UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. SUZAN M. RUSSELL, Plaintiff, -v - NEW YORK UNIVERSITY, ROBERT SQUILLACE, JOSEPH M. THOMETZ, and EVE MELTZER. Defendants.	1:15-cv-2185-GHW OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

Dr. Suzan M. Russell, a former adjunct faculty member in New York University's ("NYU" or the "University") Liberal Studies Program, alleges that she was subjected to discrimination and harassment on the basis of her gender, sexual orientation, religion, and age, and that she suffered retaliation for engaging in activity protected by federal, state, and city employment-discrimination laws. Dr. Russell brings claims against NYU under Title VII of the Civil Rights Act of 1964 ("Title VII"), Title IX of the Education Amendments of 1972 ("Title IX"), the Age Discrimination in Employment Act ("ADEA"), the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL"). She also brings claims against NYU Associate Dean Robert Squillace and former fellow NYU faculty members Joseph Thometz and Eve Meltzer under the NYSHRL and the NYCHRL. In addition to her statutory claims, Dr. Russell asserts claims against each defendant for intentional infliction of emotional distress.

All defendants have moved for summary judgment in this action. Now before the Court is Defendants NYU and Squillace's (the "NYU Defendants") motion for summary judgment. For the reasons that follow, the NYU Defendants' motion for summary judgment is GRANTED with

respect to all of Dr. Russell's federal claims, and the Court declines to exercise supplemental jurisdiction over all remaining claims in this lawsuit, including those brought against Thometz and Meltzer (together, the "Co-Worker Defendants").

I. BACKGROUND[1]

A. Plaintiff's Employment with NYU and the Key Players in This Case

Dr. Russell served as an adjunct assistant professor of humanities in NYU's General Studies Program from the fall of 1998 until 2002. Pl.'s Local Rule 56.1 Counterstatement (ECF No. 170) ("Pl.'s 56.1") ¶ 192. After serving as a visiting or adjunct faculty member at two other universities between the fall of 2002 and 2006, Dr. Russell returned to NYU in the fall of 2006, where she served as an adjunct assistant professor in the Liberal Studies Program until she was terminated on October 9, 2015. *Id.* ¶¶ 193-95; Decl. of Mercedes Colwin in Supp. of Mot. for Summ. J. (ECF No. 129) ("Colwin Decl."), Ex. 4.

As a part-time adjunct professor, Dr. Russell's employment was governed by the Collective Bargaining Agreement between NYU and International Union, UAW, AFL-CIO and Local 7902 Adjuncts Come Together, UAW (the "CBA"). Pl.'s 56.1 ¶ 196. Article XVII(A) of the CBA in effect during the time period relevant to this action, entitled "Discipline and Discharge," provided in pertinent part: "The University may discharge or discipline an adjunct or part-time faculty member during the term of his/her employment for just cause. 'Discipline' or 'discharge' means termination

[1] The following facts are drawn from the parties' Local Civil Rule 56.1 Statements and other submissions in connection with the instant motion, and are undisputed or taken in the light most favorable to Dr. Russell, unless otherwise noted. Dr. Russell responds to a large number of the NYU Defendants' Rule 56.1 factual statements either with assertions that do not cite to any record evidence, or with nothing more than the word "Deny." As the Court explained to the parties prior to submission of this motion, and as the Local Rules provide, that is not a sufficient way in which to place a fact in dispute at the summary judgment stage. Accordingly, the Court disregards those assertions for purposes of this motion and, where appropriate, deems the NYU Defendants' assertions admitted. *See, e.g.*, *Cooper v. City of New Rochelle*, 925 F. Supp. 2d 588, 602 (S.D.N.Y. 2013) ("Local Rule 56.1 states that the moving party's 56.1 statement will be deemed admitted unless controverted, and requires that such denials be supported by a specific citation to admissible evidence. Accordingly, any of the [Defendants'] Rule 56.1 Statements that [Plaintiffs] do not specifically deny—with citations to supporting evidence—are deemed admitted for purposes of [Defendants'] summary judgment motion." (internal quotation marks and citations omitted) (alterations in original)). In addition, Dr. Russell supports many assertions in her amended opposition brief with incomplete citations, such as "Luke Decl. Ex." Because such citations do not point the Court to any particular evidence in the record, the Court treats such assertions as unsupported.

of an adjunct or part-time faculty member's employment or suspension with loss of pay." *Id.*; Colwin Decl., Ex. 9 ("CBA"), at 1, 23.

During the period relevant to this lawsuit, Fred Schwarzbach was the Dean of Liberal Studies at NYU. Pl.'s 56.1 ¶ 197. In that role, Dean Schwarzbach supervised staff and full-time faculty directly, and he supervised part-time faculty indirectly. *Id.* ¶ 198. He is Jewish and is sixty-seven years old. *Id.* ¶ 517. Defendant Robert Squillace was the Associate Dean for Academic Affairs for the Liberal Studies Program. *Id.* ¶ 199. Peter Diamond, the Liberal Studies Core Program Coordinator, directly supervised Dr. Russell and all other adjunct faculty. *Id.* ¶¶ 200-01.[2] Defendant Joseph Thometz served as a full-time faculty member in the Liberal Studies Program from the fall of 2006 until he resigned at the end of the Spring 2014 semester. Decl. of John Christopher Luke (ECF No. 160), Ex. 8 (Decl. of Joseph M. Thometz ("Thometz Decl.")) ¶ 2-3. After resigning his position in the Liberal Studies Program, Thometz continued teaching at NYU's Gallatin School of Individualized Study ("Gallatin School") until May 2016, when he left NYU entirely. *Id.* Thometz was born less than one year after Dr. Russell, making him nearly the same age as Dr. Russell. Pl.s' 56.1 ¶¶ 205-06. Defendant Eve Meltzer was a tenured faculty member of the Gallatin School. *Id.* ¶ 203. Like Dr. Russell, Meltzer is Jewish. Pl.'s 56.1 ¶ 207. Thometz's maternal grandmother is also Jewish and, although he was raised Catholic, he observes Jewish holidays. *Id.* At no point in time did Defendants Thometz or Meltzer supervise Dr. Russell. *Id.* ¶ 204.

[2] Although Dr. Russell asserts in her Local Rule 56.1 counterstatement that she "also was supervised by Dean Schwarzbach and Defendant Squillace," Pl.'s 56.1 ¶ 201, she does not support that assertion by any citation to any evidence, as required both by Local Rule 56.1 and case law. Accordingly, the Court disregards her assertion to the extent it goes beyond the undisputed (and supported) proposition that Schwarzbach indirectly supervised all part-time faculty. *See id.* ¶ 198.

B. NYU's Policies

1. Non-Discrimination and Anti-Harassment Policy and Complaint Procedures for Employees

NYU has a policy entitled Non-Discrimination and Anti-Harassment Policy and Complaint Procedures for Employees (the "Policy"), which states that NYU

> is committed to maintaining an environment that encourages and fosters appropriate conduct among all persons and respect for individual values. Accordingly, the University is committed to enforcing this Non-Discrimination and Anti-Harassment Policy and Complaint Procedures at all levels in order to create an environment free from discrimination, harassment, retaliation and/or sexual assault. Discrimination or harassment based on race, gender and/or gender identity or expression, color, creed, religion, age, national origin, ethnicity, disability, veteran or military status, sex, sexual orientation, pregnancy, genetic information, marital status, citizenship status, or on any other legally prohibited basis is unlawful and undermines the character and purpose of the University. Such discrimination or harassment violates University policy and will not be tolerated.

Pl.'s 56. 1 ¶¶ 182-85; Colwin Decl., Ex. 2, at 1. The Policy also addresses retaliation:

> The University will not in any way retaliate against an individual who reports a perceived violation of this policy, participates in any investigation, or otherwise opposes perceived discrimination, harassment, or retaliation, including as a witness. . . . NYU further will not tolerate retaliation by any employee. Retaliation is a serious violation of this policy, as well as federal, state, and local law.

Pl.'s 56.1 ¶ 186; Colwin Decl., Ex. 2, at 3.

In addition to the above, the Policy provides a procedure for reporting discrimination, harassment, retaliation, or sexual assault. Pl.'s 56.1 ¶ 187; Colwin Decl., Ex. 2, at 1-2. Under that procedure, an employee may make a complaint to any of the following individuals and offices: the Office of Equal Employment ("OEO"), the Human Resources officer of the relevant School or administrative department, the Solutions Center, any supervisor, or, "[i]f the alleged respondent is a faculty member, the Dean of the appropriate School or Faculty or the Dean's designee." Pl.'s 56.1 ¶ 187; Colwin Decl., Ex. 2, at 2. Complaints may be submitted to OEO by phone, email, online form, or in person. Colwin Decl., Ex. 2, at 2. The specific phone number, email address, URL, and

physical address are provided in the Policy, as is the URL for a contact list of Human Resources officers for each School and Department of the University. *Id.* The Policy also provides that all complaints will be referred to the appropriate Human Resources officer, but "[i]f the Human Resources Officer has a personal relationship with the accused individual or otherwise has a conflicting interest, he or she must forward it to the OEO." *Id.*

With respect to investigation of complaints, the Policy provides:

> The University will conduct a prompt, thorough and impartial investigation of a complaint as necessary and appropriate.
>
> . . .
>
> The investigator will report his or her findings to the person who made the initial report, the alleged victim of discrimination, harassment, retaliation or sexual assault, the alleged wrongdoer, and relevant managers and supervisors. Where the investigator concludes that a violation of this policy has occurred, the relevant School or Department will take prompt and appropriate remedial action, including disciplinary action.

Pl.'s 56.1 ¶ 188; Colwin Decl., Ex. 2, at 2.

2. Code of Ethical Conduct

In addition to the non-discrimination and anti-harassment policy, NYU has a Code of Ethical Conduct (the "Code"). Pl.'s 56.1 ¶ 189. The Code contains a provision entitled "Respect for the Rights and Dignity of Others," which states in pertinent part:

> Every member of the University is prohibited from discriminating on the basis of race, color, religion, sexual orientation, gender and/or gender identity or expression, marital or parental status, national origin, citizenship status, veteran or military status, age, disability, and any other legally protected status; physically assaulting, emotionally abusing, or harassing anyone; and depriving anyone of rights in his or her physical or intellectual property, under University policy, or under federal, state, and local laws.

Id.; Colwin Decl., Ex. 3, at 2. The Code also includes a "Promise of No Retaliation," under which "[t]he University promises that there will be no adverse action, retribution, or other reprisal for the good faith reporting of a suspected violation of this Code, even if the allegations ultimately prove to be without merit." Pl.'s 56.1 ¶ 190; Colwin Decl., Ex. 3, at 4. Under the Code, "[i]f it is determined

that a violation [of the Code] has occurred, the University reserves the right to take corrective and disciplinary action against any person who was involved in the violation . . . . Disciplinary actions will be determined on a case-by-case basis and in accordance with the applicable disciplinary codes." Pl.'s 56.1 ¶ 191; Colwin Decl., Ex. 3, at 4.

C. Summary of Dr. Russell's Allegations

On May 22, 2014, Dr. Russell filed a charge of discrimination against NYU with the Equal Employment Opportunity Commission ("EEOC") based on the same set of facts at issue in this lawsuit. Pl.'s 56.1 ¶ 208. She initiated this lawsuit on March 24, 2015. ECF No. 1. Broadly speaking, Dr. Russell alleges that: (1) she was harassed based on her age when she received mailings from the AARP, arthritis materials, incontinence pads, vaginal lubricants, and materials referencing heart conditions, Pl.'s 56.1 ¶ 211; (2) she was harassed based on her gender when she received pornographic materials depicting women in humiliating and degrading positions, and an online business named "Suzan Russell Plus Hysterics" was opened in her name, *id.* ¶ 212; (3) she was subjected to discrimination based on her gender (and perhaps age or religion) when NYU treated her differently than Thometz with respect to the imposition of discipline, Pl.'s Am. Mem. in Opp'n to Mot. for Summ. J. (ECF No. 174) ("Pl.'s Mem.") at 20-22; (4) she was harassed based on her religion when she received mailings from Christian ministries that included materials concerning conversion to Christianity, as well as a copy of the Quran, Pl.'s 56.1 ¶ 215; (5) she was subjected to discrimination and/or harassment based on her sexual orientation when Thometz posted an online comment that allegedly "outed her," and when she received materials of a sexual nature depicting same-sex encounters, *id.* ¶ 216; and (6) her termination was retaliatory because progressive disciplinary steps were not followed, Dean Schwarzbach did not identify the faculty member who had made accusations against her in her termination letter, and her termination came after she had engaged in a number of protected activities, *id.* ¶ 219.

D. The Events at Issue

1. 2012 Email Communications and Human Resources Complaint

This dispute arises, at least to some degree, from a debate between faculty members on an electronic mailing list. In 2012, NYU's Liberal Studies Program operated a Listserv, which had been created as a means for administrators to communicate with faculty. *Id.* ¶ 220-21. Both full-time and part-time Liberal Studies faculty had access to the Listserv and could use it to send email messages to other faculty. *Id.* ¶ 222. On October 12, 2012, NYU faculty member Michael Shenefelt sent an email via the Listserv to full-time and part-time faculty members complaining of Dean Schwarzbach's use of expletives when speaking to the faculty. *Id.* ¶ 223. The same day, Dr. Russell responded to Shenefelt's email, defending Schwarzbach. *Id.* ¶ 224. She wrote: "As far as Fred's so called expletives go . . . who among us has not used an occasional expletive to vent some frustration. . . . I personally have never heard Fred utter an expletive, but now I really want him to." *Id.* ¶¶ 225-26. Dr. Russell concluded the email with: "In other words, give me a F***** break!" *Id.* ¶ 227.

The email exchange between Dr. Russell and Shenefelt gave rise to a debate between Thometz and faculty member Jacqueline Jaffe about the use of profanity and what qualifies as intimidating behavior. *Id.* ¶ 228. Thometz forwarded his email exchanges with Jaffe to Dr. Russell and requested that she read them. Dr. Russell and Thometz then exchanged several email communications on their respective viewpoints regarding the Liberal Studies Program's governance structure. *Id.* ¶ 230.

On December 6, 2012, Shenefelt again emailed the Liberal Studies faculty through the Listserv. His message discussed proposed reductions in the Liberal Studies Core Curriculum and issues concerning faculty contracts. *Id.* ¶ 231; Colwin Decl., Ex. 21. The next day, Thometz inadvertently sent an email to Dr. Russell that was meant for Shenefelt. *Id.* ¶ 232. Among other things, he referenced "Dr. Russell's disorganized rants," and wrote that she was "clearly in crisis" and that "many fulltime faculty have come forward and shared stories of what a mean-spirited

person she is." *Id.*; Colwin Decl., Ex. 21. She immediately forwarded Thometz's email to Schwarzbach, Squillace, and Diamond to inform them of Thometz's comment and to express her intention to file a complaint against him with Human Resources. *Id.* ¶ 233. Within two hours, Schwarzbach replied: "Suzan, I think that you should take this to HR." *Id.* ¶ 234; Colwin Decl., Ex. 23.

On December 7, 2012, Dr. Russell filed a complaint against Thometz with the College of Arts and Sciences Human Resources Administration ("CAS Human Resources"). *Id.* ¶¶ 235-36. She forwarded her email exchanges with Shenefelt and Thometz to the manager of Human Resources. Included among the forwarded emails was one in which Dr. Russell had noted that Schwarzbach advised her she could file a grievance in response to a public remark Thometz had made about her if she felt the need to do so. *Id.* ¶¶ 238-39. In response to Dr. Russell's complaint, Human Resources scheduled a meeting with her for the next business day, December 10, 2012. *Id.* ¶ 240. On December 8, 2012 (a Saturday), Dr. Russell emailed Schwarzbach and advised him that Director of CAS Human Resources Robert White "was upset by [ ] Thometz's email to [her]," "apologized profusely," and "was anxious to get [her] in[to Human Resources] asap to resolve the matter." *Id.* ¶ 241.

Dr. Russell met with CAS Human Resources regarding her complaint, as scheduled, on December 10, 2012. *Id.* ¶ 242. She also met with White, specifically, at some time thereafter. *Id.* ¶ 243. The following month, on January 24, 2013, Dr. Russell decided to voluntarily withdraw her Human Resources complaint against Thometz, "so long as Thometz [did] not post anymore negative personal comments about [her]." *Id.* ¶ 244.

2. Summer 2013 Online Impersonation and Unsolicited Mail/Email

In late June and early July 2013, Dr. Russell began to receive unsolicited mail at her physical NYU mailbox, including an AARP membership invoice addressed to "Suzan Litewait Russell" and two catalogs of pornographic materials. *Id.* ¶¶ 245, 247; Colwin Decl., Ex. 25; Decl. of John Luke in

Opp'n to Mot. for Summ. J. (ECF No. 168) ("Luke Decl."), Exs. 10A, 11A. She also began in July 2013 to receive unsolicited email at her NYU email address, including an e-newsletter entitled Healthy Aging. Pl.'s 56.1 ¶ 247; Colwin Decl., Ex. 26.

On July 8, 2013, a comment was posted on NBC-affiliated website ketknbc.com using Dr. Russell's email address. *Id.* ¶ 248. The comment, which was posted under the name "Christian Suzan," stated: "I hates all Christians becuz of their hypocrisy like muslims." *Id.* ¶ 249; Colwin Decl., Ex. 27. Dr. Russell did not discover the comment until she received an email response to it on September 20, 2013, and the comment was deleted by September 23, 2013. *Id.* ¶¶ 250-51.

On July 20, 2013, Dr. Russell received an email from an Australian blogger named Steve Swinsburg, informing her that someone had impersonated her and posted a comment on his blog about Lucy Appert, the director of education technology for NYU's Liberal Studies Program. *Id.* ¶ 252. The next day, the same blogger informed Dr. Russell that another comment about Appert had been posted to his blog, purporting to have been written by Wilnelia Gutierrez, Schwarzbach's executive assistant. *Id.* ¶ 254-55. The blogger did not know the identity of the individual impersonating Dr. Russell and Gutierrez, but he provided Dr. Russell with the IP address from which the comments had originated. *Id.* ¶¶ 256-57.

Dr. Russell emailed Dean Schwarzbach on July 21, 2013 to inform him of this impersonation.[3] *Id.* ¶ 258. On the same day, she also sent an email to Squillace explaining that she suspected the impersonator might be a "computer guru" from a company that her other part-time employer had recently sued. *Id.* ¶ 259.[4] When Squillace communicated with Schwarzbach about the

[3] Dr. Russell contends that her first complaint regarding the misuse of her email address was on June 23, 2013 to Defendant Squillace, Pl.'s 56.1 ¶ 258, but she fails adequately to support that assertion, citing only to her amended complaint. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004) (stating that "the party opposing [a motion for summary judgment] cannot rely on allegations in the complaint"); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 902 (1990) (Blackmun, J., dissenting) ("[T]he showing . . . required to overcome a motion for summary judgment is more extensive than that required in the context of a motion to dismiss. The principal difference is that in the former context *evidence* is required, while in the latter setting the litigant may rest upon the allegations of his complaint." (emphasis in original)).

[4] Although Dr. Russell admits this fact, she asserts that the email to Squillace was "speculative and prior to DA's

matter, he was told that he should not involve himself in the matter any further, because Schwarzbach would be handling it. *Id.* ¶ 262. In addition to the reports to Schwarzbach and Squillace, Dr. Russell reported the online impersonation to NYU's Information Technology Services ("ITS"). *Id.* ¶ 263.

On approximately July 23, 2013, Dr. Russell discovered after a Google search of herself that a comment that had been posted using her name on a blog called "NYU Local." *Id.* ¶ 264. NYU Local is a student-run blog that is independently funded and is unaffiliated with NYU; NYU plays no role in maintaining the blog and does not monitor or control any of its contents or postings. *Id.* ¶¶ 265-66. The comment, which was posted under the name "Suzan Russell," stated:

> We should abolish tenure and board of trustees! As one of NYU's highly successful adjuncts who doesn't have much time for tennis, nor watching reruns of "The Love Boat"—though I fancy Julie McCoy—and believe, indeed, NYU has "something for everyone," we could do well not to rush the net on this one, unless we're prepared to replace the entire board and hire Julie McCoy or Burl "Gopher" Smith, Your Yeoman Purser!

Id. ¶ 267; Colwin Decl., Ex. 35. Dr. Russell believed that, in stating that she "fanc[ied] Julie McCoy," the comment had "outed" her as a lesbian. Pl.s' 56.1 ¶ 268.

Also on July 23, 2013, Dr. Russell discovered a listing for a fake business by the name of "Suzan Russell Plus Hysterics" on a website called Manta.com. *Id.* ¶ 269. She informed both Schwarzbach and Squillace of her discovery. *Id.* ¶ 270. She also emailed Manta.com to obtain information about the listing. Pl.s' 56.1 ¶ 273. A Manta.com representative responded the following day, informing her that the listing had been created on June 19, 2013 using her NYU email address.

---

confirmation of Defendant Thometz as the sender of all the materials." Pl.s' 56.1 ¶ 259. As an initial matter, it is unclear how Dr. Russell's assertion responds to the NYU Defendants' assertion, since one is about online impersonation and the other is about sending materials. More importantly, to support her assertion regarding the district attorney, she merely points the Court to her own declaration, in which she states: "Late November 2013, I was told by the DA's office that Joseph Thometz was implicated in the sending of ALL the materials I was receiving and had received." Luke Decl., Ex. 3, ¶ 36. Rule 56(c)(4) provides that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Dr. Russell's statement about the DA's statement is hearsay, and is therefore not appropriately considered on a motion for summary judgment. *See, e.g.*, *Thomas v. Stone Container Corp.*, 922 F. Supp. 950, 957 (S.D.N.Y. 1996) (explaining that a statement that was "classic hearsay" was not appropriately considered on a motion for summary judgment).

Id. ¶ 274. On July 25, 2013, Dr. Russell received another email response from Manta.com stating that the company listing had "already been removed." *Id.* ¶ 275; Colwin Decl., Ex. 39.

3. NYU's Response to Dr. Russell's Complaints of Online Impersonation and Unsolicited Mail

In a July 23, 2013 email to Schwartzbach, Squillace, and Appert, Dr. Russell indicated that she believed it was a "disgruntled faculty member" who was leaving comments in her name, since it referenced information that she shared only with the faculty. *Id.* ¶ 271. In reference to the comment posted on NYU Local, she stated: "[W]hy do I have the feeling that it's Thometz since this is on the Gallatin site." Colwin Decl., Ex. 35. Schwarzbach responded to Dr. Russell later that day, stating:

> We are in contact with NYU IT security, and we have passed on information to them that will allow them to determine if there is any NYU connection to any IP address that has been flagged. We are also gathering information internally around the office. It seems that a number of staff have been subject to low-level harassment of a similar nature for some time now, but have not reported it. There may be additional information we can gather from others that will help IT Security identify the person or persons behind this.
>
> Once we are reasonably certain that we know the full extent of this harassment and impersonation, we will place the matter in the hands of NYU Campus Safety. As you say, it will be best if they pursue it. At the same time, certainly as far as I am concerned at any time you are free to report this to the police yourself.
>
> I will keep you posted as this moves forward.

Id. ¶ 272; Colwin Decl., Ex. 38. Schwarzbach wrote again approximately two hours later, stating that Campus Security had been "fully briefed on the situation" and suggesting that Dr. Russell forward additional materials to them. Colwin Decl., Ex. 38.

Also on July 23, 2013, Schwarzbach emailed Jules Martin, NYU's vice president of global security and crisis management, summarizing the events that had transpired over the previous two days. In his email, Schwarzbach stated:

> I alerted Jane DelFavero at ITS Security. We had been given an IP address by the ed/tech blogger, but when Jane ran it through her systems, she found no obvious

> NYU connections. All she can tell us is the location is Melville, Long Island. So we really don't have any idea who might be doing this . . . .

Pl.s' 56.1 ¶ 276.

The following day, Dr. Russell emailed Schwarzbach to inform him that she had just checked her NYU mail and found a notice from the AARP that used the name "Suzan Litewait Russell," as well as "pornographic magazines involving women." *Id.* ¶ 277; Colwin Decl., Ex. 42. She also stated: "I'm going to NYU security now and I'm going to the 10th precinct." Pl.s' 56.1 ¶ 278; Colwin Decl., Ex. 42. Four minutes later, Schwarzbach responded, stating "Suzan, The detective I spoke with was planning to reach out to you – did you connect? She thought it was definitely time to contact the police and she was intending to help you file a complaint. I agree – this is serious escalation." Colwin Decl., Ex. 42.

Dr. Russell filed an aggravated harassment complaint with the NYPD that day. Pl.'s 56.1 ¶ 279. She also reported the online impersonation and the unsolicited receipt of pornographic magazines to NYU's Department of Public Safety. *Id.* ¶ 280; Colwin Decl., Ex. 44. A few hours prior to that report, Dr. Russell had already received an email from Public Safety Associate Director Investigations Sheila Gay-Robbins. *Id.* ¶ 281. In the email, Gay-Robbins stated that she "conferred with Dean Schwarzbach and he mentioned it recently came to his attention someone used your identity attempted to post negative comments on a blogg [sic] and someone also created a phony social media account in your name. At your earliest convenience please contact me . . . ." *Id.* ¶ 282; Colwin Decl., Ex. 45. Gay-Robbins spoke with Dr. Russell by phone the next day and advised her to keep all evidence and provide it to the NYPD. *Id.* ¶ 283; Colwin Decl., Exs. 44, 46. On July 27, 2013, after having exchanged at least one additional email, Dr. Russell wrote to Gay-Robbins:

> I am also getting subscribed to various service [sic]…etc. So, someone is using my NYU email address to sign me up for things. I got a mailbox fullof [sic] them today and I talked to Liz the other day in our office and she said that she was getting this stuff also."

Pl.'s 56.1 ¶ 284; Colwin Decl., Ex. 47.

4. Dr. Russell's Direct Emails to Faculty Members

Believing that the individual responsible for the online impersonation and unsolicited mailings was a faculty member, Dr. Russell sent emails directly to a number of faculty members to confront them about their possible involvement. Pl.'s 56.1 ¶ 285. On July 28, 2013, she emailed Michael Rectenwald and asked him if he "happen[ed] to know anything" about her being called "spammer," "litewait," and "a troll," and about the pornography and incontinence pads she had received in her mailbox. Pl.'s 56.1 ¶ 286. Dr. Russell stated: "The NYPD and the asst da are involved in this. All I'm going to say is that Internet Impersonation carries a one-year prison term per incident. This is also identity theft, agg. harassment, sexual harassment and the abuse of a public domain." *Id.* ¶ 287; Colwin Decl., Ex. 48. Rectenwald responded that he did not have "the slightest idea and had nothing to do with this." Pl.'s 56.1 ¶ 287.

Dr. Russell also emailed JP Borum and Thometz to ask about their possible involvement. She emailed JP Borum on July 29, 2013, forwarding a message from ITT Technical Institutes, which stated, "Your free brochure will be mailed to the address you supplied below," and named her as "Suzan Troll Russell." *Id.* ¶ 288; Colwin Decl., Ex. 49. In the body of the email, Dr. Russell wrote substantially the same message she had sent to Rectenwald, and added:

> [D]o you know anything about this? Because I'm not putting up with this kind of crap. You mentioned "harassment" in your email and "trolling" in relationship to FT faculty pay raises. And, I'm going to say this and I'm going to say it once: I'm entitled to an opinion and an argument and this is harassment that is definable by law and I'm not putting up with this crap.

Id. ¶ 288; Colwin Decl., Ex. 49. When Borum did not respond, Dr. Russell wrote to her again on August 1, 2013, stating:

> I am asking again if you know about anything what is below? The university has filed a police report because I have been repeatedly harassed since the pay raise discussion.
>
> By the way, I happened to notice that you write a lot of art history and art reviews. Did you happen to know that my family owns the School of Visual Arts in the city? We own it, JP. So, you just never know who you are calling a troll, do

> you? I have a lot of contacts in the art world so you just never know who you're mouthing off to. Do you?

Pl.'s 56.1 ¶ 288; Colwin Decl., Ex. 49. Despite Dr. Russell's assertion to JP Borum that NYU had filed a police report, it was she, and not NYU, who had filed the report. *Id.* ¶ 289. Later that day, Borum forwarded Dr. Russell's emails to Gay-Robbins, stating: "Here are the two harassing emails Professor Russell has sent me. Thanks in advance for any advice and help you can provide." *Id.* ¶ 290; Colwin Decl., Ex. 49. In another email to Gay-Robbins later that day, Borum wrote: "I am upset by these accusations made by Professor Russell, and want to speak to you as soon as possible." Colwin Decl., Ex. 49.

In her July 29, 2013 email to Thometz, which again forwarded the email from ITT Technical Institutes, Dr. Russell wrote, in part:

> Do you happen to know anything about what's below? So far, I have been called a "spammer," a "litewait," "a troll." I also heard you called me that in private.
>
> (Am I a litewait, Joe? My family owns the School of Visual Arts, so am I a litewait? I have a very prominent family in the city here so do you want to take me on?)

Id. ¶ 291. The email also contained much of the same verbiage as the message Dr. Russell had earlier sent to Rectenwald, including that "Internet Impersonation carries a one year prison term per incident. This is also identity theft, agg. harassment, sexual harassment and the abuse of a public domain." Colwin Decl., Ex. 50. Dr. Russell also pasted in the body of the email excerpts of state statutes for criminal impersonation in the second degree, identity theft in the third degree, and aggravated harassment in the second degree. *Id.* In addition, she described the NYU Local post as "right up your alley. It's childish and cowardly." *Id.* Thometz responded the next day, writing in part:

> I am just now picking up your emails and, frankly, I'm confused by most of what you say. . . . I had nothing to do with the specific name-calling and other examples of harassment you mention.
>
> I don't have any recollection of using those names in private conversation with

> others, though I do recall seeing in one posting a faculty member using the term troll or trolling in reference to tone and manner that the debate about salaries had taken. But I did not participate in that debate, so I can't say much more than that. . . .
>
> I know that dealing with spam is a very irritating thing. But I also know from personal experience that it happens for all sorts of reasons, so I would not go pointing the finger at people for it.

Pl.'s 56.1 ¶ 292; Colwin Decl., Ex. 50.

Beginning on August 1, 2013, Dr. Russell sent a series of emails to Gay-Robbins listing reasons why she suspected that Borum was involved in the impersonation and spam. Pl.'s 56.1 ¶ 293. In the first email, she wrote:

> By the way, Huntington Long Island (where JP Borum's mother lives) is 9.9 miles from Hicksville (IP address [sic] from Manta) and 5.6 miles from Melville the IP address of the Swinsburg blog. All of the days that incidents occurred are on wednesdays and one weekend July 20, 21. So, the Gallatin post occurred on May 15, a Wednesday; the Manta site was created on 7/29, a wednesday; the spam entries calling me a troll..etc were all created on 7/17, a wednesday. That means that this person is out on the island on wednesdays and I'm pretty sure that JP goes out to see her elderly mother on those days. The blogs were created on 7/20 and 7/21. I'll bet when you get the porn info and I am going to check another site that the access date will be wednesday and out on the island. I can forward her email to you if you want it. She also knows that I am gay and would be able to out me which she did and I am not that open about my life at all. The pron [sic] that I got was lesbian porn. JP's gay. BINGO!!

Id. ¶ 294; Colwin Decl., Ex. 51. In an August 8, 2013 email to Gay-Robbins, Schwarzbach, and NYPD Detective Eric Ocasio, Dr. Russell stated: "JP Borum's twin brother lives in Philadelphia, PA where the porn was mailed from. It looks like JP lived there herself at one time. Bingo. The person who sent me that porn had to know about that place. I'm telling you. It's her." *Id.* ¶ 295. Dr. Russell sent a follow-up email later the same day, writing:

> So you know, JP Borum's twin brother is a big defense attorney in Philadelphia, PA. His office is on 123 S. Broad Street and the Porn store where the materials were acquired is on 234 Market Street. It's 1.7 miles from her brother's office. It's a 6 minute jaunt. I could be wrong, but it all points to her given the names that I am called in the spam and what she said in her email to me and the location of the porn store.

Id. ¶ 296. A few minutes later, Dr. Russell emailed the same recipients once again, stating:

> My boss just told me that JP Borum's brother was the asst DA in Philadelphia mainly homicide crimes. He's a bigwig down there and he has an office in Logan Square as well which is just around the corner from Market Street where the porn store is. Like I said, it explains some of the arrogance and bravado. Her brother is one of the best trial litigators down there and she may feel like she can get away with anything.

Id. ¶ 297.

5. Dean Schwarzbach's Email and the ITS Investigation

On August 1, 2013, Schwarzbach sent an email to Liberal Studies faculty and administrators, stating:

> Recently, it has come to my attention that a number of staff and faculty in our program have been subject to various forms of email, mail, and telephone harassment over the past several months. The harassment ranges from placing orders for merchandise in others' names to leaving comments on public web sites purporting to come from others.
>
> I write now for two reasons. One, as the investigation of these various forms of harassment has proceeded, it has come to light that the harassment is more pervasive and affects more of us than originally appeared to be the case. I ask now, if you have been subject to such harassment, but you have not reported it, that you report it immediately. Contact me or Shelia Gay-Robbins of Public Safety<sgr5@nyu.edu>.
>
> Two, I wish to reassure every member of our community that a full investigation is under way, involving ITS Security, NYU Public Safety, and the New York City Police. These forms of harassment constitute serious violations of University policy and are almost certainly criminal acts. We intend to identify and to hold fully accountable the person or persons responsible.

Id. ¶ 298; Colwin Decl., Ex. 54.

As part of its investigation, ITS ran the IP addresses that had been provided by Dr. Russell and confirmed that they were not linked to any computers connected to NYU's network. Pl.'s 56.1 ¶¶ 301-02.[5]

[5] Despite the fact that this assertion is supported by deposition testimony, Dr. Russell responds in her Local Rule 56.1 counterstatement as follows: "Deny. Plaintiff cannot confirm what ITS did with the IP addresses." Pl.'s 56.1 ¶ 301. That denial, unsupported by citation to any record evidence, is insufficient to create a factual dispute. Moreover, "[a] nonmovant cannot raise a material issue of fact by denying statements which the moving party contends are undisputed for lack of 'knowledge and information' in part because discovery allows the party opposing summary judgment to obtain the facts necessary to determine whether it must admit or deny them." *AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Servs. Inc.*, No. 06-cv-2142 (GEL), 2007 WL 4302514, at *4 (S.D.N.Y. Dec. 7, 2007) (Lynch, J.)

6. OEO's Investigation into Dr. Russell's Complaints of Online Impersonation and Unsolicited Mailings

On August 1, 2013, Public Safety referred Dr. Russell's complaints of online impersonation and the receipt of unsolicited email and mail to NYU's Office of Equal Employment. *Id.* ¶ 303. Dr. Russell's complaint was investigated by OEO Deputy Director Craig Jolley and Associate Director Shakera Khandakar. *Id.* ¶ 305. On August 6, 2013, Jolley emailed Dr. Russell to introduce himself and schedule a time to meet to discuss her complaints. *Id.* ¶ 306. Dr. Russell met with Jolley and Khandakar on August 9, 2013. *Id.* ¶ 307. During the meeting, Dr. Russell identified five NYU faculty members she suspected may be responsible for the complained-of conduct: Borum, Rectenwald, Shenefelt, Anthony Reynolds, and Thometz. *Id.* ¶ 308. However, she stated that she suspected Borum the most. *Id.* ¶¶ 309.[6]

After the meeting, Jolley and Khandakar accompanied Dr. Russell to her NYU mailbox to retrieve her mail and found additional pornographic materials and various sales catalogs. Colwin Decl., Ex. 46, at NYU001018. At that time, the OEO investigators made arrangements with Dr. Russell to regularly pick up her mail and filter it for her going forward. Pl.'s 56.1 ¶ 312; Colwin Decl., Ex. 46, at NYU001018.[7] OEO continued to pick up and filter Dr. Russell's mail until

---

(internal quotation marks omitted); *see also Ezagui v. City of New York*, 726 F. Supp. 2d 275, 285 n.8 (S.D.N.Y. 2010) (deeming facts admitted where defendants' response to plaintiff's Rule 56.1 statement asserted that they "[d]eny knowledge and information sufficient to form a belief as to the truth of the allegations contained in [plaintiff's Rule 56.1 statement]" (alterations in original)). Dr. Russell responds in similar fashion to several other assertions in the NYU Defendants' Local Rule 56.1 statement, and the Court will not reiterate the above reasoning for each of those instances.

[6] According to Dr. Russell, Jolley testified in his deposition that Dr. Russell had identified Thometz as her "biggest suspect." Pl.'s 56.1 ¶ 308. However, Dr. Russell has provided the Court only with certain excerpts of Jolley's deposition, and the page to which she cites for this proposition is not among them. The Court thus deems that assertion unsupported. In any event, even assuming Dr. Russell's side of the story to be true, it would not change the Court's resolution of the NYU Defendant's motion.

[7] Dr. Russell attempts to dispute this assertion in her Local Rule 56.1 counterstatement. She asserts that OEO did not "make arrangements" to pick up and filter her mail on August 9, or on any other date. Instead, Dr. Russell asserts, it was she who asked NYU to do so, and not until August 25. Pl.'s 56.1 ¶ 312. However, she cites only to an email that she sent to the OEO investigators on August 25, 2017, in which she wrote: "Thank you for speaking with me on friday and for holding my mail. Pursuant to our discussion, I would appreciate it if either or both of you get my mail for awhile out of the office on the 6th fl at 726 Broadway." Colwin Decl., Ex. 59. The distinction regarding who first suggested the mail filtering is immaterial, but the Court notes that the email Dr. Russell cites is not inconsistent with the NYU Defendants' supported assertion that OEO "made arrangements" on August 9, and therefore does not effectively place the NYU Defendants' assertion in dispute. Indeed, her assertion is contradicted by another email in the record in which she told Schwarzbach on August 23, 2013 that Jolley and Khandakar "had picked up some of [her] mail," and that

approximately September 6, 2013, when she instructed Jolley and Khandakar by email to stop doing so. Pl.'s 56.1 ¶ 313. In that email, Dr. Russell wrote: "I don't think it's necessary for you to pick my mail up any longer. It seems to have subsided and I don't think it's warranted at this point." *Id.* ¶ 314.

On August 11, 2013, Dr. Russell emailed Schwarzbach and Gay-Robbins to update them on a meeting she had just had with the NYPD. *Id.* ¶ 316. Dr. Russell stated that "[t]he university doesn't have to do anything at this time. I'll be the one who is pressing the charges." *Id.* ¶ 317. She also wrote: "I don't want to offer any details in email, so if you want more info on this, feel free to call me at home . . . ." Colwin Decl., Ex. 61.

On August 19, 2013, Schwarzbach forwarded to Gay-Robbins a spam email he had received the previous day. Pl.'s 56.1 ¶ 318. He wrote:

> Just FYI, for about a year I've been receiving all sorts of silly email like this addressed to my faculty colleague Rolf Wolfswinkel but with my email address. I had assumed they were some kind of spam, but in retrospect, in the light of the current harassment, I wonder if they are not part of the same pattern."

Id. ¶ 319; Colwin Decl., Ex. 62.

7. Dr. Russell Receives a Quran and Discovers Another Fake Business in Her Name

On or about September 3, 2013, Dr. Russell received a Spanish copy of the Quran. Pl.'s 56.1 ¶ 321. She wrote to Schwarzbach, Ocasio, Gay-Robbins, and Jolley on September 3, 2013 stating that she had obtained the sender's IP address from the merchant, and explaining: "THIS IS THE SAME IP ADDRESS OF THE INDIVIDUAL WHO SENT THE PORN TO ME FROM PHILLIE. It's a NYC residence and it's in the zip code 10013, lower Manhattan. Wow." Colwin Decl., Ex. 64.

---

they "agreed to pick up [her] mail for awhile." Colwin Decl., Ex. 63. Additionally, in her response to the Co-Worker Defendants' Local Rule 56.1 statement, Dr. Russell admitted that NYU informed her that they would intercept her mail, and began doing so, on August 9, 2013. ECF No. 161 ("Pl.'s Thometz/Meltzer 56.1"), ¶ 103. Finally, Dr. Russell herself testified in a deposition that the holding of her mail "was [OEO's] suggestion." Colwin Decl., Ex. 17, Dep. of Suzan M. Russell ("Russell Dep.") 385:9-24 (Feb. 9, 2016).

On approximately September 7, 2013, Dr. Russell discovered that someone had registered a fake business by the name of "Troll Enterprises Inc." for Constant Contact email marketing services under her name on or about July 6 or 7, 2013. Pl.'s 56.1 ¶ 322; Colwin Decl., Ex. 65.

8. Gay-Robbins Attends Dr. Russell's Meeting with the DA

On approximately September 11, 2013, Gay-Robbins accompanied Dr. Russell to a meeting at the DA's office. Pl.'s 56.1 ¶ 323. After the meeting, Dr. Russell emailed her, thanking her for attending the meeting and stating: "If you want me to, I'll keep you posted about the investigation." *Id.* ¶¶ 324-325. In response, Gay-Robbins requested that Dr. Russell continue to provide her with updates. *Id.* ¶ 326.

9. OEO's Continued Efforts to Implement Preventive Measures

On September 9, 2013, three days after Dr. Russell had asked Jolley and Khandakar to discontinue picking up her physical mail, Khandakar emailed Dr. Russell to schedule a time to meet and "discuss preventive and protective measures that the OEO [might] be able to implement." *Id.* ¶ 327. Khandakar and Dr. Russell met on September 18, 2013. Several preventive measures were discussed at the meeting, including changing Dr. Russell's NYU email address and resuming the collection and filtering of her physical mail. *Id.* ¶ 328. However, Dr. Russell rejected the options presented to her, as stated in a subsequent email to Jolley:

> To be honest, I thought it was a waste of my time. I know the university must be concerned about the legal ramifications of the pending investigation, but none of the propositions put forth made a whole lot of sense to me. Suggesting that I change my net ID is not going to prevent this individual(s) from harassing me or anyone for that matter when the net Id's are public. I declined the offer for that reason and because I am getting email information now that is relevant to the investigation and the ID should not be changed for that reason in addition to some other reasons.

Id. ¶ 329; Colwin Decl., Ex. 69.

10. Communications Between Dr. Russell and NYU Officials About the DA's Office

On September 11, 2013, Dr. Russell emailed Schwarzbach and informed him that she had met with the DA and "gave them all the evidence." Pl.s' 56.1 ¶ 330; Colwin Decl., Ex. 70. She also stated that the DA was "convening a grand jury for additional subpoenas" and that, once the culprit was identified, the DA's office was "going to issue an automatic order of protection/restraining order for me." Pl.'s 56.1 ¶ 331; Colwin Decl, Ex. 70. Dr. Russell also wrote in the email that the DA's office had given her two options: "1. press charges for multiple misdemeanors with an automatic order of protection. 2. Give the person a warning from the DA with the agreement that if the person does anything else, it will elevate the charges to a felony." Colwin Decl., Ex. 70.

Dr. Russell wrote to Schwarzbach again on September 16, 2013 stating that she had been contacted by the DA's office and informed that all subpoenas would be "going out" later that week. Pl.'s 56.1 ¶ 332; Colwin Decl., Ex. 71. She stated that, within the next month, "we'll have confirmation about who is doing this nonsense." Pl.'s 56.1 ¶ 333; Colwin Decl., Ex. 71. Schwarzbach replied about one hour later, saying "Thanks for the update, Suzan. This is good news." Colwin Decl., Ex. 71. In her response, Dr. Russell wrote:

> Once we find out who is doing this, why don't we talk about it and then decide together what would be the best thing to do for NYU. If there is more than one person, it could get messy. So, why don't we speak once we know and I will let you know asap.

Pl.'s 56.1 ¶ 334. Within less than an hour, Schwarzbach responded: "Suzan, That's fine . . . and if we need to loop in others afterward, we will." Colwin Decl., Ex. 71. According to an email from ADA Kathryn Werner to Dr. Russell, the subpoenas were sent out on September 18, 2013. Colwin Decl., Ex. 72.

Two weeks later, on September 30, 2013, Dr. Russell told Schwarzbach that the information derived from the subpoena returns would not be released until approximately October 7, 2013. Pl.'s 56.1 ¶ 336. In a response sent approximately one hour later, Schwarzbach wrote that he hoped the

DA's office would "communicate something meaningful" on October 7 so NYU could "take appropriate action internally." *Id.* ¶ 337; Colwin Decl., Ex. 73.

Dr. Russell wrote to Schwarzbach and Jolley on October 6, 2013, stating that the DA's office had informed her that stalking charges would be pursued. Pl.'s 56.1 ¶ 338. In response, Schwarzbach told Dr. Russell that NYU would take appropriate action once formal communication was received from the DA. Pl.'s 56.1 ¶ 340. Jolley also responded the next day, asking Dr. Russell to forward the email she had received from the DA. *Id.* ¶ 341. However, Dr. Russell did not do so, replying: "No. They want me to hold on pending some confirmations. I'll release everything when the time is right." *Id.* ¶ 342-343; Colwin Decl., Ex. 76. In a separate email to Jolley on the same day, Dr. Russell wrote: "And frankly, I don't have to tell the university anything at all. It's not your business. It's mine. So, it's a professional courtesy on my part to tell you anything." Pl.'s 56.1 ¶ 344.

Upon receipt of Dr. Russell's October 6, 2013 email, Schwarzbach asked Gay-Robbins to follow up on the DA's release of information:

> Is the ADA in a position to share any information about possible indictments? Are we likely to have the names of those indicted at any time soon?
>
> I assume that we would not be bound by the same standard of evidence in a criminal proceeding; that is, if we had good cause to believe a current employee were involved, we could take action internally immediately. Is this the case?

Id. ¶ 345-46. In response to Schwarzbach's inquiry, Gay-Robbins advised him that "ADA Werner is not at that point yet, she is still in the beginning stages of the investigation." *Id.* ¶ 347; Colwin Decl., Ex. 78. She also wrote: "Discussed Suzan's emails with ADA Werner, not sure about where Suzan got her information." Pl.'s 56.1 ¶ 348; Colwin Decl., Ex. 78.

On October 8, 2013, ADA Werner emailed Dr. Russell to inform her that the DA's office was "still awaiting answers on the subpoena returns" and that she would update Dr. Russell "as soon as we have some information." Pl.'s 56.1 ¶ 349; Colwin Decl., Ex. 79. Dr. Russell replied to Werner

on October 14, 2013, stating that she was still receiving "a plethora of pornographic materials via email in addition to Christian materials." *Id.* ¶ 350; Colwin Decl., Ex. 80. She also wrote: "Thanks for the recent update. Both I and the university are anxious to apprehend this individual who is obviously not well and that's being euphemistic about the situation." *Id.* ¶ 351.

In a November 8, 2013 email to Jolley and Schwarzbach, Dr. Russell advised that she would not be sharing information provided by the DA's office concerning the names of her alleged harassers. Russell Dep. 435:3-441:6. Specifically, she stated: "It'll be confidential. If the DA wants to call you and let you know who it is then I guess they will" and "They don't want to compromise the investigation." *Id.* 436:8-10, 437:22-23. Two days later, Dr. Russell emailed Schwarzbach and Jolley to advise them that the DA's office had informed her that they would be pursuing charges of aggravated harassment, internet impersonation, stalking, and possibly a hate-crime charge. Pl.'s 56.1 ¶ 354. In another email a few days later, she stated that the DA's office would also be pursuing a conspiracy charge. *Id.* ¶ 356.

During a November 13-14, 2013 email exchange with Jolley, Dr. Russell asked whether he or Schwarzbach would have any interest in holding a conference call with the DA's office. Pl.'s 56.1 ¶ 358. Jolley responded: "We are happy to join the conversation with the ADA if it would be helpful (and the ADA feels it is appropriate). Sheila from Public Safety would be the best person to participate (she is still at the University through the end of the semester)." Colwin Decl., Ex. 84. In the same email exchange, Dr. Russell also complained to Jolley about continued receipt of unwanted email, and Jolley reminded her that she had the option of marking the emails as spam in order to have similar messages diverted to her spam folder in the future. *Id.* Dr. Russell expressed concern that diversion of the messages to her spam folder could result in their deletion, while she wanted to keep them to turn over to the DA's office. *Id.* In closing, she stated: "I'll speak with DA and see what they think is best. I can tell you that they plan to proceed with the criminal investigation and it

is criminal." *Id.* Dr. Russell never responded further to Jolley's spam filtering suggestion. Russell Dep. 508:13-15.

On November 19, 2013, Dr. Russell wrote the following email to Schwarzbach and Jolley:

> I have information about one of these people that is not good. This is a very sick person who is dangerous and I'll be meeting with the DA this week to see what I can release to the university. I could be hurt in all of this.
>
> So, if the university has information about this situation that is at the DA's office then you are obligated to not only share it with me but with the DA as well so that I can protect myself.
>
> This person is very sick, Fred.

Pl.'s 56.1 ¶¶ 361-62; Colwin Decl., Ex. 85. Jolley responded the next morning, copying Gay-Robbins on the message, and encouraged Dr. Russell to contact Public Safety and the police if she felt unsafe. Colwin Decl., Ex. 46, at NYU 001138. He also asked her to "let the ADA's office know that if they need any information from the University, they should contact the University's Department of Public Safety directly." *Id.*

Gay-Robbins spoke with ADA Werner by telephone on November 25, 2013. Pl.'s 56.1 ¶ 364. During the call, Werner asked if Meltzer and an individual named Justin Fallon were employed by NYU, but did not provide any further information about the DA's investigation. *Id.*; Colwin Decl., Ex. 46, at NYU001020. On that same day, Dr. Russell emailed Schwarzbach, Jolley, and Gay-Robbins and stated:

> I am going to speak with the DA's office and I don't quite understand why NYU is talking to the DA.
>
> NYU did not file the police report and NYU did not file the complaint with the DA's office. I DID.
>
> You did nothing. I'm the one who will be pressing the charges with the DA. NOT YOU.
>
> And, since I'll be following up with a civil action, I don't want them to release certain information.
>
> It's privileged and confidential, and frankly, NYU should have told me what they

were doing.

> If you want to talk to the DA then you file a complaint. I'm sorry, but it's not your business.

Colwin Decl., Ex. 86.

The next day, Dr. Russell emailed White, the director of CAS Human Resources, stating that the DA had "confirmed by way of subpoena that Thometz [was] the one who [had] been sending all of the gay porn and disgusting sexual materials" to her. Pl.'s 56.1 ¶ 369.

11. Dr. Russell's Interactions with Shirley Smalls-Smith, the Related Investigations, and the Final Warning Letter

On approximately April 11, 2013, Dr. Russell and Liberal Studies administrative aide Shirley Smalls-Smith engaged in a dispute after Smalls-Smith asked Dr. Russell to lower her voice while making a personal call on her cell phone. Pl.'s 56.1 ¶ 370. In an email to Smalls-Smith, Dr. Russell stated that she had been on her phone with "someone in Superior Court" at the time while checking her mail. Pl.'s 56.1 ¶ 371; Colwin Decl., Ex. 88. Dr. Russell and Smalls-Smith each reported the dispute to Squillace and White, alleging that the other had engaged in inappropriately aggressive behavior. Pl.'s 56.1 ¶ 372; Colwin Decl., Ex. 89, at NYU000988. Squillace and White investigated and addressed their complaints, *id.* ¶ 373, and Dr. Russell and Smalls-Smith were directed to refrain from any unnecessary contact with each other, Colwin Decl., Ex. 90.

On May 16, 2013, Dr. Russell emailed Smalls-Smith, copying Squillace:

> The defendant in our case filed for summary judgment this morning BEFORE we had the chance to redepose our plaintiff. So, that entire deposition with your big mouth in it is going to the judge and we may have our case dismissed. Nice going, Shirley. In case you don't think that we can come after you for our losses then read the law below. Even "non-parties" can be sanctioned for unduly interrupting a deponent. Way to go, Shirley.
>
> And, I notice that I haven't gotten an apology from you either. We lose this case, and I'm coming after you or the school for the losses.

Pl.'s 56.1 ¶ 375; Colwin Decl., Ex. 90. Later the same day, both Squillace and White directed Dr. Russell to stop contacting Smalls-Smith. Pl.'s 56.1 ¶ 376. Specifically, White stated: "[P]lease stop

engaging Shirley on this matter [the phone call interruption] immediately. If you have an issue, you should go through your chain of command – starting with your direct supervisor." *Id.* ¶ 377; Colwin Decl., Ex. 91.

Dr. Russell's May 16, 2013 email prompted Smalls-Smith to file a complaint against her with CAS Human Resources after the end of the Spring 2013 semester, alleging a violation NYU's Preventing Threatening or Violent Behavior in the Workplace policy. Pl.'s 56.1 ¶ 378; Colwin Decl., Ex. 93. After an investigation, CAS Human Resources concluded that the evidence did not support a finding that Dr. Russell had violated the policy. Pl.'s 56.1 ¶ 379.

On August 9, 2013, Smalls-Smith complained to Squillace and White about Dr. Russell's continued attempts to engage her in conversation. Colwin Decl., Ex. 94. In response to Smalls-Smith's complaint, White requested a meeting with Dr. Russell to discuss the matter. Pl.'s 56.1 ¶ 381. On September 28 and 29, 2013, Dr. Russell complained to White that Smalls-Smith had made homophobic remarks to her. *Id.* ¶ 382. Specifically, she alleged that Smalls-Smith had made three comments to her: that Dr. Russell needed a new girlfriend, that Dr. Russell needed to move her bag, and that Schwarzbach did not like "flaming gay men." *Id.* ¶ 383. White referred the investigation to OEO, which determined that Smalls-Smith had not violated NYU's Non-Discrimination and Anti-Harassment Policy. *Id.* ¶ 384. In particular, OEO found that the evidence did not support a finding that Smalls-Smith had made the girlfriend and "flaming gay men" comments, and that there was no evidence to support a finding that the bag comment was motivated by Dr. Russell's membership in a protected class. *Id.* ¶¶ 385-88; Colwin Decl., Ex. 89, at NYU000991.

Despite White's and Squillace's instruction that Dr. Russell and Smalls-Smith were to avoid contact, Dr. Russell emailed Smalls-Smith on November 14, 2013. Pl.'s 56.1 ¶ 389. She wrote:

> You might be interested in knowing that my boss is going to attempt to recoup the losses that we sustained from your interruption in our depository session. It's

> around 25k. I was the one who was holding him back from doing that, but now, frankly, my dear, I no longer give a damn.

Id.; Colwin Decl., Ex. 97. That email prompted Squillace on November 27, 2013 to issue a "final written warning" for Dr. Russell's continued engagement with Smalls-Smith regarding non-work-related matters. Pl.'s 56.1 ¶ 390; Colwin Decl., Ex. 98. After a union grievance was filed on Dr. Russell's behalf, NYU converted the final written warning into a verbal warning, which was never issued. Pl.'s 56.1 ¶¶ 391-92.

12. Dr. Russell's Formal Complaints to OEO of Harassment and Discrimination by Squillace, Thometz, Meltzer, and NYU

On November 27, 2013, during NYU's Thanksgiving break, Dr. Russell sent Jolley a series of emails alleging harassment and discriminatory conduct by Thometz, Melzter, and Squillace, and requesting to file complaints against them. Pl.'s 56.1 ¶ 393. She filed a complaint against Squillace for issuing her a written warning and for asking her to meet with him in September 2013. Pl.'s 56.1 ¶ 394. She also filed a complaint against Thometz and Meltzer, alleging that the DA's office had informed her that the pornography she had been receiving by email and mail had been ordered from an IP address registered at their residence. *Id.* ¶ 395. Finally, she emailed Jolley to file an internal complaint against NYU itself for retaliation, as well as NYU, Thometz, and Meltzer for discrimination based on religion and sexual orientation. *Id.* ¶ 396.

Jolley responded to Dr. Russell's emails the next business day, December 3, 2013. *Id.* ¶ 397. In the email, Jolley advised her that OEO would move forward with its investigation of the allegations against Thometz and Meltzer, and would investigate the retaliation complaint against Squillace. *Id.* ¶ 398. With respect to the complaint against NYU itself for anti-Semitic and anti-gay discrimination, Jolley advised Dr. Russell that OEO would require additional information before proceeding with an investigation. *Id.* ¶ 401. Dr. Russell responded to Jolley later the same day and asked to postpone their discussions regarding her complaints "for a little while" because her son had been in a critical car accident in France. *Id.* ¶ 402.

13. Dr. Russell's Additional Statements to NYU About the DA's Investigation

The next day, on December 4, 2013, Dr. Russell emailed Schwarzbach and Jolley, asking that NYU refrain from taking any action against Thometz. *Id.* ¶ 403. Specifically, she wrote: "I have to ask that the university take NO action against Prof. Thometz until the judge has issued a protective order. Please communicate with Sheila Gay-Robbins before taking any action at all. There's a reason for the order and I am meeting with the DA on friday." *Id.* ¶ 404. On December 6, 2013, Dr. Russell emailed ADA Joan Illuzi-Orbon, expressing her disappointment in the DA's office's "unwillingness to follow through on the anti-semitic materials that are coming from the East Hampton residence" and to seek a protective order from a judge. Pl.'s 56.1 ¶ 406; Colwin Decl., Ex. 111.

Also on December 6, 2013, Dr. Russell emailed Jolley and Schwarzbach stating that she had just met with the DA for two hours, and that the DA had identified the individual responsible for creating the fake business listings in her name and for sending her unsolicited materials, including the alleged anti-Semitic materials. Pl.'s 56.1 ¶ 408. The email also stated that the individual was "an LSP faculty member," though it did not identify the individual by name, and stated that "[t]he DA investigative/police will be picking this individual up within the next week or so. They said that they'd let me know when it happened or is about to happen." *Id.* ¶ 409; Colwin Decl., Ex. 113. Three days later, Dr. Russell advised Jolley and Schwarzbach by email that she and the DA's office had "identified all individuals involved and when she [ADA Werner] says I can, I'll release the information." Pl.'s 56.1 ¶ 410. However, she then wrote in another email to Jolley and Schwarzbach the next day:

> I just got off the phone with DA. There is some stuff coming down the pipeline and she asked me to not say anything to NYU about specifics. Within the next week, they'll be shutting this harassment nonsense down. If what she's going to do doesn't work, she's going to escalate the situation.
>
> I'm sorry but that's all that I can tell you.

Id. ¶ 411-12. Two days later, on December 11, 2013, Dr. Russell wrote to Jolley and Schwarzbach once again, stating again that the DA had confirmed that all of the "sexual materials" and "anti-gay materials" she had received were sent from an IP address registered at the private residence of Meltzer and Thometz, and that the fake business listings and NYU Local comment had been made from the same IP address. *Id.* ¶ 413; Colwin Decl., Ex. 46, at NYU001155. She also wrote, however: "Please keep this information confidential and if you are able, please hold off on taking any adverse action until the DA has enacted its order, and they will be in touch with you soon." Colwin Decl., Ex. 46, at NYU001155. In an email sent the next day, Dr. Russell told Jolley and Schwarzbach: "It looks like Thometz is also responsible for all of the anti-semitic materials that I have received. We are waiting for a final confirm. [sic] on that." Pl.'s 56.1 ¶ 415; Colwin Decl., Ex. 46, at NYU001157.

On December 12, 2013, Dr. Russell emailed ADAs Illuzi-Orbon and Werner, asking whether Thometz would be required to "sign anything that is an admission" and whether he would be "presented with a written cease and desist order" when the DA' investigators speak to him. Colwin Decl., Ex. 115. She also asked for copies of "any and all evidence that directly links Thometz to the harassing behavior." *Id.* Iluzi-Orbon replied on the same day, advising Dr. Russell that "no paperwork [would] be generated by the investigators who ask [Thometz] to cease and desist his behavior," and that "we are not at liberty to give you documents which were generated by Grand Jury subpoena." Pl.'s 56.1 ¶ 417-18; Colwin Decl., Ex. 115.

On December 16, 2013, Dr. Russell received an email from an unfamiliar Gmail address with the subject "Last day." Pl.'s 56.1 ¶ 419; Colwin Decl., Ex. 116. The body of the email stated "Is it tomorrow." Pl.'s 56.1 ¶ 420; Colwin Decl., Ex. 116. Dr. Russell perceived the email as a threat and forwarded it to Jolley, Schwarzbach, and ADA Werner. Pl.'s 56.1 ¶ 420. Following a subpoena from the DA's office, it was determined that the email had been sent by one of Dr. Russell's current students. *Id.* ¶ 421. When she confronted the student about the email, he said he

had simply intended to ask "when was the last day of class." *Id.* ¶ 422; Colwin Decl., Ex. 118.

The next day, Dr. Russell emailed Jolley and Schwarzbach to say she had given Jolley's name and phone number to the ADA and the DA. Pl.'s 56.1 ¶ 424. She also stated:

> I did tell them that you have right to know especially since Thometz has been doing this to others and not just me.
>
> They have your info and Sheilia Gay-Robbins, but please, please do NOT do anything until you hear from them. It could jeopardize the investigation and sabotage their orders/actions. Just hang on.

Id. ¶¶ 425-426; Colwin Decl., Ex. 120. Later the same evening, Dr. Russell received an email from Werner that stated: "Our investigators are planning to speak with Professor Thometz tomorrow." Pl.'s 56.1 ¶ 427; Colwin Decl., Ex. 121. Dr. Russell forwarded the message to Jolley, who responded that he would "hold off on moving forward" until the next day and asked her to "let [him] know if there are further developments." Pl.'s 56.1 ¶¶ 428-29; Colwin Decl., Ex. 121.

14. OEO Schedules Meetings with Thometz and Melzter

On December 19, 2013, Jolley emailed Thometz and Meltzer and requested to meet with them about the complaint that Dr. Russell had filed with the OEO. Pl.'s 56.1 ¶ 430. Although meetings were scheduled for later the same day, Jolley decided that afternoon to postpone them until after the winter break that was beginning two days later, after reviewing Dr. Russell's email requesting that OEO "NOT do anything" until after they hear from the DA's office. *Id.* ¶ 431-32; Colwin Decl., Exs. 122 & 123; Colwin Decl., Ex. 55, Dep. of Craig Jolley ("Jolley Dep.") 33:7-34:18, 38:15-39:12. (Apr. 20, 2016).

On the evening of December 19, 2013, ADA Werner advised Dr. Russell that the investigators from the DA's office had spoken with Meltzer, stating: "Our investigators spoke with Professor Thometz's wife. The conversation was fruitful in terms of communicating the message that we had spoken about. I am hopeful that you will not receive any further messages or mail." Pl.'2 56.1 ¶¶ 434-36; Colwin Decl., Ex, 124. Dr. Russell forwarded that email to Jolley, who

responded the next morning by stating that OEO would "resum[e] [its] internal investigation when the University reopens on January 2nd." Pl.'s 56.1 ¶ 437; Colwin Decl., Ex. 124.

15. Dr. Russell's Renewed Communications with Thometz

On December 24, 2013, Dr. Russell took it upon herself to confront Thometz by email. Pl.'s 56.1 ¶ 438. She wrote:

> I am reforwarding to you your email from last summer when I confronted you about the porn I had been receiving and the anti-semitic materials…etc. Turns out that what you wrote below is a crock. At least, the DA in Manhattan seems to think so since all of the subpoena returns came in and all of these materials were sent from your private residence. So, not only did you out me to the entire university on NYU local, you sent me disgusting pornography with rape scenes..etc, and you sent me a Quran among a few other things. And, you opened four businesses in my name.
>
> So, here's the bottom line: you obey that cease and desist order or the DA is going to press charges and here's what you're looking at: Aggravated Harassment; Internet Impersonation, Stalking, and Hate Crime charge. I figure it's a 10-20 year stretch.
>
> It's also not going to look good on your CV that you're a gay-bashing, Jew-hating, misogynist. Is it now?
>
> Not to mention the fact that I can file a civil suit against you and your wife for punitive damages and defamation.
>
> So, despite all of the materials that you sent me saying that I was basically stupid and a "litewait," it looks like I'm not the stupid one. Didn't you know that I went to law school and that I work for a law firm?
>
> So, it was real "smart" to go after me. Wasn't it?
>
> You do one more thing to me or anyone else in the department (and you've been at this for two years apparently) and I mean one, and you're going to jail.
>
> You're not in Berkeley anymore, Toto.

Id. ¶ 439; Colwin Decl., Ex. 125. Thometz did not respond to Dr. Russell's email. Pl.'s 56.1 ¶ 442. Instead, he forwarded it to Jolley and stated that he would be available to meet with Jolley after his return to New York on January 2. *Id.* ¶¶ 443-43. Three days later, on December 27, 2013, Dr. Russell emailed Thometz again, stating that the DA "got a real kick out of the fact that you're going

to teach a course on 'evil' in the spring term and 'exacting revenge.'" *Id.* ¶ 444. Thometz forwarded that message to Jolley, as well. Colwin Decl., Ex. 126.

In a January 6, 2014 email, ADA Werner asked if Dr. Russell was available to meet on January 9, 2014 to discuss "Professors Thometz and Meltzer and any subsequent contact between you and them." Pl.'s 56.1 ¶ 445; Colwin Decl., Ex. 127. In response, Dr. Russell wrote:

> [I]f you're asking me to meet to discuss my reference to 'DA' in my email to Thometz, that reference does not apply to you or Joan or Katie. I have a family member who works in a DA's office in the city and a friend in your DA office. It was not a footnote to you.

Pl.'s 56.1 ¶ 446. In a subsequent reply, Dr. Russell told Werner that she would not make a trip to the DA's office if Werner's reason for the meeting was to discuss the email Dr. Russell had sent to Thometz. *Id.* ¶ 447. She stated that the she would only attend a meeting if it was to obtain additional information or if the DA's office wishes to "escalate the case in some way." *Id.*

16. Dr. Russell's Early 2014 Communications with NYU Administrators

On January 2, 2014, Dr. Russell informed Jolley, Schwarzbach, Squillace, and Associate Dean Lauren Holmes that she had received "another threat," but she provided no details about the nature of the threat. *Id.* ¶ 448. Holmes instructed Dr. Russell to contact NYU Public Safety about the threats. Pl.'s 56.1 ¶ 450. In reply, Dr. Russell wrote that "[t]he DA is aware of the threats and NYU is as well," adding that she had "forwarded the last email to NYU and they had security during my final exams." *Id.* ¶ 449; Colwin Decl., Ex. 129.

On January 4, 2014, Dr. Russell notified Jolley that a union grievance hearing was scheduled for later that month regarding Squillace's warning letter and that she "may not be willing to speak about it depending on what happens at the meeting." Pl.'s 56.1 ¶ 451. She also stated that she "may decide to sue the university." Colwin Decl., Ex. 130. In response, Jolley told Dr. Russell that he would hold off on her complaint against Squillace until after the grievance hearing, but that OEO would be continuing its investigation of her complaints against Thometz and Meltzer. Pl.'s 56.1

¶¶ 452-53; Colwin Decl., Ex. 130. When Jolley followed up with Dr. Russell on March 5, 2014 about her complaint against Squillace, she indicated that she did not want to speak to him "at all" about Squillace. Pl.'s 56.1 ¶ 454. However, in an email sent the following month, Dr. Russell accused Jolley of failing to follow up with her regarding her complaint against Squillace. *Id.* ¶ 455.

17. OEO's Interview of Thometz and Meltzer and Further Investigative Efforts

Jolley and White met with Thometz and Meltzer on January 9, 2017 as part of OEO's investigation into Dr. Russell's complaints. *Id.* ¶ 456. During the meeting, Thometz and Meltzer represented that they had never met Dr. Russell in person and denied having any knowledge or involvement in the alleged conduct. *Id.* ¶¶ 457-58. The next day, White sent Dr. Russell an email stating that OEO was investigating her complaint against Thometz and Meltzer and that she is "instructed not to have any contact with Meltzer/Thometz in any fashion." *Id.* ¶ 459; Colwin Decl., Ex. 134. Dr. Russell responded, telling White that the "the matter belongs to the DA" and that she was taking her "directives about the matter from the District Attorney." *Id.* ¶ 460. She concluded her email by saying: "I will not be updating the university at all any longer about the investigation at the DA's office. It has taken another turn and since it has reached a grand jury, they have asked me to keep the matter private." *Id.* ¶ 461. Only three days earlier, Dr. Russell had written in an email to ADA Werner: "Since you are not interested in prosecuting this guy [Thometz] . . [,] I'm not going to waste any more of my time or energy on this situation." Colwin Decl., Ex. 128.

On February 10, 2014, Jolley emailed Dr. Russell to request information from the DA's office regarding Dr. Russell's allegations against Thometz and Meltzer. Pl.'s 56.1 ¶ 463. Specifically, he wrote:

> We have not heard from the District Attorney or received any information from their office regarding your allegations about Professor Thometz and Professor Meltzer. We have only been able to review the limited information that we have access to internally.
>
> As such, it would be very helpful if somebody from their office would contact me

> or if you could provide written confirmation directly from their office about the information they have obtained. Is this possible?

Id. ¶ 464. Dr. Russell responded by forwarding to Jolley the December 19, 2013 email stating that the DA's investigators had spoken with Meltzer and adding: "This was sent to you! It confirms that Thometz was the one who did it." *Id.* ¶¶ 465-66; Colwin Decl., Ex. 136. Jolley responded to Dr. Russell as follows:

> Yes, I have this email but it does not provide any details about what was discussed or what information they obtained to implicate either Professor Thometz or Professor Meltzer.
>
> I am sorry you are frustrated but we really do need to be thorough in our investigation. These are serious allegations and we need to make informed decisions based on confirmed facts.

Pl.'s 56.1 ¶¶ 466-67; Colwin Decl., Ex. 136. Dr. Russell responded to Jolley's request for confirmation from the DA by stating that "the district attorney [would not] disclose certain information while a grand jury was convening." Pl.'s 56.1 ¶ 469. She also wrote: "Don't give me an attitude. This is NYU's own fault and I'm not frustrated. I'm angry. Then, you have an associate dean who takes kerosene and throws it on a burning flame. You're on your own." Colwin Decl., Ex. 137.

18. The Conclusion of OEO's Investigation into Thometz and Meltzer

On February 25, 2014, OEO "determined the evidence currently available to [them did] not support the finding of a violation of the University's Non-Discrimination and Anti-Harassment Policy" against Thometz or Meltzer. Pl.'s 56.1 ¶ 471. OEO informed the respective parties by formal letter sent to their NYU email addresses. *Id.* ¶ 472. Almost immediately, Dr. Russell replied with an email stating: "You have got to be kidding me? I'm going to sue the crap out of this school and I'm going public with this. This is outrageous." *Id.* ¶ 473.

In the findings section of the OEO Investigation Summary, Jolley and Khandakar set forth the reasoning supporting the final determination. *Id.* ¶ 474. They stated that, "[w]hile Professor

Russell's receipt of the[ ] materials is not in dispute, there is insufficient evidence at this time to determinedly identify the specific individual(s) whom may be responsible." Colwin Decl., Ex. 46, at NYU001024. They further stated in pertinent part that they had been unable to confirm if any of Dr. Russell's representations regarding Thometz and Meltzer were true, that the DA's office had failed to respond to Gay-Robbins's attempt to contact them directly, and that Dr. Russell had consistently told OEO to take no action until the DA's office had contacted them, which had not occurred. *Id.* ¶ 475. Consistent with the Investigation Summary, Dr. Russell has admitted in discovery in this action that she "has not provided NYU with documents from the D.A. identifying Thometz as the sender of pornography." Colwin Decl., Ex. 142.

Finally, although OEO had concluded that the evidence currently available did not support a finding that a violation of the Policy had occurred, the Investigation Summary concluded by stating: "If further evidence becomes available at a later date, the OEO will consider the new information at that time." Colwin Decl., Ex. 46, at NYU001025.

19. Dr. Russell's March 2014 Communications with Peter Diamond About Her Fall 2013 Student Evaluations

On March 3, 2014, Liberal Studies Core Program Coordinator Peter Diamond sent emails to a number of professors who had scored "over 0.5 point below the average" in their Fall 2013 course evaluations. Pl.'s 56.1 ¶ 478; Colwin Decl., Ex. 143. Diamond requested to have a "chat" with each professor to discuss "how they might improve their scores." Colwin Decl., Ex. 143. He also stated: "I hasten to add that this review is intended to be entirely constructive." *Id.* In response, Dr. Russell sent Diamond a series of emails asking how her score had been derived, and informing him that the union would have to be present for their discussion "given some other issues that have arisen and that are in direct relation to the DA investigation and retaliatory acts on the part of the university." Pl.'s 56.1 ¶ 480; Colwin Decl., Ex. 144. Diamond responded to Dr. Russell by

attaching the program-wide report as well as the instructor reports in an effort to explain how her score was derived. Pl.'s 56.1 ¶ 481.

After receiving Diamond's March 3, 2014 email, Dr. Russell came to believe that her course evaluations had been doctored by Squillace. Pl.'s 56.1 ¶¶ 482-83; Colwin Decl., Ex. 119, Dep. of Suzan M. Russell ("Russell Dep. III") 690-98 (Feb. 18, 2016). She testified that she suspected they had been doctored because students appeared to have responded to one another in the comments sections of her evaluations, and she believed Squillace was responsible because neither he, Schwarzbach, nor Holmes had responded to an email she sent them describing this apparent interaction. Russell Dep. III 690-95. Dr. Russell also testified that, when she viewed the same evaluations online in December 2014, they had been altered. *Id.*

In June 2015, Dr. Russell emailed Schwarzbach to raise concerns that her Spring 2015 evaluations had been doctored, in part because she did not think that students would use terms like "concrete readings" and "sufficient stake." Colwin Decl., Ex. 148.

20. The Coverage of Dr. Russell's Classes

Dr. Russell was out on leave due to a medical condition from approximately March 11, 2014 until April 14, 2014. Pl.'s 56.1 ¶ 486. On April 9, 2014, one of her students emailed her to inform her that a substitute teacher had not shown up for class that day. *Id.* ¶ 487. When Dr. Russell complained to Schwarzbach about this the same day, he responded: "We seem to have miscommunicated about your absence this week; this was our mistake, for which I apologize. We will handle arrangements for your classes for the rest of this week." *Id.* ¶¶ 488-89; Colwin Decl., Ex. 151. Dr. Russell responded, also on April 9, 2014: "Don't bother. I'll come in tomorrow." *Id.* ¶ 490.

In response to Dr. Russell's email advising Schwarzbach she would be returning to work on April 10, 2014, NYU's Americans with Disabilities Act Coordinator Mary Signor informed Dr. Russell that she was not permitted to return to work earlier than the April 14, 2014 date ordered by

her doctor. *Id.* ¶ 491; Colwin Decl., Ex. 150. Even though Dr. Russell received and responded to Signor's email on April 9, 2014, Dr. Russell came into work on April 10, 2014. Pl.'s 56.1 ¶ 492; Colwin Decl., Exs. 150, 152. Later that day, she emailed Signor to complain that returning to work was a "very bad idea" and that her heart had been acting up all day. Pl.'s 56.1 ¶ 493.

21. Dr. Russell's Termination from NYU

On approximately August 18, 2015, the parties to this litigation stipulated to the production of confidential materials, with the agreement that confidential information would be designated by affixing a stamp reading "CONFIDENTIAL" to each page of any confidential document. *Id.* ¶ 494. That stipulation was "so ordered" by this Court, with the reservation that, although the stipulation "binds the parties to treat as confidential the documents so classified," the Court's endorsement did not reflect a finding by the Court that any particular documents were confidential. *Id.* ¶ 495; Colwin Decl., Ex. 153; ECF No. 28. Paragraph 3 of the confidentiality stipulation states that "[i]nformation designated as confidential shall (a) be used by the parties only for the purpose of this litigation and not used for any other purposes whatsoever; and (b) shall not be disclosed, given, shown, discussed, or otherwise communicated or made available to anyone except as provided herein." ECF No. 28.

On September 18, 2015, Thometz and Meltzer provided their answers to Dr. Russell's first set of interrogatories, in which they identified NYU Professor Emily T. Bauman as a potential witness with relevant knowledge. Pl.'s 56.1 ¶¶ 497-98. On or about the same date, Thometz and Melzter also produced 318 pages of documents in response to Dr. Russell's first request for production of documents. *Id.* ¶ 499. Included among the produced documents were email exchanges between Thometz and Bauman that had been marked "confidential." *Id.* ¶ 500.

On the evening of October 5, 2015, Dr. Russell emailed Bauman, copying Schwarzbach, regarding comments Bauman had made to Thometz during an email exchange:

> Prof. Bauman:
>
> I don't even know you, but my lawyer sent me the discovery materials from your

> friend Thometz in regard to my federal civil case. What was so striking about your comments, in addition to other things, is that you said that I am not really Jewish? Really? And, how is that you know anything about me and my religion and my family? What's even worse is that you said that I was "milking" my brother's death? How does someone "milk" grief and loss? My son died shortly after my brother did, so am I "milking" his death too?
>
> You don't even know me, but maybe you can explain to a federal judge and jury how a 53 year old woman "milks" grief and loss. Come to the trial, Prof. Bauman, to see the rape porn that your buddy Thometz sent to me. Or, is the DA in Manhattan lying?
>
> You don't even know me, and I cannot figure out which is more offensive: being sent porn that objectifies and humiliates women or having someone comment after they have gone through two devastating losses that they "milk" their grief.
>
> You're not even human beings.

Id. ¶¶ 501-02; Colwin Decl., Ex. 156. Dr. Russell continued in a second email to Bauman and Schwarzbach the same evening:

> By the way, you weren't around when Prof. Watkins' daughter, Amy, was murdered in the city. I was around and you have no idea what that man went through. He aged ten years in a week. Or was he "milking" his grief? He never got over it and one rarely ever does. You just learn to live with it, Prof. Bauman.

Pl.'s 56.1 ¶¶ 503-05; Colwin Decl., Ex. 157.

Upon learning that Dr. Russell was engaged in direct communications with an identified potential defense witness about confidential information related to this case, counsel for the NYU Defendants sent a letter to Dr. Russell's former counsel on October 7, 2015, requesting that Dr. Russell cease and desist from such communication. Pl.'s 56.1 ¶ 506. Nevertheless, Dr. Russell emailed Bauman again on October 8, 2015. In that email, on which Schwarzbach was again copied, Dr. Russell wrote:

> Oh and by the way, Bauman, I noticed that you decided to diagnose me with what was it? Borderline Personality Disorder? Because I invited the faculty to play tennis and watch Ma and Pa Kettle movies? I thought your Ph.D was in literature and writing? You have the expertise and practice to diagnose someone? Or would you diagnose someone who sent a piece of porn to me that depicts a woman who is tied up like she is going to be quartered and a man standing over her unzipping his pants and in the caption it says, "Ready for the Big One?" How would diagnose that? Sexual pervert, sadist, misogynist? How would you

> diagnose someone who sends you a Quran on Rosh Hashanah? Is any of that in the DSM? What's amazing is that none of you ever say anything to my face; you always do this stuff in whispers behind the door, in private emails, and behind my back. You never do it with your hands on the table. How would you diagnose that? Pathological coward?

Id. ¶¶ 507-09.

On October 9, 2015, Schwarzbach sent Dr. Russell a termination letter, which stated: "Your employment in Liberal Studies is terminated, effective today, due to serious misconduct. You are engaged in harassing, intimidating, and threatening a faculty member in Liberal Studies. We also note you are in violation of a court directive." *Id.* ¶ 510; Colwin Decl., Ex. 8. The decision to terminate Dr. Russell was made solely by Schwarzbach, after consultation with NYU's Office of General Counsel concerning her conduct. Pl.'s 56.1 ¶ 516; Luke Decl., Ex. 27, at 6.

Dr. Russell's union filed a grievance protesting her termination under the CBA, which allows NYU to terminate or discipline an adjunct or part-time faculty member for "just cause." *See* Luke Decl., Ex. 27; CBA at 1, 23. The grievance proceeded to arbitration. Luke Decl., Ex. 27. The arbitrator found that Dr. Russell had engaged in misconduct that did "justify some discipline," but that her conduct did not "rise to the level that would justify immediate termination." CBA at 11. With respect to the appropriate remedy, the arbitrator concluded that a written warning was appropriate because, pursuant to the Constructive Discipline Policy, "[w]ritten warnings are appropriate . . . when the problem requires a more serious response." *Id.* The arbitrator added: "This was a serious issue that required a serious response." *Id.* The arbitrator also awarded Dr. Russell backpay for the period between her October 2015 termination and the end of the 2015-16 academic year; however, he did not award reinstatement. *Id.*

On the same day that Dr. Russell was terminated, the NYU Defendants filed a motion in this Court in connection with Dr. Russell's conduct. ECF No. 32. The motion sought (1) a protective order barring Dr. Russell from having contact with identified or potential witnesses, as well as defense counsel; (2) a finding that Dr. Russell was in contempt of court for violating the so-

ordered confidentiality stipulation; and (3) an award of sanctions, including an assessment of fees associated with preparation of the motion and an adverse jury instruction "detailing [Dr. Russell's] efforts to intimidate a witness." ECF No. 38 at 8. After full briefing and oral argument, the Court found that Dr. Russell had violated the so-ordered confidentiality stipulation. Colwin Decl., Ex. 160 (Oct. 30, 2015 Hr'g Tr.) 35:9-16, 37:11-15. With respect to the consequences of Dr. Russell's violation, the Court ordered her to pay the fees and costs that the NYU Defendants had incurred in bringing the motion. *Id.* 39:24-40:23. The Court reserved decision on the request for an adverse jury instruction and, in order to afford Dr. Russell a "second chance," the Court declined to enter the requested protective order. *Id.* 38:13-39:23

In a deposition conducted in this matter, Dr. Russell has testified that she believed NYU's decision to terminate her was inappropriate because (1) Schwarzbach did not identify in the termination letter the faculty member who made the accusations against her; (2) NYU had not followed progressive disciplinary steps prior to her termination; and (3) her termination occurred after she filed a complaint with the DA's office in 2013 and this lawsuit in 2015. Pl.'s 56.1 ¶ 518; Russell Dep. III 779:24-780:15.

22. Thometz's Admissions

During a deposition conducted in this matter on April 15, 2016, Thometz admitted he had signed Dr. Russell up for random "free stuff" and engaged in at least some impersonation of her online. Specifically, he testified that, on several occasions in 2013, he conducted "Google searches for free stuff and randomly selected sites to generate spam." Colwin Decl., Ex. 11, Dep. of Joseph M. Thometz ("Thometz Dep.") 86:7-12 (Apr. 15, 2016). Although Thometz did not recall specifics, he testified that he had signed Dr. Russell up to receive free products, emails, and catalogs, including from "adult web sites." *Id.* 87:8-17, 89:5-12. He also admitted in his testimony to having sometimes changed Dr. Russell's name to add the words "troll" or "litewait," and to authoring the NYU Local

comment "as a [parody] of e-mails she had written and sent to the faculty just a day or two before about the love boat and about tennis." *Id.* 101:5-13, 104:11-105:6.

Thometz testified that he did all of this in order to "mimic or mirror the effect of an unregulated list" and to "motivate a discussion to regulate the list serve." *Id.* 87:21-25. When asked what it was about the unregulated Listserve that justified him in signing Dr. Russell up for these materials, he testified: "Public humiliation, humiliating. The experience of being humiliated in front of colleagues. And for reasons I don't understand why it was not managed over the course of a year and a half." *Id.* 89:16-23. More specifically, Thometz believed his conduct was justified because Dr. Russell had frequently posted messages on the Listserv that he found offensive, including messages that commented on and ridiculed various members of the faculty and administration. *Id.* 91-103. In his declaration, Thometz states that he "made the decision to send to Plaintiff's NYU email and business mailbox certain random free stuff so that she would experience being spammed and in the hope that that would cause her to regulate her own conduct." Thometz Decl. ¶ 14.

Thometz engaged in all of these acts using his personal computer from a rental home in Montauk, his residence in Manhattan, and a library in Battery Park. Pl.'s 56.1 ¶¶ 525-26. According to his declaration, he "ceased all such conduct no later than July 30, 2013." Thometz Decl. ¶ 11. Dr. Russell and Thometz had never met prior to his April 15, 2016 deposition. Pl.'s 56.1 ¶ 520. Thometz testified that, because he had never met Dr. Russell at the time he engaged in this conduct, he had been unaware of her protected categories, and he had "no intention of discriminating on protective categories." Thometz Dep. 114-15.

It is undisputed that Thometz falsely denied having any knowledge about the unsolicited materials or the online impersonation during NYU's internal investigation into Dr. Russell's complaint. Pl.'s 56.1 ¶ 531; Thometz Dep. 111-12. It is also undisputed that Thometz had resigned from his position in the Liberal Studies Program approximately two years before the admissions

elicited in his April 2016 deposition, though he was still teaching independent study courses and serving on senior colloquia at NYU's Gallatin School until May 2016. Thometz Decl. ¶ 2-3.

E. The New York County DA's Response to Dr. Russell's April 2015 FOIL Request

Despite Dr. Russell's several assertions that the DA was pursuing an array of criminal charges in connection with the complained-of conduct, no charges were ever brought. According to an April 7, 2015 letter from the New York County District Attorney's office in response to a New York Freedom of Information Law request from Dr. Russell's attorney, "[f]ollowing a full investigation of Ms. Russell's allegations," the DA's office had "declined to pursue any criminal charges against any person" and that criminal charges "[could not] be sustained." *Id.* ¶ 339; Colwin Decl., Ex. 75.

In addition, in response to the FOIL request for "any documents relating to the IP addresses obtained during the investigation which link possible perpetrators to the harassment," the DA's office wrote: "Records relating to any IP Addresses were procured by way of Grand Jury Subpoena. CPL § 190.25(4) specifically prohibits he disclosure of grand jury proceedings, which are secret and not subject to disclosure except by court order." Colwin Decl., Ex. 75.

F. Procedural History

Dr. Russell initiated this action on March 24, 2015. ECF No. 1. On September 3, 2015, pursuant to the District's standing order for all counseled employment discrimination cases, the parties participated in a court-annexed mediation. ECF Nos. 22, 29. However, the mediation was unsuccessful in resolving any of the issues raised in the case. ECF No. 29. On February 3, 2016, Dr. Russell filed an amended complaint, primarily adding a claim based on her termination from NYU. ECF No. 61. In her amended complaint, Dr. Russell alleges claims against NYU for hostile work environment, discrimination, and retaliation under Title VI, Title IX, the ADEA, the NYSHRL, the NYCHRL, as well as a common-law claim for intentional infliction of emotional

distress. She also brings claims against Squillace for discrimination and harassment under the NYSHRL and the NYCHRL, as well intentional infliction of emotional distress.[8] The NYU Defendants filed separate answers to the amended complaint on March 3, 2016,[9] ECF Nos. 73-74, and discovery in this matter concluded on August 8, 2016.

The NYU Defendants filed the instant motion for summary judgment on September 23, 2016. ECF Nos. 126-129, 133-135. On October 28, 2016, the NYU Defendants filed an amended memorandum of law in support of their motion. ECF No. 158. Dr. Russell filed her opposition on November 4, 2016, ECF Nos. 168-170, and she, too, filed an amended memorandum of law in support of her opposition on November 8, 2016, ECF No. 174. The NYU Defendants filed a reply on November 14, 2016. ECF No. 178-179.[10]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting former Fed. R. Civ. P. 56(c))). A

[8] As Dr. Russell acknowledges, the Second Circuit does not currently recognize Title VII claims for discrimination based on sexual orientation. *See* Pl.'s Mem. at 29 n.3; *Christiansen v. Omnicom Grp.*, 852 F.3d 195, 199 (2d Cir. 2017) (declining to reconsider previous decision that Title VII's prohibition of discrimination "because of . . . sex" does not encompass discrimination on the basis of sexual orientation). To the extent that Dr. Russell alleges she faced discrimination on the basis of her sexual orientation, she does so only with respect to her state- and city-law claims.

[9] The Co-Worker Defendants filed answers to the amended complaint on February 24, 2016. ECF Nos. 69-70. No Rule 12 motions were filed in this case.

[10] Neither the NYU Defendants nor Dr. Russell sought leave to file their amended memoranda of law, nor have they ever provided an explanation of their reasons for filing them or the changes they contained. In their reply brief, the NYU Defendants argue: "Notably, on November 8, 2016, Plaintiff's counsel filed an amended memorandum of law in opposition to the NYU Defendants' Motion for Summary Judgment . . . without leave of court. Accordingly, the NYU Defendants respectfully request the Court disregard Plaintiff's amended memorandum of law." NYU Defs.' Reply Mem. in Supp. of Mot. for Summ. J. (ECF No. 179) ("Defs.' Reply Mem.") at 1 n.1. That argument is ironic, since the NYU Defendants did the same thing. In any event, the Court will treat all parties alike with respect to this issue and will consider both Dr. Russell's and the NYU Defendants' amended memoranda.

genuine dispute exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," while a fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

The movant bears the initial burden of demonstrating "the absence of a genuine issue of material fact," and, if satisfied, the burden then shifts to the non-movant to present "evidence sufficient to satisfy every element of the claim." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008) (citing *Celotex*, 477 U.S. at 323-24). To defeat a motion for summary judgment, the non-movant "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting former Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 586, and she "may not rely on conclusory allegations or unsubstantiated speculation," *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001) (internal quotation marks and citation omitted).

In determining whether there exists a genuine dispute as to a material fact, the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (internal quotation marks and citation omitted). The Court's job is not to "weigh the evidence or resolve issues of fact." *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 254 (2d Cir. 2002) (citation omitted); *see also Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996) ("In applying th[e] [summary judgment] standard, the court should not weigh evidence or assess the credibility of witnesses."). "Assessments of credibility and choices between conflicting versions of the events are

matters for the jury, not for the court on summary judgment." *Jeffreys v. City of New York*, 426 F.3d 549, 553-54 (2d Cir. 2005) (citation omitted).

III. DISCUSSION

The Court begins (and more or less ends) with Dr. Russell's federal-law claims. Those claims are brought against NYU for (1) hostile work environment in violation of Title VII and the ADEA; (2) discrimination in violation of Title VII and the ADEA; (3) retaliation in violation of Title VII; and (4) hostile work environment and retaliation in violation of Title IX.

A. Hostile Work Environment Claims Against NYU Under Title VII and the ADEA

Dr. Russell alleges that NYU subjected her to a hostile work environment in violation of Title VII and the ADEA. To establish a claim for a hostile work environment pursuant to Title VII or the ADEA, a plaintiff must demonstrate "(1) that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment and (2) that there is a specific basis for imputing the conduct creating the hostile work environment to the employer." *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009) (internal quotations marks and citation omitted); *see Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003) (explaining that the same standards apply under Title VII and the ADEA). The Court need not determine for purposes of the NYU Defendants' motion whether Dr. Russell has made a showing of sufficiently severe or pervasive harassment because, on the undisputed factual record presented to the Court, no reasonable jury could find a sufficient basis to impute the alleged conduct to NYU. *See Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (declining to decide the first prong where the second prong was not satisfied).[11]

[11] In declining to address the first prong of Dr. Russell's hostile work environment claim, the Court takes no position concerning the nexus between the complained-of conduct and any of Dr. Russell's protected characteristics.

The standard for imputation of conduct to an employer depends upon the status of the alleged harasser. When the harasser is a supervisor, the employer is presumed to be either strictly or vicariously liable. *See Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 63 (2d Cir. 1998) (citation omitted). However, "when the harassment is attributable to a co-worker, rather than a supervisor, . . . the employer will be held liable only for its own negligence." *Id.* (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 801-07 (1998)). More specifically, "[w]hen harassment is perpetrated by the plaintiff's coworkers, an employer will be liable if the plaintiff demonstrates that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 107 (2d Cir. 2011) (internal quotations marks and citation omitted); *see also Murray v. New York Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) ("An employer who has notice of a discriminatorily abusive environment in the workplace has a duty to take reasonable steps to eliminate it." (citation omitted)). Because it is undisputed that the alleged harassers in this case—Thometz and/or Meltzer—were Dr. Russell's co-workers rather than her supervisors, the latter standard applies here.

Dr. Russell does not contend that NYU failed to provide a reasonable avenue for complaint, nor could she. The record unequivocally shows that NYU had a robust anti-discrimination and anti-harassment policy, which included a detailed complaint procedure with at least five different outlets to which an employee could make a complaint. Moreover, there is no dispute that Dr. Russell in fact filed a series of formal complaints with OEO, thereby taking advantage of at least one of the avenues of complaint that NYU provided. *See Duch*, 588 F.3d at 763 (holding that "no reasonable jury could conclude that defendants failed to provide [plaintiff] with a reasonable avenue of complaint" where employer provided "numerous alternative avenues of complaint that [plaintiff] could, and eventually did, pursue").

In addition, there is no dispute that NYU knew that Dr. Russell was receiving unsolicited email and mail, at least some of which was offensive, and that she was being anonymously

impersonated on the internet. The record shows that Dr. Russell reported these occurrences in July 2013, as well as on a rolling basis thereafter. The sole question for the Court with respect to her hostile work environment claim, then, is whether the factual record presented by the parties is such that no reasonable juror could find that NYU failed to take reasonable steps to remedy the alleged harassment. The Court concludes that it is. In reaching that conclusion, the Court is mindful that the standard for imputing liability to NYU for harassment by co-workers is negligence, not strict liability. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013) ("If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a 'supervisor,' however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided." (citation omitted)). No reasonable jury could conclude that NYU acted negligently in response to Dr. Russell's complaints.

The record shows that representatives of NYU responded to Dr. Russell's complaints and follow-up emails promptly and often. Very shortly after she complained to Schwarzbach of the online impersonation, the matter was referred to ITS to investigate whether the posts were made from computers on NYU's network. Indeed, within seven days of Dr. Russell's initial report to Schwarzbach, three NYU departments were involved in an investigation into her complaint. In addition to ITS's efforts, Gay-Robbins, the associate director of NYU's Department of Public Safety, reached out to Dr. Russell proactively to discuss the reported impersonation. The day after Dr. Russell reported the impersonation and the receipt of pornographic materials directly to Public Safety, she and Gay-Robbins spoke by phone. Both Schwarzbach and Gay-Robbins encouraged Dr. Russell to contact the police. Further, shortly after Public Safety received Dr. Russell's complaint, it

referred the complaint to OEO.[12] Less than one week after that referral, Jolley, OEO's deputy director, made contact with Dr. Russell, and OEO commenced its own investigation.

It is undisputed that the anonymous acts of online impersonation and the sending of unsolicited emails, mail, and products (to the extent they were not mere spam) were committed using a personal computer from locations outside of NYU, and not while connected to any NYU network. It is similarly undisputed that all of the online impersonation was conducted on websites over which NYU had no control, including NYU Local, ketknbc.com, and the Swinsburg blog. When ITS's prompt investigation into the IP addresses provided by Dr. Russell had resulted in the determination that this activity had not been conducted on NYU's networks, NYU's ability both to investigate the complained-of conduct and to remedy it became limited, as did the scope of NYU's duty to take corrective action. *See, e.g.*, *Snell v. Suffolk Cty.*, 782 F.2d 1094, 1104 (2d Cir. 1986) (stating that whether an employer took "reasonable steps to remedy it" may turn in part on "the resources available to the employer"); *Distasio*, 157 F.3d at 65 (stating that factors to be considered in deciding whether employer took reasonable steps include "the nature of the employer's response in light of the employer's resources" (citation omitted)); *Lima v. Addeco*, 634 F. Supp. 2d 394, 400-01 (S.D.N.Y. June 9, 2009) (Chin, J.) (stating that an employer may be held liable only if the plaintiff shows that it "knew or should have known of the . . . conduct and failed to take corrective measures *within its control*" (emphasis added) (citation omitted)); *see also Green v. Jacob & Co. Watches, Inc.*, --F. Supp. 3d--, No. 15-cv-3611 (PAC), 2017 WL 1208596, at *3 (S.D.N.Y. Mar. 31, 2017) (holding that plaintiff "has plausibly alleged that [defendant] knew of discriminatory conduct and failed to take corrective

[12] To the extent that Dr. Russell contends that liability should be imputed to NYU because Schwarzbach failed to initially report her complaints to one of the individuals or offices listed in NYU's Non-Discrimination and Anti-Harassment Policy, that argument is without merit. As an initial matter, Dr. Russell provides no legal support for the proposition that an employer's non-compliance with its policies, on its own, is a ground for the imputation of conduct on a hostile work environment claim. It is not. As already explained, the relevant legal question is whether NYU took reasonable steps after it knew of harassment. *See Rojas*, 660 F.3d at 107. Moreover, Dr. Russell fails to provide any evidentiary basis from which a jury could conclude that this alleged non-compliance made any difference to NYU's response as a whole. Indeed, OEO—one of the offices specifically listed in the Policy—became involved in the investigation within days of Dr. Russell's initial complaint to Schwarzbach.

measures *within its control*" (emphasis added) (internal quotation marks and citation omitted)); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 785 (E.D. Wis. 1984) (considering whether it "was within the defendants' capability to halt the harassment campaign").

Nevertheless, OEO took steps to attempt to remedy the effects of the complained-of conduct by filtering Dr. Russell's physical mail and changing her NYU email address, and Jolley explained to her how to take advantage of and improve the performance of NYU's email spam filtering system by flagging offensive messages. But Dr. Russell specifically instructed OEO to stop picking up and filtering her mail, and she rejected the other preventative measures that OEO had proposed, in part because she wanted to continue receiving the offensive materials to use as evidence in a criminal or civil proceeding. Even so, OEO continued to offer these solutions to her on later occasions.

Dr. Russell's argument that NYU's response to the complained-of conduct was insufficient because NYU did not interview or otherwise investigate "all individuals named as possible harassers" during her initial meeting with OEO, Pl.'s Mem. at 16, is unavailing. First, the record shows that Dr. Russell provided nothing more to NYU than her own speculation that Borum, Schenefelt, Rectenwald, and Reynolds might be responsible. Indeed, she concedes that her naming of Borum—who she identified in the August 2013 meeting and in emails to several people, including an NYPD detective—was purely speculative. *See, e.g.*, Pl.'s 56.1 ¶ 294. Dr. Russell provides no legal support for the proposition that NYU had a duty to take particular investigative steps against particular individuals based solely on her speculative say-so. And, contrary to her assertion, NYU did not violate its own policies by failing to interview those individuals. The Policy does not provide that NYU will interview every alleged wrongdoer. Instead, it states that the University will investigate alleged violations "as necessary and appropriate," and that, while every investigation "will include an interview with the alleged employee-victim," the investigation "also *may* include interviews with . . . the alleged wrongdoer." Luke Decl., Ex. 24, at NYU001203 (emphasis added).

NYU did interview Dr. Russell, and it did not violate its own policies by opting not to interview Borum, Schenefelt, Rectenwald, and Reynolds without any evidence of their involvement.

Similarly, Dr. Russell's argument that NYU was negligent in failing to take disciplinary action against Thometz and/or Meltzer fails, because the record simply does not support such a conclusion. NYU had no basis to connect Thometz or Meltzer to the complained-of conduct—other than, again, Dr. Russell's say-so and her unsubstantiated representations about the DA's investigation—until at least December 17, 2013.[13] On that date, Dr. Russell forwarded to Jolley an email from ADA Werner stating: "Our investigators are planning to speak with Professor Thometz tomorrow." Pl.'s 56.1 ¶ 427; Colwin Decl., Ex. 121. To that first objective indication of potential involvement, Jolley reacted promptly. Only two days later, he scheduled a meeting with Thometz and Meltzer, which he postponed only because Dr. Russell had asked him to "hold off on taking any adverse action" against Thometz and to "NOT do anything" until after he heard from the DA's office. Colwin Decl., Ex. 46, at NYU001155; Pl.'s 56.1 ¶¶ 425-26; Colwin Decl., Ex. 120. When, later that same evening, Dr. Russell forwarded an email from ADA Werner stating that the DA's investigators had spoken with Meltzer, Jolley promptly responded the next morning that OEO would resume its investigation as soon as NYU reopened on January 2. Pl.'s 56.1 ¶ 437; Colwin Decl., Ex. 124.

One week after NYU reopened from its holiday closure, Jolley and White did meet with Thometz and Meltzer, who denied having any knowledge of or involvement in the complained-of conduct. Thus, aside from the hardly inculpatory indication from Werner that the DA's investigators had spoken to Meltzer, NYU still had no basis at that time to impose discipline on either of them. Instead, Jolley made continued and varied attempts to obtain confirmation from the

[13] Indeed, taking disciplinary action against Thometz and/or Meltzer with nothing more than Dr. Russell's own hearsay reports could have subjected NYU to action—whether a legal claim or a union grievance—by them. The Court declines to endorse an approach that would require an employer to impose discipline on an employee without an adequate basis in evidence to do so.

DA's office that there was evidence tying Thometz to the alleged misconduct—evidence that NYU could not itself have collected—but he received none. And by the time Thometz admitted to engaging in at least some of the complained-of conduct during his mid-April 2016 deposition, he was no longer employed by the Liberal Studies Program, and he left NYU altogether the next month.[14] Thometz Decl. ¶¶ 2-3.

Furthermore, the record is replete with instances of Dr. Russell asking NYU to play second-chair to the DA with respect to investigation of the complained-of conduct and specifically instructing NYU to refrain from taking action. For instance, only three weeks after she first alerted Schwarzbach to the online impersonation, Dr. Russell emailed Schwarzbach and Gay-Robbins to inform them that, in light of her meeting with the police, "[t]he University doesn't have to do anything at this time." Pl.s' 56.1 ¶ 317; Colwin Decl., Ex. 61. Approximately one month later in September 2013, she informed Schwarzbach that the DA was in the process of sending out subpoenas to identify the culprit and stated: "Once we find out who is doing this, why don't we talk about it and then decide together what would be the best thing to do for NYU." Colwin Decl., Ex. 71. Dr. Russell added: "So, why don't we speak once we know and I will let you know asap." *Id.* In early December 2013, only one week after having filed a formal written complaint with OEO against Thometz and Meltzer, Dr. Russell responded to Jolley's acknowledgement of the complaint by stating: "I have to ask that the university take NO action against Prof. Thometz until the judge has issued a protective order. Please communicate with Sheila Gay-Robbins before taking any action at all." Pl.'s 56.1 ¶ 403-04. In addition, on at least one occasion, Dr. Russell made known her disapproval of NYU's attempt to communicate with the DA's office about its investigation. When Gay-Robbins spoke with ADA Werner by phone on November 25, 2013, Dr. Russell issued a sharp

[14] Although the parties do not point the Court to any cognizable evidence concerning the reason for Thometz's May 2016 departure from NYU, Dr. Russell presents no evidence suggesting that NYU acted negligently in retaining Thometz for an undue length of time after his admissions.

rebuke. In an email to Schwarzbach, Jolley, and Gay-Robbins, she stated "I don't quite understand why NYU is talking to the DA" and "I'm sorry, but it's not your business." Colwin Decl., Ex. 86.

These instructions from Dr. Russell, particularly when viewed in light of NYU's limited ability to investigate off-campus conduct and its concomitant need to rely on law enforcement, provide further support for the conclusion that NYU's response to Dr. Russell's complaints was reasonable. *See, e.g.*, *Torres v. Pisano*, 116 F.3d 625, 638-39 (2d Cir. 1997) (holding, on summary judgment, that failure to act in response to complaint was not unreasonable where plaintiff asked supervisor to whom she complained to "keep the matter confidential and to refrain from taking action until a later date").[15]

***

In sum, the record shows that several different officials high in NYU's chain of command responded promptly and often to Dr. Russell's complaints and communications, met with Dr. Russell and others, and took significant steps both to identify the culprit and to alleviate the effects of the harassment on Dr. Russell in the interim. In so doing, NYU was limited by its inability to exercise the investigative powers of law enforcement with respect to off-campus conduct and by Dr. Russell's own requests that it forbear from taking action on several occasions to avoid interference

[15] The holding in *Pisano* does not create an absolute rule. In *Pisano*, the Second Circuit stated that "[t]here is certainly a point at which harassment becomes so severe that a reasonable employer simply cannot stand by, even if requested to do so by a terrified employee." 116 F.3d at 639. As examples, the court cited "cases in which a supervisor or co-worker is harassing a number of employees, and one harassed employee asks the company not to take action," as well as cases in which "serious physical or psychological harm . . . would have occurred if the employer did not act forthwith." *Id.* None of those circumstances is present here. First, there is absolutely no evidence in the record suggesting that Dr. Russell asked NYU to refrain from taking action because she was too terrified to pursue her complaint. Indeed, she had brought complaints to the attention of both NYU and law enforcement and, at least from NYU's perspective, she requested that NYU refrain from taking action in order to coordinate the two investigations and avoid interference with law enforcement efforts. *See id.* at 638-39 ("[I]n evaluating the reasonableness of [defendant's] conduct, [plaintiff's] understanding is not determinative. What *is* relevant is what [plaintiff] said to [defendant], and [defendant's] reasonable understanding of what she meant." (emphasis in original)). Second, there were no other victims of harassment here who suffered because Dr. Russell's requests were heeded. Finally, even assuming *arguendo* that Dr. Russell was suffering "serious physical or psychological harm" as the result of ongoing harassment, NYU reasonably understood that it was not going unaddressed. Instead, Dr. Russell was pursuing her complaint with law enforcement, who was better equipped to investigate the misconduct that NYU had already determined was not taking place on its network.

with law enforcement's efforts respecting the same conduct. Indeed, it is difficult to imagine what else NYU could have done under the circumstances.

The gravamen of Dr. Russell's argument for imputation of liability to NYU appears to be that NYU "did not stop the harassment." *See, e.g.*, Pl.'s Mem. at 14. But hostile work environment claims under Title VII and the ADEA do not turn on an absolute duty to stop harassment. Instead, an employer like NYU is liable only if it failed to take reasonable steps to eliminate known harassment.[16] *See Rojas,* 660 F.3d at 107; *Distasio*, 157 F.3d at 63; *Murray*, 57 F.3d at 249. In light of the above, and particularly in view of the nature of NYU's response "in light of [its] resources," *see Distasio*, 157 F.3d at 65, the Court concludes that no reasonable jury could find that NYU responded negligently here. Accordingly, summary judgment is granted for NYU with respect to Dr. Russell's hostile work environment claims. *See, e.g.*, *Kodengada v. Int'l Bus. Machs. Corp.*, 88 F. Supp. 2d 236, 243 (S.D.N.Y. 2000) (holding, on summary judgment, that alleged harassment could not be imputed to employer because employer "investigated [plaintiff's] complaints and arranged meetings to address his problems"); *cf. Alfano v. Costello*, 294 F.3d 365, 380 (2d Cir. 2002) (reversing denial of defendant's post-verdict motion for judgment as a matter of law, in part because the complained-of incidents that "did have a sexual overtone were difficult for an employer to remedy because they were largely anonymous").

B. Discrimination Claims Against NYU Under Title VII and the ADEA

Dr. Russell also contends that NYU treated her differently with respect to her termination because of her membership in protected classes. *See* Pl.'s Mem. at 20. A plaintiff may prove a discrimination claim either through direct evidence of intent to discriminate or by indirectly showing circumstances giving rise to an inference of discrimination. *Vega v. Hempstead Union Free Sch. Dist.*,

[16] It may be that, in many cases, reasonableness requires employers to put an end to harassment. Such may be the case, for example, where witnesses are able to identify the harasser or where it is within the employer's abilities to identify the harasser through other means. In this case, however, both the anonymous and the remote nature of the conduct at issue placed significant obstacles in NYU's way.

801 F.3d 72, 87 (2d Cir. 2015). Where, as here, a plaintiff alleging discrimination under Title VII does not present direct evidence of discriminatory intent, a summary judgment motion is subject to the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000) (applying *McDonnell Douglas* framework to Title VII summary judgment motion). Under that framework, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination by demonstrating that: (1) she belonged to a protected class; (2) she was qualified for the position; (3) she experienced an adverse employment action; and (4) the adverse employment action took place under circumstances giving rise to an inference of discrimination. *Abrams v. Dep't of Pub. Safety*, 764 F.3d 244, 251-52 (2d Cir. 2014). If the plaintiff meets that initial burden, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. *Id.* at 251; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (stating that this burden is "one of production, not persuasion"). If the employer does so, the presumption of discrimination raised by the *prima facie* case is rebutted, and the burden returns to the plaintiff to point to evidence from which a reasonable jury could conclude that the employer's stated reasons are merely a pretext for unlawful discrimination. *See Kovaco v. Rockbestos-Surprenant Cable Corp.*, 834 F.3d 128, 136 (2d Cir. 2016).

NYU concedes that Dr. Russell is able to establish the first three elements of a *prima facie* case: She is a member of a protected class, she was qualified to perform the functions of her job, and she suffered an adverse employment action in the form of termination. NYU Defs.' Mem. in Supp. of Mot. for Summ. J. (ECF No. 158) ("Defs.' Mem.") at 14. However, NYU contends that Dr. Russell has failed to present evidence that her termination occurred under circumstances giving rise to an inference of discrimination. The Court agrees.

Examples of circumstances that may give rise to an inference of discrimination include the employer's criticism of the plaintiff's job performance in terms that are degrading with respect to her protected characteristics; or "invidious comments about others in the employer'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." *Littlejohn v. City of New York*, 795 F.3d 297, 312 (2d Cir. 2015) (citation omitted). "[A]n inference of discrimination also arises when an employer replaces a terminated or demoted employee with an individual outside the employee's protected class." *Id.* at 312-13 (citation omitted).

As noted, the decision to terminate Dr. Russell was made solely by Schwarzbach after consultation with NYU's Office of General Counsel. Pl.'s 56.1 ¶ 516; Luke Decl., Ex. 27, at 6. Dr. Russell does not argue that Schwarzbach made any comments or took any actions prior to (or after) her termination that are suggestive of discriminatory intent. Instead, she argues only that NYU treated her less favorably than a similarly situated male employee. Pl.'s Mem. at 20. A plaintiff seeking to establish an inference of discrimination on that basis "must show she was similarly situated in all material respects to the individuals with whom she seeks to compare herself." *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) (internal quotation marks and citation omitted); *see also id.* at 40 (stating that "a plaintiff must show that her co-employees were subject to the same performance evaluation and discipline standards").

Dr. Russell used Thometz as her comparator.[17] She contends that, while they were both subject to the NYU's Code of Ethical Conduct, and they both violated it, only she was terminated. Pl.'s Mem. at 20-21. Thus, she argues, "NYU treated Defendant Thometz more favorable [sic] due to his sex." *Id.* at 22. Dr. Russell's reliance on Thometz as her comparator fails because, at the time he admitted to the conduct—which the Court assumes *arguendo* to have violated the Code of Ethical Conduct—he was no longer employed by the Liberal Studies Program, and therefore was no longer under Schwarzbach's control. That difference is highly material.

[17] To the extent that Dr. Russell uses Thometz as a comparator, she does so only with respect to their differences in gender. She does not attempt to use Thometz as a comparator with respect to his age or religion. *See* Pl.'s Mem. at 20 ("Defendant NYU Treated Plaintiff Differently Because She Is a Woman.").

"To be considered similarly situated, an individual must have been treated more favorably by the same decisionmaker that dealt with the plaintiff." *White v. Conn. Dep't of Corr.*, No. 08-cv-1168, 2010 WL 3447505, at *6 (D. Conn. Aug. 24, 2010) (Droney, J.). Schwarzbach could not have treated Thometz differently when it became known that he had violated the Code because Schwarzbach no longer had any authority to discipline him. As a result, Dr. Russell has failed to show that she and Thometz were similarly situated in all material respects. *See Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997) (holding that employees were not similarly situated to plaintiff in large part because they had different supervisors); *Baity v. Kralik*, 51 F. Supp. 3d 414, 447 (S.D.N.Y. 2014) (fact that "different decisionmakers were involved" in comparative employment decisions was "significant enough to prevent a reasonable jury from finding that [comparator employee] and Plaintiff were similarly situated so as to allow the drawing of an inference of discrimination from the fact that [comparator employee] was promoted while Plaintiff was dismissed"); *Conway v. Microsoft Corp.*, 414 F. Supp. 2d 450, 465 (S.D.N.Y. 2006) ("In the Second Circuit, whether or not co-employees report to the same supervisor is an important factor in determining whether two employees are subject to the same workplace standards for purposes of finding them similarly situated."); *see also Iuorno v. DuPont Pharm. Co.*, 129 F. App'x 637, 640-41 (2d Cir. 2005) (holding that chemists who worked in other DuPont laboratories and reported to different supervisors were not similarly situated to plaintiff).[18] Therefore, Dr. Russell has failed to create an inference of discrimination by comparison to Thometz.

Dr. Russell also attempts to create an inference of discriminatory intent by pointing to the union arbitrator's determination that the emails she sent to Bauman did not constitute "just cause" to immediately terminate her. Pl.'s Mem. at 22. That attempt is unavailing. While such an argument

[18] Even if Thometz were similarly situated to Dr. Russell, any inference of discrimination would be significantly weakened, if not eliminated, by the fact that he left NYU very shortly after he admitted to the complained-of conduct in mid-April 2016.

might have had merit if the arbitrator had concluded that Dr. Russell had not engaged in misconduct or that discrimination had played any role in her termination, that is not the case here. As explained earlier in this opinion, the arbitrator found that Dr. Russell had engaged in misconduct that was "serious" and that did "justify some discipline." Luke Decl., Ex. 27, at 11. He simply concluded that the misconduct did not "rise to the level that would justify immediate termination." *Id.* While the arbitrator's conclusion was certainly authoritative with respect to Dr. Russell's rights under the CBA, it does not support an inference that she was terminated for discriminatory reasons.

Dr. Russell cites to *Tomasino v. Mount Sinai Medical Center & Hospital*, No. 97-cv-5252 (TPG), 2003 WL 1193726 (S.D.N.Y. Mar. 13, 2003), for the proposition that the arbitrator's factual findings are entitled to great weight. But *Tomasino* refutes, rather than supports, her argument. In *Tomasino*, the arbitrator found that the plaintiff had engaged in misconduct but that termination was too severe a penalty. *Id.* at *13. Because the arbitrator found that the plaintiff had engaged in misconduct but "did not indicate that [defendant's] reason for the discharge was motivated by anything other than [defendant's] judgment as to [plaintiff's] infractions," the court found the arbitrator's decision to be "highly probative of the *absence* of discriminatory intent" with respect to the defendant's decision to terminate the plaintiff and held it insufficient to give rise to an inference of discriminatory intent on summary judgment. *Id.* (emphasis added). That analysis applies equally here.

The arbitrator hearing Dr. Russell's grievance found that, while she had engaged in serious misconduct, immediate termination was too severe a penalty. Luke Decl., Ex. 27, at 11. As in *Tomasino*, the arbitrator did not find that NYU's termination of Dr. Russell was motivated by any discriminatory animus or anything else other than its judgment as to Dr. Russell's misconduct. Accordingly, as in *Tomasino*, the Court finds the arbitrator's findings to be highly probative of the absence of discriminatory intent in connection with her termination.[19] While the arbitrator may have

[19] Even if the Court did not treat the arbitrator's findings as being highly probative of the absence of discriminatory intent, those findings would simply be neutral on that issue. Either way, the arbitrator's findings do not support an

disagreed with NYU's business judgment as to the appropriate level of discipline, the federal laws that Dr. Russell invokes here do not permit the Court to review business decisions that are not the result of discriminatory animus. *See Alfano*, 294 F.3d at 377 ("[The court's] role is to prevent unlawful hiring practices, not to act as a superpersonnel department that second guesses employers' business judgments." (quoting *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001))). Because Dr. Russell has failed to present any evidence from which a reasonable jury could draw an inference of discrimination, she has failed to satisfy her burden to establish a *prima facie* case of discrimination.

Had Dr. Russell satisfied her burden at the first stage of the *McDonnell Douglas* framework, the burden would then shift to NYU to come forward with a legitimate, non-discriminatory reason for her termination. *See Abrams*, 764 F.3d at 251. Here, NYU has come forward with a legitimate, non-discriminatory reason for Dr. Russell's termination. As the record clearly shows, after receiving Thometz's discovery responses in this litigation, Dr. Russell sent a series of emails to Liberal Studies Professor Emily Bauman, who had been identified as a witness. And she sent the last of those emails even after being advised to cease and desist from any direct communication with Bauman. NYU reasonably concluded that Dr. Russell's conduct in sending these emails violated its Code of Ethical Conduct, and the arbitrator's decision that Dr. Russell had engaged in "serious" misconduct that "justif[ied] some discipline" further supports the conclusion that NYU has met its burden to produce a legitimate, non-discriminatory reason for her termination. Finally, with the exception of the arguments and evidence that the Court has already rejected in connection with the *prima facie* prong of the analysis, Dr. Russell presents no evidence that NYU's stated reason for her termination was merely a pretext for discrimination.

---

inference of discriminatory intent sufficient to survive summary judgment.

***

For the reasons above, Dr. Russell has failed to create a triable issue of fact on her claims for discrimination under Title VII or the ADEA. While she may argue that NYU overreacted by terminating her—a conclusion the Court does not reach—she has failed to meet her burden, minimal as it may be, to demonstrate circumstances giving rise to an inference that she was terminated because of her sex, age, or religion. The Court therefore grants NYU's motion for summary judgment with respect to these claims.

C. Retaliation Claim Under Title VII[20]

Claims for retaliation in violation of Title VII are also subject to the *McDonnell Douglas* burden-shifting analysis. *See Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005). To establish a *prima facie* claim of retaliation, a plaintiff must show that: (1) she participated in protected activity; (2) the defendant knew about her participation in protected activity; (3) the defendant took an adverse employment action against the plaintiff; and (4) there exists a causal connection between the protected activity and the negative employment action. *Hicks v. Baines*, 593 F.3d 159, 164 (2d Cir. 2010). If the plaintiff establishes a *prima facie* claim, a presumption of retaliation arises, which the defendant can rebut by producing a legitimate, non-retaliatory reason for the adverse employment action. *Id.* If the defendant successfully rebuts the presumption, "the plaintiff must point to evidence that would be sufficient to permit a rational factfinder to conclude that the employer's explanation is merely a pretext for impermissible retaliation." *Treglia v. Town of Manlius*, 313 F.3d 713, 721 (2d Cir. 2002) (citation omitted). Title VII retaliation claims are subject to a stricter causation requirement than claims for status-based discrimination. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013). "[A] plaintiff alleging retaliation in violation of Title VII must show that retaliation was a 'but-for' cause of the adverse action, and not simply a 'substantial'

[20] Dr. Russell does not bring a retaliation claim under the ADEA.

or 'motivating' factor in the employer's decision." *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 845-46 (2d Cir. 2013) (citing *Nassar*, 133 S. Ct. at 2526, 2533). Although "'but-for' causation does not require proof that retaliation was the only cause of the employer's action," a plaintiff must prove that "the adverse action would not have occurred in the absence of the retaliatory motive." *Zann Kwan*, 737 F.3d at 846.

Dr. Russell has alleged six retaliatory acts by the NYU Defendants: (1) being called into a meeting with Schwarzbach and Squillace in September 2013 to discuss the Smalls-Smith matter; (2) being issued a final warning letter regarding the Smalls-Smith matter on November 27, 2013; (3) being asked to find class coverage and being denied class coverage following a heart attack in March 2014; (4) being called in to discuss her student evaluations, and Squillace allegedly tampering with her student evaluations; (5) her termination in October 2015; and (6) being required to attend court hearings and conferences in connection with this lawsuit. Am. Compl. (ECF No. 61). In their opening brief, the NYU Defendants argued that none of those acts, except for Dr. Russell's termination, amounted to adverse employment action within the meaning of Title VII. *See* Defs.' Mem. at 19-22. They also argued that some of the alleged acts were simply unsupported by the record as a factual matter. *See id.* Dr. Russell provided no response whatsoever to those arguments in her opposition brief. *See* Pl.'s Mem. at 22-25. In fact, she concedes in her opposition brief that her termination in October 2015 was "in essence Defendant NYU's first actual opportunity to retaliate against [her]." *Id.* at 24. Accordingly, the Court deems Dr. Russell to have abandoned her retaliation claim to the extent it is premised on adverse action other than her termination. *See Jackson v. Fed. Express*, 766 F.3d 189, 198 (2d Cir. 2014) ("[I]n the case of a counseled party, a court may, when appropriate, infer from a party's partial opposition that relevant claims or defenses that are not defended have been abandoned."); *Adams v. N.Y. State Educ. Dep't*, 752 F. Supp. 2d 420, 452 n.32 (S.D.N.Y. 2010) (collecting cases in which courts deemed plaintiff's claims abandoned for failure to address defendant's arguments); *Lipton v. Cty. of Orange, N.Y.*, 315 F. Supp. 2d 434, 446 (S.D.N.Y.

2004) (stating, on summary judgment: "This Court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed."); *Douglas v. Victor Capital Grp.*, 21 F. Supp. 2d 379, 393 (S.D.N.Y. 1998) (deeming claims abandoned where plaintiff failed to address claims in opposition to defendants' summary judgment motion).

The NYU Defendants argued in their opening brief that summary judgment is warranted on Dr. Russell's claim for retaliatory termination because she has not pointed to any evidence of a causal connection between her termination and any protected activity. Defs.' Mem. at 22-24. "[P]roof of causation can be shown either: (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." *Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000). In a deposition, Dr. Russell testified that her termination was retaliatory because (1) Schwarzbach did not identify the faculty member who had made accusations against her in her termination letter; (2) progressive disciplinary steps were not followed; and (3) her termination occurred after she filed her complaint with the DA's office and instituted this lawsuit. Russell Dep. III 779:24-780:15. With respect to the third ground, the Court infers from Dr. Russell's amended complaint that she also intended to assert that her termination was effectuated in retaliation for filing internal complaints with OEO and for filing a charge with the EEOC.

Despite mentioning it in her deposition, Dr. Russell has provided no legal basis—or even any argument at all—for the proposition that Schwarzbach was under an obligation to name the accuser in the termination letter, or that failure to name the accuser in any way supports an inference of retaliatory intent. As the NYU Defendants point out, Schwarzbach had every reason to think that Dr. Russell knew the identity of the accuser, since she had copied Schwarzbach on each of her emails to Bauman as recently as one day earlier. Colwin Decl., Exs. 156-157; Pl.'s 56.1 ¶¶ 507-09.

As a result, the Court does not understand what, if any, inference Dr. Russell would hope for a jury to draw. In any event, by failing to address this basis for her claim after the NYU Defendants had challenged it in their opening brief, Dr. Russell has abandoned it. *See Moccio v. Cornell Univ.*, No. 09-cv-3601, 2009 WL 2176626, at *4 (S.D.N.Y. July 21, 2009) (Lynch, J.) ("Whatever the merit of [the defendants'] argument [for dismissal], plaintiff has abandoned the . . . claim, as her motion papers fail to contest or otherwise respond to [the] defendants' contention.").

The same is true of her contention that Schwarzbach's failure to follow progressive disciplinary steps before terminating her reflects retaliatory animus. Again, Dr. Russell provides no argument on this basis for her claim at all. And, as the NYU Defendants argue, the CBA governing her employment relationship with NYU does not require progressive steps to be followed. If there is some other document that requires the University to take progressive disciplinary steps, Dr. Russell has not brought it to the Court's attention. As with the above, by failing to address this apparent basis of her claim at all after the NYU Defendants had challenged it in their opening brief, Dr. Russell has abandoned it.

The NYU Defendants argue that, as a matter of law, Dr. Russell is unable to establish an inference of retaliatory animus based on temporal proximity between her protected activities and her termination. That is correct. "The temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a prima facie case of retaliation under Title VII, but without more, such temporal proximity is insufficient to satisfy appellant's burden to bring forward some evidence of pretext." *Abrams*, 764 F.3d at 254. The Supreme Court has noted that:

> [t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close," *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 ([10th Cir.] 2001). *See, e.g.*, *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 ([10th Cir.] 1997) (3-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-[75] ([7th Cir.] 1992) (4-month period insufficient).

Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001). The Second Circuit has "not drawn a

bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship . . . ." *Gorman-Bakos v. Cornell Coop. Extension of Schenectady Cty.*, 252 F.3d 545, 554 (2d Cir. 2001). Nonetheless, courts in the Second Circuit have generally considered two to four months to be the "outer edge of what courts . . . recognize as sufficiently proximate to admit of an inference of causation." *Woods v. Enlarged City Sch. Dist. of Newburgh*, 473 F. Supp. 2d 498, 529 (S.D.N.Y. 2007); *see McDowell v. North Shore-Long Island Jewish Health Sys., Inc.*, 788 F. Supp. 2d 78, 83 (E.D.N.Y. 2011) (holding that a "greater than three month gap" was "insufficient to raise an inference of retaliation"); *Cunningham v. Consol. Edison Inc.*, No. 03-cv-3522 (CPS), 2006 WL 842914, at *19 (E.D.N.Y. Mar. 28, 2006) ("[A] passage of two months between the protected activity and the adverse employment action seems to be the dividing line."); *Hussein v. Hotel Emps. & Rest. Union, Local 6*, 108 F. Supp. 2d 360, 367 (S.D.N.Y. 2000) ("[T]he passage of more than two months defeats any retaliatory nexus."); *Ponticelli v. Zurich Am. Ins. Grp.*, 16 F. Supp. 2d 414, 436 (S.D.N.Y. 1998) (holding that two-and-a-half months is "hardly the close proximity of time contemplated . . . for allowing a plaintiff to establish the 'causal connection' element of [a] retaliation claim").

As explained above, the cognizable protected activities here are Dr. Russell's complaints to OEO and other internal offices, her complaint to the DA's office, the filing of her EEOC charge, and the filing of this lawsuit.[21] Each of those activities was too remote from her termination to give rise to an inference of retaliation based on temporal proximity. She made her initial internal complaint to NYU on December 7, 2012, nearly three years before her termination, and her formal complaints against Thometz, Meltzer, and Squillace to OEO on November 27, 2013, nearly two years prior to her termination. Dr. Russell filed her harassment complaint with the DA's office on

[21] To the extent that Dr. Russell seeks to rely on her filing of a police report, the Court notes that the filing of a police report is typically not a protected activity for purposes of employment-discrimination laws. That is so because, at least where the police report itself does not reference discrimination based on a protected characteristic, it is "not made in opposition to statutorily prohibited discrimination." *Mi-Kyung Cho v. Young Bin Café*, 42 F. Supp. 3d 495, 508 (S.D.N.Y. 2013) (magistrate judge). In any event, the record in this case does not support sufficient temporal proximity between the police report and Dr. Russell's termination to create an inference of retaliatory animus. Dr. Russell filed a police report on July 24, 2013. Colwin Decl., Ex. 43. That date—more than two years before her termination—is too remote.

July 24, 2013, more than two years before her termination. She filed her charge with the EEOC on May 22, 2014, approximately seventeen months before her termination. Finally, she filed this lawsuit on March 24, 2015, approximately six months prior to her termination. As the cases cited above make clear, the amount of time that passed between each of those activities and Dr. Russell's termination is too long to give rise to an inference of retaliatory animus founded solely on temporal proximity. As explained above, Dr. Russell has presented no other evidence suggestive of retaliatory motivation for her termination.

In addition, as described in the previous section of this opinion, NYU has come forward with a legitimate and non-retaliatory reason for Dr. Russell's termination, namely, her emails to Bauman.[22] For the same reasons she has failed to establish a *prima facie* case of retaliation, she also fails to present evidence from which a reasonable jury could conclude that NYU's explanation was a pretext for impermissible retaliation. Notably, even if the Court had found sufficient temporal proximity between Dr. Russell's protected activities and her termination to satisfy the first prong of the *McDonnell Douglas* framework, that would not be enough to survive summary judgment on the third prong. *See Abrams*, 764 F.3d at 254 ("The temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a prima facie case of retaliation under Title VII, but without more, such temporal proximity is insufficient to satisfy appellant's burden to bring forward some evidence of pretext.").

In her opposition brief, Dr. Russell relies for the first time on the alleged temporal proximity between the court-ordered mediation held in this lawsuit and her termination. *See* Pl.'s Opp'n at 23-24. The Court has substantial doubts as to whether a court-ordered mediation is an "investigation, proceeding, or hearing under this subchapter" within the meaning of 42 U.S.C. § 2000e-3(a)'s

[22] Because it need not do so, the Court takes no position regarding whether Dr. Russell's breach of the confidentiality order in this case constitutes a "legitimate" reason for her termination.

participation clause. *See, e.g.*, *Littlejohn*, 795 F.3d at 316 ("We have recently made clear that the participation clause only encompasses participation in formal EEOC proceedings . . . ."); *see also Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990) ("The purpose of section 2000e-3's participation clause is to protect the employee who utilizes the tools provided by Congress to protect his rights." (internal quotation marks and citation omitted)). The Court need not resolve that question here, however. The mediation is not referenced anywhere in Dr. Russell's amended complaint, which was filed well after both the mediation and her termination. In addition, when she testified at her deposition as to the factual bases of her retaliation claim, she made no mention of the mediation. Accordingly, the Court has not considered this argument in analyzing the NYU Defendants' motion. *See, e.g.*, *Feldman v. Sanders Legal Grp.*, 914 F. Supp. 2d 595, 600 n.5 (S.D.N.Y. 2012) (declining to consider plaintiff's arguments in opposition brief that were "based on facts and theories that are not in the Complaint"); *Tomlins v. Vill. of Wappinger Falls Zoning Bd. of Appeals*, 812 F. Supp. 2d 357, 363 n.9 (S.D.N.Y. 2011) (declining to consider facts raised for the first time in opposition papers, "as they do not form the basis for Plaintiff's claims, and the complaint may not be amended simply by raising new facts in opposition to Defendants' motion"); *Scott v. City of N.Y. Dep't of Corr.*, 641 F. Supp. 2d 211, 229 (S.D.N.Y. 2009) (explaining that facts and theories raised for the first time in opposition papers should not be considered in resolving a summary judgment motion), *aff'd* 445 F. App'x 389 (2d Cir. 2011); *Southwick Clothing LLC v. GFT (USA) Corp.*, No. 99-cv-10452 (GBD), 2004 WL 2914093, at *6 (S.D.N.Y. Dec. 15, 2004) ("A complaint cannot be amended merely by raising new facts and theories in plaintiffs' opposition papers, and hence such new allegations and claims should not be considered in resolving the motion [for summary judgment]."); *see also Hayes*, 84 F.3d at 619 ("[A] party may not create an issue fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony."). Moreover, even if the Court did consider the temporal proximity between the court-order mediation and Dr. Russell's termination, that evidence alone

would be insufficient to satisfy her burden at the final stage of the *McDonnell Douglas* analysis. *See Abrams*, 764 F.3d at 254.[23]

Accordingly, Dr. Russell's Title VII retaliation claim fails, and the Court grants summary judgment for the NYU Defendants on that claim.

D. Title IX Claims

Dr. Russell also asserts claims for discrimination and retaliation pursuant to Title IX. As the NYU Defendants correctly recognize, courts are split on the question whether, or under what circumstances, Title IX provides a private cause of action for employment discrimination in educational institutions. *See Summa*, 708 F.3d at 131 & n.1 (declining to decide "whether there is a private right of action for employment discrimination under Title IX"). *Compare Towers v. State Univ. of N.Y. at Stony Brook*, No. 04-cv-5243 (FB), 2007 WL 1470152, at *4 (E.D.N.Y. May 21, 2007) ("The Court agrees with those courts that have held that Title IX cannot be used to circumvent the remedial scheme of Title VII."), *and Vega v. State Univ. of N.Y. Bd. of Trustees*, No. 97-cv-5767 (DLC),

[23] Dr. Russell attempts to further support her claim by asserting, for the first time in her opposition papers, that certain statements suggestive of retaliatory animus were made during the September 3, 2015 court-annexed mediation. The Court will not consider those statements for several reasons. First, she made no reference to them in her amended complaint, which was filed well after the mediation, or in her depositions. *See, e.g.*, *Scott*, 641 F. Supp. 2d at 229 (explaining that facts and theories raised for the first time in opposition papers should not be considered in resolving a summary judgment motion). Even more importantly, the Procedures of the Mediation Program for this District provide that "[a]ny communications made exclusively during or for the mediation process shall be confidential" and that "[t]he parties may not disclose discussions or other communications with the mediator unless all parties agree, because it is required by law, or because otherwise confidential communications are relevant to a complaint against a mediator or the Mediation Program arising out of the mediation." Procedures of the Mediation Program, United States District Court for the Southern District of New York (June 2, 2017). As one court has explained: "The benefits of mediation include its cost-effectiveness, speed and adaptability. Successful mediation, however, depends upon the perception and existence of mutual fairness throughout the mediation process." *Fields-D'Arpino v. Rest. Assocs., Inc.*, 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999). Thus, "courts have implicitly recognized that maintaining expectations of confidentiality is critical." *Id.*; *see also Bradley v. Fontaine Trailer Co.*, No. 06-cv-62, 2007 WL 2028115, at *5 (D. Conn. July 10, 2007) ("The parties must trust that their disclosures, both oral and written, during mediation will remain confidential and that their candor will be protected."). In fact, courts have sanctioned attorneys for violating mediation confidentiality rules. *See, e.g.*, *Bernard v. Galen Grp., Inc.*, 901 F. Supp. 778, 784 (S.D.N.Y. 1995) (imposing sanctions on attorney for intentionally violating court-annexed mediation confidentiality rules); *see also Spoth v. M/Y Sandi Beaches*, No. 09-cv-647, 2010 WL 2710525, at *6 (W.D.N.Y. July 7, 2010) (same). For that reason, it is perhaps telling that the disclosure of these alleged statements is found in a declaration signed by Dr. Russell, but not in any of the papers signed by her counsel. The NYU Defendants have denied making the statements that Dr. Russell alleges were made during the mediation. Assuming her assertions to be true, however, leads to the conclusion that Dr. Russell has violated the confidentiality rules applicable to this District's court-annexed mediation program. The Court will not reward that violation by considering the alleged statements in resolving this summary judgment motion.

2000 WL 381430, at *3 (S.D.N.Y. Apr. 13, 2000) ("This Court agrees with the Fifth Circuit and numerous district courts that have held that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex, and limiting money damages under Title IX to student plaintiffs."), *with Morris v. Fordham Univ.*, No. 03-cv-556 (CBM), 2004 WL 906248, at *3 (S.D.N.Y. Apr. 28, 2004) ("Neither the Supreme Court nor the Second Circuit has resolved the question whether Title IX provides a cause of action to employees of federally funded educational programs who bring claims of sex discrimination against their employers. We agree with our sister court's determination in *Henschke* [*v. New York Hospital-Cornell Medical Center*, 821 F. Supp. 166, 172 (S.D.N.Y. 1993)] that it does.").

Happily, it is unnecessary for the Court to wade into that dispute in order to rule on the NYU Defendants' motion. In their opening brief, the NYU Defendants argued that, even assuming there is a private right of action under Title IX, Dr. Russell's claims must be dismissed for the same reasons as her Title VII claims because they are subject to the same analysis. Dr. Russell has arguably abandoned her Title IX claim by failing to respond to that argument.[24] *Bonilla v. Smithfield Assocs. LLC*, No. 09-cv-1549, 2009 WL 4457304, at *4 (S.D.N.Y. Dec. 4, 2009) (Chin, J.) (dismissing claims "as a matter of law" as "effectively abandoned" where defendant had raised three arguments for dismissal and plaintiff responded to only one in his opposition papers).

Even had Dr. Russell not abandoned her Title IX claims, summary judgment would be proper. As both parties appear to agree, cases under Title IX are governed by the same standards as those under Title VII. *See Summa*, 708 F.3d at 131 ("Title VII and Title IX are governed by the same substantive standards for reviewing claims of both harassment and retaliation." (citing *Murray*, 57

[24] To be precise, Dr. Russell does not respond to the argument that her Title IX claims must be dismissed for the same reasons as her analogous Title VII claims. She does apparently agree, however, that her Title IX claims would be subject to the same analysis as Title VII. *See, e.g.*, Pl.'s Mem. at 26 ("Plaintiff brings her Title IX claim under a hostile work environment theory. A Title IX claim of hostile work environment is governed by traditional Title VII hostile work environment jurisprudence (internal quotation marks and citation omitted)). Thus, she has either abandoned her claims or conceded a portion of the NYU Defendants' argument.

F.3d at 248)); *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) ("[A] Title IX hostile education environment claim is governed by traditional Title VII 'hostile environment' jurisprudence." (internal quotation marks and citation omitted)); *id.* ("[A] Title IX sex discrimination claim requires the same kind of proof required in a Title VII sex discrimination claim.").

The Court notes two caveats from the proposition that Title VII and Title IX are subject to the same analysis, though neither of them is material here. First, in *Nassar*, the Supreme Court imposed a stricter standard of causation for retaliation claims under Title VII. 133 S. Ct. at 2533. That distinction is immaterial here because the Court's decision on Dr. Russell's Title VII retaliation claim did not turn on the nature of the causation standard. Second, claims for hostile educational environment under Title IX—at least those brought by students for harassment by teachers or other students, such as those cited by Dr. Russell—require proof that the educational institution violated an even lower standard of care than negligence, namely, deliberate indifference. *See Nungesser v. Columbia Univ.*, --F. Supp. 3d--, 2017 WL 1135647, at *11 (S.D.N.Y. Mar. 24, 2017) ("An educational institution may . . . be held liable under Title IX for 'deliberate indifference to known acts of harassment' of one student by another or of a student by a teacher." (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998))). "Deliberate indifference" in that context means that the educational institution's actions must be "clearly unreasonable," which is more than a "mere 'reasonableness' standard." *Davis*, 526 U.S. at 648-49. That potential distinction is immaterial here. Because the Court has already concluded that Dr. Russell has failed to satisfy her burden at the summary judgment stage on the higher standard of negligence, she *a fortiori* fails on the "deliberate indifference" standard.[25]

[25] Claims under Title IX also require actual notice of harassment, whereas constructive notice can suffice under Title VII. *Gebser*, 524 U.S. at 288-90. That distinction is also immaterial here.

Thus, for the reasons described in the Court's analysis of Dr. Russell's Title VII claims, summary judgment is granted for the NYU Defendants on her Title IX claims.

E. NYSHRL and NYCHRL Claims

Having disposed of all federal claims in this action, the Court is required to reexamine its subject matter jurisdiction over the remaining claims. *See, e.g.*, *ACCD Glob. Agric. Inc. v. Perry*, No. 12-cv-6286 (KBF), 2013 WL 840706, at *1 (S.D.N.Y. Mar. 1, 2013) ("[F]ederal courts are mandated to *sua sponte* examine their own jurisdiction at every stage of the litigation."). According to the Amended Complaint, each of the parties to this action is domiciled in New York. ECF No. 61 ¶¶ 8-14. Therefore, because the parties are non-diverse, Dr. Russell's NYSHRL and NYCHRL are before the Court as a matter of supplemental jurisdiction.

28 U.S.C. § 1367(c) provides that district courts may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." The Second Circuit counsels that, absent exceptional circumstances, federal courts "should abstain from exercising pendent jurisdiction when federal claims in a case can be disposed of by summary judgment." *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 53 (2d Cir. 1986); *see also Klein & Co. Futures, Inc. v. Bd. of Trade of City of N.Y.*, 464 F.3d 255, 262 (2d Cir. 2006) ("It is well settled that where, as here, the federal claims are eliminated in the early stages of litigation, courts should generally decline to exercise pendent jurisdiction over remaining state law claims."); *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988))); *Kavit v. A.L. Stamm & Co.*, 491 F.2d 1176, 1180 (2d Cir. 1974) (Friendly, J.) ("If it appears that the federal claims are subject to dismissal under [Rule] 12(b)(6) or could be disposed of on a motion for summary judgment under [Rule] 56, the court should refrain from exercising pendent jurisdiction absent exceptional circumstances.").

As the Supreme Court has explained (and countless courts have repeated), "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966); *see also Wilson v. Dantas*, No. 12-cv-3238 (GBD), 2013 WL 92999, at *9 (S.D.N.Y. Jan. 7, 2013) ("Non-federal claims . . . are the only ones left. Comity and respect for New York state courts dictate that where possible, state courts should decide matters of state law, and that absent exceptional circumstances, this Court should decline to exercise supplemental jurisdiction over such claims."). Accordingly, and because the Court finds that no exceptional circumstances exist here,[26] the Court declines to exercise supplemental jurisdiction over Dr. Russell's NYSHRL and NYCHRL claims against the NYU Defendants as well as the Co-Worker Defendants. Those claims are, therefore, dismissed without prejudice.

IV. CONCLUSION

For the foregoing reasons, the NYU Defendants' motion for summary judgment is GRANTED as to all claims under Title VII, the ADEA, and Title IX. Because the Court declines to exercise supplemental jurisdiction over the remaining state- and city-law claims, Dr. Russell's claims under the NYSHRL and NYCHRL are DISMISSED without prejudice as to all defendants in this action.

The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case.

SO ORDERED.

Dated: July 17, 2017
New York, New York

GREGORY H. WOODS
United States District Judge

[26] Exceptional circumstances may exist where, for example, the remaining state claims are "closely tied to questions of federal policy" or where the federal court has already invested "substantial time and energy" on the state-law issues prior to dismissal of the federal claims. *McLean v. Cowen & Co.*, 660 F.2d 845, 848 (2d Cir. 1981). They may also exist where federal claims are dismissed only days before trial was set to begin. *See Kolari*, 455 F.3d at 123 n.6. No such circumstances are present here.