20-1514

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DR. MUKUND VENGALATTORE,

Plaintiff-Appellant,

—against—

CORNELL UNIVERSITY, BETSY DEVOS, SECRETARY OF EDUCATION U.S. DEPARTMENT OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE CORNELL UNIVERSITY

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Rule 26.1 Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel of record for Defendant-Appellee Cornell University certifies that it has no parent company and that there are no publicly held corporations that own 10% or more of its stock.

Dated: November 20, 2020

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Statutes

TABLE OF AUTHORITIES

Page(s)

Other Authorities

INTRODUCTION

This is the latest, and hopefully final, chapter in years of internal disputes, administrative agency proceedings, and litigation between Cornell University ("Cornell" or the "University") and Mukund Vengalattore ("Vengalattore"), a former Cornell professor. Vengalattore was denied tenure based on a lack of academic productivity. Separately, he was suspended for two weeks because of his romantic relationship with a student he supervised. He challenged both the tenure denial and the finding that he violated University policy in state court, and he lost. The Appellate Division of the New York Supreme Court rejected his claims in 2018, and Vengalattore did not appeal.

It is unclear, therefore, what Vengalattore seeks in this litigation. He concedes that he is ***not*** challenging the denial of tenure (see Opening Br. at 13), nor could he do so in light of the state court's determination. Perhaps he is attempting to renew his challenge to the suspension, but, if so, he is collaterally estopped by the state court's disposition of his claim. While he complains at length about supposed discrimination on the basis of his race, national origin and gender, he fails to identify any adverse employment action that was not already reviewed and upheld in the state court litigation.

The shortcomings of his pleading actually run much deeper. Vengalattore contends that he was subjected to race discrimination in violation of Title VI of the

Civil Rights Act, 42 U.S.C. §§ 2000d-2000d-7, but his complaints about stray remarks by non-decisionmakers do not give rise to an inference of discrimination by the University. The same is true of his claim under Title IX of the Civil Rights Act, 20 U.S.C. §§ 1681-88, which prohibits gender discrimination in educational programs. Equally unavailing are his attempts to suggest that Cornell failed to follow its policies – in particular its Title IX policy (Policy 6.4) – in the investigation of the student's complaint that before she and Vengalattore were involved in a romantic relationship, they had a nonconsensual sexual encounter. The simple truth, as demonstrated by the record below, is that Policy 6.4 was inapplicable to the investigation of the student's complaint because it was time- barred. Instead, the investigation was conducted under an entirely distinct University policy that prohibits consensual romantic relationships between faculty and students under their supervision. And beyond these factual shortcomings, Vengalattore fails to state a Title IX claim for relief as a matter of law. Title IX prohibits sex discrimination in educational programs, but not alleged employment discrimination against a faculty member.

Whatever Vengalattore hopes to achieve, and whatever his motivations in continuing to litigate against the University, it is quite clear that he fails to state any claims upon which relief can be granted. The District Court properly dismissed the case, and its decision should be affirmed.

I. JURISDICTIONAL STATEMENT

The District Court had federal question and supplemental jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291, as the District Court entered a final judgment against Vengalattore on May 1, 2020, and Vengalattore timely filed a notice of appeal on May 8, 2020.

II. STATEMENT OF ISSUES

1. Did Vengalattore allege facts sufficient to support a reasonable inference of discrimination on the basis of race, color, or national origin under Title VI, 42 U.S.C. §§ 2000d-2000d-7?
2. Does Title IX, 20 U.S.C. §§ 1681-88, create a private right of action for employment discrimination and, if so, did Vengalattore allege facts sufficient to support a reasonable inference of gender discrimination under Title IX?
3. Did Vengalattore allege facts sufficient to state a claim under 42 U.S.C. § 1983 ("§ 1983"), including that Cornell is a state actor?
4. Did the District Court abuse its discretion in declining to extend supplemental jurisdiction over Vengalattore's state law defamation claim?

III. STATEMENT OF THE CASE

A. FACTUAL HISTORY

Jane Roe ("Roe"), a graduate student at Cornell, worked in Vengalattore's physics laboratory from 2009 to November 2012. JA 35 ¶¶ 201-02, 283. In November 2014, Roe accused Vengalattore of (1) engaging in a ***nonconsensual*** sexual encounter with her and (2) having a ***consensual*** sexual relationship with her

while she worked in his physics lab. JA 45 ¶¶ 324, 326, 332. In February 2015, the University commenced an investigation into Roe's allegations. JA 47 ¶¶ 343-574.

Roe's complaint raised questions under two distinct Cornell policies, but only one of those policies applied to the investigation. Cornell's Policy 6.4, which was promulgated pursuant to Title IX and which is discussed throughout Vengalattore's Brief, was not at issue. Policy 6.4 applies to allegations of ***nonconsensual*** sexual conduct (i.e., assault, harassment or discrimination). JA 27 ¶ 132. Under Policy 6.4, a complainant must file a complaint within the earlier of one year after he or she is no longer under the faculty member's supervision, or three years from the date of the alleged misconduct. JA 28 ¶ 140. Roe complained in 2014, four years after the alleged nonconsensual event and two years after she left the University. Her claim, therefore, was time-barred under Policy 6.4 and ***the investigation into Roe's complaints against Vengalattore was not conducted under that policy***. JA 69 ¶ 581; SA-34.[1]

[1] The Amended Complaint includes documents incorporated by reference and/or integral to the Amended Complaint. Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004) ("A complaint is deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are integral to the complaint." (citation omitted)). The Amended Complaint includes the September 25, 2015 investigation report, and quotes extensively from it. See JA 68-74 ¶¶ 575-620; Sira, 380 F.3d at 57 (finding that documents were incorporated by reference into the complaint where the complaint "explicitly refer[red] to and relie[d] upon" them).

Cornell also maintains a separate Romantic and Sexual Relationships Policy, which is set forth in the Faculty Handbook. It provides that no member of the University community may "simultaneously be romantically or sexually involved with a student whom he or she teaches, advises, coaches, or supervises in any way." JA 32 ¶ 175; JA 69 ¶ 577. Unlike Policy 6.4, which prescribes specific procedures that must be followed in resolving complaints of unwelcome, ***nonconsensual*** sexual conduct, the Romantic and Sexual Relationships Policy is more flexible and does not mandate any particular investigatory procedures or timelines.

The University's bylaws delegate to the Deans of the respective Cornell colleges (in this case, the Arts and Sciences Dean, Gretchen Ritter) authority over all personnel matters in their respective colleges. SA-25. Dean Ritter was responsible for ensuring that the alleged consensual relationship would be investigated, and that appropriate sanctions would be imposed if it was determined that Vengalattore violated the Romantic and Sexual Relationships Policy.

Alan Mittman and Sarah Affel, seasoned human resources professionals employed by the University and acting on behalf of Cornell's Office of Workplace Policy and Labor Relations (the "WPLR"), conducted an independent and thorough investigation into Roe's allegations. JA 47-68 ¶ 343-574. Mittman and Affel:

- Interviewed numerous witnesses, including Vengalattore, Roe, Vengalattore's colleagues, graduate students who worked with Vengalattore and Roe in the lab, Roe's sister and friends, Roe's friend's husband, a graduate student with whom Roe allegedly had a romantic relationship, and the professor who supervised Roe's work after she left Vengalattore's lab. JA 47 ¶¶ 343, 355; JA 48 ¶ 364; JA 51 ¶ 389; JA 52 ¶¶ 392, 401; JA 53 ¶ 412; JA 54 ¶ 417; JA 55 ¶¶ 425, 427; JA 56 ¶¶ 435, 437; JA 59 ¶¶ 474, 476; JA 60 ¶¶ 481, 483, 490; JA 61 ¶¶ 501, 504; JA 63 ¶ 521; JA 64 ¶ 527; JA 67 ¶ 559. The witnesses included men and women, and individuals of Indian and non-Indian descent (JA 35 ¶¶ 206, 208; JA 36 ¶ 212; JA 37 ¶ 234; JA 39 ¶ 252), as well as several witnesses identified by Vengalattore. JA 49 ¶ 375; JA 52 ¶¶ 392, 401; JA 56 ¶ 435; JA 59 ¶ 476; JA 60 ¶ 483.
- Permitted Vengalattore and Roe to make multiple submissions to the investigators. JA 49 ¶ 374; JA 51 ¶¶ 384-88; JA 58 ¶ 465.
- Reviewed Roe's medical records, JA 55 ¶¶ 431-32, and Vengalattore's lab logs and computer files, JA 64 ¶ 536.
- Appraised Vengalattore of the allegations by Roe and gave him ample opportunity to respond. JA 48 ¶ 363; JA 49 ¶ 368; JA 56 ¶ 442.

- Provided a draft appendix of evidence and witness interview summaries, to which Vengalattore and his counsel responded. JA 62-63 ¶¶ 510-20.
- Issued a detailed final report explaining their conclusions and their reasoning. JA 68-74 ¶¶ 575-620.

See also SA33-96 (listing additional details of the investigation and documents reviewed, including phone logs, text messages, emails, and receipts for gifts Vengalattore gave to Roe).

On September 25, 2015, the investigators issued a report "recommend[ing] that the Dean find that a preponderance of the credible evidence supports the conclusion that [Vengalattore] . . . had a romantic or sexual relationship with the Complainant, a student he directly supervised" ("WPLR Report"). JA 68 ¶¶ 575-76. The investigators recommended that "no specific finding be made as to whether the first sexual encounter rises to the level of sexual assault as defined by Policy 6.4." JA 68 ¶ 576; JA 69 ¶ 581.

In October 2015, Dean Ritter adopted the investigators' recommendation and issued a letter to Vengalattore admonishing him for lying in the investigation and for violating University policy by having a consensual relationship with Roe. JA 75 ¶ 621. Dean Ritter wrote:

> I find that a preponderance of evidence supports the claim that you were involved in a sexual relationship with your former graduate student over a period of several months while also serving as her graduate advisor. As a result, I find that you have violated the university's

> "Romantic and Sexual Relationships" policy by engaging in such conduct. I also find that there is not significant evidence to support the claim that the initial sexual encounter between you and the graduate student involved a sexual assault. . . . Given the finding of an inappropriate sexual relationship, I also find that in your denial of a sexual relationship you have lied to the investigators in this case.

Id. ¶ 622.

Dean Ritter suspended the imposition of sanctions pending the outcome of an ongoing but separate challenge by Vengalattore to the University's denial of tenure. Id. ¶ 623. On February 17, 2017, Dean Ritter imposed the only sanction that was ever leveled against Vengalattore for his improper relationship with Roe: a two-week suspension without pay, effective June 1, 2017. JA 76 ¶ 637-38. Vengalattore did not challenge the suspension through Cornell's internal grievance procedure.

B. PROCEDURAL HISTORY

1. Internal Tenure Decision and Review

In the spring of 2014, Vengalattore was considered for a promotion to a position as a tenured professor. JA 42 ¶ 293. In May 2014, before she had raised any allegations of sexual misconduct against Vengalattore, Roe sent a letter to the departmental tenure committee, alleging that Vengalattore "threw" a "power supply" at her during the time she was working in his lab. JA 34 ¶ 310. Vengalattore was informed of Roe's allegation and submitted a written denial to the departmental tenure committee. Id. ¶ 311-312.

Wholly separate from the investigation into Roe's subsequent sexual misconduct allegations, Vengalattore's tenure bid was considered by several committees within the University. First, the departmental tenure committee voted narrowly in favor of granting Vengalattore tenure. JA 44 ¶ 320. However, after an ad hoc committee reviewed Vengalattore's tenure application, Dean Ritter issued a preliminary decision on October 29, 2014 recommending that tenure be denied, citing Vengalattore's sparse academic productivity as the reason for her decision. JA 45 ¶ 323; JA 46 ¶ 336. The Faculty Advisory Committee on Tenure Appointments ("FACTA"), which confidentially advises the University Provost, also reviewed Vengalattore's tenure application in early 2015 and similarly recommended to the Provost that Vengalattore's tenure application be denied based on a lack of demonstrated productivity. JA 46 ¶ 337-38. In February 2015, Dean Ritter informed Vengalattore that his application for tenure was denied. Id. ¶ 342.

Vengalattore appealed the tenure decision internally. JA 48 ¶ 361. In December 2015, the Tenure Appeals Committee concluded that Roe's May 2014 letter should not have been included in the tenure review materials due to a conflict of interest between Vengalattore and Roe. JA 75 ¶ 624; JA 157 ¶ 8; JA 172 ¶ 8. On February 16, 2016, following another multitiered review of a redacted tenure dossier that no longer referenced Roe's allegations, Dean Ritter concluded that

tenure should be denied. JA 75 ¶¶ 626, 628; JA 156 ¶ 12; JA 172 ¶ 12. The University Provost agreed and issued a final decision on May 3, 2016. JA 75 ¶ 631.

2. State Court Proceedings

In June 2016, Vengalattore filed a lawsuit against Cornell in the New York Supreme Court pursuant to Article 78 of New York's Civil Practice Law and Rules ("Article 78").[2] Vengalattore sought a de novo tenure review and the expungement of the finding that he violated the Romantic and Sexual Relationships Policy. JA 293-94.[3] He contended that his tenure denial was arbitrary and in bad faith, and that the tenure review was conducted in violation of University policy. JA 219, 228. He also claimed that the disciplinary finding was made "in violation of University policy, including the University's Dismissal/Suspension Policy." JA 230-31 ¶ 130.

[2] Article 78 is the modern codification of the common law writs of certiorari, mandamus and prohibition under New York law. See CPLR § 7801.

[3] The Court may take judicial notice of this and other filings in the Article 78 proceeding to establish the fact of the filings. Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991) (noting that "[c]ourts routinely take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings"); Beauvoir v. Israel, 794 F.3d 244, 249 n.4 (2d Cir. 2015) (noting that, in reviewing a motion to dismiss, the Court "may take judicial notice of the fact that the state-court complaint contained certain statements").

The New York Supreme Court granted Vengalattore's request for a de novo tenure review, but not the request to expunge the finding that he violated the Romantic and Sexual Relationships Policy. JA 244.[4] Vengalattore then filed a motion renewing his request to expunge the disciplinary finding. SA-1-3. In August 2017, the state court denied Vengalattore's motion, holding that that the trial court had "a full opportunity to review [Vengalattore's] tenure process as well as the Workplace Policy and Labor Relations investigation and its finding," and that there was "no ambiguity in not granting the specific request for expungement of the finding." SA-3. Vengalattore did not appeal this decision.

Cornell, however, appealed the order granting a de novo tenure review. In an opinion dated March 30, 2018, the Appellate Division held that Cornell had not deviated from its procedures in connection with the previously completed tenure review; that the decision to deny tenure was not arbitrary or capricious, or made in bad faith; and that Roe's sexual misconduct allegations did not influence the tenure

[4] The Court may take judicial notice of this and the other state court judgments issued in the Article 78 proceedings. See Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Cafe, 566 F.2d 861, 862 (2d Cir. 1977) ("Rule 201 of the Federal Rules of Evidence permits this court to take judicial notice of judgments of courts of record."); Williams v. N.Y. City Hous. Auth., 816 F. App'x 532, 534 (2d Cir. 2020) ("[T]he district court did not err in considering [the plaintiff's] Article 78 petition and state court decision because they were public records, and thus appropriate for judicial notice.").

decision. Vengalattore v. Cornell Univ., 161 A.D.3d 1350, 1352-54 (3d Dep't 2018).

Vengalattore did not seek further appellate review of the state court decisions on tenure and his disciplinary sanction. Instead, in July 2018 he filed complaints with the New York Division of Human Rights ("DHR") and the Equal Employment Opportunity Commission ("EEOC"), alleging that the actions taken against him were discriminatory. The DHR concluded that there was no probable cause to believe that Cornell engaged in unlawful discrimination, and it dismissed Vengalattore's complaint. SA-108-113. The EEOC similarly dismissed the federal administrative charge, and Vengalattore opted not to pursue litigation of his employment discrimination claims under the New York Human Rights Law or Title VII.

3. Federal Court Proceedings

Vengalattore then filed this lawsuit against Cornell in September 2018, and added the Secretary of Education Betsy DeVos and the U.S. Department of Education as defendants. Id. The Complaint, as amended, asserted claims against Cornell for (1) a violation of Title IX, 20 U.S.C. §§ 1681-88; (2) a violation of Title VI, 42 U.S.C. §§ 2000d-2000d-7; (3) a violation of due process pursuant to § 1983; and (4) defamation. JA 78, 89, 95, 97. Cornell filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c)

and/or for summary judgment pursuant to Federal Rule of Civil Procedure 56. Dkt. 41 ("Motion").

The District Court granted Cornell's Motion, concluding that the Amended Complaint failed to state claims for relief under Title IX, Title VI, and § 1983. Dkt. 59 at 18, 25, 26. In the absence of any viable federal claims, the Court declined to exercise supplemental jurisdiction over the remaining state law defamation claim. Id. at 27.

IV. SUMMARY OF ARGUMENT

The only alleged adverse actions taken against Vengalattore – the denial of tenure and the finding that Vengalattore violated the Romantic and Sexual Relationships Policy, which resulted in a two-week suspension – were upheld in state court. The factual determinations necessarily made in that court are binding, and they are fundamentally inconsistent with Vengalattore's newest piece of litigation. Vengalattore is collaterally estopped from relitigating the questions that were resolved in the New York Supreme Court and the Appellate Division.

Furthermore, the Amended Complaint fails to support a plausible inference of race discrimination in violation of Title VI. The allegations underlying Vengalattore's Title VI claim – (1) a stray remark by a single professor with no involvement in the Romantic and Sexual Relationships Policy investigation or the imposition of the sanction, (2) alleged deviations from inapplicable University

policies, and (3) alleged statements made by Roe while under Vengalattore's supervision years before the investigation into her complaints of sexual misconduct – were properly rejected by the District Court as a basis for plausible discrimination claims.

Vengalattore's Title IX claim fares no better. Neither the Supreme Court nor the Second Circuit has recognized an implied private right of action under Title IX for plaintiffs asserting employment discrimination claims against academic institutions. Nor should such a right of action be implied, as it is not contemplated by the text of Title IX. Indeed, any attempt to create a Title IX employment discrimination right of action would undermine the carefully wrought administrative machinery of Title VII of the Civil Rights Act of 1964, 29 U.S.C. §§ 2000e et seq. ("Title VII").

Even if Title IX could be interpreted to support a private cause of action for employment discrimination, Vengalattore's Title IX claim suffers from the same flaws as his Title VI claim. Vengalattore is collaterally estopped by the state court's determinations from complaining about his tenure denial, the finding of responsibility for violating the Romantic and Sexual Relationships Policy, or the two-week suspension that he received as a result. He does not identify any other adverse employment actions, and his vague, internally inconsistent accusations are insufficient to raise a plausible inference of gender discrimination.

The Amended Complaint also fails to state a claim for relief under § 1983, as it relies on the same inapplicable University policy (Policy 6.4) as his Title VI and Title IX claims. Moreover, § 1983 applies only to governmental entities, and Vengalattore cannot establish that Cornell is a state actor. Finally, the District Court did not abuse its discretion in declining to exercise supplemental jurisdiction over the state law defamation claim after it dismissed the federal claims against Cornell.

V. ARGUMENT

A. STANDARD OF REVIEW

1. Judgment on the Pleadings

The Second Circuit reviews de novo a district court's decision to grant a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010). The Court employs the standard applicable to motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Id. To survive dismissal, the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Kim v. Kimm, 884 F.3d 98, 103 (2d Cir. 2018). The complaint must plead "enough facts to state a claim to relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), and "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

On a Rule 12(c) motion, the court considers "the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case." L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 422 (2d Cir. 2011) (citation omitted). "A complaint is [also] deemed to include . . . materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint." Id. (citation omitted). Although the Court must generally accept as true all of the factual assertions in the complaint, the Court need not credit "factual assertions that are contradicted by the complaint itself, by documents upon which the pleadings rely, or by facts of which the court may take judicial notice." Perry v. NYSARC, Inc., 424 F. App'x 23, 25 (2d Cir. 2011). Nor is the Court "bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions." In re Facebook, Inc., Initial Pub. Offering Derivative Litig., 797 F.3d 148, 159 (2d Cir. 2015). Even if all of the allegations contained in the complaint are deemed true, the complaint must nonetheless be dismissed if the claims "fail[] as a matter of law." Wojchowski v. Daines, 498 F.3d 99, 106 (2d Cir. 2007).

2. Supplemental Jurisdiction

The Second Circuit reviews a district court's decision declining to exercise

supplemental jurisdiction for abuse of discretion. Spiegel v. Schulmann, 604 F.3d 72, 78 (2d Cir. 2010) (per curiam).

B. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF UNDER TITLE VI.

Vengalattore contends that Cornell discriminated against him because of his race, color, or national origin by "applying an unfair, unreliable, and partial process against him in resolving Roe's complaints" and that Cornell "applied its policies and procedures in a racially-biased manner . . . which led to an erroneous and adverse employment action." JA 92 ¶¶ 686, 691. To state a viable Title VI claim, a plaintiff must plead that the defendant discriminated against him on the basis of race, that the discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions. Kajoshaj v. N.Y. City Dep't of Educ., 543 F. App'x 11, 13 (2d Cir. 2013). A plaintiff's "naked allegations" that he was treated differently cannot demonstrate a plausible entitlement to Title VI relief. Id.[5]

[5] Vengalattore argues that plaintiffs alleging employment discrimination need to meet only a "minimal" pleading burden. See Opening Br. at 40. If Vengalattore is suggesting that complaints of employment discrimination are exempt from the plausibility pleading standard articulated in Iqbal, 556 U.S. at 681, he is mistaken. See Littlejohn v. City of New York, 795 F.3d 297, 310 (2d Cir. 2015) (concluding that "Iqbal's requirement applies to Title VII complaints of employment discrimination," but does not affect the presumptions afforded to plaintiffs under the McDonnell Douglas burden-shifting framework for adjudicating claims of discrimination).

1. Vengalattore Is Collaterally Estopped from Asserting His Title VI Claim.

The New York Appellate Division held conclusively that Vengalattore was properly denied tenure and disciplined, and that Cornell's decisions were not arbitrary, capricious, unfair or in violation of applicable policies. Those determinations are binding and preclude any argument that Cornell was motivated by discriminatory animus. Vengalattore is collaterally estopped from recasting the same grievances in a different statutory framework.

"The Full Faith and Credit Act, 28 U.S.C. § 1738[,] . . . requires the federal court to 'give the same preclusive effect to a state-court judgment as another court of that State would give.'" Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 293 (2005) (citing Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 523 (1986)). Collateral estoppel "may be invoked to preclude a party from raising an issue (1) identical to an issue already decided (2) in a previous proceeding in which that party had a 'full and fair opportunity' to litigate." Fuchsberg & Fuchsberg v. Galizia, 300 F.3d 105, 109 (2d Cir. 2002).

First, Vengalattore is collaterally estopped from relitigating any matters relating to the tenure decision. The Appellate Division upheld Cornell's decision to deny tenure, holding that Cornell did not deviate from its procedures in connection with the tenure review; that the decision to deny tenure was not arbitrary or capricious, nor was it made in bad faith; and that neither the sexual

misconduct allegations raised by Roe nor her May 2014 letter improperly influenced the tenure decision. Vengalattore, 161 A.D.3d at 1352-54. Vengalattore was represented by counsel and had a full and fair opportunity to litigate these issues, as they were fully briefed and argued before both the trial court and the Appellate Division.[6] Even if he were still challenging the denial of tenure, he conceded in his Opening Brief that he is ***not*** asserting such a challenge in this appeal. Opening Br. at 13.

Second, the state courts soundly rejected Vengalattore's assertion that Cornell failed to follow its policies in the investigation of Roe's complaints.[7] Vengalattore asked the New York Supreme Court to expunge Cornell's finding that he violated the Romantic and Sexual Relationships Policy, arguing that

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[6] As noted above, Vengalattore concedes that the tenure decision is not at issue in this appeal. See Opening Br. at 13. Nonetheless, Vengalattore continues to conflate the denial of tenure and the investigation of Roe's allegation, dedicating a significant portion of his Opening Brief to the tenure decision and continuing to pursue damages resulting from the end of his employment at Cornell.

[7] Before the District Court, Vengalattore misleadingly argued that the Article 78 proceeding challenged only the tenure denial. See Dkt. 52 at 6. However, this assertion is plainly contradicted by the Article 78 filings and judgments, of which the Court may take judicial notice. See III(B)(1), supra; JA 232 (clarifying that Vengalattore's Article 78 petition both "challenges the University's independent denial of [Appellant's] tenure application" and "[Cornell's] finding of a romantic relationship"); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1095 (2d Cir. 1995) (affirming dismissal where the complaint's "attenuated allegations of control [we]re contradicted both by more specific allegations in the Complaint and by facts of which we may take judicial notice").

Cornell "did not 'substantially adhere[] to its own published rules and guidelines for disciplinary proceedings,'" JA 230 (citing Warner v. Elmira Coll., 59 A.D.3d 909, 910 (3d Dep't 2009)), including Cornell's Dismissal/Suspension Policy; JA 202 ¶ 57. The New York Supreme Court evaluated and rejected the claim. Although the state court did not explicitly state the rationale for its determination, the outcome is nevertheless dispositive. See BBS Norwalk One, Inc. v. Raccolta, Inc., 117 F.3d 674, 677 (2d Cir. 1997) (noting that "[t]he prior decision need not have been explicit on the point, since if by necessary implication it is contained in that which has been explicitly decided, it will be the basis for collateral estoppel" (citation omitted)).

Vengalattore does not deny that he had a full and fair opportunity to challenge the finding that he had a romantic relationship with a student whom he supervised. Nor could he. The New York Supreme Court denied Vengalattore's request for expungement following briefing and oral argument. JA 239. It also denied Vengalattore's motion to modify its order to expunge the finding that he violated the Romantic and Sexual Relationships Policy, holding that that the trial court had "a full opportunity to review [Vengalattore's] tenure process as well as the Workplace Policy and Labor Relations investigation and its finding" and that there was "no ambiguity in not granting the specific request for expungement of the finding." SA-1-3. Vengalattore was represented by counsel throughout the

Article 78 proceeding and was free to appeal the denial of his motion to expunge, but he did not. He is therefore estopped from arguing that Cornell deviated from its procedures in investigating Roe's complaints against him.

2. The Amended Complaint Failed to Raise Even an Inference of Race Discrimination.

In support of his Title VI claims, Vengalattore alleged that (1) Professor Paulette Clancy made a racially insensitive statement during the tenure review process; (2) Cornell deviated from its procedures in resolving Roe's complaints against him; and (3) Cornell failed to disavow racist statements supposedly made by Roe when she worked in Vengalattore's lab, several years before the investigation into her complaints was conducted. These allegations are contradicted by the very documents on which Vengalattore relies, and, as the District Court correctly concluded, they fail to provide even "minimal evidence" of discriminatory intent.[8]

[8] Vengalattore's Title VI claim also fails because he failed to plead sufficient facts showing that Cornell was a recipient of federal funds aimed primarily at funding employment, a threshold requirement for a claimant to recover under Title VI against an employer. See Ass'n Against Discrimination in Emp't, Inc. v. City of Bridgeport, 647 F.2d 256, 276 (2d Cir. 1981). The Amended Complaint's conclusory allegations regarding various federal grants and awards that Cornell received lack sufficient factual detail supporting a reasonable inference that the grants and awards were primarily intended to support employment. JA 90-91 ¶¶ 680-81. The Court below found that there was a question of fact as to whether Cornell's receipt of federal funds implicated Title VI, and while Cornell disagrees, that issue is not the subject of this appeal.

a. Professor Clancy's Statement

Vengalattore points to a single statement made by faculty member Professor Clancy during the FACTA committee's review of Vengalattore's tenure application. Echoing a concern raised by several other reviewers, Professor Clancy said that she "found [Vengalattore's] interactions with the graduate students to be unacceptable and unsupportable by a major research university like Cornell." JA 46 ¶ 339. She added, "[c]learly the only students who are prepared to take the abuse he dishes out are both men and they are both from the Indian subcontinent, where perhaps the culture between advisor and protégé is different." Id.

Preliminarily, it must be emphasized that this assertion relates only to the tenure review, which Vengalattore says he is not challenging in this litigation. Beyond that, the statement by Professor Clancy does not support even a minimal inference of discrimination ***by the University*** in connection with the decisions about which Vengalattore complains. The statement does not evidence hostility toward individuals from the Indian subcontinent, but instead reflects Professor Clancy's attempt to explain Vengalattore's concerning interactions with his graduate students. More importantly, Vengalattore does not allege, nor could he, that Professor Clancy was involved in investigating or resolving Roe's complaints or in the decision to suspend him for two weeks. In fact, the FACTA report was prepared before the WPLR even commenced its investigation into Roe's

complaints, nearly eight months before Dean Ritter adopted the WPLR Report's recommendations, and approximately two years before Dean Ritter imposed the sanction on Vengalattore. See JA 48 ¶¶ 337-39; JA 74 ¶ 621; JA 76 ¶ 637. This lack of a nexus between Professor Clancy's statement and the resolution of Roe's complaints undercuts any inference of discrimination Vengalattore seeks to have this Court draw on an otherwise blank canvas. Nweze v. N.Y.C. Transit Auth., 115 F. App'x 484, 486 (2d Cir. 2004) (finding that an alleged racist comment could not support a finding that the decision to discharge the plaintiff was based on his race where the individual who made the remark did not recommend that the plaintiff be discharged); Henry v. Wyeth Pharm., Inc., 616 F.3d 134, 149 (2d Cir. 2010) (noting that "when the remark was made in relation to the employment decision at issue" is relevant to its probative value); Tomassi v. Insignia Fin. Grp., 478 F.3d 111, 115 (2d Cir. 2007) ("[T]he more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination.").

Vengalattore argues, however, that Dean Ritter failed to "take exception to" this statement, remove Professor Clancy from the FACTA Committee, and ask the Committee to make a new recommendation. Opening Br. at 42. From those dots, he tries to connect a thin line, speculating that Dean Ritter may have allowed Professor Clancy's views to carry over to the resolution of Roe's complaints. Id.

This is insufficient to protect his Title IV claim from dismissal. Dean Ritter adopted the WPLR investigators' report two years later, following their thorough and independent investigation of Roe's allegations. Dean Ritter had every right to rely on this thorough report. Vengalattore's effort to connect the dots between Professor Clancy's statement in the tenure review and Dean Ritter's decision regarding the policy violation is so attenuated that it cannot be deemed anything more than speculation. Mere speculation cannot support an inference of discrimination, particularly where, as here, it is contradicted by other allegations in the Amended Complaint and incorporated documents. Alexander v. Bd. of Educ. of the City of New York, 648 F. App'x 118, 121 (2d Cir. 2016) (affirming dismissal of complaint where the plaintiff's "attenuated allegations" were "contradicted [] by more specific allegations in the [c]omplaint and documents incorporated by reference," which "failed to raise a right to relief above the speculative level") (citation omitted).[9]

b. Alleged Deviation from the Rules in Resolving Roe's Complaints

Next, Vengalattore argues that Cornell's "numerous deviations from its

[9] Moreover, the FACTA Committee's role is to provide a confidential recommendation to the University Provost. As a result, the interim Provost – not Dean Ritter – received the FACTA Committee report containing Professor Clancy's statement. See SA-105-07. It defies logic to suggest that Dean Ritter's reaction to Professor Clancy's statement is evidence of discrimination when she did not even see the report containing that statement.

established rules governing misconduct investigations" support an inference of discrimination. According to the Amended Complaint, (1) Cornell "disregarded certain provisions of Policy 6.4" (JA 93 ¶ 693(f)); (2) Roe's allegations should have been resolved using the procedures described in the Dismissal/Suspension Policy, as set out in the University Bylaws (JA 33-34 ¶¶ 184-94; JA 92 ¶ 693(a)); and (3) Roe's allegations should have been resolved by the Standing Committee on Academic Freedom & Professional Status of the Faculty ("Committee on Professional Status") using procedures set out in the Faculty Handbook (JA 31-33 ¶¶ 171-83; JA 92 ¶ 693(a)). However, as the documents incorporated into the Amended Complaint make clear, with the exception of one provision in the Dismissal/Suspension Policy, these other procedures ***did not apply*** to the resolution of Roe's complaints.

Citing Doe v. Columbia University, 831 F.3d 46 (2d Cir. 2016), and Menaker v. Hofstra University, 935 F.3d 20, 33 (2d Cir. 2019), Vengalattore argues that procedural deficiencies in a university's investigation and adjudication of a sexual misconduct complaint raise an inference that the university was motivated by bias. However, neither Doe nor Menaker stands for the proposition that a university's failure to comply with ***inapplicable*** procedures raises an inference of racial bias. It defies logic to suggest otherwise.

(1) Policy 6.4

Vengalattore complains that Cornell did not follow the procedural steps laid out in Policy 6.4. Vengalattore's protests are at best misguided. As noted above, Policy 6.4 was adopted by Cornell to comply with Title IX, which addresses issues of ***unwelcome, nonconsensual*** sexual conduct. But ***Policy 6.4 did not apply to the investigation of Roe's complaints against Vengalattore***. Roe waited more than a year after she left the University to voice her complaints against Vengalattore, and her complaints were time-barred under Policy 6.4. Therefore, as was made clear to Vengalattore at the outset, Roe's allegations were investigated and considered under the separate Romantic and Sexual Relationships Policy, not Policy 6.4. No inference of discrimination can be drawn from the failure to follow an inapplicable policy.

Although Vengalattore argues that Cornell investigated Roe's complaints under Policy 6.4, his assertions are contradicted by the WPLR Report, which is quoted and incorporated by reference in the Amended Complaint. Vengalattore cherry-picks from the WPLR Report, stating that "[t]he investigators wrote that they had concluded the sexual assault investigation was 'time-barred' on February 16, 2015, but '[a]t the request of the Dean,' had proceeded with the investigation anyway." JA 69 ¶ 582. This is misleading, though, as the full text of the WPLR Report makes clear: "[T]he investigators concluded that the time limitations under

Policy 6.4 barred an Internal Formal Complaint ***of sexual violence and sexual harassment***. At the request of the Dean and with the Complainant's participation, this investigation proceeded ***under the Romantic and Sexual Relationships Policy***." SA-38 (emphasis added). See also SA-34 (identifying the Romantic and Sexual Relationships Policy as the "Policy" under which the investigation was conducted); JA 87 ¶ 670(b) (discussing the procedures used while "investigating Plaintiff Dr. Vengalattore for allegedly violating the romantic and sexual relationships policy"); JA 92 ¶ 693(a) (same). This Court should disregard any allegations and arguments related to Policy 6.4. See Perry, 424 F. App'x at 25.[10]

(2) The Dismissal/Suspension Policy

Vengalattore is collaterally estopped from arguing that Cornell failed to comply with the Dismissal/Suspension Policy. See V(B)(1), supra. In any event, as the Amended Complaint itself makes clear, Cornell complied with the only

[10] To the extent that Vengalattore asks the Court to overturn Policy 6.4 or challenges its adoption, such claims are not properly before the Court. Article III of the U.S. Constitution limits the exercise of judicial power to "cases" and "controversies." Aetna Life Ins. Co. of Hartford v. Haworth, 300 U.S. 227, 239 (1937). A "difference or dispute of a hypothetical or abstract character" is not a justiciable controversy. Id. at 240. Nor does a plaintiff satisfy Article III's case or controversy requirement unless he can demonstrate, *inter alia*, that he suffered an "injury in fact" caused by the complained-of conduct. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014). Vengalattore cannot demonstrate that he suffered any injury because of an application of Policy 6.4, and his complaint therefore does not raise a justiciable controversy with respect to the policy.

applicable portions of that policy. The Dismissal/Suspension Policy provides that "[i]n the case of suspension of less than one semester . . . a dean's determination to suspend a faculty member shall be subject to existing grievance procedures." JA 34 ¶ 194. Vengalattore was suspended for two weeks and was therefore free to pursue a grievance, but he did not, despite repeated reminders from Cornell that he had a right to do so. JA 76 ¶ 638.

(3) The Committee on Professional Status

Vengalattore contends that Roe's allegations should have been resolved by the Committee on Professional Status using procedures set out in the Faculty Handbook. JA 31 ¶¶ 171-72; JA 92 ¶ 693(a). According to the Amended Complaint, "Policy 6.4 required that other allegations against faculty that might lead to discipline were to be investigated by the Committee on . . . Professional Status." JA 31 ¶ 131. The provision Vengalattore references states that "University Policy 6.2.10, Establishment of College-Level Academic Grievance Procedures . . . will govern any ***grieved or contested disciplinary action***, other than ***contested cases involving academic freedom issues***, which is the adjudicatory responsibility of the Committee [on Academic Freedom and the Professional Status of the Faculty]." SA-16 (emphasis added).[11] In other words, this Committee

[11] This document is incorporated by reference into the Amended Complaint. See JA 27-31 ¶¶129-71 (citing to and quoting extensively from Policy 6.4).

might have resolved an internal challenge to the disciplinary finding had Vengalattore elected to pursue one. But, again, Vengalattore chose not to. His assertions regarding this Committee are both irrelevant and devoid of any inference of discrimination. Perry, 424 F. App'x at 25.

c. Roe's Statements

Vengalattore relies on two statements allegedly made by Roe. He says that Roe remarked to him and other students: "You are all Indians. Of course you stick together," and that the students also were "Indians, who are hardworking like Chinese." JA 39 ¶ 259-60. But Roe was a graduate student working under Vengalattore's supervision, not a faculty member or administrator. She had no decisionmaking authority relating to the work of the WPLR, Dean Ritter's finding, or the two-week suspension. Even if these statements reflected some bias on Roe's part, they do not suggest discriminatory animus by Dean Ritter or any members of the Cornell administration. Nweze, 115 F. App'x at 486 (an alleged racist comment by an individual not involved in the challenged decision did not support an employment discrimination claim).

Significantly, Vengalattore does not suggest that Roe's remarks were made during the investigation of her complaints. He contends that Roe made these statements while working in the lab, several years before the WPLR investigation even began. This undercuts any connection between the statements and the

decisions at issue here. See JA 39 ¶ 258-60; JA 53 ¶ 409; Henry, 616 F.3d at 149 (noting that "when the remark was made in relation to the employment decision at issue" is relevant to its probative value); Tomassi, 478 F.3d at 115 ("[T]he more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination.").

Vengalattore also argues that Cornell ignored this and other evidence that Roe was racially prejudiced against those of Indian descent. He contends that the WPLR credited Roe's testimony without commenting on whether her racial prejudice prompted her to make false claims against him. JA 93-94 ¶ 696(g). Yet again, this is an attempt to relitigate the finding that Vengalattore violated the Romantic and Sexual Relationships Policy, in derogation of the conclusive determinations made in the state court litigation. Moreover, these allegations are belied by the WPLR Report, which demonstrates that the investigators thoroughly considered all the evidence in reaching their well-reasoned recommendation, including a careful analysis of Roe's potential motives to lie and her credibility. See SA-89-93.

Vengalattore's remaining scattershot challenges to the WPLR investigation do not fare any better, as they are also contradicted by the thorough investigation detailed in the WPLR Report and by the state court determinations. JA 94 ¶ 696(g). Vengalattore does not identify a single applicable policy that was arguably

violated by the WPLR in conducting its investigation. Unsurprisingly, he cites no case law for the proposition that a failure to conduct a sexual misconduct investigation in accordance with his own personal preference supports an inference of bias. See Menaker, 935 F.3d at 33 ("[O]nce a university has ***promised procedural protections*** to employees, the disregard or abuse of those procedures may raise an inference of bias." (emphasis added)); Schwarzkopf v. Sikorsky Aircraft Corp., 607 F. App'x 82, 82 (2d Cir. 2015) ("We reject any invitation to second-guess [the defendant's] personnel decisions because 'we do not sit as a super-personnel department that reexamines an entity's business decisions.'" (quoting Delaney v. Bank of Am. Corp., 766 F.3d 163, 169 (2d Cir. 2014))). Vengalattore may believe that the investigation should have been conducted differently or even that a different outcome was warranted, but that is simply irrelevant to the questions at hand.

C. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF UNDER TITLE IX.

1. No Private Right of Action for Employment Discrimination Exists Under Title IX, and No Such Right Can Be Implied.

a. The Plain Text of Title IX Does Not Authorize a Private Right of Action for Employment Discrimination.

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

assistance." 20 U.S.C. § 1681(a). The Second Circuit has not ruled on whether a private right of action exists under Title IX for claims of employment discrimination.[12] However, "[a]n overwhelming majority of district courts in this Circuit have found that an implied private right of action does not exist[] under Title IX for employees alleging gender discrimination in the terms and conditions of their employment." Gayle v. Children's Aid Coll. Prep Charter Sch., No. 18-cv-9874, 2019 WL 3759097, at *4-5 (S.D.N.Y. July 29, 2019). See, e.g., Philpott v. New York, 252 F. Supp. 3d 313, 318-19 (S.D.N.Y. 2017); Uyar v. Seli, No. 16-cv-186, 2017 WL 886934, at *6 (D. Conn. Mar. 6, 2017); Towers v. State Univ. of N.Y. at Stony Brook, No. 04-cv-5243, 2007 WL 1470152, at *3-4 (E.D.N.Y. May 21, 2007); Urie v. Yale Univ., 331 F. Supp. 2d. 94, 97 (D. Conn. 2004); Gardner v. St. Bonaventure Univ., 171 F. Supp. 2d 118, 128 (W.D.N.Y. 2001); Vega v. State Univ. of N.Y. Bd. of Trs., No. 97-cv-5767, 2000 WL 381430, at *3 (S.D.N.Y. Apr. 13, 2000). The Fifth Circuit reached the same conclusion in Lakoski v. James, 66 F.3d 751, 756 (5th Cir. 1995).

[12] Cornell acknowledges that courts in other circuits have reached a different conclusion, but notes that most of those cases were decided twenty to thirty years ago. See, e.g., Lipsett v. Univ. of Puerto Rico, 864 F.2d 881 (1st Cir. 1988); Doe v. Mercy Catholic Med. Ctr., 850 F.3d 545 (3d Cir. 2017); Preston v. Virginia ex rel. New River Cmty. Coll., 31 F.3d 203 (4th Cir. 1994); Ivan v. Kent State Univ., 92 F.3d 1185 (6th Cir. 1996). As discussed below, those cases were wrongly decided and are not binding on this Court.

These cases have correctly declined to expand Title IX beyond the plain words of the statute. Such holdings are consistent with the Supreme Court's recent admonition that a statute is to be interpreted "in accord with the ordinary public meaning of its terms at the time of its enactment," as "only the words on the page constitute the law adopted by Congress and approved by the President." Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020). Otherwise, courts "risk amending statutes outside the legislative process reserved for the people's representatives." Id. See also United States v. Gayle, 342 F.3d 89, 92 (2d Cir. 2003) ("Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well.").

The text of Title IX, which refers only to "***education*** programs and activities," does ***not*** mention employment discrimination at all, let alone a private right of action for employment discrimination. The statute therefore does not support the interpretation that Vengalattore advances here: that any employee of an educational institution – which would include administrative staff, custodial staff, clerical workers, and others whose work does not actually involve education at all – could bring a claim under Title IX, a statute plainly designed to address gender inequities in educational programs. See O'Connor v. Davis, 126 F.3d 112, 117 (2d Cir. 1997) ("[B]y modifying the phrase 'program or activity,' Congress left the

modifier 'education' intact, and we are bound under ordinary rules of statutory construction to give content to the entire phrase selected by Congress.").

Cornell acknowledges that the Supreme Court recognized an implied private right of action under Title IX in Cannon v. University of Chicago, 441 U.S. 677 (1979). However, Cannon was a narrow holding, implying only a private right of action for ***students*** complaining about discriminatory treatment. In the years since Cannon was decided, the Supreme Court has never extended that right to include employment discrimination claims, which are properly asserted under Title VII by claimants who first exhaust statutory administrative procedures.

For example, the Supreme Court held in Franklin v. Gwinnett County Public Schools that a ***student*** could pursue a claim for damages under Title IX. 503 U.S. 60 (1992). Similarly, in North Haven Board of Education v. Bell, 456 U.S. 512 (1982), the Court considered challenges to the validity of federal regulations issued under Title IX by ***school boards***. These cases, which are cited in Vengalattore's brief, did not require the Supreme Court to consider an employee's ability to pursue a claim for employment discrimination under the statute.

Nor does Jackson v. Birmingham Board of Education control, contrary to Vengalattore's suggestion. The plaintiff in Jackson, a coach, alleged that he was retaliated against for complaining of discrimination against ***students***, in particular female athletes whose team did not receive equal funding and who did not have

equal access to athletic equipment and facilities – a clear Title IX violation. 544 U.S. 167, 171 (2005). He did not claim that he was subjected to employment discrimination on the basis of his gender. Unlike Vengalattore, the plaintiff in Jackson could not have brought a Title VII claim because Title VII does not prohibit the underlying discrimination at issue in his claim – discrimination against students on the basis of sex. See 42 U.S.C. § 2000e-3 (prohibiting employers from discriminating against employees who oppose practices made unlawful by Title VII or who participate in a Title VII investigation). In Jackson, the Supreme Court therefore did not have to consider the relationship between Title VII and Title IX, and neither that case nor the other cases cited by Vengalattore hold that a private right of action for employment discrimination exists under Title IX.

Vengalattore nevertheless asks this Court to extend Title IX to claims of employment discrimination. Such a judicial expansion of the scope of the law in the absence of any supporting language in the text of the statute would run afoul of more recent pronouncements from the Supreme Court about implied causes of action. For example, in the years since Cannon recognized an implied right of action for students asserting Title IX claims, the Supreme Court has become increasingly reluctant to recognize new statutory causes of action without explicit textual support. See Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (describing "the notable change in the Court's approach to recognizing implied causes of

action" over the last two decades); Alexander v. Sandoval, 532 U.S. 275, 287, 288 n.7 (2001) (stating that "the interpretive inquiry begins with the text and structure of the statute and ends once it has become clear that Congress did not provide a cause of action" (citation omitted)); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) ("Concerns with the judicial creation of a private cause of action [also] caution against its expansion."); id. at 175-76 (Stevens, J., dissenting) ("The Court's current view of implied causes of action is that they are merely a 'relic' of our prior 'heady days.'" (quoting Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring))).

Recognizing this shift in the Supreme Court's jurisprudence, this Court has repeatedly refused to recognize an implied private right of action where the text of a statute does not provide for one. See, e.g., Lopez v. Jet Blue Airways, 662 F.3d 593, 597 (2d Cir. 2011) (refusing to find a private right of action under the Air Carrier Access Act where the statute did "not expressly provide a right to sue the air carrier," noting that Supreme Court precedent "requir[es] that a review of the text and structure of a statute yield a clear manifestation of congressional intent to create a private cause of action before a court can find such a right to be implied"); Moya v. U.S. Dep't of Homeland Sec., 975 F.3d 120, 128 (2d Cir. 2020) (refusing to find a private right of action because the text of the statute "does not evince a 'clear manifestation of congressional intent' to create a private right of action

against executive agencies acting in their regulatory capacity" (quoting Lopez, 662 F.3d at 596)); Bellikoff v. Eaton Vance Corp., 481 F.3d 110, 116 (2d Cir. 2007) (refusing to find a private right of action for violations of some sections of the Investment Companies Act because "no provision of the [statute] explicitly provides a private right of action for violations of [those sections]").

Of course, this Court cannot overturn the Supreme Court's decision in Cannon or take away the right of students to assert Title IX claims, regardless of this shift away from the recognition of implied causes of action. However, recasting Title IX to adopt a new implied cause of action for employment discrimination would be inappropriate and directly contrary to the more recent mandates discussed above.

b. Allowing Employment Discrimination Claims to Be Brought Under Title IX Would Undermine Title VII's Comprehensive Remedial Scheme.

Allowing claims of employment discrimination under Title IX simply because an employee is associated with an education program or activity would also degrade Congress's carefully crafted scheme for remedying employment discrimination. Under Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for the nonjudicial and nonadversarial resolution of claims. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979) (superseded in part

on other grounds by the 1991 Amendments to the Civil Rights Act of 1964); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (noting that "cooperation and voluntary compliance" were selected by Congress as the preferred means for eliminating discriminatory practices in the employment setting). Congress created a detailed investigatory procedure and gave the EEOC "an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." Id. Unlike Title VII, however, Title IX has no time limits for action, conciliation provisions, or administrative process for the assertion and investigation of claims. Compare 20 U.S.C. §§ 1681 et seq. (Title IX) with 42 U.S.C. §§ 2000e et seq. (Title VII).

The Supreme Court has been reluctant to permit plaintiffs to skirt Title VII's requirements by bringing employment discrimination claims under other statutes, absent explicit statutory authority. For example, as Vengalattore notes, the Supreme Court has construed 42 U.S.C. § 1981 ("§ 1981") as creating a private right of action for individuals alleging race-based employment discrimination. See, e.g., Johnson v. Ry. Exp. Agency, Inc., 421 U.S. 454 (1975). However, an employment discrimination cause of action is found explicitly in the text of § 1981, which provides that all persons shall have the same right in every state and territory to, *inter alia*, "make and enforce contracts." Any employment relationship is contractual, and a refusal to hire or a decision to terminate an

employee on account of race unquestionably infringes on that employee's right to "make and enforce" an employment contract. See Hishon v. King & Spalding, 467 U.S. 69, 74 (1984) (noting that "the underlying employment relationship is contractual" and that, "once the contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of that relationship").[13] Thus, in applying § 1981 to race discrimination claims in employment, the Court merely applied the explicit language of the statute, rather than implementing a new or implied cause of action in derogation of Title VII's administrative framework.[14]

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[13] Moreover, § 1981, enacted as part of the Civil Rights Act of 1866, long predated Title VII, enacted in 1964. See Guardians Ass'n of N.Y. City Police Dep't., Inc. v. Civil Serv. Comm'n of City of New York, 633 F.2d 232, 268 (2d Cir. 1980). This Court has expressed reluctance to expand § 1981 beyond its intended scope, noting that the Court "lack[s] the power to reshape § 1981 in the mold of Title VII; only Congress can redraft an act of Congress." Guardians Ass'n of N.Y. City, 633 F.2d at 268 (refusing to expand § 1981 to prohibit facially neutral conduct).

[14] Title VI, unlike Title IX, specifies a process for the assertion of discrimination claims. It indicates that individual plaintiffs can pursue a cause of action without adhering to Title VII's administrative process and that Title VI is intended to encompass employment discrimination by certain employers who receive federal funding. See 42 U.S.C. §§ 2000d-2, 2000d-3 (providing that "any person aggrieved . . . may obtain judicial review of such action in accordance with chapter 7 of Title 5" and stating that "[n]othing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment").

By way of contrast, the Supreme Court has refused to permit the disruption of Title VII's carefully developed administrative process based on other statutes that do not explicitly apply to the employment context. For example, the Court foreclosed the possibility of bringing ordinary Title VII employment discrimination claims through 42 U.S.C. § 1985(3), which prohibits conspiracies to violate civil rights, reasoning that if a violation of Title VII could be asserted through § 1985(3), a complainant "could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." Great Am. Fed. Sav. & Loan Ass'n, 442 U.S. at 375-76. See also Alexander, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) ("[W]hen remedial devices provided in a particular [a]ct are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."); Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 254-55 (2009) ("Allowing a plaintiff to circumvent" a statute's administrative exhaustion and other provisions would be "inconsistent with Congress' carefully tailored scheme").

This Court has been similarly reluctant to create or expand private rights of action where enforcement schemes already exist. See Lopez, 662 F.3d at 597

(noting that a right of action "should not be implied because the statute provides an administrative enforcement scheme designed to vindicate fully the rights of disabled passengers"); Moya, 975 F.3d at 128 (refusing to imply a private right of action where "Congress expressly provided two alternative mechanisms to enforce the prohibition against discriminatory agency action"); Bellikoff, 481 F.3d at 116 (refusing to imply a private right of action where the statute provided for enforcement by the Securities and Exchange Commission); cf. Lakoski, 66 F.3d at 754 (reasoning that permitting employment discrimination claims for damages under Title IX "would disrupt [Title VII's] carefully balanced remedial scheme for redressing employment discrimination").

Vengalattore could have pursued a Title VII gender discrimination claim in federal court upon his exhaustion of the administrative process, but he chose not to do so. Perhaps he had misplaced confidence in his state court litigation. Whatever his rationale, he should not be permitted to circumvent Title VII and assert a sex discrimination claim under a statute that does not authorize such a cause of action.

c. The Requested Expansion of Title IX Would Be Inconsistent with the Legislative History of the Statute

An extension of Title IX to include employment discrimination claims by faculty members would be contrary to the legislative history underlying the statute. Title IX, which was adopted eight years after Title VII was promulgated to address employment discrimination, originated as a floor amendment during debate on the

Educational Amendments of 1972. 18 Cong. Rec. 5803 (1972). The floor amendment did contain a provision addressing employment discrimination. Id. § 1005. That provision would have amended Title VII to remove the exemption for educational institutions. Id.; Lakoski, 66 F.3d at 756. The language in the portion of the floor amendment that would become Title IX, however, did not refer to employment at all, let alone create a private right of action for employment discrimination. 18 Cong Rec. 5803 §§ 1001-03. Instead, it prohibited discrimination against beneficiaries of education programs and activities and authorized federal agencies to terminate funding upon a finding of discrimination. Id. at §§ 1001-02. While Congress was still considering the Educational Amendments of 1972, it passed the Equal Employment Opportunity Act of 1972, which removed Title VII's exemption for educational institutions thereby obviating the need for such a provision in the Education Amendments. Pub. L. No. 92-261 (1972), 86 Stat. 103; Lakoski, 66 F.3d at 757. As a result, the final bill enacted by Congress omitted the language amending Title VII but left the provision that would become Title IX intact.

The simultaneous proposal of these two provisions, with their differing remedial mechanisms, confirms that Congress was trying to accomplish two different goals with each piece of the legislation. First, it intended to amend Title VII to address employment discrimination at educational institutions, adhering to

the existing comprehensive administrative scheme. Second, it intended to prohibit discrimination against students and other beneficiaries of education programs and activities without that administrative machinery, instead empowering federal agencies to remedy such discrimination by terminating funding for educational programs. The passage of the Equal Employment Opportunity Act of 1972 in the interim accomplished the first of these two goals, leaving Title IX to accomplish the second. It defies logic to suggest that in adopting Title IX Congress intended to exclude gender discrimination claims by employees of academic institutions from the carefully wrought administrative machinery of Title VII, particularly after it had just passed legislation permitting this precise group of employees to bring gender discrimination claims under Title VII.[15]

2. Regardless of Whether a Private Right of Action for Employment Discrimination Exists Under Title IX, the Amended Complaint Failed to State a Claim for Relief.

Vengalattore claims that Cornell discriminated against him because of his sex by "applying an unfair, unreliable, and partial process against him in resolving Roe's complaints against him" and that Cornell "applied its policies and

[15] As the Fifth Circuit noted, the Equal Employment Opportunity Act of 1972 also amended Title VII to add coverage for state and local governmental employees, subjecting them to Title VII's administrative machinery for the assertion of claims. Lakoski, 66 F.3d at 756; Pub. L. No. 92-261 (1972), 86 Stat. 103. As the Lakoski court reasoned, "[t]hat Congress intended to create a bypass of Title VII's administrative procedures so soon after its extension to state and local governmental employees is an extraordinary proposition."

procedures in a gender-biased manner . . . which led to an erroneous outcome." JA 79 ¶ 663; JA 80 ¶ 668. Even if this Court were to recognize a private right of action for employment discrimination under Title IX, the claim would be analyzed under the same framework as a claim of employment discrimination under Title VII claims of discrimination. See Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995). In order to make out a prima facie case of discrimination in violation of Title VII, a plaintiff has the burden of establishing that (1) he is a member of a protected class; (2) he performed the job satisfactorily or was qualified for the position; (3) he suffered an adverse employment action; and (4) the action occurred under circumstances giving rise to an inference of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Vengalattore's pleading falls woefully short. As a threshold matter, none of the adverse employment actions Vengalattore could conceivably challenge – the denial of tenure, the finding that he violated the Romantic and Sexual Relationships Policy, and the subsequent two-week suspension – can support a claim for relief. Vengalattore concedes that the tenure decision, litigated to finality in the state court, is not at issue here. See Opening Br. at 13; V(B)(1), supra. Similarly, because the Romantic and Sexual Relationships Policy finding and discipline were also resolved by the state court, he is collaterally estopped from

relitigating those issues in federal court. See V(B)(1), supra. Vengalattore therefore cannot identify an adverse employment action that was allegedly based on his sex, and, accordingly, his Title IX claim fails. Schwarzkopf, 607 F. App'x at 82 ("We reject any invitation to second-guess [the defendant's] personnel decisions because 'we do not sit as a super-personnel department that reexamines an entity's business decisions.'" (citation omitted)).

Even if Vengalattore could allege an actionable adverse action, the Amended Complaint fails to support an inference of gender discrimination. Vengalattore alleges that (1) Cornell adopted Policy 6.4 in an effort to lower the protections for men accused of sexual misconduct, (2) Cornell deviated from its policies in resolving Roe's complaints against him, and (3) the WPLR investigators "have a history of anti-male bias" and "displayed gender bias in the investigation." JA 86-89 ¶ 670. Many of the allegations are contradicted by the Amended Complaint and incorporated documents. Based on his remaining allegations, Vengalattore's Title IX claim does not rise to the level of plausibility.

a. The Adoption of Policy 6.4

Vengalattore alleges that Policy 6.4 was adopted in an effort to lower the procedural protection for men accused of sexual misconduct. JA 86-87 ¶ 670(a). Even accepting as true Vengalattore's account of Policy 6.4's origin, it has absolutely nothing to do with his claim of gender discrimination. As discussed

above, the investigation of Roe's complaints ***did not proceed under Policy 6.4***. The circumstances under which Policy 6.4 was adopted are therefore completely irrelevant to Vengalattore's Title IX claim.

b. Deviation from Rules in Resolving Roe's Complaints

As he did in support of his Title VI claims, Vengalattore alleges that Cornell "disregarded certain provisions of Policy 6.4" and "refused to follow the more protective procedures set out in the Faculty Handbook and the Campus Bylaws." JA 87 ¶ 670(b), (c). Once again, these allegations fail to give rise to an inference of discrimination because the documents incorporated into the Amended Complaint make clear that, with the exception of one provision in the Dismissal/Suspension Policy (describing Vengalattore's ability to grieve the Dean's finding and sanction, an option he failed to pursue), these procedures ***did not apply*** to the resolution of Roe's complaints. And even if Vengalattore were permitted to relitigate Cornell's compliance with the Dismissal/Suspension Policy, notwithstanding the conclusive findings in the state court proceedings, the same documents show that Cornell complied with the portions of that policy applicable to the resolution of Roe's complaints. See V(B)(2)(b)(2), supra.

c. WPLR Investigators' "History" and "Display" of Gender Bias

Vengalattore's vague and unsupported allegation that the WPLR investigators were accused of anti-male bias in an unidentified and unrelated prior

lawsuit is insufficient to support a reasonable inference that they discriminated against Vengalattore in the resolution of Roe's complaints. Cameron v. Cmty. Aid For Retarded Children, Inc., 335 F.3d 60, 63 (2d Cir. 2003) (noting that "purely conclusory allegations of discrimination, absent any concrete particulars," are insufficient). Nor can any substance be attached to Vengalattore's remaining protestations regarding the investigation, which are contradicted by the thorough investigation detailed in the WPLR Report. See JA 88-89 ¶ 670(e). Again, Vengalattore does not allege that these purported investigative deficiencies violated any applicable policy, and Cornell is aware of no case law finding an inference of bias based solely on a university's failure to conduct an investigation in the manner that the accused would have preferred. See Menaker, 935 F.3d at 33. Cornell concluded that Vengalattore violated the Romantic and Sexual Relationships Policy, and he was disciplined accordingly. As noted above, the Court does not sit as a "super-personnel department" to review this personnel decision. Schwarzkopf, 607 F. App'x at 82.

D. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER § 1983.

The District Court correctly concluded that Vengalattore failed to state a claim under 42 U.S.C. § 1983. As a threshold matter, Vengalattore's § 1983 claim is premised on Policy 6.4. See Opening Br. at 47 ("Count III alleges that [Policy 6.4's] severe restriction on Dr. Vengalattore's procedure protections violated his

Fourteenth Amendment right to due process of law."). Because Vengalattore was not investigated or disciplined under Policy 6.4, its impact on his rights is purely hypothetical, and he cannot possibly allege any facts sufficient to support a plausible inference that it violated his rights to due process. For the same reason, no justiciable controversy exists with respect to Policy 6.4. Susan B. Anthony List, 573 U.S. at 158. See n.10, supra.

Nor does the Amended Complaint allege facts sufficient to support a plausible inference that Cornell is a state actor. See Colombo v. O'Connell, 310 F.3d 115, 117 (2d Cir. 2002) ("A plaintiff fails to state a claim under Section 1983 where the plaintiff does not sufficiently allege that the defendant acted under color of state law."). Although this question requires consideration of whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself," N.Y. City Jaycees, Inc. v. U.S. Jaycees, Inc., 512 F.2d 856, 858-59 (2d Cir. 1975), the question may properly be resolved on a motion to dismiss, see, e.g., Wright v. Zabarkes, 347 F. App'x 670, 672 (2d Cir. 2009); Curto v. Smith, 248 F. Supp. 2d 132, 137, 139 (N.D.N.Y. 2003), aff'd 93 F. App'x 332 (2d Cir. 2004); Hyman v. Cornell Univ., No. 5:15-cv-792, 2017 WL 1194231, at *8 n.6 (N.D.N.Y. Mar. 30, 2017), aff'd, 721 F. App'x 5 (2d Cir. 2017).

Vengalattore argues that Cornell has a "sufficiently close nexus" to the state because it includes four "statutory" colleges, receives funding from New York, and several of the University's trustees are appointed by the state. Opening Br. at 48. Courts have repeatedly held that Cornell is not a state actor with regard to policies governing academic matters or matters of conduct and discipline. Curto v. Smith, 248 F. Supp. 2d 132, 139-40 (N.D.N.Y. 2003) (citations omitted); see also Hyman, 2017 WL 1194231, at *8 n.6; Beck v. Cornell Univ., No. 16-cv-1104 (GTS/ATB), 2016 WL 6208535, at *2-3 (N.D.N.Y. Sept. 22, 2016), adopted 2016 WL 6208542 (N.D.N.Y., Oct. 24, 2016). Moreover, a school's receipt of public funds does not render it a state actor. See Rendell-Baker v. Kohn, 457 U.S. 830, 840-43 (1982); see also Wright, 347 F. App'x at 672. Nor is the school's label as a "statutory" college dispositive. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001). Importantly, the state "does not have direct operational authority" over Cornell's statutory colleges, nor are its employees classified as members of the state civil service. Stoll v. N.Y. State Coll. of Veterinary Med. at Cornell Univ., 723 N.E. 2d 65, 68 (N.Y. 1999).[16] The state

[16] In Stoll, the New York Court of Appeals considered whether one of Cornell's statutory colleges was a state agency for the purposes of New York's Freedom of Information Law, an inquiry that parallels the state-action analysis under federal law. This analysis of the nexus between the state and Cornell's statutory colleges, conducted by the state's highest court, is therefore relevant and, if applied, dispositive of Vengalattore's argument.

legislature has specifically committed several aspects of the administration of the statutory colleges to Cornell's private discretion, including "hiring faculty, maintaining discipline and formulating educational policies." Id. Because Vengalattore's § 1983 claim relates to Cornell's creation and enforcement of one such disciplinary policy, Cornell may not be characterized as a state actor for purposes of his claim.

As to Vengalattore's argument that Cornell is a state actor because the Department of Education "coerced" Cornell to enact Policy 6.4, it fails for the same reasons that every other one of Vengalattore's Policy 6.4 arguments fail – Policy 6.4, including any "coercion" relating thereto, has nothing to do with this case, and there is no justiciable "case or controversy" relating to Policy 6.4. JA 96 ¶ 709. Moreover, "the mere fact that [an entity] is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 41 (1999) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974)). A majority of courts have determined that a private university's compliance with Title IX regulations does not transform it into a state actor for purposes of the Fourteenth Amendment. See, e.g., Faparusi v. Case W. Reserve Univ., 711 F. App'x 269, 275-76 (6th Cir. 2017); Heineke v. Santa Clara Univ., No. 17-cv-05285, 2017 WL 6026248, at *16 (N.D. Cal. Dec. 5, 2017); cf. Sutton v. Providence St. Joseph Med.

Ctr., 192 F.3d 826, 838 (9th Cir. 1999) (holding that the defendant's enforcement of a federal law did not satisfy the state action requirement for purposes of the plaintiff's claim under the Religious Freedom Restoration Act and noting that "to accept Plaintiff's argument would be to convert every employer . . . into a governmental actor every time it complies with a presumptively valid, generally applicable law"). The District Court therefore properly dismissed Vengalattore's § 1983 claim.

E. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO EXERCISE SUPPLEMENTAL JURISDICTION OVER THE DEFAMATION CLAIM.

In a single footnote that cites no legal support, Vengalattore requests that this Court vacate dismissal of the defamation claim and remand it to the District Court for reconsideration if the Court overturns dismissal of any of the three federal claims. See Opening Br. at 50 n.4.

The Second Circuit reviews a district court's decision declining to exercise supplemental jurisdiction for abuse of discretion. Spiegel, 604 F.3d at 78. Vengalattore fails to cite this standard, let alone articulate how the District Court abused its discretion. To the contrary, in considering the discretionary exercise of supplemental jurisdiction, the Supreme Court has noted that "in the usual case in which all federal-law claims are eliminated before trial, that balance of factors to be considered . . . will point toward declining to exercise jurisdiction over the

remaining state-law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988). There is no reason here to conclude that the District Court abused its discretion in declining to exercise supplemental jurisdiction over the state law claims, thus there is no reason to vacate its dismissal of the state law defamation claim. If, as the District Court properly held, the Amended Complaint fails to state a claim for relief under Title VI, Title IX, and § 1983, the District Court did not abuse its discretion in dismissing the state law claim.

CONCLUSION

Cornell's separate decisions to deny tenure to Vengalattore and to suspend him for two weeks for a prohibited consensual relationship with a student under his supervision have been litigated in, and upheld by, the Appellate Division of the New York courts. Vengalattore's latest attempt to recast his accusations as federal discrimination and due process claims cannot revive claims that are plainly barred by principles of collateral estoppel.

For all the vitriol mustered in Vengalattore's brief, what is particularly striking is his failure to identify any adverse employment action taken against him that has not already been adjudicated conclusively. He cites a policy that did not apply to the investigation of claims against him, insignificant "facts" that do not come close to supporting an inference of discrimination by Cornell, and statutes that do not support any of the causes of action pled in this case. It is time to put an

end to Vengalattore's relentless march through the University's internal processes, the state courts, state and federal agencies, and now the federal courts. Cornell respectfully requests that the Court affirm the dismissal of Vengalattore's Amended Complaint in its entirety.

Respectfully submitted,

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November 20, 2020

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