those claims may not be brought under Title IX. Accordingly, any such disparate impact claim regarding St. Mary's disciplinary policies in general must be dismissed.

Further, plaintiff offers no evidence of intentional discrimination on the part of St. Mary's generally. For example, the Code of Conduct does not facially differentiate between male or female accusers or accused, and does not proscribe alternative disciplinary procedures based on the sex of the students involved. To the extent that plaintiff does offer evidence, it is entirely focused on the disparate *treatment* of Pacheco specifically. Thus, plaintiff has presented no evidence that raises a genuine issue of material fact as to St. Mary's procedures *generally*, and St. Mary's is entitled to summary judgment on those claims. The Court will assess the claims as they relate to Pacheco's specific investigation and adjudication below.

b. Violations regarding Pacheco specifically

The essential elements of Title VII discrimination claims are (1) a plaintiff is a member of a protected class, (2) some unfavorable or adverse action against the plaintiff, and (3) a causal nexus—*i.e.* that membership in the protected class was a motivating or substantial factor in the adverse action. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (finding a plaintiff could prevail on a Title VII claim by showing a prohibited trait was a motivating or substantial factor in the adverse action), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1075, as recognized in *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517, 2525–2527, 186 L.Ed.2d 503 (2013) (noting the amended statute eliminated aspects of the burden-shifting framework suggesting a but-for causation standard, but allowed plaintiffs to recover if they could prove the protected class was a motivating factor). *But see Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009)

(noting that ADEA plaintiffs must prove that age was a but-for cause of the adverse action, rather than merely a motivating factor).

As noted, Title IX is informed by the body of law developed under Title VII. Thus, the essential elements of Title IX claims are largely analogous to Title VII claims, with the exception that Title IX allows only recovery for intentional discrimination. *Sandoval*, 532 U.S. at 280. To prevail, Title IX plaintiffs must establish (1) that the plaintiff was a member of a protected class, (2) that the plaintiff suffered an unfavorable or adverse action, and (3) that the discrimination was a substantial or motivating factor for the defendant's actions. *See Yusuf v. Vassar College,* 35 F.3d 709 (2d Cir. 1994); *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 638–41 (6th Cir. 2003) (citing favorably to *Yusuf*); *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 961–62 (4th Cir. 1997), rev'd en banc on other grounds, 169 F.3d 820 (4th Cir. 1999).

It is undisputed that Pacheco is a member of a protected class: males. It is also undisputed that he was subject to an unfavorable or adverse action in his disciplinary action. However, Pacheco claims that the investigation and disciplinary proceedings were impermissibly tainted by gender bias. The imposition of university discipline where gender is a substantial or motivating factor is a violation of Title IX. *Id.*

Specifically, plaintiff alleges two theories in which gender was a substantial or motivating factor in St. Mary's investigation and adjudication of Alfonso Pacheco: (1) erroneous outcome based on a flawed proceeding, and (2) selective enforcement. In fact, both St. Mary's and Pacheco cite to *Yusuf v. Vassar Coll.*, 35 F.3d. 709, 715 (2d Cir. 1994) for the proposition that these are the two primary theories to challenge disciplinary actions under Title IX as discriminatory against male students:

> Plaintiffs attacking a university disciplinary proceeding on grounds of gender bias can be expected to fall generally within two categories. In the first category, the

> claim is that the plaintiff was innocent and wrongly found to have committed an offense. In the second category, the plaintiff alleges selective enforcement. Such a claim asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender.

Yusuf, 35 F.3d. at 715. Because the Court finds that there is insufficient evidentiary basis for either theory, the Court will assess each one separately.

i. Erroneous Outcome

An erroneous outcome claim is one where a plaintiff alleged he or she was innocent and wrongly found to have committed an offense. *Yusuf*, 35 F.3d at 715. Plaintiffs must present evidence "to cast articulable doubt on the accuracy of the outcome of the disciplinary proceeding." *Id.* Further, there must be a causal connection between the flawed outcome and alleged gender bias. *Id.* Thus, a plaintiff must also present evidence that his or her gender was a substantial or motivating factor behind an erroneous finding. *Id.* Such evidence includes "particular evidentiary weaknesses behind the finding such as motive to lie on the part of complainant or witnesses, particularized strengths of the defense," "procedural flaws," or "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.*

St. Mary's moved for summary judgment, arguing that no evidence exists to cast doubt on the outcome of the proceeding or that Pacheco's gender played a role in the resolution of his case. Pacheco's complaint alleges that parties involved in the investigation and disciplinary proceedings harbored "anti-male gender bias." Compl. 8. However, there is no evidence of any anti-male bias among the investigators, the disciplinary panel, or the appeals panel. In fact, Pacheco's summary judgment evidence consists of four exhibits: Officer Vargara's deposition testimony, Officer Osuna's deposition testimony, the complainant's deposition testimony, and the September 3, 2016

letter to Dean Bessler regarding the outcome of Pacheco's appeal. ECF No. 25. Pacheco points out that according to both officers and the complainant herself, both Pacheco and complainant were "found partially unclothed and highly intoxicated." Resp. 6. Assuming the truth of Pacheco's evidence, and drawing all reasonable inferences in his favor, the fact that Pacheco and the complainant were intoxicated and undressed is not evidence of an erroneous outcome or anti-male gender bias in the disciplinary proceedings. Such evidence does not cast doubt on the outcome of the proceeding.

Pacheco also cites to a portion of his own deposition testimony in which he states that he and the complainant were affectionate, that "dirty talk" continued between them as they entered Pacheco's dorm room, and that the complainant was intoxicated but not unconscious. Resp. 6 (citing Pacheco Depo. 253–254). He argues this casts doubt on the disciplinary proceeding because "there is absolutely no difference between the actions and state of the Plaintiff and complainant except for their gender." Compl. 6. According to Pacheco, the outcome was erroneous because "if the complainant was not unconscious then they treated the students differently based solely on their gender difference." *Id.* This Court takes this argument to mean that if the investigatory panel was incorrect in concluding that the complainant was unconscious, then he was wrongly found to have committed an offense and that this Court must overturn that result.

But taken as true—that the complainant was not unconscious while Pacheco was attempting to have sexual intercourse with her—there was no evidence that the disciplinary panel's decision was motivated by Pacheco's gender. Rather, it appears clear that the decision was based on the statements given to investigators, particularly the statements by two eyewitnesses—Hernandez and Griego—that the complainant appeared unconscious and Pacheco was standing over her

unconscious body with a visible erection. Def.'s Ex. C, ECF No. 20–4. Even if those witnesses were mistaken, the evidence suggests that the investigation panel made its decision by reviewing the statements and weighing the witnesses' credibility. Pacheco raises no evidence of improper motive on the part of the panelists, and offers no statements by members of the tribunal or patterns of decision-making at St. Mary's that that suggest influence based on Pacheco's gender. Pacheco also raises no statements by pertinent university officials that suggest Pacheco's gender was a motivating factor in the disciplinary proceedings.[9]

St. Mary's provided affidavit testimony that Dean Bessler did tell the complainant initially that "she had done nothing wrong" when he first spoke with her because she appeared distressed and he wanted to ensure she felt comfortable providing information to the police and the school. Def.'s Ex. E, ECF No. 20–6. St. Mary's also provided evidence that Pacheco raised these concerns on appeal, and that the appeals board considered the comment, in context, to be an expression of support to a frightened student being told by police and school officials that she had almost been sexually assaulted. Def.'s Ex. O, ECF No. 20–16. There is no evidence that Bessler's comments to the complainant were motivated by the gender of the parties. No reasonable inference can be made that these comments—made to the complainant outside of the disciplinary proceedings—suggest that Pacheco's gender was a motivating factor in the determinations by the investigative panel or appeals panel, as Bessler did not participate in the deliberations of either panel.

Pacheco also suggests that the "evidentiary weakness" in his case raises a genuine issue of material fact as to the existence of an erroneous outcome. Compl. 8. St. Mary's argues, however, that there is no evidence of evidentiary weakness or of particularized strength of a defense to the

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[9] Dean Bessler's comments to the complainant on the morning of May 4th that "she had done nothing wrong" featured heavily in Pacheco's complaint, but were not addressed in his response to summary judgment. Pacheco did suggest that Bessler was deposed and that a copy of his deposition testimony would be provided to the court, Resp. 9, but no such deposition was provided.

charges against Pacheco. Pl.'s Mot. 14–15. St. Mary's suggests that the evidentiary case was strong and supported the findings against Pacheco. Further, St. Mary's points out that there is no evidence of strength of defense. This Court agrees. In fact, it is undisputed that Pacheco did not appear at his own disciplinary hearing, did not submit evidence to the panel, refused to speak to investigators, and failed to raise any defense. There is no evidence raising a genuine issue of material fact as to the evidentiary weakness or strength of a defense in the proceedings against Alfonso Pacheco.

Pacheco also suggests that St. Mary's investigation and disciplinary procedures are flawed and denied him the minimal due process required for fair proceedings. Compl. 7–8. Specifically, Pacheco referred to the proceedings as a "Star Chamber" and a "kangaroo court," arguing that he should have been allowed to confront and cross-examine his accusers. *Id.* According to Pacheco, Dean Bessler stated that accused students do not have the right to confront or cross-examine their accusers under Title IX, according to a "Dear Colleague Letter" circulated by the Department of Education. Resp. 8–9. Plaintiff has provided no evidence as to Bessler's statement, or the Dear Colleague Letter.

St. Mary's provided testimony from Bessler that he did not tell Pacheco that he could not conduct cross examinations. Def.'s Ex. F, ECF No. 20–7. Rather, the evidence shows that Bessler informed Pacheco that accused students could ask direct questions to any witness presented with the exception of the opposing party, and that he could pose questions to the chair of the judicial board to ask the other party. *Id.* St. Mary's also provided a copy of the purported letter, which states that the Department of Education Office of Civil Rights (OCR) "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing" because it might escalate or perpetuate a hostile environment. Def.'s Ex. J 12, ECF No.

20–11. However, there is no evidence that solely males are denied the opportunity to cross-examine their accusers, or that Pacheco himself was denied an opportunity to confront or cross-examine the complainant because of his gender. In fact, Pacheco appears to have denied himself the opportunity to participate meaningfully in the investigatory hearing—he did not attend, and chose not to examine *any* witnesses at all. Further, it is clear that the right of cross-examination and confrontation as it exists in criminal settings is not a requirement of due process in school disciplinary proceedings. *See Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1979). Ultimately, there is no evidence raising a genuine issue of material fact that the lack of cross-examination was a procedural flaw casting doubt on the accuracy of the proceeding, or that gender was a motivating factor behind an erroneous outcome here.

Pacheco also claimed procedural flaws that denied him a meaningful appeal. Compl. 9. Specifically, he argues that St. Mary's policies require that proceedings be recorded to provide a meaningful appeals process but that Bessler stated that someone "didn't press record," rendering the appeal a "sham." *Id.* However, Pacheco presented no evidence as to the lack of a recording of the disciplinary proceedings, or as to Bessler's statement that someone "didn't press record." [10] Further, plaintiff provides no reasoning why the lack of a recording renders the appeals process a "sham" or casts doubt on the outcome of Pacheco's disciplinary proceedings. Finally, plaintiff presented no evidence that the motivating factor behind this clerical error was Pacheco's gender. Pacheco presented no evidence raising a genuine issue of material fact that the lack of a recording

[10] St. Mary's evidence does suggest that the disciplinary proceedings were not recorded because neither Pacheco nor the complainant appeared to present evidence, and that the panel proceeded directly to deliberations. Pl.'s Ex. L, ECF No. 20–13. Accordingly to Kathe Lehman-Meyer, one of the members of the hearing panel, deliberations are never recorded.

was a procedural flaw casting doubt on the accuracy of the proceeding, or that gender was a motivating factor behind an erroneous outcome here.

Pacheco's complaint outlined several other alleged procedural flaws or failures to comply with the procedures outlined in the Code of Conduct.[11] St. Mary's addressed the substance of each allegation in its motion for summary judgment, arguing that the evidence established that St. Mary's *did not* fail to comply with the Code. Mot. 7–11. However, Pacheco does not raise these alleged failures as procedural flaws that resulted in an erroneous outcome, and he presents no evidence that St. Mary's failed to comply with the Code other than what has previously been discussed. By failing to present these issues in his response, plaintiff has abandoned these issues. *See Black v. N. Panola Sch. Dist.*, 461 F.3d 584 n.1 (5th Circ. 2006) ("[Plaintiff's] failure to pursue [a] claim beyond her complaint constituted abandonment."); *see also Vela v. City of Houston*, 271 F.3d 659, 678–79 (5th Circ. 2001) (finding an argument raised weakly in the pleadings but not re-asserted at summary judgment is abandoned). The Court will treat these allegations as conceded, and St. Mary's is entitled to summary judgment.

In sum, because Pacheco has presented no evidence casting doubt on the outcome of his disciplinary proceedings and no evidence that gender was a motivating factor in any erroneous outcome here, there is no genuine issue of material fact as to the theory of erroneous outcome under Title IX. No reasonable fact-finder could look to the evidence presented by plaintiff and infer that the disciplinary proceedings here resulted in an erroneous outcome, or that Pacheco's

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[11] Specifically, Pacheco alleged that St. Mary's (1) failed to provide fair notice of the parameters of charged offenses, (2) failed to impartially investigate the allegations, (3) failed to provide the names of witnesses against Pacheco, (4) failed to locate and preserve relevant evidence, (5) failed to compel testimony of student witnesses, (6) failed to allow Pacheco to be present during the disciplinary hearing, (7) failed to allow Pacheco to cross-examine witnesses, and (8) failed to allow Pacheco's appeal to be considered in a "meaningful manner." Compl. 11.

gender was a motivating factor in an erroneous outcome. St. Mary's is therefore entitled to summary judgment on that claim.

c. Selective Enforcement

A selective enforcement claim is one where a plaintiff alleges that, regardless of his guilt or innocence, the decision to initiate proceedings or the penalty imposed was affected by the student's gender. *See Yusuf*, 35 F.3d at 715; *Mallory*, 76 Fed. Appx. at 638; *Doe v. Brown University*, 166 F. Supp. 3d 177, 185 (D.R.I. 2016). This type of claim is centered on the familiar concept of disparate treatment accompanying traditional discrimination cases. Plaintiffs must establish that he or she (1) is a member of a protected class, (2) suffered an adverse action, and (3) was treated less favorably than other similarly situated students, outside the protected class, under nearly identical circumstances. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Lee v. Kansas City S. Ry. Co.,* 574 F.3d 253, 259 (5th Cir. 2009). Again, it is not disputed that Pacheco is a member of a protected class: males. Nor is it disputed that he suffered an adverse action in the form of discipline by St. Mary's. The critical question, therefore, is whether St. Mary's treated other similarly situated female students more favorably under nearly identical circumstances.

Pacheco's complaint also alleges that he engaged in the "exact same conduct" as the complainant, but that he—the male student—was disproportionately disciplined while the female complainant was not disciplined at all. Compl. 12. Thus, Pacheco offers his accuser as a comparator. Specifically, he alleges that they were both found partially clothed and intoxicated, but that he was subjected to disciplinary proceedings while she was not. *Id.*

St. Mary's argues that there was no evidence of a comparator who was treated more favorably under similar circumstances. Mot. 15. Specifically, St. Mary's asserts that the complainant was

not similarly situated to plaintiff under nearly identical circumstances because at the relevant time complainant "was not half naked, aroused and attempting sexual intercourse on a comatose plaintiff." *Id.* Rather, St. Mary's emphasizes, it was the allegations against—and conduct of—the plaintiff that resulted in disparate treatment from the complainant, and not their respective genders. This Court agrees.

The investigation into Pacheco arose from complaints and allegations of sexual misconduct from his fellow students who removed the complainant from his dorm room and called the police. The police officers, responding to those calls, arrested Pacheco and charged him with criminal offenses. The evidence establishes that St. Mary's instituted an investigation under those circumstances. There is absolutely no evidence that the complainant was similarly situated—no students made allegations or complaints of sexual misconduct against her, including Pacheco, and no criminal charges were filed against her. In short, the evidence presented shows that Pacheco and complainant were not similarly situated in nearly identical circumstances. While complainant was undoubtedly treated more favorably, the differences between them—most notably the lack of any allegation or complaint of misconduct—account for this disparate treatment. Pacheco has presented no comparisons to female students who were treated more favorably than he was when accused of sexual assault, sexual harassment, or conduct inconsistent with the university goals and values. Pacheco can, therefore, point to no evidence to establish an essential element of his selective enforcement claim: that a similarly situated female student was treated more favorably under nearly identical circumstances. St. Mary's is therefore entitled to summary judgment regarding those claims.

iv. Section 1983 claims

Pacheco alleges that, pursuant to 42 U.S.C. § 1983, Officers Osuna and Vargara are liable for violations of Pacheco's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution. Compl. 14. Specifically, Pacheco alleged that while he was being interviewed by the officers in the early hours of May 3rd, he was handcuffed to a metal chair and was denied access to water or the bathroom while he was confined. Compl. 10. Later, after the he was transported to jail, he noticed bruises on his arms "from the brutality and physical abuse by St. Mary's campus Police." *Id.* Pacheco testified that he was bruised because the officers held him tight on the arms while transporting him to the police station down a flight of stairs. Pls.' Ex. D 101:4–7, 141:1–18, ECF No. 21–5. Thus, according to Pacheco, the officers violated his constitutionally protected right against excessive force and the conditions of his confinement (or an episodic act or omission) while acting under color of state law.[12]

Officers Osuna and Vargara separately moved for summary judgment, arguing there was no excessive force, that Pacheco was not denied water, and that he was not denied the use of a bathroom during his confinement. Pls.' Mot., ECF No. 21. Specifically, defendants argue that Pacheco suffered *de minimis* injuries in the form of minor bruises on his arms, that the force applied was objectively reasonable under the circumstances (given Pacheco's intoxication at the time of

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[12] The Fourth Amendment's prohibition on unreasonable seizures protects persons from unreasonable or excessive use of force by police. *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003). The Eighth Amendment's prohibition on "cruel and unusual punishment" protects convicted inmates from substandard conditions of confinement, while the Due Process Clause found in the Fifth and Fourteenth Amendments imposes similar requirements on pre-trial detainment of unconvicted suspects and defendants. *See Hare v. City of Corinth, Miss.*, 74 F.3d 633, 648–49 (5th Cir.1996) (en banc) (noting the difference between a challenge based on the conditions of confinement and an episodic act or omission); *Cupit v. Jones*, 835 F.2d 82 (5th Cir. 1987) ("[T]he due process clause of the fourteenth amendment accords pretrial detainees rights not enjoyed by convicted inmates under the eighth amendment prohibition against cruel and unusual punishment."). It also protects a pretrial detainee from excessive force that amounts to punishment. *See Graham v. Connor*, 490 U.S. 386, 395 n. 11 (1989) (suggesting a constitutional violation arises when a prison official uses force not to restore order, but to cause harm).

arrest), and that video evidence establishes that he never even requested water or use of the bathroom. Pls.' Mot. 5–10. Thus, according to defendants, Pacheco suffered no constitutional violation. Further, defendants argue that, even if he did suffer a constitutional violation, Officers Osuna and Vargara are entitled to qualified immunity. *Id.* at 12. Specifically, defendants claim there is no authority suggesting that gripping an intoxicated arrestee's arms tightly, handcuffing him to a chair, or failing to provide water upon request is an unlawful deprivation of a clearly established constitutional right. *Id.* at 13–15.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 does not create substantive rights, but instead provides a remedy for violations of existing federal statutory and constitutional rights. *LaFleur v. Tex. Dep't of Health*, 126 F.3d 758, 759 (5th Cir. 1997); *Jackson v. City of Atlanta, Tex.*, 73 F.3d 60, 63 (5th Cir. 1996), cert. denied, 519 U.S. 818, 117 S. Ct. 70 (1996). Critically, § 1983 imposes liability for the deprivation of a right protected by the Constitution or laws of the United States, "not violations of duties of care arising out of tort law." *Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987). Plaintiffs must establish that they were (1) deprived of a right secured by the Constitution or laws of the United States, and (2) that defendant acted under color of state law in depriving that right. *Doe ex rel. Magee v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 854 (5th Cir. 2012).

However, the doctrine of qualified immunity protects some government officials from liability in § 1983 claims. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). Qualified immunity is an immunity from suit, rather than a mere defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The Supreme Court has stressed that immunity questions should be resolved as early as possible. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). Therefore, in assessing § 1983 claims in which qualified immunity is an issue, the Court must first assess qualified immunity—whether the facts alleged show the officer's conduct violated a constitutional right, and whether the law on that right was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009) (emphasizing that judges may exercise in their sound discretion which of the two prongs to address first).

Pacheco argues that the qualified immunity issue should go to the jury and that this Court may deny summary judgment because there are fact questions as to whether the violations here were clearly established—that is, whether it is sufficiently clear that a reasonable official would understand that the conduct here would violate the rights of plaintiff. *Kinney v. Weaver*, 367 F.3d 337, 356–57 (5th Cir. 2004) (allowing the question of qualified immunity to proceed to a jury).

However, in light of the circumstances of this particular case, the Court will first assess whether the alleged conduct rises to a violation of a constitutional right. If a constitutional violation is found in the alleged facts, the Court will assess whether the law was clearly established.

1. There is no evidence of a constitutional violation.

As noted, defendants argue that the facts, taken in the light most favorable to Pacheco, do not rise to the level of a constitutional violation. Specifically, defendants argue that bruising Pacheco's arms while escorting him down a staircase is a *de minimis* injury that does not amount to a

constitutional violation. *Glenn v. City of Tyler*, 242 F. 3d 307, 314 (5th Cir. 2001). Further, even if not *de minimis*, the officer's conduct would not satisfy the standards of excessive force given defendant's intention in maintaining physical control over an intoxicated arrestee walking down a flight of stairs. In other words, defendants argue there is no evidence that the officers gripped Pacheco's arms "maliciously and sadistically for the purpose of causing harm." *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993). Similarly, defendants argue that there is no evidence that handcuffing an arrestee to the arm of the chair rises to the level of a constitutional violation. Finally, defendants maintain that Pacheco never requested water or to use the restroom, and that they therefore never denied any such request as alleged.

To succeed on an excessive force claim, a plaintiff bears the burden of showing (1) an injury that is more than *de minimis*, (2) which resulted directly and only from the use of force that was excessive to the need, and (3) the force used was objectively unreasonable. *Glenn v. City of Tyler*, 242 F.3d at 314. There is no requirement that the injury be significant, serious, or more than minor, but there must be "some injury," and the injury must be evaluated in the context in which the force was deployed. *Id.* (citing *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999). In this case, it is undisputed that Pacheco was bruised following his arrest, but the source of the bruising *is* disputed. However, Officer Osuna testified that, assuming the officers had caused the bruise, that it was a "bad bruise" and that too much force was used. Pl.'s Ex. B 14, ECF No. 25–5. Taken in the light most favorable to plaintiff, this is evidence that Pacheco suffered "some injury" that was more than *de minimis*.

However, there is no evidence that the force used was excessive to the need or that it was objectively unreasonable. "[W]hen a court is called upon to examine the amount of force used on a pretrial detainee for the purpose of institutional security, the appropriate analysis is . . . whether

force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." *Valencia*, 981 F.2d at 1446. It is undisputed that Pacheco was heavily intoxicated when he was transported to the jail. In fact, as plaintiff's evidence shows, Officer Osuna testified that they had been trained to hold a suspect's arm while transporting them, and that Pacheco was "very intoxicated walking down the stairs . . . with his arms [handcuffed] behind his back." Pl.'s Ex. B 12:13–20. Plaintiff suggests that the evidence shows that he had been able to walk "to and from his bed and his chair and too [sic] the door," and that this evidence raises a fact question as to whether the officers really needed to help Pacheco down the stairs. But Officer Vargara's testimony, which plaintiff presented as evidence, establishes that Pacheco was "very intoxicated" and that when the officers escorted him down the stairs they grabbed him "with a little bit more force to keep him upright." Pl.'s Ex. A 42:24–25, 64:1–5, ECF No. 25–4. Similarly, Officer Osuna testified that Pacheco was "a little wobbly on his feet, very intoxicated," that that each officer had grabbed an arm to walk Pacheco down the stairs. Pl.'s Ex. B 9:22–25. Pacheco offers no evidence that the use of force was excessive to the need—the need to transport an intoxicated arrestee safely down a flight of stairs—or that force was used maliciously for the purpose of causing harm. There is no evidence that Pacheco complained at the time that the officers' grip was hurting him or that the officers were trying to injure him. Indeed, nothing in the evidence presented by plaintiff raises a genuine issue of material fact as to whether the officers gripped Pacheco's arm with the purpose of harming him.

For the same reasons, plaintiff fails to raise a fact question that a constitutional violation for excessive force occurred in handcuffing Pacheco to a chair while he was detained. As presented by plaintiff, Officer Vargara testified that Pacheco was allowed to sit with his hand handcuffed to the chair rather than having both hands cuffed behind his back "in order for him to be a little bit

more comfortable." Pl.'s Ex. A 66:8–12. There is no evidence that handcuffs were used excessively or for the purpose of harming Pacheco.

Further, Pacheco's claims based on the conditions of his confinement—that he was handcuffed to a chair and denied water or use of a bathroom—fails to rise to the level of a constitutional violation. As noted by defendants, Pacheco provides no caselaw, statute, or other authority which requires an arrestee to be given water. However, this Court is aware that constitutional challenges by pretrial detainees may be brought under two alternative theories: as an attack on a "condition of confinement" or as an "episodic act or omission." *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 644–45 (5th Cir.1996) (en banc). "If the plaintiff has properly stated a claim as an attack on conditions of confinement, he is relieved from the burden of demonstrating a municipal entity's or individual jail official's actual intent to punish because, as discussed below, intent may be inferred from the decision to expose a detainee to an unconstitutional condition." *Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009). The more common claim, though, is a challenge to specific officials for acts or omissions. *Id.* Under in episodic-acts-or-omissions claims, a plaintiff must prove intent—that the officers "acted or failed to act with deliberate indifferent to detainee's needs." *Id.; see also Hare*, 74 F.3d at 644–645 (articulating the deliberate indifference standard for episodic acts or omissions, but noting "negligent inaction by an officer does not violate the due process rights of a person lawfully held in custody of the State"). Such basic human needs include food, clothing, shelter, medical care, and reasonable safety. *Hare*, 74 F.3d at 639 (quoting *DeShaney v. Winnebago Cty. Department of Soc. Serv.*, 489 U.S. 189, 200, 109 S.Ct. 998, 1005–06, 103 L.Ed.2d 249 (1989)). It seems indisputable that water and the use of a restroom are basic human needs, and that the State of Texas must provide such to detainees and prisoners who are confined for prolonged periods of time.

However, Pacheco cites no authority—and this Court knows of none—requiring an arrestee to be given water upon request while he is under short-term custody. Further, Pacheco offers no evidence that he ever made such a request. In fact, according to the officers' testimony, Pacheco did *not* request water or to use the bathroom. Even more surprisingly, plaintiff's evidence suggests that Pacheco actually *was* given water by another officer. *See* Pl.'s Ex. A 76:4–12 (Officer Vargara noting that she heard Pacheco was given water, but didn't witness Pacheco drinking water); Pl.'s Ex. B 29:9–21 (Officer Osuna stating that Pacheco did not request water, but that he did read in an email "that he said Sergeant Schnieder gave him a bottle of water").

Finally, even if Pacheco was denied water, he has provided no evidence of a constitutional violation under applicable deliberate indifference standard—*i.e.* the subjective intent to cause harm. *Hare*, 74 F.3d at 649. Deliberate indifference in the context of an episodic failure to provide for a pretrial detainee's needs means that: 1) the official was aware of facts from which an inference of substantial risk of serious harm could be drawn; 2) the official actually drew that inference; and 3) the official's response indicates the official subjectively intended that harm occur. *Hare*, 74 F.3d at 649–50. There is no evidence that the officers were aware, or should have been aware, of an unjustifiably high risk of not providing Pacheco with a glass of water. It is clear Pacheco was intoxicated—he apparently vomited in the police station—and Officer Vargara testified that he was concerned for his health, but did not think medical attention was necessary. Pl.'s Ex. A 74:20–23. Pacheco offers no evidence from which the officers could infer a substantial risk of serious harm, or that they *actually drew that inference*. Further, there is no evidence that the officers' failure to provide Pacheco with water was subjectively intended to harm him. While it may have been reasonable to provide an intoxicated arrestee with a glass of water, deliberate indifference cannot be inferred from the failure to act reasonably. *Hare*, 74 F.3d at 649.

For the same reasons, the claim of episodic act or omission in the denial of use of a bathroom fails to raise a fact question that a constitutional violation occurred. First, Pacheco cites no authority—and this Court knows of none—requiring an arrestee to be given access to a restroom upon demand while in short-term custody. Second, there is no evidence that that Pacheco ever requested to use the restroom. Third, even assuming he had asked and was denied use of a restroom, there is no evidence that Officers Vargara or Osuna were deliberately indifferent to a substantial risk of serious harm. That is, Pacheco presents no evidence that Officer Vargara or Officer Osuna were aware of facts from which an inference could be drawn that a substantial risk of harm existed in denying Pacheco access to a restroom for the few hours he was at the station, or *that the officers actually drew that inference.*

While Pacheco obviously takes issue with the conduct of the officers here in handcuffing him to a chair, or denying him water or a restroom, this Court is not in a position to loosen the standards upon which courts in this jurisdiction assess allegations of constitutional violations. Ultimately, courts are instructed to accord jail officials "wide-ranging deference" to an official's attempt to maintain order, discipline, and security in the jail. *Bell v. Wolfish,* 441 U.S. 520, 521 (1979); *Alberti v. Klevenhagen,* 790 F.2d 1220, 1223 (5th Cir. 1986) ("[A] federal court should not, under the guise of enforcing constitutional standards, assume the superintendence of jail administration."). Here, even construing Pacheco's evidence in the light most favorable to him, there is no evidence upon which a reasonable fact-finder could infer that a constitutional violation occurred. Therefore, because there is no genuine issue of material fact that Pacheco suffered a constitutional violation, Pacheco's claims lack merit and the officials here are entitled to qualified immunity. Accordingly, defendants are entitled to summary judgment on these claims.

v. Declaratory Relief

Pacheco's complaint also seeks declaratory relief that defendants have committed violations of his rights under contract law, as well as state and federal law. However, the Declaratory Judgment Act provides that a court "[i]n the case of actual controversy . . . may declare the rights and other legal relations of any interested party," 28 U.S.C. § 2201(a), not that it must do so. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136, 127 S. Ct. 764, 166 L. Ed. 2d. 604 (2007). There is no absolute right to a declaratory judgment in federal courts, and courts may dismiss a declaratory action for equitable, prudential, or policy arguments. *Id.*

Further, as discussed above, this Court finds that defendants are entitled to summary judgment on the claims for breach of contract, negligence, violation of Title IX, and violations of civil rights pursuant to § 1983. Accordingly, this Court finds that no controversy remains to be settled, and declines to exercise its discretion in further declaring the rights or other legal relations of the parties here.

VI. CONCLUSION

In sum, the Court will grant plaintiff's motion for extension of time and will deem his response to defendants' motions for summary judgment as timely.

Upon consideration, however, Pacheco has failed to raise a genuine issue of material fact as to his claims for breach of contract, negligence, violation of Title IX, or violation of constitutional rights pursuant to § 1983. Pacheco abandoned his claims for breach of contract and negligence. Further, he failed to raise any evidence that his gender was a motivating factor in producing an erroneous outcome of St. Mary's disciplinary proceedings. Finally, he failed to raise any evidence that he suffered a constitutional violation at the hands of Officer Vargara or Officer Osuna, and the officers are therefore entitled to qualified immunity.

Accordingly, defendants are entitled to summary judgment as a matter of law.

A separate order shall issue.

Royce C. Lamberth
United States District Judge

DATE: 6/20/17