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**ORDER AND JUDGMENT* OF THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
(MAY 12, 2021)**

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

JOHN OIRYA,

Plaintiff-Appellant,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant-Appellee.

No. 20-4052

**(D.C. No. 2:16-CV-01121-BSJ)
(D. Utah)**

**Before: TYMKOVICH, Chief Judge, HOLMES, and
BACHARACH, Circuit Judges.**

* We conclude that oral argument would not materially help us to decide the appeal. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G). So we have decided the appeal based on the record and the parties' briefs.

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

This appeal is brought by Mr. John Oirya, a Kenyan citizen who attended Brigham Young University. During his time there, BYU investigated his role in separate incidents involving sexual harassment, an effort to retaliate, perjury, and submission of false financial information. The investigation led BYU to expel Mr. Oirya, and he sued under Title IX and state law.

The district court granted summary judgment to BYU on these claims. Mr. Oirya appeals the award of summary judgment, and we affirm.

I. We Engage in De Novo Review, Applying the Same Summary-Judgment Standard That Governed in District Court

We apply de novo review, exercising our independent judgment to determine whether BYU showed the absence of a genuine dispute of material fact and entitlement to judgment as a matter of law. *See Foster v. Mountain Coal Co.*, 830 F.3d 1178, 1186 (10th Cir. 2016) (de novo review); Fed. R. Civ. P. 56(a) (standard for summary judgment). In determining whether BYU has made this showing, we view the evidence and all reasonable inferences favorably to Mr. Oirya. *Foster*, 830 F.3d at 1186.

II. BYU Was Entitled to Summary Judgment on the Title IX Claims

Title IX prohibits discrimination based on gender. *Throupe v. Univ. of Denver*, 988 F.3d 1243, 1250-51 (10th Cir. 2021). Invoking this prohibition, Mr. Oirya claims that BYU committed gender discrimination, favoring his accuser because she was female. Though BYU did credit the accuser's account, Mr. Oirya has

not presented evidence tying the decision to his gender.

**A. Mr. Oiryia Hasn't Presented Evidence
Creating a Reasonable Inference of Gender
Discrimination**

Mr. Oiryia asserts four theories of gender discrimination:

1. Erroneous outcome
2. Selective enforcement
3. Inadequate investigation
4. Deliberate indifference

All of these theories fail as a matter of law.

1. Erroneous Outcome

Title IX prohibits a university from reaching “an erroneous outcome in a student’s disciplinary proceeding because of the student’s sex.” *Doe v. Baum*, 903 F.3d 575, 585 (6th Cir. 2018). Invoking this prohibition, Mr. Oiryia contends that BYU erroneously found sexual harassment and an effort to retaliate against the accuser. We reject these contentions.

a. Sexual Harassment

Title IX is not violated just because a university believes a female accuser over a male respondent. *See Doe v. Univ. of Denver*, 952 F.3d 1182, 1196 (10th Cir. 2020). To the contrary, Mr. Oiryia had to present evidence casting articulable doubt on the outcome and to show the influence of gender bias. *See Doe v. Trustees of Boston Coll.*, 892 F.3d 67, 91 (1st Cir. 2018); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).

Mr. Oirya presents no such evidence. He argues that he couldn't have committed sexual harassment because he didn't know the accuser. But this argument does not fit the accusation. Mr. Oirya was accused of putting a piece of paper on his lap, holding it with his left hand, unzipping his jeans, and putting his right hand inside his jeans to aggressively scratch his crotch. These accusations didn't imply or require Mr. Oirya's familiarity with the accuser.

b. Effort to Retaliate

BYU found not only sexual harassment but also an effort to retaliate against the accuser. Here too Mr. Oirya questions the accuracy of the outcome, alleging gender discrimination. But again we see no evidence of gender discrimination.

The parties agree that Mr. Oirya met with male classmates after the allegation had surfaced. BYU ultimately concluded that in these meetings, Mr. Oirya had tried to learn the accuser's identity. Mr. Oirya doesn't question this conclusion. But he insists that he wanted only to take the accuser to lunch and apologize. But once he learned the accuser's identity, he instead insulted her (calling her rude, strange, and hostile) and suggested that she was obsessed with pornography. Given these actions, Mr. Oirya's innocent explanation for the meeting does not cast meaningful doubt on BYU's finding of an effort to retaliate.

Mr. Oirya points out that two of the classmates said that he hadn't retaliated against the accuser. But they acknowledged that Mr. Oirya had tried to learn the accuser's identity.

Given Mr. Oirya's effort to learn the accuser's identity and his later treatment of her, no factfinder could reasonably blame gender discrimination for BYU's finding of an effort to retaliate.

c. Plagiarism and Submission of False Financial Information

BYU also found plagiarism and submission of false financial information to the university. Mr. Oirya challenged these findings, but the district court granted summary judgment to BYU on this challenge.

On appeal, Mr. Oirya argues that the court erroneously reasoned that BYU had acted properly even if it had discriminated based on gender. But this argument misstates what the district court said. The court said only that Mr. Oirya had not disputed the allegations involving plagiarism and submission of false information.

But we may assume, for the sake of argument, that he had disputed these allegations. He still hasn't said how BYU's findings would reflect gender bias.

2. Selective Enforcement

Mr. Oirya claims not only an erroneous outcome but also selective enforcement. For this claim, Mr. Oirya identifies his accuser as a female who obtained more favorable treatment in the course of the university's investigation. "But allegations regarding the University's treatment of [Mr. Oirya's] accuser do not support his claim that a female in similar circumstances—*i.e.*, a female accused of sexual harassment [and retaliation]—was treated more favorably."

Rowles v. Curators of Univ. of Mo., 983 F.3d 345, 359 (8th Cir. 2020).

On appeal, Mr. Oirya theorizes that the district court granted summary judgment without considering whether BYU's factual determinations were supported by substantial evidence. But Mr. Oirya did not raise this theory in the amended complaint or in his response to the summary-judgment motion.

Mr. Oirya waited to present the theory in his motion for relief from the judgment. But it was too late for him to raise a new theory in that motion. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). The court could not find a genuine issue of material fact on the presence of substantial evidence if BYU had no need to muster evidence supporting its factual finding.

3. Inadequate Investigation

Mr. Oirya also bases gender bias on deficiencies in BYU's investigation. In our view, however, no reasonable factfinder could infer gender bias from BYU's steps to investigate the allegations. BYU interviewed eleven witnesses and gave Mr. Oirya ample opportunities to respond to each allegation.

Despite these opportunities, Mr. Oirya contends that BYU failed to interview the individuals who had taught the accuser, some of the students in the classroom when Mr. Oirya had allegedly committed sexual harassment, and students in the classroom in the days following the incident. But Mr. Oirya does not say what these individuals could have added or how BYU's investigative choices reflected gender bias.

4. Deliberate Indifference

A university “may be liable under Title IX provided it (1) has actual knowledge of, and (2) is deliberately indifferent to, (3) harassment that is so severe, pervasive and objectively offensive as to (4) deprive access to the educational benefits or opportunities provided by the school.” *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*, 511 F.3d 1114, 1119 (10th Cir. 2008).

Focusing on the element of deliberate indifference, Mr. Oirya asserts that BYU ignored his allegations that the accuser had lied. But BYU considered these allegations and rejected them. In the appeal, Mr. Oirya refers to no evidence suggesting deliberate indifference. In the absence of such evidence, BYU was entitled to summary judgment on this theory of liability.

B. The District Court Didn’t Fail to Consider Mr. Oirya’s Arguments About Termination of His Employment and Prohibition from Entering Campus

Before the accusations surfaced, Mr. Oirya had worked at BYU as a graduate assistant. When BYU expelled him, it also terminated his employment as a graduate assistant and prohibited him from entering the campus.

Mr. Oirya disagrees with these actions and argues that the district court failed to consider his claims challenging termination of his employment and prohibition from entering the campus. But Mr. Oirya had not presented these as distinct claims. His claims involved only challenges to the university’s investiga-

tion and decision to credit the accuser's account. Mr. Oiryia presents no separate reason to question his termination of employment or prohibition from entering the campus based on findings of sexual harassment and an effort to retaliate. So the district court did not err by declining to consider these as distinct claims.

III. The District Court Did Not Overlook Mr. Oiryia's Claim Involving Violation of Immigration Law

When foreign students study at a university, it must maintain an active record in the Student and Exchange Visitor Information System. So BYU maintained this record for Mr. Oiryia while he was actively enrolled. When he was suspended, however, the university terminated this record. Mr. Oiryia claims that BYU violated the law by prematurely terminating this record.

In the complaint, Mr. Oiryia had based the claim on federal law. But in responding to a motion to dismiss, he conceded that the motion was well-taken and agreed to dismissal. So the district court dismissed this claim. On appeal, he recharacterizes the claim as one based on state law. But in district court, he had based the claim on federal law. Given his concession in district court, no immigration law claim remained (under either federal or state law) when BYU moved for summary judgment.

Affirmed.

Entered for the Court

Robert E. Bacharach
Circuit Judge

**MEMORANDUM DECISION AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH GRANTING
DEFENDANT BRIGHAM YOUNG
UNIVERSITY'S MOTION FOR
SUMMARY JUDGMENT
(JANUARY 9, 2020)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

JOHN OIRYA,

Plaintiff,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant.

Case No. 2:16-cv-01121-BSJ

Before: Bruce S. JENKINS,
U.S. Senior District Judge.

On December 4, 2019, the Court heard oral arguments on Defendant Brigham Young University's ("BYU") Motion for Summary Judgment.¹ Having considered the Motion, Plaintiff John Oirya's Opposition,² BYU's Reply,³ and the arguments presented

¹ ECF No. 190.

² ECF No. 194.

during the hearing, and for good cause appearing, the Court hereby GRANTS BYU's Motion and dismisses with prejudice all of Mr. Oirya's claims as detailed below:

STANDARD OF REVIEW

"Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1219 (10th Cir. 2016). The movant "need only point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." *United States v. Simons*, 129 F.3d 1386, 1388 (10th Cir. 1997) (quoting *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992)).

UNDISPUTED FACTS

Rule 56(c)(1) of the Federal Rules of Civil Procedure states "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (a) citing to particular parts of materials in the record . . . or (b) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Moreover, "[t]he court need consider only the cited materials." Fed. R. Civ. P. 56(c)(3). With this rule in mind, and after a thorough review of the parties' briefs and properly cited, submitted, and admissible evidentiary

3 ECF No. 197.

materials, the Court determines that the following facts are undisputed:

1. Mr. Oirya was a BYU student from 2002 to 2013.⁴
2. In the winter semester of 2013, however, he was accused of three separate incidents of student misconduct: 1) admissions and immigration fraud; 2) plagiarism; and, 3) sexual misconduct toward a female student.⁵
3. Regarding the first incident, on January 10, 2013, BYU gave Mr. Oirya a document entitled “Allegation and Invitation to Respond” accusing him of “falsely claim[ing] that he was receiving [required] funding” for his education from the Kenyan government and supplying “forged documents” in support of that claim.⁶
4. On January 25, 2013, BYU gave Mr. Oirya another “Allegation and Invitation to Respond” document accusing him of the remaining two violations of university policy: 1) plagiarism in an assignment and in a “Linguistics Masters [thesis] proposal;”; and 2) an allegation of sexual harassment.⁷
5. The plagiarism allegation charged Mr. Oirya with copying significant portions of his academic writ-

⁴ See Amd. Compl., ECF No. 25, ¶ 6; Oirya’s Academic Tr., ECF No. 190, Ex. 1.

⁵ See ECF No. 25, ¶¶ 14, 45-132; ECF No. 190, Ex. 2, 4.

⁶ See ECF No. 190, Ex. 2; Oirya Dep. 101:17-102:24, Jan. 15, 2019, ECF No. 190, Ex. 3.

⁷ ECF No. 190, Ex. 4; see Oirya Dep. 139:18-142:25.

ing from sources available publicly, such as Wikipedia, and failing to adequately attribute scholarly research.⁸

6. Regarding the sexual harassment accusation, the January 25, 2013 document explained that a female student had accused Mr. Oiryia, while in class, of “plac[ing] a piece of paper on his lap, unbutton[ing] and unzip[ing] his pants, h[olding] the piece of paper on his lap with his left hand and reach[ing] into his open pants with his right hand.” Mr. Oiryia also “engaged in retaliatory behavior” by “call[ing] together the male students” in their class “to learn the identity of the female who had reported him . . . [.]” as BYU originally kept the accuser’s identity confidential.⁹

7. These documents invited Mr. Oiryia to “prepare [his] own personal written response” and promised him a “reasonable time” to do so.¹⁰

I. Mr. Oiryia’s Response to the Plagiarism Allegations

8. On February 4, 2013, Mr. Oiryia submitted a four-page written response, with twenty-six pages of exhibits, to the allegation that he plagiarized an assignment. He did not deny the plagiarism. Rather, he blamed his professor and BYU generally for not adequately teaching him that “substantially lift[ing] from Wikipedia . . . is a form of plagiarism.”¹¹

⁸ See ECF No. 190, Ex. 4.

⁹ *Id.*; see Oiryia Dep. 141:9-142:25.

¹⁰ ECF No. 190, Ex. 2, 4.

¹¹ ECF No. 190, Ex. 5 at 2; see Oiryia Dep. 115:2-116:15.

9. The same day, he submitted a separate five-page response, with fifteen pages of exhibits, to the allegation of plagiarism in his master's thesis. He similarly did not deny that plagiarism but said his professors "could have acted more responsibly in helping [him] avoid the alleged charges of plagiarism" but did not give him "critically needed feedback." He speculated "their feedback could have made a big difference in enabling [him] to avoid plagiarism. . ."¹²

II. Mr. Oirya's Response to the Sexual Harassment Allegations

10. Mr. Oirya was provided a copy of the unidentified Title IX accuser's written complaint.¹³

11. On January 14, 2013, the accuser met with another professor in the Mass Communications Program, Dr. Plowman, who told her that Mr. Oirya "was having a meeting with all the guys in the program." The accuser later spoke to one of those men who said that Mr. Oirya, "was trying to figure out who made the report."¹⁴

12. The accuser later said she was "in a constant state of anxiety" as a result of Mr. Oirya's conduct. "For the first time in my life I am wearing a 'rape whistle' at all times," she wrote. She further explained that if Mr. Oirya was allowed to stay in the program,

¹² See ECF No. 190, Ex. 6; Oirya Dep. 120:11-122:15.

¹³ See ECF No. 190, Ex. 7.

¹⁴ *Id.* at 1-2.

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she would have to consider “dropping out of the program and leaving BYU.”¹⁵

13. On February 14, 2013, Mr. Oirya submitted an eight-page response, with 17 pages of exhibits, to the Title IX allegations.¹⁶

14. In his response, Mr. Oirya called the allegations “categorically false, unfounded, inconceivable and slanderous,” but also invited “necessary disciplinary actions” if BYU “determines this charge to be substantiated. . . .”¹⁷

15. Mr. Oirya’s response largely consisted of explaining that “no normal person” would have reacted as the accuser did.¹⁸

16. Mr. Oirya also denied asking classmates for the name of his accuser. He acknowledged, however, that he met with his male classmates but claims it was merely to ask “my close friends (such as my classmates) for suggestions and guidance on how to proceed forward with this matter.”¹⁹

17. Mr. Oirya also wrote that the accuser had “brought upon herself unnecessary ‘anxiety’ and unjustified ‘psychological toll’ by choosing to misconstrue my intentions and perceive me only in a bad light.” He further stated, “if I were to be given the opportunity to know who this individual is, I would be glad

¹⁵ *Id.*

¹⁶ ECF No. 190, Ex. 8.

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 2-3.

¹⁹ *Id.* at 5.

to take her to lunch, and apologize to her for the pain and suffering that I might have inadvertently caused to her.”²⁰

18. Recognizing that Mr. Oirya could not fully respond without knowing the accuser’s identity, BYU obtained permission from the accuser and provided her identity to him, whereupon Mr. Oirya submitted another four-page response on February 25, 2013.²¹

19. In his additional response, Mr. Oirya explained he had always treated his accuser as a friend but had “mostly felt some sense of lukewarm welcome and hostility from her.” Given her “lukewarm and hostile” attitude, Mr. Oirya speculated that “any minor or trivial act on my part (be it real, perceived, imagined or even contrived) could have triggered such an accelerated and uncontrollable hyper-reaction from [the accuser] toward me.”²²

20. Mr. Oirya’s subsequent response also offered speculation about why his accuser might have raised allegations against him. “I might have tucked my untucked shirt or T-shirt into my pants as an act of trying to dress modestly. However, the complainant might have misconstrued my actions to be ‘scratching’ my crotch.”²³

²⁰ *Id.* at 8.

²¹ ECF No. 190, Ex. 9.

²² *Id.* at 1-2.

²³ *Id.* at 3.

III. Mr. Oirya's Response to the Academic Fraud Allegations

21. As a foreign student, Mr. Oirya was required by law and university policy to have proof of financial stability to support himself in the United States. As such, he, or his uncle, submitted a letter, purportedly from the Kenyan government, showing financial support.²⁴

22. During a routine check of his financial documents, however, BYU's International Student Services Office ("ISSO") contacted the Kenyan embassy and was informed for the first time that the letter may be fraudulent, whereupon BYU launched an investigation and informed Mr. Oirya of its concerns about his documentation.²⁵

23. Mr. Oirya did not provide a formal written response to this admissions fraud allegation, but on October 3, 2012, he transmitted an email to ISSO Director Sam Brown indicating, "I spoke with the Kenyan embassy staff and they [also] told me that there could be a problem with the authenticity of my Bursary offer letter."²⁶

²⁴ ECF No. 190, Ex. 10. Mr. Oirya asserts his uncle deceived BYU rather than Mr. Oirya himself. He does not explain how this distinction is material. Mr. Oirya does not deny that law and policy required him to prove financial stability. Also, Mr. Oirya was aware of the documents BYU received, whether from Mr. Oirya or his agent, indicating the Kenyan government would provide him money. Nonetheless, Mr. Oirya testified that he never received money from the Kenyan government despite the representations made to BYU.

²⁵ ECF No. 190, Ex. 11.

²⁶ ECF No. 190, Ex. 12.

24. Mr. Oirya directed BYU to discuss the fraud allegation with his uncle, Mr. Fred Odhiambo, who Mr. Oirya alleged “had information on [that] allegation” and could “respond to BYU on behalf of Mr. Oirya.”²⁷

25. On October 17, 2012, Mr. Odhiambo emailed Mr. Brown informing him that “some ministry people were colluding with conmen not to forward [the bursary money]” and Mr. Oirya was “becoming a victim of an evolving syndicate that was trying to divert his bursary money to some underground deals.”²⁸

26. On November 8, 2012, Mr. Odhiambo emailed Mr. Brown again, stating “the money was being delayed in being processed” because “some individuals in the government [] were working on diverting this money to themselves.” He also explained that “[t]he Kenyan Embassy in Washington, DC USA is directly involved in this matter and is keenly following up on the outcomes of the ongoing investigations. It will keep you posted.”²⁹

27. However, Mr. Oirya was never able to demonstrate he had the financial backing from the Kenyan government that he previously had claimed in the admissions process, and no one from the Kenyan

27 Amd. Compl. ¶ 33. On December 12, 2017, BYU filed a short form discovery motion, ECF No. 49, to get contact information for Mr. Odhiambo. BYU used that information to attempt to contact him, but Mr. Odhiambo never responded and was, therefore, never deposed. See ECF No. 190, Ex. 13.

28 ECF No. 190, Ex. 14 at 2.

29 ECF No. 190, Ex. 15 at 3.

Embassy ever contacted BYU or authenticated the letter.³⁰

28. During his deposition, Mr. Oirya acknowledged he never received money from the Kenyan government.³¹

IV. BYU's Fair Investigative Steps

29. During BYU's investigation of the sexual harassment, Mr. Oirya met with BYU Title IX Investigator Melba Latu to discuss the allegations.³²

30. He met at least twice with BYU Title IX Coordinator Sarah Westerberg to discuss the allegations.³³

31. He met at least twice with BYU's ISSO Director Sam Brown to discuss the admissions fraud allegations, and testified to meeting "multiple times" with Ms. Westerberg and Mr. Brown during the investigative process.³⁴

32. Mr. Oirya also had "at least three, maybe four meetings" with BYU Associate Dean of Students Neal Cox to discuss the allegations.³⁵

33. Mr. Cox described his interactions with Mr. Oirya during the investigation as follows:

³⁰ Hepari Dep. 77:3-78:8, Oct. 17, 2018, ECF No. 190, Ex. 16; Cox. Dep. 93:12-94:1, Oct. 16, 2018, ECF No. 190, Ex. 17.

³¹ Oirya Dep. 56:11-60:12.

³² *See id.* at 148:5-8.

³³ *See id.* at 148:9-19.

³⁴ *Id.* at 69:8-25, 149:9-25.

³⁵ *Id.* at 147:9-148:4.

More than any student I ever worked with in 20 years, John was demanding information far and way beyond what we ordinarily would supply students with. I attempted to be patient. I attempted to do all I could to supply what information he had a legal right to and access to . . . I wanted to be thorough, but I was anxious to conclude this matter which had extended out for a long period of time, much longer than most any honor code case I remember working with.³⁶

34. BYU personnel also interviewed at least five fact witnesses while investigating the foregoing allegations.³⁷

V. Mr. Oirya's Suspension and Dismissal

35. On March 4, 2013, after Associate Dean Neal Cox interviewed Mr. Oirya and, after "a thorough review of available information," BYU suspended Mr. Oirya.³⁸

36. Mr. Oirya exercised his rights to "request an administrative review [] of any Decision resulting in a disciplinary action." Pursuant to BYU's policy, the review was directed to the Dean of Students Vernon Heperi, who had the authority to "modify the sanction applied to the student based upon the [r]eview."³⁹

36 Cox Dep. 81:6-11, 83:15-18.

37 See BYU's Resp. Interrog. No. 4, ECF No. 190, Ex. 18.

38 ECF No. 190, Ex. 19.

39 See ECF No. 190, Ex. 20 at 5-6, 9.

37. On March 19, 2013, Mr. Oirya met with Mr. Cox and Mr. Heperi so that Mr. Heperi could interview Mr. Oirya for the administrative review.⁴⁰

38. Immediately following that meeting, Mr. Oirya emailed Mr. Heperi, “It was great to have a review with you . . . I had earlier [] feared that I might not be given any opportunity to speak” during the appeal, but “you met and exceeded these expectations . . . I can now recommend any student to come and directly talk to you more openly, contrary to my earlier fears that I had about you.”⁴¹

39. After meeting with Mr. Oirya, Mr. Heperi exercised his powers under the Honor Code Policy and modified the sanction against Mr. Oirya to permanent dismissal from the university. In a letter dated March 20, 2013, Mr. Heperi stated to Mr. Oirya as follows: “After carefully reviewing your most recent violations of the Honor Code, *i.e.*, inappropriate gender-based behavior and admission fraud, and in light of your past history of misconduct at the university I have determined to dismiss you from Brigham Young University.”⁴²

VI. Mr. Oirya Applies to Auburn University

40. On January 20, 2013, well *before* his suspension and dismissal from BYU, Mr. Oirya submitted an

⁴⁰ See ECF No. 190, Ex. 21 at 2.

⁴¹ *Id.*

⁴² ECF No. 190, Ex. 22.

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application to Auburn University for matriculation into its Ph.D. program in business management.⁴³

41. The Auburn application asked Mr. Oirya to “[l]ist in order (most recent first) all colleges and universities [he had] attended.” Mr. Oirya did not list his most recent academic programs at BYU on the application.⁴⁴

42. Mr. Oirya did submit BYU transcripts to Auburn, but they were dated November 14, 2011.⁴⁵

43. Mr. Oirya admitted during his deposition he did not disclose to Auburn that he was enrolled at BYU or that he was dismissed from BYU after 2011, though Mr. Oirya states he submitted updated transcripts that evidenced his enrollment post-2011.⁴⁶

44. Mr. Oirya was accepted by Auburn’s Ph.D. program.⁴⁷

45. On February 2, 2015, however, Mr. Oirya’s estranged wife sent a letter to Auburn informing it for the first time that “[Mr. Oirya] had been expelled from Brigham Young University.”⁴⁸

46. After receiving the letter, Auburn reached out to BYU and asked for information regarding Mr. Oirya. In response, BYU explained the allegations

⁴³ See ECF No. 190, Ex. 23 at 5.

⁴⁴ *Id.*

⁴⁵ *Id.* at 17-19.

⁴⁶ See Oirya Dep. 231:8-241:23.

⁴⁷ Amd. Compl. ¶ 219.

⁴⁸ ECF No. 190, Ex. 24.

against Mr. Oirya and said he had been suspended and then dismissed.⁴⁹

47. On March 5, 2015, Auburn rescinded Mr. Oirya's admission to Auburn University because "the information regarding [his] standing at BYU was not provided by [him]" when he applied to Auburn.⁵⁰

48. On October 10, 2017, Mr. Oirya filed an action in the United States District Court for the Middle District of Alabama in the case of *John Oirya v. Auburn University*, Case No. 3:17-cv-681 (the "Auburn Case"), Mr. Oirya alleged that he had been improperly dismissed from Auburn University.⁵¹

49. On October 2, 2019, Court in the Auburn Case entered an Order granting Auburn University's summary judgment motion and dismissing Mr. Oirya's claims against it.⁵²

50. That court found that "Oirya was disenrolled and terminated [from Auburn University] because Auburn discovered that [Mr. Oirya] failed to submit an accurate and complete transcript from BYU and was prohibited from re-entering BYU."⁵³

⁴⁹ See ECF No. 190, Ex. 25.

⁵⁰ ECF No. 190, Ex. 26.

⁵¹ ECF No. 191, Ex. 1.

⁵² *Id.*

⁵³ *Id.* at 39.

VII. Application of the Law to the Undisputed Facts

Based on the record, the central question before the Court is whether Mr. Oirya received a process that was fair under the circumstances. Mr. Oirya failed to establish a genuine dispute of material fact on this issue. The undisputed material facts show that BYU provided Mr. Oirya with a considered, determined, fair process that substantially complied with BYU's policies and procedures and all relevant laws.

Mr. Oirya was accused of three separate and independent instances of misconduct: (1) admissions and immigration fraud, (2) plagiarism, and (3) sexual misconduct. As the undisputed material facts show, Mr. Oirya admitted that he never received funds from the Kenyan government as he had previously represented to BYU. He also admitted the allegations of plagiarism, though he explained that, in his view, he could have been better taught about what plagiarism is. His explanation does not change his admitted plagiarism on two different occasions. These admissions by Mr. Oirya to the first and second allegations of misconduct, in and of themselves, justify BYU's decision to discipline Mr. Oirya. Because the process provided to Mr. Oirya was fair, and because Mr. Oirya admitted to two of the three charges of misconduct, no reasonable juror could conclude that BYU's decision to discipline Mr. Oirya was improper. As a result, each of Mr. Oirya's claims fail as a matter of law and are dismissed, as explained more fully below.

1. Mr. Oirya's Contract Claims Fail

Mr. Oirya asserted claims for breach of contract and breach of the covenant of good faith and fair dealing.⁵⁴ The premise for both claims is Mr. Oirya's allegation that BYU breached a contractual duty to provide him with (1) notice of his alleged misconduct and (2) an opportunity to respond. This alleged contractual duty is found in BYU's Honor Code Policy.⁵⁵ As the Tenth Circuit has not defined the relationship between a private university and its students as contractual, but other circuits have, this Court will assume, but not decide, the existence of a contract between Mr. Oirya and BYU. *Compare Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998) ("The student-college relationship is essentially contractual in nature. The terms of the contract may include statements provided in student manuals and registration materials.") (internal citations omitted) *with Mittra v. Univ. of Med. & Dentistry of New Jersey*, 316 N.J. Super. 83, 719 A.2d 693, 694 (App. Div. 1998) (explaining that "the relationship between the university and its students should not be analyzed in purely contractual terms.").

Assuming a contract existed between Mr. Oirya and BYU, BYU did not breach its contractual duty to provide Mr. Oirya notice or an opportunity to respond pursuant to BYU's Honor Code. Mr. Oirya was provided with notice of each of his alleged violations.⁵⁶ Mr. Oirya was also provided an opportunity to respond to

⁵⁴ ECF No. 25.

⁵⁵ ECF No. 190, Ex. 20 at 2.

⁵⁶ See ECF No. 190, Ex. 2, 4.

each charge—and availed himself of that opportunity. *Id.* As detailed above, Mr. Oirya submitted a four-page written response, with 26 pages of exhibits, to the allegation that he plagiarized an assignment and a separate five-page response, with 15 pages of exhibits, to the allegation of plagiarism in his master's thesis.⁵⁷ In neither submission did he deny the charge of plagiarism. *Id.* In response to the Title IX allegations, Mr. Oirya submitted an initial eight-page written response, with 17 pages of exhibits, and a subsequent four-page written response.⁵⁸ While Mr. Oirya did not submit a formal written response to the admissions and immigration fraud allegation, he transmitted an email to ISSO Director Sam Brown indicating, "I spoke with the Kenyan embassy staff and they [also] told me that there could be a problem with the authenticity of my Bursary offer letter."⁵⁹ Mr. Oirya's uncle, Fred Odhiambo, also responded to that allegation on behalf of Mr. Oirya.⁶⁰ Ultimately, however, Mr. Oirya was not able to demonstrate he had the financial backing from the Kenyan government that he previously had claimed in the admissions process, and no one from the Kenyan Embassy ever contacted BYU or authenticated the letter.⁶¹ Mr. Oirya acknowledged he never received money from the Kenyan government.⁶²

57 *See* ECF No.190, Ex. 5-6.

58 *See* ECF No. 190, Ex. 8-9.59

59 *See* ECF No. 190, Ex. 12.

60 *See, e.g.*, ECF No. 190, Ex. 14.

61 *See* Hepari Dep. 77:3—78:8; Cox. Dep. 93:12—94:1.

62 *See* Oirya Dep. 56:11—60:12.

In addition to Mr. Oirya's written responses to the allegations of misconduct, Mr. Oirya also had numerous personal interviews with BYU personnel regarding these charges. Mr. Oirya met with BYU Title IX Investigator Melba Latu, at least twice with BYU Title IX Coordinator Sarah Westerberg, at least twice with BYU's ISSO Director Sam Brown, at least three times with BYU Associate Dean of Students Neal Cox, and once with BYU Dean of Students Vernon Heperi. BYU also interviewed eleven fact witnesses while investigating these allegations.

In light of the undisputed facts regarding the process provided to Mr. Oirya, the Court concludes that BYU complied with its alleged contractual duty to provide Mr. Oirya with notice of the allegations and an opportunity to respond. Consequently, BYU did not breach its contractual duties or its duty of good faith and fair dealing and Mr. Oirya's claims for breach of contract and breach of the duty of good faith and fair dealing fail as a matter of law. Moreover, because Mr. Oirya admitted to two of the three allegations of misconduct, the Court cannot conclude that BYU's process led to an inappropriate outcome. In short, BYU did not breach its contractual duties to provide Mr. Oirya with a fair process, and even if it did, such breach was not the cause of Mr. Oirya's alleged damages—his own admitted misconduct was.

2. Mr. Oirya's Defamation Claim Fails

Mr. Oirya's third cause of action alleges BYU defamed him by informing Auburn about his misconduct, suspension, and dismissal.⁶³ His defa-

⁶³ Amd. Compl. ¶ 246.

mation claim fails because Mr. Oirya failed to submit any evidence creating a disputed issue of material fact about whether what BYU said to Auburn was false. To the contrary, the undisputed evidence established that BYU did not say anything untrue to Auburn. His claim also fails because the undisputed facts also showed that the statements were privileged, the statute of limitations has run, and because BYU's statements were not the cause of his dismissal from Auburn.

Truth is an "absolute defense" to a defamation claim. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 57 (Utah 1991). BYU notified Auburn that allegations were made against Mr. Oirya and that BYU investigated, suspended, and dismissed him, which is all indisputably true.⁶⁴ Mr. Oirya's defamation claim fails because BYU's statements to Auburn were true.

Even if some portion of BYU's statement was not true, Mr. Oirya's defamation claim would still fail because BYU's statements are privileged. "Under Utah law, 'false and defamatory statements are not actionable if they are protected by a legal privilege.'"

⁶⁴ ECF No. 190, Ex. 22. Mr. Oirya alleged in his opposition memorandum that additional statements were made to Auburn but did not support that contention by citation to any admissible evidence. Thus, the Court does not consider these statements in reaching its conclusion. Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials.") But even if such additional statements were made and properly presented to the Court, such statements are not actionable in this case for the other reasons discussed herein. Namely, BYU's statements were privileged, Mr. Oirya's defamation claim was untimely, and the alleged defamatory statements were not the cause of Mr. Oirya's alleged harms, as was found by our sister court in the Middle District of Alabama.

Lifevantage Corp. v. Domingo, 208 F. Supp. 3d 1202, 1220 (D. Utah 2016) (quoting *DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979, 982). A qualified privilege applies when “a defendant seeks to vindicate or further an interest regarded as being sufficiently important to justify some latitude for making mistakes.” *Brehany*, 812 P.2d at 58 (internal quotations omitted). “When circumstances mandate wholly open, frank, and unchilled communication, the law readjusts the scales that balance the right to free expression with the interest in protecting one’s reputation.” *O’Connor v. Birmingham*, 2007 UT 58, ¶ 29, 165 P.3d 1214. “Th[is] privilege [] extends to statements made to advance a legitimate common interest between the publisher and the recipient of the publication.” *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 27, 221 P.3d 205, 214 (internal quotations omitted). Thus, “an employer’s communication to other interested parties concerning the reasons for an employee’s discharge” are privileged. *Id.*; see also *Brehany*, 812 P.2d at 59 (finding privilege when management informed employees and buyers of former employees’ termination for drug use).

Just as an employer is privileged in communicating to potential employers the reasons for an employee’s discharge, a university is undoubtedly privileged in explaining to other universities why a student was dismissed. In fact, a number of courts have found that transmission of statements related to disciplinary proceedings are privileged. See, e.g., *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 761 (D. Md. 2015) (statements shared to a University regarding sexual assault are privileged); *Melious v. Besignano*, 125 A.D.3d 727, 728-29, 4 N.Y.S.3d 228 (N.Y. App. Div. 2015)

(finding privilege when statements were made in “official capacity” during teacher disciplinary proceeding, and dissemination of information was to others with “corresponding interests in the subject matter”); and *Beauchene v. Mississippi Coll.*, 986 F. Supp. 2d 755, 767 (S.D. Miss. 2013) (qualified privilege exists during disciplinary proceedings due to Universities “obligation to ferret out such conduct”).

The case of *Gomes v. University of Maine System* is instructive. There, a plaintiff’s defamation claim was based on university officials speaking about plaintiff’s sexual assault disciplinary proceeding with news agencies, the NCAA, and the student’s new institution. *Gomes*, 365 F. Supp. 2d at 43 (D. Mn. 2005). The court dismissed this claim because “a university disciplinary proceeding for a student is a setting ‘where society has an interest in promoting free, but not absolutely unfettered speech,’ and the conditional privilege attaches to university statements concerning the proceeding.” *Id.* (quoting *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991)). BYU is on all fours with *Gomes*. In fact, BYU’s situation is more compelling because Mr. Oirya makes no allegation BYU disseminated information to the public. It is simply a question of sharing disciplinary files school-to-school, as permitted by law. This kind of candor must be permitted or universities will have to remain silent even when a transferring student may pose a danger. Thus, the Court concludes that any statements made by BYU to Auburn were privileged and Mr. Oirya’s defamation claim fails for this additional reason.

In any event, another court has already found that Mr. Oirya was dismissed from Auburn because of his own false statements and not because of any

statements from BYU.⁶⁵ Mr. Oirya is estopped from challenging this finding. *Gudmundson v. Del Ozone*, 2010 UT 33, ¶ 37, 232 P.3d 1059. Because Mr. Oirya was dismissed from Auburn due to his own false statements, Mr. Oirya cannot establish a causal link between BYU's alleged defamatory statements and the damages, if any, stemming from his dismissal from Auburn. This is fatal to his defamation claim and provides a third, independent basis for dismissal of this claim.

Finally, Mr. Oirya's defamation claim is also barred by the statute of limitations. In Utah, an action for defamation must be brought within one year. Utah Code § 78B-2-302(4). Here, the alleged defamatory conduct occurred on February 18, 2015.⁶⁶ Mr. Oirya did not file his complaint until October 31, 2016—one year and eight months later, Mr. Oirya alleged that the discovery rule applies and saves his claim from dismissal. However, the record contains no evidence that BYU concealed its conduct and the discovery rule does not apply. *See Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, P 25, ¶¶ 34-43, 108 P.3d 741.

The Court concludes that Mr. Oirya's defamation claim fails for each of these four independent reasons.

3. Mr. Oirya's Title IX Claims Fail

Mr. Oirya asserted four Title IX claims against BYU: due process violations, deliberate indifference,

⁶⁵ ECF No. 191, Ex. 1.

⁶⁶ See ECF No. 190, Ex. 25.

erroneous outcome, and selective enforcement.⁶⁷ Title IX provides that [n]o person 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).⁶⁸ As acknowledged by Mr. Oirya, to prevail on his Title IX claims, he must prove that there was “a causal connection between gender discrimination and the [alleged] wrongful outcome” of BYU’s investigatory procedure.⁶⁹ As a result, evidence of a “flawed proceeding that has led to an adverse and erroneous outcome” is not enough without evidence of a “causal connection

67 ECF No. 25

68 The Tenth Circuit has held that the framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), applies to Title IX claims. See *Hiatt v. Colorado Seminary*, 858 F.3d 1307, 1315 n.8 (10th Cir. 2017). “Under *McDonnell Douglas*, a plaintiff must first establish a *prima facie* case for discrimination or retaliation by showing an employer took adverse . . . action against the plaintiff based on the plaintiff’s sex. The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse action. If the employer satisfies this burden, then summary judgment is warranted unless the plaintiff can show there is a genuine issue of material fact as to whether the proffered reason is pretextual.” *Id.* at 1316 (quotation marks, citations, and brackets omitted).

69 ECF No. 194 at 18 (citing *Vega v. State Univ. of N.Y. Bd. Of Trustees*, No. 97-cv-5767, 2000 WL 381430 at *4 (S.D.N.Y. Apr. 13, 2000)). See also *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d. Cir. 1994) (“[W]e may safely say that Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline.”).

between the flawed outcome and gender bias.” *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d. Cir. 1994).

Mr. Oirya has presented no evidence to this Court that BYU’s decision to suspend, and ultimately dismiss, him was the result of gender bias or discrimination. For this reason, each of his Title IX claims fail. Further, Mr. Oirya has also failed to establish other elements of each of his four Title IX claims. These deficiencies are discussed further below.

a. Violation of Title IX—Due Process and Procedural Rights

Mr. Oirya’s first Title IX claim—due process and procedural rights—alleges BYU did not provide Mr. Oirya with adequate due process and provided “preferential treatment of Mr. Oirya’s female accuser” and “stacked” the investigative process against him “because he is a male.”⁷⁰ “It is well-established . . . that a private university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts.” *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 602 (D. Mass. 2016) (quotation marks omitted). “Since [BYU] is a private college, and not a state actor, the federal Constitution does not establish the level of due process that [BYU] had to give [Mr. Oirya] in his disciplinary proceeding.” *Xiaolu Peter Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 462 (S.D.N.Y. 2015) (footnote omitted); *see Rensselaer Soc. of Engineers v. Rensselaer Polytechnic Inst.*, 260 A.D.2d 992, 689 N.Y.S.2d 292, 295 (1999) (private university disciplinary proceedings “do not implicate the full

⁷⁰ Amd. Compl. ¶ 255.

panoply of due process guarantees") (internal quotation marks omitted)).

As detailed above, it is undisputed that Mr. Oirya was given written notice of the Title IX allegations—indeed, he was provided with the name and full written report of his accuser—and he responded in writing (twice) and in person on numerous occasions. Furthermore, BYU conducted an extensive investigation, including interviewing eleven witnesses and meeting with Mr. Oirya several times. Nothing in the record supports Mr. Oirya's claims that the investigation "plac[ed] special emphasis on the allegations, witnesses, and supposed evidence supplied by his female accusers . . . on the basis of his sex or gender."⁷¹

b. Violation of Title IX—Deliberate Indifference

Mr. Oirya's second Title IX claim—deliberate indifference—also fails. To prevail on deliberate indifference, Mr. Oirya must show BYU "(1) has actual knowledge of, and (2) is deliberately indifferent to, (3) harassment that is so severe, pervasive and objectively offensive as to (4) deprive access to the educational benefits or opportunities provided by the school." *Rost ex rel. K. C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008). Here, Mr. Oirya cannot establish deliberate indifference because he does not point to any evidence in the record that BYU acted indifferently. Rather, BYU gave Mr. Oirya notice of the claims against him, investigated the claims, concluded Mr. Oirya was the perpetrator

⁷¹ Amd. Compl. ¶ 22.

rather than the victim, and upheld that decision on appeal. While Mr. Oiryia disagrees with the outcome of the investigation and appeal process, he has not shown BYU was indifferent to any alleged harassment perpetrated against Mr. Oiryia. Thus, given the undisputed facts in the record, Mr. Oiryia's deliberate indifference claim fails.

c. Violation of Title IX—Erroneous Outcome

Mr. Oiryia's third Title IX claim—erroneous outcome—alleges BYU failed to provide “proper process” and that the process was preferential to his female accusers.⁷² To prevail on an erroneous-outcome claim, he must prove that the outcome was erroneous and “that gender bias was a motivating factor” in that outcome. *Doe v. Trustees of Bos. Coll.*, 892 F.3d 67, 90 (1st Cir. 2018). Mr. Oiryia has not shown the outcome was erroneous; nor is there any evidence that gender was a motivating factor in his suspension or dismissal. “To show this causal link,” Mr. Oiryia “cannot merely rest on superficial assertions of discrimination but must establish that particular circumstances suggest that gender bias was a motivating factor.” *Id.* at 91 (quotation marks and brackets omitted). Mr. Oiryia offers no evidence of bias in the written policies; no evidence of any kind of systemic bias against males; and no evidence of particularized bias in his case.

⁷² 72 Amd. Compl. ¶¶ 267-269.

d. Violation of Title IX—Selective Enforcement

Mr. Oirya's fourth Title IX claim—selective enforcement—alleges BYU's investigation into his misconduct was “motivated by his gender and that a similarly situated woman would not have been subjected to the same disciplinary proceedings.”⁷³ To prevail, he must show that “regardless of [his] 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. “To support a claim of selective enforcement, a male plaintiff must demonstrate that a female was in circumstances sufficiently similar to his own and was treated more favorably by the University.” *Xiaolu Peter Yu*, 97 F. Supp. 3d at 480 (quoting *Mallory v. Ohio Univ.*, 76 F. App'x 634 (6th Cir. 2003)). That is, he must show that BYU's actions against him “were motivated by his gender and that a similarly situated woman would not have been subjected to the same disciplinary proceedings.” *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 757 (E.D. Tenn. 2009). Mr. Oirya has not presented any evidence of selective enforcement. He has presented no evidence of any similarly situated women who were treated more favorably.

In sum, Mr. Oirya has failed to present evidence that BYU's decision to terminate his enrollment was motivated by gender bias. Mr. Oirya has also failed to establish other elements of each of his four Title IX claims. For these reasons, the Court concludes that his Title IX claims fail as a matter of law.

⁷³ *Id.* ¶ 273.

4. Mr. Oiry'a's Tort Claims Fail

Finally, Mr. Oiry'a alleges two tort claims: negligence and intentional infliction of emotional distress ("TIED"). Both claims fail.

An essential element of any negligence claim is a breach of a duty. *See Earl v. LaVerkin City*, 2016 UT App 196, ¶ 11, 382 P.3d 676. Mr. Oiry'a alleges BYU breached its duty to "carry out a reasonable and fair investigation into the allegations against him, as outlined in its school and employment policies."⁷⁴ As noted above, BYU provided Mr. Oiry'a with notice of the three allegations of misconduct and invited him to respond. Mr. Oiry'a responded to all three allegations in writing and in person. BYU also interviewed 11 witnesses and met with Mr. Oiry'a numerous times. The record before the Court establishes that BYU engaged in a determined and fair process. Therefore, BYU did not breach any duty to carry out a reasonable and fair investigation and Mr. Oiry'a's negligence claim fails.

As to his IIED claim, Mr. Oiry'a failed to present any evidence from which a rational fact-finder could conclude that BYU intended to cause him emotional damage. *See Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 58, 70 P.3d 17 (noting that an essential element of IIED is "intentionally engaging] in some conduct toward the plaintiff, . . . with the purpose of inflicting emotional distress"). To the contrary, Mr. Oiry'a expressed satisfaction with the

⁷⁴*Id.* ¶ 300.

process BYU afforded to him. For this reason, Mr. Oirya's IIED claim fails.⁷⁵

ORDER

For all of the above reasons, it is hereby ORDERED that BYU's Motion for Summary Judgment is GRANTED and all of Mr. Oirya's claims are dismissed with prejudice. Judgment shall be entered accordingly.

IT IS SO ORDERED.

DATED this 9th day of January 2020.

BY THE COURT

/s/Bruce S. Jenkins
U.S. Senior District Judge

⁷⁵ Additionally, given the court's assumption that a contract governs the relationship between the parties, the tort claims are also barred by the economic-loss doctrine. *See Reighard v. Yates*, 2012 UT 45, ¶ 1 14-21, 285 P.3d 1168.

**MEMORANDUM DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH DENYING MOTION FOR
RELIEF FROM JUDGMENT
(APRIL 7, 2020)**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

JOHN OIRYA,

Plaintiff,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant.

Case No. 2:16-CV-01121-BSJ

Before: Bruce S. JENKINS, District Judge.

This matter comes before the court on Plaintiff John Oirya's "Motion for Relief from Summary Judgment."¹ Mr. Oirya contends the court's January 9, 2020 Judgment² in favor of Brigham Young University ("BYU") should be altered because BYU's counsel "improperly and inaccurately represented the Court's

¹ ECF No. 213

² ECF No. 201.

true ruling.”³ Neither party requested oral argument and the court finds it can decide the matter on the basis of the written submissions. The court has carefully considered the parties’ arguments, applicable law, and the relevant facts. Now, being fully advised, the court will deny Mr. Oirya’s Motion for Relief from Summary Judgment.

I. Summary of the Order Underlying Judgment

The court begins with a short summary of its January 9, 2020 Order that led to the judgment Mr. Oirya now challenges.⁴ In short, the court’s January 9 Order granted BYU summary judgment because Mr. Oirya did not dispute two of BYU’s asserted bases for dismissing him: First, he never received money from the Kenyan government despite earlier making representations to BYU that he had; and second, he plagiarized material for one of his courses. The court found these two reasons sufficient to justify Mr. Oirya’s dismissal from BYU. Also, the court found that—to the extent it needed to consider BYU’s third basis for dismissal, sexual misconduct—BYU adequately investigated those allegations before dismissing Mr. Oirya. In addition to these findings, the court noted Mr. Oirya offered no evidence that BYU’s actions were motivated by gender bias; a failure fatal to his Title IX claims. Finally, the court noted several independent reasons Mr. Oirya’s state-law claims failed. For example, his defamation claim failed because: he had no evidence BYU said anything untrue about him; BYU’s statements were privileged;

³ ECF No. 213 at 3.

⁴ ECF No. 200.

the statute of limitations barred the claim; and the court afforded preclusive effect to the District of Alabama's order, which found Mr. Oirya's legal harm was caused by his own misstatements, rather than any statement from BYU. Mr. Oirya now seeks to challenge the judgment under Federal Rules of Civil Procedure 59 and 60.

II. Analysis

First, Mr. Oirya asks the court to alter its judgment pursuant to Rule 60(b). Rule 60(b) allows a party to seek relief from judgment for enumerated reasons, including, fraud, newly discovered evidence, and other reasons that undermine the validity of the judgment. Rule 60(b) relief "is extraordinary and may only be granted in exceptional circumstances." *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005). Second, Mr. Oirya also cites Rule 59(e), which allows a party to request the court alter or amend its judgment. "A Rule 59(e) motion to alter or amend the judgment should be granted only 'to correct manifest errors of law or to present newly discovered evidence.'" *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). On the other hand, Rule 59 "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Nelson* at 929. When considering Mr. Oirya's arguments, the court is mindful of the Tenth Circuit's admonition that "[a] pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*,

935 F.2d 1106, 1110 (10th Cir. 1991).⁵ In construing Mr. Oiry'a's filings, the court must overlook "plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements" but the court must simultaneously refrain from acting as Mr. Oiry'a's advocate. *Id.*

a. Mr. Oiry'a Offers No Adequate Basis to Relieve Him from Judgment

Mr. Oiry'a provides no proper basis for the court to alter its judgment under Rule 59(e) or 60(b). In short, the court decided the case based on the issues raised and briefed by the parties— while Mr. Oiry'a was represented by counsel—granting summary judgment in favor of BYU on all of Mr. Oiry'a's then-pending claims. As discussed in detail below, Mr. Oiry'a does not persuade the court to alter its judgment or otherwise provide him relief.

1. The Issues Raised and Decided at the Summary-Judgment Stage Disposed of All of Mr. Oiry'a's Claims

Mr. Oiry'a first raises a procedural objection, suggesting there are over three hundred outstanding legal issues that must be resolved. He seems to believe the Rules of Civil Procedure required BYU to address each and every numbered paragraph in his

⁵ While *Hall* indicates leniency is afforded to "pleadings" subsequent Tenth Circuit cases suggest this leniency is properly afforded motions as well. *See, e.g., Dalton v. State Farm Fire & Cas. Co.*, 66 F. App'x 824, 825 (10th Cir. 2003) (considering whether district court properly applied more lenient standards to two motions).

complaint to obtain summary judgment. This belief is contrary to the express language of Federal Rule of Civil Procedure 56(a), which states: "A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." As indicated, summary judgment is addressed on a claim-by-claim basis. Rule 56 does not require a movant to challenge each numbered paragraph in a complaint on an individualized basis. Instead, the Rule allows for argument on each legal claim, which is comprised of the various factual allegations in a complaint. BYU sought summary judgment on all of Mr. Oirya's legal claims that were pending at the time BYU filed its motion. After briefing from BYU and Mr. Oirya (while still represented by counsel), the court granted summary judgment in favor of BYU on all of Mr. Oirya's claims.

Also, Mr. Oirya suggests BYU did not seek summary judgment on his eighth cause of action, which alleged violations of immigration law stemming from BYU's management of his records in the Student and Exchange Visitor Information System ("SEVIS"). The court agrees that this was not raised at summary judgment. Unfortunately for Mr. Oirya, this circumstance does not avail him because the court previously dismissed this count—with prejudice—based on an earlier motion BYU filed.⁶ Accordingly, BYU had no need to address Mr. Oirya's immigration claim at the summary-judgment stage because that claim had already been dismissed. Thus, nothing remained for

⁶ See ECF No. 93.

trial following summary judgment because all claims had been terminated.

2. Mr. Oiryia Identifies No New Evidence and No Fraud or Misconduct Perpetrated by BYU

Mr. Oiryia brings Rule 60 challenges under subsections 60(b)(2) and 60(b)(3), which he addresses together. The court will address them in the same manner. To obtain relief under Rule 60(b)(2), Mr. Oiryia must show (1) newly discovered evidence exists; (2) he was diligent in discovering the new evidence; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) that further proceedings (*i.e.* a new trial) with the newly discovered evidence would probably produce a different result. *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1290 (10th Cir. 2005).⁷ Next, to prevail under Rule 60(b)(3), Mr. Oiryia must provide “clear and convincing proof” of fraud, misrepresentation, or misconduct that substantially interfered with his ability to prepare for trial. *Zurich* at 1290.

Mr. Oiryia first claims that, until oral argument on December 4, 2019, BYU did not identify the individuals interviewed during its investigation.⁸ Mr.

⁷ Similarly, Rule 59(e) allows the court to modify its judgment where a party presents newly discovered evidence. *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). While Mr. Oiryia does not separately address Rule 59(e), the court considers it nonetheless given Mr. Oiryia’s pro se status.

⁸ ECF No. 210 at 9-10 (citing Dec 4, 2019, Mot. Hr’g 73:3-18, 81:6-14).

Oirya's suggestion is mistaken as revealed by the portion of the hearing transcript he cites. A review of the December 4 Hearing transcript reveals BYU cited to the record while discussing the identities of the witnesses it interviewed. The portion of the record BYU cited contains its discovery responses identifying the witnesses at issue and providing further citations to the notes of interview for each witness, which BYU previously provided to Mr. Oirya in response to his discovery requests.⁹ Thus, Mr. Oirya identifies no new evidence, and no attempt on BYU's part to misrepresent these witnesses' identities.

Mr. Oirya next argues BYU "unlawfully withheld" three witness statements that exonerate him of any wrongdoing related to the sexual harassment complaint against him.

Again, this argument raises no new evidence because BYU identified these witnesses in its response to Mr. Oirya's interrogatory number four. BYU attached its response to interrogatory number four to its motion for summary judgment.¹⁰ Moreover, all three witness statements submitted by Mr. Oirya bear a Bates stamp indicating they were part of BYU's discovery production. Accordingly, this is not new evidence because it was produced to Mr. Oirya during discovery. Mr. Oirya may believe BYU had an affirmative duty to raise these matters in its summary-judgment briefing. Any such belief is mistaken. It was incumbent on Mr. Oirya, via his counsel, to alert the court to evidence purportedly creating a genuine

⁹ ECF No. 190, Ex. 18 at 12-15.

¹⁰ See ECF No. 190, Ex. 18 at 15.

dispute of material fact at the summary judgment stage. *See* Fed. R. Civ. P. 56(c)(1). Thus, responsibility for any omission of these statements from the summary-judgment proceedings lies with Mr. Oirya. It does not constitute fraud on the part of BYU. Accordingly, this issue provides no basis for the court to grant Mr. Oirya relief from judgment.

Third, Mr. Oirya argues BYU recanted evidence it presented during summary judgment because BYU's motion indicated it interviewed eleven fact witnesses during its investigation, while the draft order BYU prepared, and the court's Order, indicated BYU interviewed "at least five fact witnesses."¹¹ This argument raises no new evidence because the parties each addressed this issue during summary judgment. Further, BYU did not commit fraud but rather changed the language in the proposed order to "at least five witnesses" because Mr. Oirya's Opposition conceded BYU had interviewed at least that many witnesses during its investigation.¹² Also, the court notes that the language "at least five witnesses" is entirely consistent with a scenario in which BYU interviewed eleven witnesses. BYU's amended language more carefully reflects the parties' agreed view of the facts. Accordingly, the court does not find these circumstances constitute fraud on BYU's part.

Finally, Mr. Oirya suggests the court improperly took judicial notice of facts found by the U.S. District Court for the District of Alabama. This argument fails for two reasons. First, while BYU filed a notice

¹¹ ECF No. 200 at 9.

¹² *See* ECF No. 194 at 6-7.

of supplemental authority shortly after the District of Alabama issued its order,¹³ Mr. Oirya never opposed BYU's request for this court to afford preclusive effect to the District of Alabama's decision. In fact, Mr. Oirya did not file any response to the notice of supplemental authority. Likewise, he did not address the matter in his Opposition to BYU's Motion for Summary Judgment, which he filed over three weeks after BYU filed its notice. Mr. Oirya may not ignore an issue on summary judgment and then hope to raise it subsequently in a motion for relief from judgment. Second, even assuming this court acted improperly by affording preclusive effect to the Alabama order, that order provides only one of four alternative bases justifying dismissal of Mr. Oirya's defamation claim. The court also granted BYU summary judgment on this issue because the undisputed facts did not reveal any untrue statement from BYU; BYU's statements were privileged; and the claims were barred by the applicable statute of limitations. Thus, even setting the District of Alabama's proceedings aside, three sufficient bases remain justifying dismissal of Mr. Oirya's defamation claim.

III. Conclusion

Based on the foregoing, the court finds no reason to set aside or modify its judgment.¹⁴ At the summary-

¹³ ECF No. 191.

¹⁴ Mr. Oirya cites the catchall provision found at Rule 60(b)(6), but he makes no discernable argument for relief from judgment under this provision. "Parties moving for relief under Rule 60(b) cannot simply throw in subsection (6) without any new arguments and expect to obtain a new trial." *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1293 (10th Cir. 2005).

judgment stage, Mr. Oirya did not offer evidence to dispute any material facts. Instead, Mr. Oirya offered explanations for his misconduct that did not impact the legal analysis. For example, he claimed he was not sufficiently warned that copying material from Wikipedia constitutes plagiarism. While this assertion may make Mr. Oirya feel less blameworthy, it does not diminish BYU's justification for his dismissal. Critically, Mr. Oirya did not deny that he copied from Wikipedia. Similarly, Mr. Oirya attempts to blame his uncle, Fred Odhiambo, for Mr. Oirya's untrue claim that he received financial aid from the Kenyan government. While Mr. Oirya may have grounds to be upset with his uncle, any miscommunication between them did not relieve Mr. Oirya of his responsibility to prove he had adequate financial support. Nor does it relieve him of fault for making inaccurate representations to BYU regarding that support. Similarly his uncle is without authority to absolve Mr. Oirya of his legal obligations or the consequences of his statements to BYU.¹⁵ Finally, Mr. Oirya was unable to dispute BYU's evidence showing it conducted an adequate investigation of the sexual harassment allegations against Mr. Oirya and that BYU's conclusions were supported by substantial evidence. It is undisputed that BYU interviewed multiple witnesses, including Mr. Oirya. Further, BYU allowed Mr. Oirya multiple opportunities to address the allegations against him in writing and to meet with BYU's administrators to discuss the charges.

¹⁵ Further, despite BYU's efforts to reach Mr. Odhiambo, he was never deposed. Accordingly, even assuming Mr. Odhiambo could somehow provide a legal excuse for Mr. Oirya's misstatement, the record contains no testimony from Mr. Odhiambo.

Mr. Oirya understandably prefers the investigation had not resulted in his dismissal. While the court understands Mr. Oirya's preference, he offers no sufficient legal basis upon which the court could grant him relief from judgment. Mr. Oirya is not entitled to the relief he seeks here because he offers no new evidence and no description of any fraud or similar wrongdoing on BYU's part. Accordingly, the court's January 9, 2020 Judgment will stand.

IV. Order

Based on the foregoing, Mr. Oirya's Motion to Alter Judgment is hereby DENIED. (ECF No. 213).

Dated this 7th day of April 2020.

BY THE COURT

/s/ Bruce S. Jenkins
United States Senior District Judge

**TRANSCRIPT OF PROCEEDINGS–
JUDGE'S ORDER–RELEVANT EXTRACTS
(DECEMBER 4, 2019)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JOHN OIRYA,

Plaintiff,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant.

Case No. 2:16-CV-01121-BSJ

Before: Bruce S. JENKINS, District Judge.

[December 4, 2019 Transcript, p.3]

Assuming, but not deciding the existence of a so-called contract, there really the question is, was the process provided, the process provided fair under the circumstances? And, in the opinion of the Court, it was and is, so, at this point, I'm going to grant the motion for summary judgment.

[. . .]

**ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT
DENYING PETITION FOR REHEARING
(JUNE 8, 2021)**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN OIRYA,

Plaintiff-Appellant,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant-Appellee.

No. 20-4052
(D.C. No. 2:16-CV-01121-BSJ)
(D. Utah)

Before: TYMKOVICH, Chief Judge, HOLMES, and
BACHARACH, Circuit Judges.

Appellant's motions to disqualify and to add attachments are denied. Appellant's petition for rehearing is also denied. Finally, Appellant's petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is denied.

App.51a

Entered for the Court

/s/ Christopher M. Wolpert
Clerk

**AMENDED COMPLAINT-
RELEVANT EXCERPTS
(FEBRUARY 7, 2017)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION

JOHN OIRYA,

Plaintiff,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant.

Case No. 2:16-CV-01121-BSJ

Before: Bruce S. JENKINS, District Judge.

[. . .]

Background

6. From January 2002 until on or about March 2013, Mr. Oirya was both a student and an employee at BYU, where he pursued multiple degrees and worked at various of its facilities.

7. As of January 2013, Mr. Oirya was employed by BYU in two Graduate Research Assistantship educational opportunities in the Instructional Psych-

ology Department and the Communication Department.

8. As of October 2012, Mr. Oirya was enrolled in a two-year Master's Program in Mass Communication at BYU.

9. In January 2013, Mr. Oirya obtained a curricular practical training opportunity and an employment opportunity at Utah Valley University through BYU.

10. During 2002 until 2013, BYU and Utah Valley University were receiving Federal financial assistance.

11. As both student and an employee at BYU, Mr. Oirya entered into a contractual relationship with BYU as described herein.

12. The official BYU policies are required to provide students and employees accused of disciplinary violations with certain procedural protections before suspension, termination, or expulsion.

13. Among other things, BYU operates and maintains the BYU Honor Code Office ("HCO"), which investigates and disciplines students for violations of university policy; BYU Human Resources Office ("HRO"), which interprets, investigates violations of, and disciplines employees for violations of laws and policies in workplaces at BYU; and the BYU Office of the General Counsel ("OGC"), which provides legal advice to officials and administrators at BYU regarding compliance with laws and Official BYU Policies.

General Allegations

14. During his time at BYU, Mr. Oirya was accused of committing violations of BYU's policy(ies), which were evidenced by mostly false, inaccurate, and misleading information.

15. Without his knowledge and awareness, BYU prepared and submitted allegation reports, which alleged law and policy violations against him.

16. Indeed, from 2004 through 2013, BYU received from females at BYU mostly false, inaccurate and misleading allegations against him, including those which would be covered under Title IX.

17. When Mr. Oirya became aware of the allegations, he requested that he be granted the opportunity, pursuant to BYU's policies, to respond to the allegations. This included, or should have included, being given notice and an opportunity to review the evidence and allegations asserted against him, as well as the chance to respond by presenting material evidence and witnesses to defend himself against those allegations.

18. BYU generally denied him these due process rights.

19. BYU adopted, published, and maintained certain grievance procedures, as mandated by federal law and regulation.

20. Purporting to act pursuant to these policies, BYU began an investigation into complaints lodged against Mr. Oirya.

21. However, BYU's investigation was one-sided and unfair, placing special emphasis on the allegations,

witnesses, and supposed evidence supplied by his female accusers, and discounting his story, witnesses, and evidence on the basis of his sex or gender

22. As a matter of fact, BYU denied him the equitable application of these grievance procedures. Whenever he explained to BYU that the alleged female complainants were presenting false, inaccurate, and misleading allegations against him and requested that BYU equally apply its grievance procedures to him, BYU was deliberately indifferent toward his complaints and denied him the due process he is entitled to receive during such investigations.

23. Even though Mr. Oirya had requested access to the evidence and witnesses against him, the students who allegedly complained and witnessed the allegations continuously graduated or left BYU.

24. In this regard, BYU hid or failed to inform Mr. Oirya of complaints against him for months or years, which effectively denied Mr. Oirya the availability of these witnesses and their testimony.

25. BYU failed to follow its own procedures and policies, and these deficiencies were significant to the point that these failures changed the outcome of the investigation.

Alleged Honor Code Violations

26. BYU's Student Conduct Policy (the "Honor Code") or the Honor Code Investigation and Administrative Review Process (the "Honor Code Review Process") guarantees that "the student receives from the university, prior to the actual implementation of any disciplinary action, (i) notice of the nature of the

alleged suspected Honor Code violation(s), and (ii) an opportunity to respond.”

27. Additionally, the Honor Code provides for “witnesses or other persons having information about the student and or/the allegations” to be interviewed during the investigatory process.

28. BYU’s Administrative and Staff Employee Grievance Policy (the “Employee Grievance Policy”) provides that “Employees who are terminated shall have an opportunity for an administrative review by the Human Resource Committee.”

29. On January 25, 2013, Neal L. Cox (“Mr. Cox”), Associate Dean of Students, provided Mr. Oirya with an Allegation Information and Invitation to Respond.

30. On January 28, 2013, Mr. Cox provided Mr. Oirya with a Request to Review Honor Code Office Educational Records, which provided notice to Mr. Oirya of four alleged violations.

31. The four allegations were malicious, false, inaccurate, and misleading in their material contents, facts, and presentations.

32. These four allegations were deficiently and unfairly investigated, and as a result, Mr. Oirya did not receive the process required by BYU’s Policies, as alleged herein and will be revealed through discovery.

33. For example, a Mr. Fred Odhiambo (“Mr. Odhiambo”) had information on the allegation of admission fraud contained in an Allegation Information and Invitation to Respond, and offered to respond to BYU on behalf of Mr. Oirya. However, BYU’s inves-

tigators ignored him and his material submissions to BYU.

34. In January 2013, Mr. Oirya sent an email to Mr. Cox requesting his entire record in order to ensure that he received notice and an opportunity to respond to all of the allegations of misconduct against him.

35. Mr. Cox responded, acknowledging Mr. Oirya's request for his records but denying him his records, stating that his focus is only on the four allegations that were presented and asking Mr. Oirya to "[p]lease consider responding to the four allegations we have presented."

36. On March 1, 2013, Mr. Cox suspended Mr. Oirya after making a determination on the allegations, and informed him of the right to appeal the suspension action by requesting an administrative review through the Office of the Dean of Students.

37. One week later, Mr. Oirya requested that Mr. Cox provide him with sufficient notice of the grounds for his suspension so he could prepare his appeal.

38. On March 9, 2013, Mr. Oirya filled out an Honor Code Administration Review application and sent it to Mr. Cox.

39. Mr. Cox never sufficiently responded to Mr. Oirya's application or other requests for information, and Mr. Oirya became concerned that he was never going to enjoy his right to an appeal.

40. On March 12, 2013, Mr. Oirya wrote to Stephen M. Craig, University counsel, requesting that the Office of General Counsel review Mr. Cox's suspension determination, and that the Office help coordinate Mr. Oirya's appeals.

41. Mr. Craig denied Mr. Oirya's request for assistance.

42. As a result, he was never able to obtain the requested notices that formed the basis for his suspension from BYU, was never able to prepare his appeal, which ultimately denied him a fair hearing.

43. Additionally, when he was expelled from BYU, one of the reasons was for his "history of misconduct" dating back to 2004.

44. However, Mr. Oirya was unable to address this alleged "history" because BYU failed to provide him with the requested documents, witnesses, and evidence against him, therefore denying him notice and the opportunity to respond.

The Supposed Allegations Against Mr. Oirya

Allegation One

45. During Spring 2011, Mr. Oirya enrolled in Linguistics 330 ("Ling 330") at BYU, which was taught by Professor Deryle W. Lonsdale ("Professor Lonsdale").

46. Professor Lonsdale alleged that he had "issues" with Mr. Oirya regarding plagiarism, which were resolved during the term. Professor Lonsdale indicated that Mr. Oirya told him he was unfamiliar with the relevant policies. Professor Lonsdale offered to provide "more information," if necessary, regarding this issue.

47. Mr. Oirya never intentionally violated any BYU policies or procedures concerning plagiarism.

48. Professor Lonsdale apparently sent information concerning his “issues” with Mr. Oirya to Mr. Cox or another administrator in November 2011.

49. Mr. Cox provided Mr. Oirya with the above description on January 21, 2013. When he did, Mr. Oirya sent an email to Mr. Cox requesting material documentation on the allegation of plagiarism so that he could respond to the allegation thoroughly.

50. On February 1, 2013, Mr. Cox denied Mr. Oirya his request for more information stating that he did not ask the professor for more information. As a result, Mr. Oirya was unable to adequately and completely rebut all of Professor Lonsdale’s specific claims and obtain a fair hearing.

51. Professor Lonsdale claimed that he addressed the subject of plagiarism on the first day of class, in front of approximately 30 student witnesses. As such, Mr. Oirya asked Mr. Cox to interview these witnesses to verify Professor Lonsdale’s claims.

52. However, Mr. Cox denied Mr. Oirya’s request and never interviewed these witnesses.

53. An allegation of plagiarism is something of a “scarlet letter” in the academic community. Simply alleging it against someone can be incredibly damaging to that person’s reputation and career.

54. Rather than conduct the investigation as it should have, BYU prejudged the allegation of plagiarism against Mr. Oirya, assuming it to be true even before Mr. Oirya had an opportunity to respond.

55. As a result of the deficient investigation, prejudgment, and insufficient information provided to Mr. Oirya, he could not adequately respond to the

allegation of plagiarism because he was never made aware of the basis for it.

56. As it was, Mr. Oirya responded to the one specific piece of information he received, which was the short description of the incident that Professor Lonsdale provided to Mr. Cox or another administrator back in November 2011. Mr. Oirya responded that Professor Lonsdale did not sufficiently discuss the policies concerning plagiarism, but that after the problems were identified, he worked with Professor Lonsdale to resolve the issues.

Allegation Two

57. During January 2012, Mr. Oirya drafted a project thesis proposal, in collaboration with staff at Granite Park Junior High School (“GPJHS”), in Salt Lake City, Utah. Dan P. Dewey (“Professor Dewey”) offered to be one of Mr. Oirya’s advisors on the proposal.

58. Despite Professor Dewey’s trusted position as an advisor to Mr. Oirya, Professor Dewey apparently told BYU that Mr. Oirya should be denied admissions to the Teaching English to Speakers of Other Languages (“TESOL”) Masters of Arts program at BYU on the basis of plagiarism and other untrue allegations.

59. Mr. Oirya had requested feedback from Professor Dewey. This feedback would have addressed the subject of plagiarism and other allegations that Professor Dewey later asserted against him.

60. However, Professor Dewey never responded to his request for feedback, and effectively denied

him feedback or the opportunity to address whatever his concerns about plagiarism may have been.

61. In fact, Mr. Oirya was denied admission to the TESOL program.

62. Upon receiving the denial letter, Mr. Oirya met with Professor Wendy Baker-Smemoe (“Ms. Baker-Smemoe”), the author of the denial letter.

63. Mr. Oirya requested that BYU provide him the reasons for his denial and the opportunity to respond in a hearing.

64. However, Ms. Baker-Smemoe told Mr. Oirya that the application deadline had already passed, effectively making the denial decision final.

65. In February 2013, Mr. Oirya asked Mr. Cox for the opportunity to respond to these, and other, plagiarism allegations.

66. Specifically, he requested that Mr. Cox investigate Professor Dewey’s failure to provide him the feedback he was required to provide as his advisor, which would have addressed and prevented the claims of plagiarism and any other claims asserted by Professor Dewey.

67. Mr. Cox denied the request to investigate Professor Dewey, explaining that the BYU Honor Code Office and the Office of the Dean of Students had no jurisdiction over investigating cases of misconduct by professors at BYU.

68. On March 15, 2013, Mr. Oirya contacted the BYU Office of the General Counsel (“OGC”) regarding the ongoing biased investigations being pursued

against him by the Office of the Dean of Student, Mr. Cox and Vernon L. Heperi, the Dean of Students.

69. Administrative staff at OGC referred Mr. Oirya to John Rosenberg ("Dean Rosenberg"), Dean of the College of Humanities at BYU who had administrative authority to investigate Professor Dewey's misconduct and grant him his required impartial hearing.

70. On March 15, 2013, Mr. Oirya contacted Dean Rosenberg, who responded by instructing him that "You can make an appointment . . . through Karmen Smith. . . . I will look forward to meeting with you."

71. Dean Rosenberg instructed Mr. Oirya to make an appointment to meet with him after Thursday, March 21, 2013.

72. On March 16, 2013, and on March 19, 2013, Mr. Heperi acknowledged Mr. Oirya's emails regarding the due process procedures that had been granted by Dean Rosenberg.

73. However, BYU, through Mr. Heperi, expelled Mr. Oirya from BYU on March 20, 2013, before the procedures he was entitled to receive through Dean Rosenberg even began, let alone were brought to a conclusion.

Allegation Three

74. In January 2013, Mr. Oirya's female classmate in the Department of Mass Communication at BYU (herein referred to as "Jane Doe") alleged that:

On Tuesday, December 4, 2012, I was sitting in Dr. Callister's [class] . . . next to . . . [Mr. Oirya] . . . Dr. Callister directed the class's

attention back to the screen to explain what he wanted us to do. I looked to my left and [he] had placed a piece of paper on top of his lap and held it with his left hand, had unbuttoned and unzipped his jeans and put his right hand inside or his jeans to aggressively scratch his crotch.

75. Jane Doe's complaint identified nearly seventeen class members and the professor, a Dr. Callister, as witnesses.

76. Thereafter, Melba Latu ("Ms. Latu") interviewed Jane Doe's witnesses who, by and large, testified that they did not have any evidence that Mr. Oirya had sexually harassed Jane Doe.

77. On February 14, 2013, Mr. Oirya submitted a written response to Mr. Cox denying and challenging the credibility of Jane Doe's allegation.

78. In fact, Mr. Oirya did not commit the acts of which he was accused.

79. On March 4, 2013, Mr. Cox issued a letter to Mr. Oirya, dated March 1, 2013, suspending him from BYU over Jane Doe's sexual harassment allegation.

80. Mr. Oirya requested that Mr. Cox provide him with the evidence that he relied upon to implicate him. Mr. Cox conceded that he found no evidence or witnesses that supported Jane Doe's specific allegation, but that he relied on other alleged violations against him at BYU to arbitrarily determine that he was "far more likely than not" to be responsible for Jane Doe's allegation. However, BYU was yet to grant, and never granted, Mr. Oirya notices and hearings over

these alleged violations spanning more than nine years, that Mr. Cox relied upon to suspend him from BYU.

81. Before Mr. Cox ever granted Mr. Oirya notice and an opportunity to respond to Jane Doe's allegation, which occurred no earlier than January 25, 2013, Mr. Cox had already, by no later than January 24, 2013, prepared a "Suspension Draft" letter intending to suspend Mr. Oirya from BYU for an alleged "extensive pattern of inappropriate behavior towards female BYU students."

82. Additionally, Mr. Cox had already prepared a "Dismissal Draft" letter intending to expel Mr. Oirya from BYU for an alleged "extensive pattern of inappropriate behavior against female BYU students spanning more than nine years."

83. The alleged "inappropriate behavior" in both drafts included Jane Doe's allegation.

84. Thus, the investigations conducted or decisions made by BYU were influenced by prejudice or bias against Mr. Oirya, in violation of his rights as guaranteed by BYU's Policies and Title IX.

85. Under information and belief, BYU, and Mr. Cox specifically, believed Jane Doe because she is a woman and disbelieved and denied Mr. Oirya his due process rights to a fair and proper investigation and hearing because he is a man.

86. Upon information and belief, a similarly situated woman would have received her full procedural rights under BYU's policies, and evidence of the same will be revealed through discovery.

87. Indeed, BYU's preference without factual basis or support of the story told by Mr. Oirya's female accuser(s) demonstrates an illegal bias against him as a man and in favor of his female accuser(s).

88. In her complaint, Jane Doe issued an ultimatum which denied Mr. Oirya the opportunity for an equitable and impartial resolution, demanding that:

If the action taken by the University allows [Mr. Oirya] to stay in the Mass Communications Program, even with restrictions, . . . I may have to go to measures as extreme as dropping out of the program and leaving BYU.

89. However, when Mr. Cox's investigations found no evidence or witnesses to support Jane Doe's allegation, Mr. Cox yielded to Jane Doe's demands by unfairly taking disciplinary actions against Mr. Oirya rather than drop the charges.

Allegation Four

90. On March 11, 2011, BYU terminated Mr. Oirya from his employment with the university at least partly on the basis of Jane Doe's false and fraudulent allegation of sexual harassment.

91. Feeling discouraged, Mr. Oirya met with some of his classmates to ask for advice about how to be reinstated at his now terminated employment.

92. After this meeting, Jane Doe alleged that the purpose of the meeting was to retaliate against her for filing the complaint of sexual harassment.

93. On January 16, 2013, and January 17, 2013, Ms. Latu interviewed and obtained Witness Statement Reports from the participants in Mr. Oirya's meeting.

94. These witnesses refuted Jane Doe's claim of retaliation and testified that Mr. Oirya was simply trying to get some advice about how to be reinstated at his terminated employment.

95. On February 14, 2013, Mr. Oirya submitted a written response to Mr. Cox refuting Jane Doe's allegation of retaliation, and demonstrating his earnest efforts to seek reinstatement at his prior place of employment.

96. On March 1, 2013, Mr. Cox determined that Jane Doe's allegation of retaliation was unfounded, and absolved Mr. Oirya of any wrongdoing by excluding this allegation from his letter suspending him from the University.

97. On March 4, 2013, Mr. Cox handed the suspension letter to Mr. Oirya. At the same time, Mr. Cox verbally informed him that Mr. Cox believed the allegation of retaliation to be unfounded.

98. However, on March 20, 2013, Mr. Heperi ignored and disregarded Ms. Latu's Witness Statement Reports, Mr. Oirya's response, and Mr. Cox's exoneration letter and expelled him from BYU.

Allegation Five

99. Aside four allegations mentioned above, but BYU also alleged that Mr. Oirya had committed fraud in the process of seeking admission to the university.

100. Mr. Oirya was a national of Kenya and maintained a nonimmigrant (F-1) status in the United States.

101. During February 2012, Mr. Odhiambo, Mr. Oirya's relative and guardian, applied for a financial educational bursary for Mr. Oirya. Mr. Odhiambo made the bursary application to the Kenyan Ministry of Higher Education, Science & Technology (hereafter the "Kenya Government"), a department of the executive branch for the national government of Kenya.

102. On April 2, 2012, the Kenya Government issued Mr. Odhiambo a bursary offer letter and a Contract of Support, fulfilling Mr. Oirya's "documentary evidence of financial support" which Mr. Odhiambo directly mailed to BYU on his behalf.

103. Due to unexpected delays by the Kenya Government in releasing Mr. Oirya's bursary finances, Mr. Oirya began to experience severe economic hardship while studying in the United States.

104. Mr. Odhiambo resorted to using his meager personal resources to support Mr. Oirya at BYU, pending the release of Mr. Oirya's bursary finances.

105. As Mr. Oirya's severe economic hardship persisted, he sought the advice of the BYU Financial Services Office ("BYU FSO"), which gave him the option to utilize BYU's short-term student loans towards his tuition costs, and repay them later.

106. BYU FSO referred Mr. Oirya to the International Student Services Office ("ISSO") at BYU for other financial options available to students on an F-1 visa.

107. ISSO offered Mr. Oirya on-campus, authorized off-campus, and curricular practical training employment options.

108. On September 11, 2012, Sam Brown (“Mr. Brown”), Director of ISSO, and David Settle (“Mr. Settle”), International Student Advisor for BYU at ISSO, sent a copy of Mr. Oirya’s bursary offer letter to the Embassy of Kenya in Washington, D.C. (the “Kenyan Embassy”) requesting that the Kenyan Embassy “verify that [the letter] was legitimate.”

109. On or about October 3, 2012, Mr. Oirya contacted the Kenyan Embassy at the request of Mr. Brown and Mr. Settle. The staff at the Kenyan Embassy notified Mr. Oirya that they were conducting investigations into his bursary offer and that the Embassy had asked Mr. Brown and Mr. Settle to provide them with the original copy of Mr. Oirya’s bursary offer letter and the Contract of Support.

110. However, Mr. Brown and Mr. Settle failed to provide the Kenyan Embassy with these two documents, did not make any follow-up contacts with the Kenyan Embassy, and failed to fully cooperate in the Kenyan Embassy’s investigations.

111. On November 4, 2012, Mr. Odhiambo sent an email to Mr. Brown, requesting BYU’s parties to directly engage Mr. Odhiambo in relation to Mr. Oirya’s bursary, stating:

please contact me only directly for any information on [Mr. Oirya’s] finance situation. Do not request this information through him. As you may understand, he is too far away in America, and does not have direct access to the information that you are seeking. . . .

112. On November 8, 2012, Mr. Odhiambo sent an email to Mr. Brown notifying him about the delay in the release of Mr. Oirya's bursary finances and explained to Mr. Brown that he was using alternative means of sending money to support Mr. Oirya at BYU pending the release of Mr. Oirya's bursary finances.

113. On or about November 12, 2012, Mr. Brown notified Mr. Odhiambo that the staff from the Dean of Students Office would contact Mr. Odhiambo regarding investigations into Mr. Oirya's bursary offer by the Kenya Government.

114. In the meantime, Mr. Odhiambo provided other options for temporarily resolving Mr. Oirya's severe economic hardship, including having an American sponsor temporarily assist Mr. Oirya and be reimbursed when Mr. Oirya's bursary finances were released.

115. Warner P. Woodworth ("Professor Woodworth"), Mr. Oirya's friend and professor at BYU, offered to temporarily support Mr. Oirya financially pending the release of Mr. Oirya's bursary finances.

116. Professor Woodworth's support was provided for in the Certificate of Eligibility for Nonimmigrant (F-1) Student Status ("Form I-20").

117. On November 15, 2012, Mr. Cox acknowledged Mr. Oirya's ongoing severe economic hardship.

118. On January 10, 2013, Ms. Latu and Mr. Cox provided Mr. Oirya with an Allegation Information and Invitation to Respond document, which alleged six points of admission fraud.

119. Mr. Oirya forwarded these allegations to Mr. Odhiambo in order for Mr. Odhiambo to respond directly to Ms. Latu and other parties at BYU.

120. With no investigations underway, the reasons for the delay in the release of Mr. Oirya's bursary finances by the Kenyan Government remained merely speculative. However, the Kenyan Embassy and Mr. Odhiambo offered to conduct thorough and conclusive investigations through the Kenyan Government and provide the information and evidence to BYU.

121. On January 23, 2013, and on January 27, 2013, Mr. Odhiambo sent two emails to Ms. Latu updating her on the status of Mr. Oirya's bursary finances. Ms. Latu acknowledged receiving these emails, but ignored them and never responded to Mr. Odhiambo.

122. On February 1, 2013, Mr. Cox prematurely and arbitrarily concluded that Mr. Oirya's bursary offer letter was fraudulent and on March 1, 2013, Mr. Oirya was suspended from BYU for "submitting false documents," without BYU having properly attempted to receive confirmation of the bursary from the Kenyan Embassy and Mr. Odhiambo.

123. Additionally, Mr. Cox's determination in this regard contained information that was taken out of context, making the factual basis for his conclusions inaccurate.

124. On March 5, 2013, Mr. Odhiambo sent Mr. Cox a letter from the Kenyan Government's Law Courts dated February 28, 2013, along with an email stating that Mr. Oirya's bursary "money indeed exists" and that Mr. Oirya's "documentary evidence of financial support" was "not false."

125. However, Mr. Cox disregarded this evidence and other updates from Mr. Odhiambo.

126. Additionally, on March 19, 2013, Mr. Odhiambo sent Mr. Heperi the same letter from the Kenya Government's Law Courts dated February 28, 2013, along with an email stating that Mr. Oirya's bursary "grant money was genuine, rather than false."

127. Once again, Mr. Heperi acknowledged receiving this email but ignored and never responded to Mr. Odhiambo.

128. On March 20, 2013, Mr. Heperi permanently expelled Mr. Oirya from BYU for the admission fraud allegations in relation to his bursary offer without ever waiting on the findings from the investigations by the Kenyan Embassy and Mr. Odhiambo.

129. In fact, Mr. Oirya never committed the alleged fraud when applying to the university.

130. This action by BYU rendered Mr. Oirya ineligible to receive his bursary offer through BYU.

131. Mr. Cox and Mr. Heperi wrongfully believed that Mr. Oirya submitted documentary evidence of financial support that "were not in fact from a legitimate governmental organization" and their investigation and decision were in part influenced by James Crane ("Mr. Crane"), who prejudicially testified in his submissions to BYU that Mr. Oirya's bursary offer "letter in actuality could be a forgery since numerous forgeries come out of Africa."

132. However, the Kenyan Government has confirmed that the "Ministry of Higher Education, Science & Technology", which offered Mr. Oirya the

bursary, was indeed a legitimate organization and offered overseas bursaries to Kenyan national students.

Alleged Title IX Violations

133. Apparently throughout the course of Mr. Oirya's employment and enrollment at BYU, BYU received and compiled numerous inaccurate and misleading allegations of alleged "Title IX Violations" against him.

134. BYU's Unlawful Gender Discrimination, Unlawful Sexual Harassment and Inappropriate Gender-Based Behavior Policy (hereafter "BYU Gender Policy") provides that "[a]n adequate, reliable and impartial investigation will be undertaken in a prompt and equitable manner. . . . The university will, in good faith, attempt to conclude the investigation within sixty (60) days of receiving the complaint."

135. Additionally, BYU's Gender Policy provides "[i]f . . . the investigation cannot be concluded within sixty (60) day period, the accused and the aggrieved will be provided with notice of a specific time frame for concluding the investigation and . . . periodic reports regarding the status of the investigation . . . [as well as] notice of the outcome of the investigation."

136. However, did not comply with BYU's Gender Policy by failing, among other things, to provide Mr. Oirya with notice and periodic reports of the status of the investigations for the specific Title IX allegations.

137. Instead, BYU essentially sandbagged Mr. Oirya with a host of inaccurate and false allegations, and denied him the right to conduct contemporaneous investigations or defenses of the same.

138. Indeed, BYU administrators with the authority to institute corrective measures deliberately denied Mr. Oirya the process set forth above. For example, on February 7, 2005, Ms. Schmidt, the Equal Employment Opportunity Manager, “interview[ed] a number of student employees” regarding the allegations against Mr. Oirya but failed to provide Mr. Oirya with any information in order to “maintain confidentiality.”

139. BYU has suffered from a rash of negative stories in the media related to its investigations into sexual assault cases.

140. Out of a fear of being criticized from students, the media, the general public, or otherwise for failing to take sexual harassment claims seriously, BYU placed unwarranted weight and confidence in the allegations of Mr. Oirya’s female accusers because they were women, and discounted his story because he was a man.

141. As such, BYU’s decision-maker(s) and its investigator(s) were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault.

142. Indeed, the university seriously neglected its duties to conduct a full and fair investigation because the accusations were being levied by a woman against a man. BYU failed to follow up on Mr. Oirya’s witnesses or other witnesses who could have refuted his accuser’s story, did not disclose to him the evidence against him, and prejudged the outcome of the

disciplinary process before it ever began in large part because Mr. Oirya is a man.

143. In these ways and others that will be revealed through discovery, Mr. Oirya was deprived his due process and procedural rights to which he is entitled under the law.

144. Between June 25, 2011, and December 29, 2011, Mr. Oirya was employed as a cafeteria worker in BYU's MTC Cafeteria.

145. In November 2011, two alleged Title IX violations were brought against Mr. Oirya. Dean Wright ("Mr. Wright"), Director of BYU Dining Services, and Douglas Walker ("Mr. Walker") restricted Mr. Oirya's employment and requested that Sue DeMartini ("Ms. DeMartini"), Equal Opportunity Manager and Deputy Title IX Coordinator for BYU, conduct an investigation into these two allegations.

146. The first complaint alleged that Mr. Oirya made two sister missionaries feel uncomfortable by challenging them on the appropriateness of their decision to serve on a mission for the LDS Church.

147. Mr. Oirya denied this allegation and provided Ms. DeMartini with three other sister missionaries and two colleagues who were present and witnessed the interaction.

148. Ms. DeMartini confirmed that she did not investigate this allegation and did not interview Mr. Oirya's witnesses but rather relied on the initial complaint only.

149. The second complaint alleged that Mr. Oirya asked a female co-worker if she had breast implants.

150. Mr. Oirya denied this allegation and provided Ms. DeMartini with at least six of his co-workers who were present at the time and place of the alleged incident as his witnesses.

151. Ms. DeMartini interviewed the complainant and all of her witnesses and obtained their investigation reports. However, Ms. DeMartini did not interview Mr. Oirya's witnesses and denied him the opportunity to respond, rebut, explain, or put forth any evidence.

152. As a result of these biased investigations, Mr. Oirya sent an email to Mr. Wright complaining of Ms. DeMartini's conduct. Mr. Wright never instituted any corrective investigations to address the unfairness and incompleteness of Ms. DeMartini's investigation.

153. In January 2012 and January 2013, Ms. DeMartini and Mr. Woodard notified Mr. Oirya about the existence of alleged Title IX violations and employment violations dating back to 2005, even citing several of the violations. However, when Mr. Oirya requested that he be given the due process provided for in BYU's Gender Policy and grievance procedures, Ms. DeMartini and Mr. Woodard denied his request and therefore he was not allowed to respond to, rebut, explain, correct, or put forth his material evidence and witnesses to each specific alleged violation, dating back to at least 2005.

154. On January 11, 2013, Mr. Woodard issued a memorandum to Mr. Oirya permanently dismissing him from "employment of any kind at Brigham Young University" as "a result of the numerous complaints . . . received over the years dating back to 2005."

155. Mr. Oirya protested that BYU was yet to provide him with any notice or opportunity to be heard on any of the allegations, and requested the due process provided for in the BYU Policies.

156. On January 18, 2013, Ms. DeMartini reiterated to Mr. Oirya that he was notified verbally and in writing that he no longer was eligible for employment at BYU. Ms. DeMartini told him that because inappropriate comments and behavior fall within the purview of the BYU Gender Policy, Mr. Oirya had the right to appeal and could request a review before the Assistant Administrative Vice President of Human Resource Services, Mr. Forrest Flake ("Mr. Flake").

157. On March 12, 2013, Ms. DeMartini sent an email to Mr. Oirya inviting him to pick up the allegation record from her office in order to prepare his appeal.

158. That same day, Mr. Oirya went to collect the allegation record only to find that the granted records were grossly deficient and did not comprise nearly all of the allegations dating back to 2005.

159. Ms. DeMartini instructed Mr. Oirya to request any missing allegation records and appeal information through Mr. Flake.

160. On March 15, 2013, Mr. Oirya emailed Mr. Flake and requested a meeting to supplement the deficient records. However, at a meeting on March 19, 2013, Mr. Flake instructed Mr. Oirya to obtain the records from Ms. DeMartini.

161. On March 15, 2013, Mr. Oirya also sent an email to Mr. Heperi reminding him about his requested due process for at least four other separate

cases that BYU was handling through separate departments, including cases by Mr. Flake, Ms. DeMartini, the BYU Police Department, and the College of Humanities.

162. On March 16, 2013, Mr. Heperi acknowledged Mr. Oirya's email and corresponded with Mr. Flake, Ms. DeMartini, Police Chief Larry Stott ("Chief Stott") from the BYU Police Department, Dean Rosenberg from the College of Humanities and Mr. Craig from the Office of General Counsel.

163. On March 19, 2013, Mr. Oirya sent Mr. Heperi a follow-up email reminding him of his request to allow him the opportunity to clear any allegations against him with the other departments on the BYU campus. Mr. Heperi acknowledged Mr. Oirya's email and forwarded the email and his acknowledgment to Mr. Cox.

164. However, on March 20, 2013, just one day later, Mr. Heperi expelled Mr. Oirya from BYU for inappropriate gender-based behavior and a history of misconduct, which included 26 counts of Title IX violations dating back to 2004. Mr. Oirya was thereafter required "to sever all formal connections with [BYU] . . . effective immediately."

165. Mr. Oirya was never given the opportunity to be heard and confront the allegations against him, but rather the expulsion action deliberately terminated and denied Mr. Oirya access to all his grievance procedures available at BYU and to which he was entitled.

Alleged Employment Violations

166. BYU's Administrative and Staff Employee Grievance Policy (the "Employee Grievance Policy")

provides that “Employees who are terminated shall have an opportunity for an administrative review by the Human Resource Committee.”

167. On January 11, 2013, Mr. Woodard also terminated Mr. Oirya’s employment with BYU for allegations of unsatisfactory performance and disregard of supervisor directives, supposedly dating back to 2005.

168. On January 18, 2013, Ms. DeMartini did not allow Mr. Oirya to appeal this decision, stating “As a student employee, you do not have the right to appeal based on . . . unsatisfactory performance and disregard of supervisor directives.”

169. However, Mr. Oirya should have been given an opportunity for an administrative review pursuant to the Employee Grievance Policy.

BYU Police Department Allegations

170. On or about February 2009, police lieutenant Arnold Lemon from the BYU Police Department provided Mr. Oirya with brief paragraph extracts of select allegations against him.

171. On February 11, 2009, Mr. Oirya requested from Chief Stott full notice and an opportunity to be heard for the allegations against him by the police department.

172. However, on February 17, 2009, Mr. Oirya’s request was denied.

173. As mentioned above, On March 16, 2013, and March 19, 2013, Mr. Heperi acknowledged Mr. Oirya’s requests for due process from the police department.

174. Nonetheless, at least some of the violations for which Mr. Oirya was expelled on March 20, 2013, were given to Mr. Heperi by the police department, and Mr. Oirya was never given the opportunity to respond in any meaningful way.

175. On July 23, 2013, Sergeant Mike Mock relied on these false allegations to ban Mr. Oirya from the Harold B. Lee Library.

Attempts to Transfer and Immigration Status

Maintenance of F-1 Status

176. Mr. Oirya maintained a lawful nonimmigrant (F-1) status, an active SEVIS record, and valid “Form I-20” in the United States.

177. During all relevant times, the Atlanta English Institute (AEI), located in the city of Atlanta, Georgia, and BYU, were Student and Exchange Visitor Program (SEVP)-certified schools.

178. BYU placed its ISSO under the administrative control of Mr. Heperi and the Office of the Dean of Students.

179. The staff at ISSO was comprised of Mr. Brown and several senior International Student Advisors, including Mr. Settle, Miles J. Ogden (“Mr. Ogden”), Cristi Mateani (“Ms. Mateani”), and Vanessa Ocana (“Ms. Ocana”).

180. Mr. Brown and these advisors had access to the SEVIS system and its database that is maintained by the U.S. Department of Homeland Security.

181. The ISSO was responsible for transferring the F-1 SEVIS records of F-1 students between BYU and other SEVP-certified schools.

182. On October 2, 2012, Mr. Oirya contacted and applied to a pre-doctoral degree program (GRE/GMAT) at AEI to study as an F-1 student.

183. On March 15, 2013, Mr. Oirya contacted AEI by phone to inquire about his admissions status at AEI. Ms. Salima Abdul Sultan, the Admissions Official at AEI, confirmed to Mr. Oirya that he had been accepted to AEI. She explained to him that AEI would send him his official admissions acceptance letter via email, which would be addressed to BYU.

184. In the meantime, she sent Mr. Oirya an "F-1 Student Transfer-In" form to complete, in order to facilitate the transfer of his SEVIS record from BYU to AEI.

185. Mr. Oirya shared the good news of his acceptance to AEI with Mr. Ogden, who responded by granting him the "Transfer Out Form" for BYU. Mr. Ogden instructed Mr. Oirya to fill out both BYU and AEI's SEVIS transfer forms and return them to him so he could process the transfer out of his SEVIS record from BYU to AEI.

186. On March 15, 2013, Mr. Oirya filled out the AEI form and the BYU form with as much information as he had at the moment.

187. As noted on both of these SEVIS transfer forms, Mr. Oirya filled out the forms on March 15, 2013.

188. Since Mr. Oirya had not yet received his admissions offer letter from AEI as of March 15, 2013,

he filled out both forms with tentative date information. In AEI's "F-1 Student Transfer-In" form he responded to the question "What is the transfer out date in SEVIS?" by filling in "Not yet requested." In BYU's F-1 "Transfer Out Form" he filled in the tentative "SEVIS release date" of "04/26/2013." He handed both partially filled out forms to Mr. Ogden.

189. Mr. Oirya planned to replace the tentative date information with a definitive SEVIS transfer out date upon receiving his official acceptance letter from AEI.

190. On March 18, 2013, AEI notified BYU, in an official acceptance letter emailed to Mr. Oirya, that Mr. Oirya "has been officially accepted to the Atlanta English Institute (AEI)".

191. By this notice, AEI requested BYU to transfer out Mr. Oirya's active SEVIS record to AEI. Indeed, AEI provided to BYU AEI's SEVIS school code "ATL 214F 015540," to facilitate the correct transfer of the SEVIS record to AEI.

192. Mr. Oirya printed out and handed his acceptance letter from AEI to Mr. Ogden, who acknowledged AEI's notification and request for SEVIS transfer by signing the AEI "F-1 Student Transfer-In" form, on March 18, 2013.

193. To ensure compliance with U.S. federal laws and policies that govern the transfer of SEVIS records between SEVP-certified schools, Mr. Ogden calculated the difference between Mr. Oirya's newly requested SEVIS transfer date of "March 18, 2013" and the "October 15, 2013" enrollment date on AEI's acceptance notice letter. Mr. Ogden established that the difference between these dates was more than 5 (five) months.

194. Mr. Ogden then advised Mr. Oiryia that U.S. federal laws and regulations require that the enrollment date at the transfer-in school be within 5 (five) months of the SEVIS record release date at the transfer-out school.

195. Mr. Ogden asked Mr. Oiryia to contact AEI right away and request AEI to offer him an earlier enrollment date that was within five (5) months of March 18, 2013.

196. In the meantime, Mr. Ogden partially processed Mr. Oiryia's SEVIS record transfer to AEI and had ISSO send Mr. Oiryia an email notifying him that "Your transfer letter has been filled out and faxed to the Atlanta English Institute."

197. On March 18, 2013, Mr. Oiryia contacted AEI by phone to obtain an earlier enrollment date. A phone receptionist at AEI notified Mr. Oiryia that AEI's admissions office had closed for the day, and instructed Mr. Oiryia to call back on the following day.

198. On March 19, 2013, Mr. Oiryia contacted AEI again. AEI's admissions office offered him an earlier enrollment date of June 17, 2013. Mr. Oiryia immediately returned to Mr. Ogden's office to have Mr. Ogden update his SEVIS record at BYU with the new enrollment date information, and release Mr. Oiryia's SEVIS record to AEI.

199. Upon Mr. Oiryia entering Mr. Ogden's office, Mr. Brown walked into Mr. Ogden's office and ordered Mr. Ogden to immediately stop and discontinue the transfer of Mr. Oiryia's SEVIS record to AEI.

200. Mr. Brown explained that Mr. Heperi had ordered that BYU must retain and not transfer out

Mr. Oirya's SEVIS record to AEI or any other SEVP-certified school that accepts him.

201. Mr. Ogden and Mr. Oirya protested against Mr. Brown's order, stating that AEI had already officially notified BYU of Mr. Oirya's acceptance to AEI, and requested the transfer of his SEVIS record in active status to AEI, as required by U.S. federal laws and policies.

202. Mr. Brown insisted that BYU will comply with Mr. Heperi's order. Mr. Brown disregarded Mr. Ogden's and Mr. Oirya's protests and denied Mr. Ogden any opportunity to update Mr. Oirya's SEVIS transfer forms with the new June 17, 2013 date, and release the SEVIS record to AEI.

203. Mr. Ogden became visibly shaken over Mr. Brown's deliberate disregard for SEVIS record transfer laws and policies.

204. Mr. Oirya became completely filled with anxiety and grief owing to BYU's deliberate unlawful actions of denying him his nonimmigrant (F-1) rights.

205. On March 20, 2013, Mr. Brown called Mr. Oirya and notified him that he had terminated Mr. Oirya's SEVIS record in the SEVIS database, effectively depriving him of his maintenance of F-1 status in the United States.

206. Mr. Brown then directed Mr. Oirya to immediately depart the United States, without providing him with any alternative avenues.

207. By his own admission, Mr. Brown was aware of the United States "federal regulations and policies" that mandated the transfer of an F-1 student's SEVIS

records between SEVP-certified schools, but deliberately disregarded these statutes.

208. On March 22, 2013, Mr. Oiryia sent an email to Mr. Brown requesting that he transfer Mr. Oiryia's terminated SEVIS record to AEI so that AEI could assist Mr. Oiryia with SEVIS reinstatement through United States Citizenship and Immigration Services ("USCIS").

209. Mr. Brown responded, notifying Mr. Oiryia that "Atlanta English Institute has declined to accept [Mr. Oiryia's] terminated SEVIS record," explaining that AEI does "NOT accept terminated records" and does "NOT help with reinstatements" of SEVIS records, notwithstanding that it was BYU's intentional misconduct that caused the record to enter into a terminated status.

210. Between March 21, 2013, and March 22, 2013, Mr. Oiryia contacted, applied to, and was accepted to Selnate International School ("Selnate"), another SEVP-certified school.

211. Tracy Rogers ("Mr. Rogers"), the Director for Selnate, offered to assist Mr. Oiryia with applying for the reinstatement of his terminated SEVIS record, through USCIS.

212. On March 25, 2013, Mr. Rogers requested additional reinstatement information from BYU through Mr. Brown and Ms. Mateani.

213. Specifically, he requested an explanation for "why BYU would terminate [Mr. Oiryia's SEVIS] record rather than let [Mr. Oiryia] transfer [it out] in [active] status."

214. On March 26, 2013, Mr. Heperi responded to Mr. Rogers' emails stating that he was "unable to respond to [Mr. Rogers'] request for more information" to assist Selنate in applying for Mr. Oirya's SEVIS reinstatement.

215. As a result, Mr. Rogers was unable to assist Mr. Oirya.

216. In addition, he was forced to rescind Mr. Oirya's admissions to Selنate on April 8, 2013, by explaining to Mr. Oirya that:

We have received very limited information back from BYU, but more importantly, we have reviewed your situation with our senior staff and feel that it would be best if we did not accept your request and application at this time. I suggest you look elsewhere for help in applying for reinstatement if you feel you have a strong case to do so.

217. With Mr. Heperi's deliberate refusal and failure to cooperate in Selنate's efforts to reinstate Mr. Oirya's terminated SEVIS record, Mr. Heperi further denied Mr. Oirya the reinstatement to and maintenance of his F-1 status in the United States.

218. On or about March 26, 2013, Mr. Brown contacted Utah Valley University and terminated Mr. Oirya's CPT, effectively denying Mr. Oirya the benefits of his active F-1 status. Duane Miller, Mr. Oirya's CPT supervisor at Utah Valley University, notified Mr. Oirya via email of Mr. Brown's termination of his CPT.

[. . .]

The Aftermath

227. In 2014, without any prior notice or hearing, BYU issued a letter to Mr. Oirya permanently banning him from the BYU campus.

228. Thereafter, the BYU police department enforced this ban by handing Mr. Oirya the letter banning him from the campus, harassing him, and aggressively escorting him off the BYU campus.

[. . .]

234. Nonetheless, it appears that these hidden and unrevealed allegations played a large part in BYU's decision to terminate Mr. Oirya's employment, expel him from the school, prohibit him from ever visiting the campus, as well as the university's continuing practice of spreading disinformation and false allegations about Mr. Oirya to the subsequent educational institutions at which he has attempted to enroll and obtain a terminal degree.

First Cause of Action Breach of Contract

235. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

236. BYU's employment and student policies are valid, binding, and existing contracts to which Mr. Oirya and BYU are parties.

237. Mr. Oirya has performed all of his obligations under BYU's Policies, or to the extent he has not, performance has been excused.

238. BYU and its administrators or agents have breached BYU's Policies by their conduct described

herein and as will be revealed through discovery and presented at trial.

239. Mr. Oirya has been damaged by BYU's breach in an amount to be proven at trial.

**Second Cause of Action
Breach of the Covenant of
Good Faith and Fair Dealing**

240. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

241. An implied covenant of good faith and fair dealing inheres in every contract.

242. Under the covenant of good faith and fair dealing, both parties impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract.

243. By suspending and expelling Mr. Oirya without providing him the process granted in BYU's Policies, and other acts described herein and will be revealed at trial, BYU has denied Mr. Oirya the fruits of those contracts, thereby breaching the implied covenant of good faith and fair dealing.

244. Mr. Oirya has been damaged by BYU's breach in an amount to be proven at trial.

**Third Cause of Action
Defamation**

245. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

246. The information in Mr. Oirya's Suspension Letter, Expulsion Letter, and BYU's information release to Auburn is false.

247. This information was not a privileged communication.

248. In publishing this information, BYU acted at least with negligence, if not intentionally for the purpose of damaging Mr. Oirya's educational opportunities at Auburn, and any subsequent professional opportunities arising from the completion of his degree at that university.

249. Mr. Oirya has been damaged by BYU's defamation in an amount to be proven at trial.

**Fourth Cause of Action
Violation of Title IX-Due Process and
Procedural Rights**

250. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

251. BYU receives Federal financial assistance.

252. BYU, as a recipient of Federal financial assistance, is required to adopt and publish grievance procedures providing for the prompt and equitable resolution of student complaints alleging any action which would be prohibited by Title IX or its regulations.

253. As part of this requirement, BYU is obligated to provide an investigative and disciplinary process that must protect the due process rights of all parties involved.

254. For the reasons contained herein, and as will be revealed through discovery, BYU fell far below this standard when it came to its investigation and discipline of Mr. Oirya.

255. This failure was due to BYU's preferential treatment of Mr. Oirya's female accuser, who was accorded special status and privileges on the basis of her sex. Similarly, Mr. Oirya's story was discounted and the investigative and disciplinary process stacked against him because he is a male.

256. BYU's student disciplinary process is, as implemented, contrary to Title IX because Mr. Oirya was on the basis of sex, excluded from participation in, denied the benefits of, and subjected to discrimination under BYU's disciplinary process.

257. Mr. Oirya has been damaged by BYU's violation in an amount to be proven at trial.

Fifth Cause of Action
Violation of Title IX-Deliberate Indifference

258. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

259. BYU receives Federal financial assistance.

260. Through his unfair and unjust disciplinary proceedings, Mr. Oirya suffered harassment on the basis of his sex that was sufficiently severe, pervasive, and objectively offensive that it effectively barred him access to educational opportunities or benefits.

261. BYU university officials with the authority to take corrective action had actual knowledge of Mr. Oirya's complaints of harassment and unfair treatment.

262. BYU was deliberately indifferent in its response or lack thereof because it responded in a way that was clearly unreasonable under the circumstances, including but not limited to because the uni-

versity expelled Mr. Oirya and took other action adverse to him before he was even able to meet with the administrators to whom he had complained.

263. Rather than investigate these charges as they should have done, these very same university administrators relied upon the uninvestigated allegation to dismiss Mr. Oirya and terminate his relationship with BYU.

264. Mr. Oirya has been damaged by BYU's violation in an amount to be proven at trial.

Sixth Cause of Action
Violation of Title IX-Erroneous Outcome

265. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

266. BYU receives Federal financial assistance.

267. BYU's pattern of decision-making throughout the disciplinary proceedings was discriminatorily applied in favor of Mr. Oirya's female accusers and against him on the basis of his sex, as is alleged herein and will be identified through discovery.

268. Mr. Oirya was wrongly found to have engaged in a history of misconduct against female students at BYU over a period of time and punished with expulsion from the University and his employment, when indeed no proper process was ever conducted prove his guilt or innocence.

269. As a result, the outcome of BYU's disciplinary proceedings was erroneous because of a sexual bias, favoring and preferring the allegations of Mr. Oirya's female accuser and disfavoring his because he is a man.

270. Mr. Oirya has been damaged by BYU's violation in an amount to be proven at trial.

Seventh Cause of Action
Violation of Title IX-Selective Enforcement

271. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

272. BYU receives Federal financial assistance.

273. BYU's actions constitute selective enforcement against Mr. Oirya as they were motivated by his gender and that a similarly situated woman would not have been subjected to the same disciplinary proceedings and/or would have received the full and fair process to which she is entitled under BYU policies and the law.

274. BYU administrators received complaints against Mr. Oirya that were mostly presented by female complainants. BYU selectively applied its disciplinary procedures to female complainants by intentionally and deliberately granting only the females due process protections but denying the Mr. Oirya the same due process protections because he was a male.

275. BYU granted the female complainants the right to present their complaint accounts, evidence, and witnesses to BYU administrators who had authority to institute the corrective measures. On the basis of the complainants' accounts, evidence, and testimonies presented by their witnesses, BYU expelled Mr. Oirya from his employment and educational program at BYU, thereby violating his Title IX rights.

276. Furthermore, BYU granted Mr. Oirya's accuser access to the witnesses, materials, evidence, and other privileges that it denied to Mr. Oirya throughout the course of the investigation, even though he repeatedly requested the same from the university in writing.

277. BYU therefore discriminatorily applied its disciplinary procedures with sexual bias by intentionally and deliberately favoring females against the male Mr. Oirya.

278. In these ways, and others that will be revealed through discovery, people of the opposite gender in circumstances sufficiently similar to Mr. Oirya's were treated more favorably by BYU.

279. A similarly situated female student would have received the full due process to which she is entitled, or would have otherwise been treated more favorably by the university, than was Mr. Oirya, and as a result of a proper investigation, would not have been subject to disciplinary proceedings based on false and fraudulent allegations.

280. Mr. Oirya has been damaged by BYU's violation in an amount to be proven at trial.

**Eighth Cause of Action
Violation of Immigration Law**

281. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

282. Mr. Oirya was a nonimmigrant (F-1) student in the United States and maintained an active SEVIS record and valid Form I-20.

283. BYU is a SEVP-certified school and operated International Student Services Office that managed the transfer of SEVIS records between BYU and other SEVP-certified schools.

284. BYU is obligated under federal law and its own institutional SEVIS policies to maintain these records and transfer them between schools upon transfer request by the F-1 student.

285. On or about March 15, 2013, Mr. Oirya desired to transfer out of BYU and was accepted to AEI, a SEVP-certified school.

286. Mr. Oirya notified BYU of his intent to transfer and that he intended to transfer to AEI.

287. Upon notification, BYU failed to properly update Mr. Oirya's SEVIS record as a "transfer out" student on his requested with a release date, or otherwise failed to maintain this his record appropriately and in accordance with Federal law and BYU's own institutional policies.

288. BYU's failures included that it did execute the SEVIS transfer procedures required to grant AEI access to Mr. Oirya's SEVIS record in the SEVIS database.

289. BYU's actions with regards to Mr. Oirya's transfer request, carried out by its designated school official(s), is conduct that does not comply with Federal regulations and violates BYU's contractual policies with respect to Mr. Oirya's SEVIS record.

290. The statements of BYU's designated school official(s) made in connection with Mr. Oirya's transfer request were false.

291. BYU deliberately and maliciously deprived Mr. Oirya the maintenance of his nonimmigrant (F-1) status when they refused to process Mr. Oirya's SEVIS record transfer to AEI, and terminated the SEVIS record in the database, thereby rendering him out of status, and deportable.

292. Mr. Oirya has been damaged by BYU's violation in an amount to be proven at trial.

Ninth Cause of Action
Intentional Infliction of Emotional Distress

293. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

294. BYU's conduct was outrageous and intolerable in that it offended against the generally accepted standards of decency and morality.

295. BYU intended to cause, or acted in reckless disregard of the likelihood of causing, emotional distress.

296. Mr. Oirya suffered severe emotional distress.

297. BYU's conduct proximately caused Mr. Oirya's emotional distress.

298. Mr. Oirya has been damaged by BYU's violation in an amount to be proven at trial.

Tenth Cause of Action
Negligence

299. Mr. Oirya incorporates the allegations of the preceding paragraphs as if fully stated herein.

300. BYU owed Mr. Oirya a duty of care to carry out a reasonable and fair investigation into the alle-

gations against him, as outlined in its school and employment policies.

301. As described herein, BYU's conduct well fell below the standard of care resulting in a breach of its duty to Mr. Oirya.

302. Mr. Oirya suffered an injury or loss due to the breach, including his termination and expulsion.

303. BYU was the cause in fact and proximate cause of Mr. Oirya's injury or loss.

304. Mr. Oirya has been damaged by BYU's violation in an amount to be proven at trial.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff Mr. Oirya hereby demands a trial by jury on all issues so triable.

DATED this 7th day of February, 2017

**ANSWER TO AMENDED COMPLAINT-
RELEVANT EXCERPTS
(FEBRUARY 28, 2017)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

JOHN OIRYA,

Plaintiff,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant.

Case No. 2:16-CV-01121-BSJ

Before: Bruce S. JENKINS, District Judge.

Defendant BRIGHAM YOUNG UNIVERSITY (“BYU” or “Defendant”) answers each of the specific allegations in Plaintiff John Oirya (“Mr. Oirya” or “Plaintiff”) Amended Complaint as follows:

[. . .]

73. As relates to the allegations contained in paragraph 73, Defendant admits that Mr. Oirya was dismissed from BYU on March 20, 2013. As relates to the remainder of the allegations contained in paragraph 70, Defendant denies.

[. . .]

154. As relates to the allegations contained in paragraph 154, Defendant admits that Mr. Oirya was given a letter on January 11, 2013, entitled "Campus Memorandum" which rendered him ineligible for employment of any kind at BYU. As relates to the remainder of the allegations contained in paragraph 154, Defendant avers that the cited "Campus Memorandum" speaks for itself and no response is necessary. To the extent a response is necessary, Defendant denies.

[. . .]

175. As relates to the allegations contained in paragraph 175, Defendant admits that Mr. Oirya was banned from BYU campus. As to the remainder of the allegations contained in paragraph 175, Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations and, therefore, denies.

[. . .]

205. As relates to the allegations contained in paragraph 205, Defendant admits that Mr. Brown and the ISSO were advised on March 20, 2013 of Mr. Oirya's dismissal from the University, and thereafter ISSO changed Mr. Oirya's SEVIS record to 'out of status,' as required by federal law. Defendant also admits that Mr. Brown contacted Mr. Oirya the same day, March 20, 2013, and advised him of his change in status, and also what options he had moving forward. Defendant denies the remainder of the allegations contained in paragraph 205.

[. . .]

227. As relates to the allegations contained in paragraph 227, Defendant admits that Mr. Oirya was banned from BYU's campus. Defendant denies the remainder of the allegations contained in paragraph 227.

228. As relates to the allegations contained in paragraph 228, Defendant admits that Mr. Oirya was banned from BYU's campus and that the BYU police department assisted with the ban. Defendant denies the remainder of the allegations contained in paragraph 228.

[. . .]

**MOTION FOR SUMMARY JUDGMENT
AND SUPPORTING MEMORANDUM-
RELEVANT EXCERPTS
(OCTOBER 1, 2019)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

JOHN OIRYA,

Plaintiff,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant.

Case No. 2:16-CV-01121-BSJ

Before: Bruce S. JENKINS, District Judge.

Defendant Brigham Young University (“BYU”), pursuant to Federal Rule of Civil Procedure 56, moves for summary judgment.

[. . .]

BYU certainly understands Mr. Oirya disagreed with the outcome of the proceedings. The university even understands Mr. Oirya disputes some of the facts that were investigated. But in resolving this motion, Mr. Oirya’s disputes are beside the point—only one issue is dispositive: whether the investiga-

tive process was fair and consistent with BYU's policies.

[. . .]

1. Mr. Oirya was a BYU student from 2002 to 2013. *See Amended Complaint ("Compl."), Doc. 25, ¶ 6; see also* Mr. Oirya's academic transcript attached as Exhibit 1.

[. . .]

34. BYU personnel also interviewed eleven fact witnesses while investigating the foregoing allegations. *See* BYU's Response to Interrogatory No. 4, attached as Exhibit 18.

[. . .]

39. However, Mr. Heperi exercised his powers under the Honor Code Policy and modified the sanction against Mr. Oirya to permanent dismissal from the university. In a letter dated March 20, 2013, Mr. Heperi stated to Mr. Oirya as follows: "After carefully reviewing your most recent violations of the Honor Code, i.e., inappropriate gender-based behavior and admission fraud, and in light of your past history of misconduct at the university I have determined to dismiss you from Brigham Young University." *See* Exhibit 22.

[. . .]

**OPPOSITION TO MOTION FOR SUMMARY
JUDGMENT-RELEVANT EXCERPTS
(NOVEMBER 1, 2019)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JOHN OIRYA,

Plaintiff,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant.

Case No. 2:16-CV-01121-BSJ

Before: Bruce S. JENKINS, District Judge.

Plaintiff John Oirya (“Plaintiff”), by and through counsel, hereby files this Opposition to Motion for Summary Judgment. Plaintiff opposes the Motion filed by BYU as follows:

[. . .]

Finally, there was no evidence to indicate that Mr. Oirya had committed fraud in the investigation of the bursary issues. Unfortunately, BYU concluded that Mr. Oirya was “a problem” at the outset of the investigations, and had predetermined the outcome before the investigations even began.

[. . .]

34. BYU personnel also interviewed eleven fact witnesses while investigating the foregoing allegations.

Disputed: There is no evidence which identifies the witnesses interviewed with respect to the three specific allegations identified, namely the alleged plagiarism, sexual harassment and bursary/fraud allegations, which allegedly happened in late 2012 or early 2013. Based on the dates and the names identified in BYU's Exhibit 18, BYU interviewed five individuals—Brittany Karzen, Cindy Guillory, Scott Nash, Keith Evans, and Jonathan Birkel—who are not known to be BYU staff (and some of these individuals could possibly be staff in the BYU honor code or Title IX offices) and it is not known who these individuals even are, aside from Ms. Karzen. *See* BYU Exhibit 18.

[. . .]

Absolutely no evidence as to the sex-based allegation was presented to the decision-makers; the entire allegation is based solely on statements by one individual, which statements are accusatory in nature and, in fact, reflect that the accuser approached the situation with an inherent bias.

[. . .]

As a result, there was no evidence to find Oirya guilty. However, rather than drop the charges against Oirya, BYU proceeded to arbitrarily and capriciously implement its already pre-determined and gender-biased suspension and expulsion actions against Oirya.

[. . .]

**REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT–
RELEVANT EXCERPTS
(NOVEMBER 15, 2019)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

JOHN OIRYA,

Plaintiff,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant.

Case No. 2:16-CV-01121-BSJ

Before: Bruce S. JENKINS, District Judge.

INTRODUCTION

There is one issue before the Court: Did Defendant Brigham Young University (“BYU”) provide Plaintiff John Oirya (“Oirya”) a fair process prior to dismissing him from BYU. The undisputed facts, which include Oirya’s admission that BYU “met and exceeded [his] expectations,” show that BYU did. *See* BYU’s Ex. 21 at 2. Therefore, all of Oirya’s claims must be dismissed.

[. . .]

... Oiryia was expelled as a result of three specific complaints: 1) admissions and immigration fraud; 2) plagiarism; and, 3) sexual misconduct toward a female student. . . .⁷

[. . .]

⁷ Oiryia's arguments are often factually inconsistent. For instance, Oiryia asserts that BYU interviewed the classmate who accused him of sexual harassment (*see* Opposition at 11; 20; 22-23) and admits that BYU interviewed at least 5 witnesses, *id.* at 6, but also claims that BYU "failed to interview even one relevant witness to the sexual harassment charge," *id.* at 30, that BYU "never interviewed" his witnesses, *id.* at 26, and that BYU "did not interview any class members or other parties who were present," *id.* at 20. While Oiryia's arguments often muddy the record, the facts themselves are clear: BYU interviewed Oiryia, his accuser, and at least 11 other witnesses. *See* BYU's Facts 29-38.

**MOTION AND MEMORANDUM
FOR RELIEF FROM SUMMARY
JUDGMENT-RELEVANT EXCERPTS
(FEBRUARY 6, 2020)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JOHN OIRYA,

Plaintiff,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant.

Case No. 2:16-CV-01121-BSJ

Before: Bruce S. JENKINS, District Judge.

[. . .]

(a) Unresolved Ground of “Substantial Evidence” of the Three Complaints

The Tenth Circuit has held that a university's disciplinary action must be based on two grounds of (i) adequate investigative procedure, and (ii) substantial evidence. *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 625 (10th Cir. 1975) (“The adequacy of the [investigative] procedure plus the substantial evidence element constitute the basis and the record to test

whether [a university's disciplinary] action was arbitrary.") (emphasis added).

[. . .]

"[T]he 'mistake' provision in Rule 60(b)(1) provides for the reconsideration of judgments where the judge has made a substantive mistake of law or fact in the final judgment or order." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996). The Court's ruling constitutes "a substantive mistake of law" because the law required the Court to resolve not only the ground of "adequate investigative procedure" but also that of credible and "substantial evidence." Accordingly, the Court's ruling should be vacated so that a jury can resolve the remaining ground of credible and "substantial evidence."

[. . .]

**OPENING BRIEF OF APPELLANT-
RELEVANT EXCERPTS
(JUNE 15, 2020)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN OIRYA,

Plaintiff-Appellant,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant-Appellee.

On Appeal from the United States
District Court for the District of Utah
District Court Case No. 2:16-CV-01121-BSJ
Honorable Judge Bruce S. Jenkins

OPENING BRIEF OF APPELLANT

[. . .]

Evidently, these two summary judgment rulings deliberately ignored and disregarded any consideration of, and were NOT based upon, the second ground of “substantial evidence.” Through this deliberate unlawful omission, the District Court completely failed to review and consider the overwhelming evidence in the summary judgment record that exonerated Oirya

from BYU's asserted bases for expelling him. Also, BYU did NOT produce at summary judgment any "substantial evidence" of Oiry'a's misconduct or guilt, to demonstrate to the Court that its expulsion of Oiry'a was supported by the second ground.

[. . .]

Oiry'a denied this charge as demonstrated by summary judgment evidence. Oiry'a testified that this charge was "categorically false, unfounded, inconceivable and slanderous." (See Doc. 190-14, pg 2 of 26). In his deposition testimony (See Doc. 194, pg 6 of 38, ¶ 29-32), Oiry'a "denied" this charge by testifying that he did NOT "unzip[] his pants and put his hand in his pants in class" (Doc. 190-5, pg 37 of 50:6-15), and that he "did not engage in any sexually inappropriate activity in [his] classroom." (Doc. 190-6, pg 15 of 50:3-8). Also, Oiry'a testified that he knew "nothing whatsoever about (i) the alleged complainant (ii) the alleged complaint [of sexual harassment], and (iii) the alleged date of occurrence of the claimed charge" of sexual harassment. (Doc. 190-14, pg 2 of 26; See also, Oiry'a's Deposition—Doc. 190-6, pg 37 of 50:18-38 of 50:1).

[. . .]

BYU's own independent investigations exonerated Oiry'a from Karzen's charges. (Doc. 190-13). BYU declared in its summary judgment submissions to the District Court that it "interviewed eleven fact witnesses while investigating [] allegations" against Oiry'a, which included Karzen's two charges. (See Doc. 190, pg 10, ¶ 34; See also, Doc. 197, pg 8, footnotes). During oral arguments at summary judgment, BYU identified the three specific key witnesses to Karzen's charges

as Scott Nash, Keith Evans and Jonathan Birkel. (*See* Doc. 223-1, pg 74 of 85:3-18). All of these witnesses exonerated Oirya from Karzen's charges. Scott Nash exonerated Oirya from Karzen's charge of sexual harassment by testifying that he and the nearly 10 other witnesses to Karzen's charge of sexual misconduct "could offer that they haven't seen any evidence of sexual harassment" by Oirya toward Karzen. (Doc. 213, pg 89-90 of 105 ¶¶ 5,7) (emphasis added).

Keith Evans exonerated Oirya from Karzen's charge of retaliation by testifying that "[h]is impression and he believes that the" impression of other nearly 10 witnesses who were present at the meeting that Oirya had with the witnesses, was that Oirya "was just trying to cope and get some advice" from the witnesses on how to be reinstated to his employment that BYU had unfairly terminated on January 11, 2013 (*See* 190-14, pg 16 of 26), rather than retaliate against Karzen, and "Keith hasn't experienced any kind of negative outcome [including retaliation by Oirya] from [Oirya's] meeting" with the witnesses, that Karzen had falsely claimed was retaliatory towards her. (Doc. 213, pg 92-93 of 105 ¶¶ 13-14).

Jonathan Birkel exonerated Oirya from Karzen's charge of retaliation by testifying that the purpose of Oirya's meeting with the witnesses was NOT to retaliate against Karzen, but to seek the appropriate BYU administrators in BYU's "chain of command" who could reinstate Oirya to his terminated employment pursuant to BYU's Grievance Policy, and that Birkel "hasn't seen any negative repercussions of the meeting [and he] would be surprised if" any of the nearly 10 witnesses who participated in that meeting "said that they have had a negative experience

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[including retaliation by Oirya] because of the meeting" that Oirya had with the witnesses. (Doc. 213, pg 95-96 of 105 ¶¶ 6-10, 13-14).

REPLY BRIEF OF APPELLANT-
RELEVANT EXCERPTS
(SEPTEMBER 4, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN OIRYA,

Plaintiff-Appellant,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant-Appellee.

On Appeal from the United States
District Court for the District of Utah
District Court Case No. 2:16-CV-01121-BSJ
Honorable Judge Bruce S. Jenkins

REPLY BRIEF OF APPELLANT

BYU declares that it “interviewed 11 fact witnesses” while investigating the three allegations against Oirya, that included Karzen’s accusations. (Appellee Br. pg. 19, footnote n. 3). However, BYU has not produced, and CANNOT produce, even a single witness testimony statement, from any of these 11 witnesses, to prove Oirya’s misconduct or guilt.

[. . .]

**NOTICE OF BAN FROM THE
BRIGHAM YOUNG UNIVERSITY CAMPUS
AND DISMISSAL/DISCONTINUANCE
FROM ACADEMIC CLASSES–
RELEVANT EXCERPTS
(FEBRUARY 14, 2014)**

John Oirya
2808 N 700 E
Provo, UT 84604

Dear John Oirya,

As a private educational institution, Brigham Young University may exclude or ban persons from its property who violate its standards and rules, or who threaten or appear to pose a threat to those who are permitted access to its premises.

Based on an email that you sent to your former classmates and professors who are current students and employees of the University, it has been established that you have engaged in retaliatory behavior against BYU students who have reported your behavior and in addition, you have obtained and dispersed documents in violation of University Policy. Because your conduct has been in violation of Brigham Young University standards and/or threatens the well-being of our faculty, staff, and students, you are being banned or otherwise excluded from the campus and all of its facilities and immediately dismissed/discontinued from your current or future academic classes. You are ineligible to appear on university property, to attend daytime or evening classes, to register for courses, to graduate, to work for the university, or to reside in BYU housing.

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[. . .]

Sincerely,

Banning Committee

**RECORD OF ALLEGED
HONOR CODE TITLE IX VIOLATIONS-**

Title IX Violations	
15.	JO places a piece of paper over his crotch) area unzips his pants, scratches crotch while in class. Female student is sitting by him and witnesses, is extremely uncomfortable

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F-1 VISA TERMINATION RECORD
(MARCH 20, 2013)

SEVIS
STUDENT & EXCHANGE VISITOR INFORMATION SYSTEM

F-1 Student Oirya, John Juma

Event Name	Event Date	Resulting Status	Performed By
Terminate - User Termination	03/20/2013 19:20:14	TERMINATED	Samuel Brown

EXHIBIT 7
JIM WOODARD MEMORANDUM
TERMINATING EMPLOYMENT OF MR. OIRYA

BRIGHAM YOUNG UNIVERSITY
CAMPUS MEMORANDUM

Date 01/11/2013

From Jim Woodard - Employee Relations Manager

To John Juma Oirya BYUID: 022161543

John,

The purpose of this memo is to inform you that you are no longer eligible for employment of any kind at Brigham Young University. This is a result of the numerous complaints we have received over the years dating back to 2005.

1. Female staff and student employees have expressed their concerns in working with you because your inappropriate comments and behaviors make them uncomfortable. For example, one female student reported that you asked her if she had breast implants.
2. Supervisors have also expressed frustrations in working with you because they have to tell you repeatedly to stop socializing and complete your assigned tasks. Several have commented that you are "high maintenance" and they prefer not to invest the time it takes to monitor your work.
3. It has also been reported that the council and directives provided to you by your super-

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visors and other university officials has been disregarded by you.

Consequently, BYU has determined that you are no longer eligible for employment of any kind at Brigham Young University. Please conduct yourself accordingly.

Signed,

/s/ Jim Woodard

Employee Relations Manager
Brigham Young University

EXHIBIT 19
MARCH 4, 2013 SUSPENSION LETTER—
RELEVANT EXCERPTS

Neal L. Cox
Associate Dean of Students
Brigham Young University

March 1, 2013 (Delivered on March 4, 2013)

John Juma Oirya
7501 University Station
Provo, UT 84602

Dear John:

After interviewing you, completing a thorough review of available information and considering the recommendation made by the Honor Code Committee, I am suspending you from Brigham Young University because of violations of the Honor Code. These violations include submitting false documents, plagiarism and sexual harassment. This action makes you ineligible to attend daytime or evening classes, to register for other courses, to work for the university, or to reside in BYU-contracted housing. You may not enroll in or be enrolled in any BYU class or course that could apply to graduation, including but not limited to Independent Study courses, until you are returned to good Honor Code standing. A hold has been placed on your record which will prevent you from being considered for admission to any Church Educational System school until you are returned to good Honor Code standing.

[. . .]

EXHIBIT 22
MARCH 20, 2013 DISMISSAL LETTER—
RELEVANT EXCERPTS

Vernon L. Heperi
Associate Student Life Vice President
and Dean of Students
Dean of Students Office

March 20, 2013

John Oirya
7501 University Station
Provo, UT 84602

Dear John,

After carefully reviewing your most recent violations of the Honor Code, i.e. inappropriate gender-based behavior and admission fraud, and in light of your past history of misconduct at the university I have determined to dismiss you from Brigham Young University. This decision is effective immediately and means you are permanently dismissed from the university and will not be allowed to reapply for admission to the university in the future.

[. . .]

