even trying to qualify it by saying things like "I believe" will not transform the statement into a "pure opinion." *Id.* at 272-73. And saying someone "lied" "based on facts" known to the speaker is not a statement of opinion. *Id.* at 273.

Here, Dean Ritter asserted, based on her review of the facts "that a preponderance of evidence supports" the claims that he "was "involved in a sexual relationship with your former graduate student over a period of several months while also serving as her graduate advisor," "violated the university's 'Romantic and Sexual Relationships' policy by engaging in such conduct" and "lied to the investigators in this case" through his "denial of a sexual relationship." (Doc. 31, ¶ 723.) A reasonable recipient of that statement would conclude that she "spoke with authority," given her review of the facts, and would conclude that her accusations of sexual misconduct and dishonesty were "based on facts." *See Davis*, 24 N.Y.3d at 272-73. Of course, these statements were not based on facts, and were demonstrably false. (Doc. 31, ¶ 725.) They are therefore actionable defamatory statements. *See Davis*, 24 N.Y.3d at 273.

Next, Cornell claims that Dr. Vengalattore has not alleged *per se* defamation concerning his performance of his profession because Dean Ritter's statements "have nothing to do with his abilities as a physicist, but rather involve acts of misconduct demonstrating his absence of character." (Doc. 41-1, 24.) This argument yet again ignores relevant law and common sense. Statements are defamatory *per se* under New York law "if they "relate to a matter of significance and importance in her profession." *Coe v. Town of Conklin*, 94 A.D.3d 1197, 1199 (3d Dept. 2012)

(internal quotation omitted). While Cornell is correct that the statement must be "more than a general reflection upon plaintiff's character or qualities," a statement that "imputes incompetence, incapacity or unfitness in the performance of one's profession" or "suggest[s] improper performance of one's duties or unprofessional conduct" is defamatory *per se*. *Clemente v. Impastato*, 274 A.D.2d 771, 773 (3d Dept. 2000) (internal quotation omitted). Accusing a professor of violating university policy by engaging in an improper sexual relationship and lying about that fact, certainly "imputes … unfitness in the performance of one's profession" as a professor of any subject. *See id.* Indeed, allegedly violating university policy bears directly on a professor's performance of his duties, and certainly would constitute "unprofessional conduct" that could reasonably be expected to harm that professor's employment prospects. *Id.* Thus, Dean Ritter's statements were defamatory *per se*.

Cornell also asserts that Dr. Vengalattore "has become a limited purpose public figure" based on false factual assertions that have no basis in the record. Cornell relies on news coverage of Cornell's findings, to which Dr. Vengalattore did not contribute and has no connection, as somehow being evidence that he engaged in a "vitriolic campaign to widely publicize his dispute with Cornell, and to assail the University and its administration in the process." (Doc. 41-1, 24.) These factual assertions are simply false. Dr. Vengalattore had no involvement in publishing these stories, did not host a website disseminating information about the investigation, and the only actions he has taken have been to defend himself against Cornell's false statements. (Attachment B, ¶¶ 20-24.)

Moreover, even if Cornell's statements were accurate, a person becomes a "limited purpose public figure" only if the defendant "show[s] the plaintiff has [] successfully invited public attention to his views in an effort to influence others *prior to* the incident that is the subject of litigation." *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136 (2d Cir. 1984) (emphasis added). Cornell's allegations all relate to news coverage *of Dean Ritter's* defamatory statements, and thus could not have been

made prior to her defamatory incident. (*See* Doc. 40, exhibits 29, 30, 31, 34.) Thus, Cornell cannot show that Dr. Vengalattore is a limited purpose public figure. *See Lerman*, 745 F.2d at 136.

Cornell next claims that it "is entitled to the qualified privilege that attaches to common interest communications" because both it and Dr. Vengalattore's prospective employers "have an interest" in the subject of Dean Ritter's letter. (Doc. 41-1, 25.) This argument is inconsistent with binding law. The "qualified privilege" is meant to allow "the flow of information between persons sharing a common interest" "so long as the privilege is not abused." *Silverman v. Clark*, 35 A.D.3d 1, 10 (1st Dept. 2006) (internal quotation omitted). But it does not extend to a former employer and prospective employers, even if they share a common interest in the subject of the statement, because the "institutional relationship that ordinarily might give rise to a common interest or duty to speak" does not extend that far. *Id.* at 11-12. Thus, Cornell is not entitled to share defamatory statements with other universities without end.

Finally, even if Cornell's arguments about Dr. Vengalattore's status as a limited purpose public figure or the common interest privilege were valid, they would not entitle Cornell to any relief. Overcoming these defenses merely requires a showing of malice, "which includes either common-law malice (motivated by spite or ill will) or constitutional malice (statements made with a high degree of awareness of their falsity)." *Silverman*, 35 A.D.3d at 11. Dr. Vengalattore has pled "malice," and particularly noted that "Cornell knew of or recklessly disregarded the falsity of these statements" when it made them. (Doc. 31, ¶¶ 728-29.) Without the benefit of any discovery, these statements are enough to plead the necessary elements of the claim, and thus summary judgment is improper.

CONCLUSION

This Court should deny Cornell's motion in its entirety.

September 16, 2019

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5210
N.D. N.Y. Bar Roll # 700434

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC, 20036
caleb.kruckenberg@ncla.legal
(202) 869-5210
N.D. N.Y. Bar Roll # 700434
Counsel for Plaintiff