No. 23-

IN THE

Supreme Court of the United States

SAMER ALI-HASAN, M.D.,

Petitioner,

v.

ST. PETER'S HEALTH PARTNERS MEDICAL ASSOCIATES, P.C., AND ST. PETER'S HEALTH PARTNERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an employer violate Title VII when it terminates a physician's employment based on an accusation of sex discrimination that the employer knows is untrue?

2. Is there a division of opinion in the Circuit and District Courts on this issue?

LIST OF PARTIES

Samer Ali-Hasan, M.D., *Petitioner*

St. Peter's Health Partners Medical Associates, P.C., *Respondent*

St. Peter's Health Partners, *Respondent*

RELATED CASES STATEMENT

Ali-Hasan v. St. Peter's Health Partners Medical Associates. P.C., et al., Case No. 22-2669, United States Court of Appeals for the Second Circuit. Judgment entered Nov. 7, 2023. [1a]

Ali-Hasan v. St. Peter's Health Partners Medical Associates, P.C., et al., Case No. 1:19-cv-01589, U.S. District Court for the Northern District of New York. Judgment entered Sept. 22, 2022. [8a]

Ali-Hasan v. Jorge Constantino, M.D., Case No. 1:21-cv-00697, U.S. District Court for the Northern District of New York. Pending.

Ali-Hasan v. St. Peter's Health Partners Medical Associates, P.C., et al., Case No. CV-23-0988, New York Supreme Court, Appellate Division, Third Judicial Department. Pending.

Ali-Hasan v. St. Peter's Health Partners Medical Associates, P.C., et al., Index No. 907826-22, Albany County Supreme Court, State of New York. Judgment entered Aug. 14, 2023. *(Appeal Case No. CV-23-0988)*

Ali-Hasan v. Rik Baier, et al., Index No. 904074-22, Albany County Supreme Court, State of New York. Judgment Entered Dec. 13, 2023.

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JURISDICTION STATEMENT

This petition for writ of certiorari to the United States Court of Appeals for the Second Circuit was timely filed within 90 days of the Second Circuit's decision dated November 7, 2023 [1a]. The Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

42 USCS § 2000e-2 provides:

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . .

STATEMENT OF THE CASE

The Circuit Courts have accepted the principle that neither a student nor a faculty member may be disciplined, in either a public or a private university or college, based on an unfounded allegation of sexual misconduct. For example, in *Vengalattore v. Cornell University*, 36 F.4th 87 (2nd Cir. 2021), the Second Circuit held that, even though the university conducted several hearings examining whether a professor should be granted tenure, the professor was allowed to maintain a Title VII claim on the theory that a female graduate student used a fabricated allegation of sexual misconduct against the professor as a weapon in the workplace to successfully deny him tenure. The Second Circuit reasoned that the United States Department of Education's policy of special vigilance against sex discrimination supplied at least some evidence that the university was biased against males in investigating the allegations of sexual harassment. The Second Circuit sees some evidence of anti-male bias as essential in a claim of this type. For that reason, it ruled against petitioner.

This Court's decision in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), however, rejected the concept that anti-male or anti-male bias need be shown in proving a case under Title VII. All that is required is that sex be taken into account in the decision-making. This Court's intervention here is needed because the Circuit Courts and the District Courts have been divided on the type of evidence needed to establish anti-male bias or whether anti-male bias is even an element of such a Title VII claim when the employee is explicitly accused of misconduct related to sex. See Point II, *infra*. Lower courts have

been bogged down in their own notions of bias, pretext, or comparator evidence, and have failed to appreciate the simple test announced in *Bostock* – was sex taken into account by the employer in its decision-making.

The case of Dr. Ali-Hasan, a Board-certified interventional cardiologist and a partner in St. Peter's Health Partners Medical Associates [SPHPMA], squarely presents the question outside the educational context as to whether an employee who is accused of misconduct explicitly related to sex has a claim for violation of Title VII when the employer proceeds with termination of employment in bad faith, *i.e.* knowing the allegation of such misconduct is untrue or without following its own rules with respect to investigating the accusation. In the absence of intervention by this Court, employees will be free to make unsubstantiated allegations of sex discrimination and thereby procure the termination of another's employment based on the bare allegation of sex-related wrongdoing.

Dr. Ali-Hasan's case perfectly illustrates the problem raised by terminating an employee based on the mere allegation of sex discrimination. He was never even informed of the existence of an ***anonymous*** complaint against him, nor was he given the opportunity to respond in any way. He wasn't interviewed nor was he allowed to suggest witnesses. The quality of the investigation was summarized in the following quote from the District Court: "Viewing the evidence in the light most favorable to Petitioner, a jury could reasonably find that his employment was terminated in response to allegations of sexual misconduct, following an irregular investigative process." [26a-27a]

A Brief History of Petitioner's Employment

Dr. Ali-Hasan worked at Samaritan Hospital in Troy, New York, which was part of a medical facilities network known as St. Peter's Health Partners [SPHP]. SPHPMA was the physicians group serving that network.

It is undisputed that prior to an anonymous complaint of sex discrimination against Dr. Ali-Hasan, he was never subject to prior discipline for any reason. His file was clear of complaints, from patients or physicians. He had among the highest patient satisfaction ratings. He was a strong financial producer for the practice. He had far lower rates of complications than other interventional cardiologists. He was hired to develop the Troy market for SPHPMA, where the practice had historically struggled to compete with Albany Associates in Cardiology, and he succeeded. At Samaritan Hospital, where he worked, Dr. Ali-Hasan also handled interventional procedures for Dr. Papaleo, who was from the competitor group Capital Cardiology Associates, and Dr. Annisman, who visited Samaritan periodically from Southern Vermont. There were no complaints from those physicians about petitioner's work. [PA-216, 239, 263-265]

The Joint Operating Committee (JOC) manages the day-to-day affairs of SPHPMA's cardiology group. [PA-255-256] The Chair of the Joint Operating Committee was Dr. James Phillip. The JOC made all the decisions concerning how the cardiology practice operated, the medical performance of physicians, and the behavior of physicians. [PA-233-234, 238-239 255-256]

In May or June of 2019, Dr. Phillip met with Dr. Ali-Hasan and told him he was doing an excellent job for the cardiology practice. [PA-256, 258, 260-265, 272, 274] Dr. Phillip further testified that the JOC never met with Dr. Ali-Hasan concerning any behavioral issues and never received any complaints that petitioner did not treat female staff appropriately. [PA-274]

On July 31, 2021, Dr. Ali-Hasan was called into an unscheduled and unexpected meeting with Kelli Valenti and Dr. William Kowal. Valenti was interim President of SPHPMA, replacing Rik Baier who had left a few days earlier. Kowal was head of the Executive Committee of SPHPMA. They told Dr. Ali-Hasan that he was being terminated from employment immediately and that he needed to arrange to remove his things and get out. [PA-255, 258-260]

Valenti agreed that Dr. Ali-Hasan was stunned. The termination came out of the blue insofar as he was concerned. Naturally, Dr. Ali-Hasan inquired as to why. Valenti said "he was searching for answers." [Id][1]

Valenti and Dr. Kowal told Dr. Ali-Hasan at the meeting that there was an anonymous complaint against him and that Human Resources had done an investigation. They told him that the SPHPMA board had determined to terminate his employment "for cause" but that the JOC had requested that it be changed to a "without cause" termination. That was the first Dr. Ali-Hasan heard of

1. Valenti denied having anything to do with the termination, which was true. Baier handled everything before he left but passed the final act on to Valenti. [Id.]

the anonymous complaint, the investigation, or that anyone was developing "cause" to terminate his employment. [Id.]

Unbeknownst to Dr. Ali-Hasan, the Executive Committee minutes reference a vote to terminate him "for cause" because of alleged violations of the Code of Conduct. [PA-225, 247][2] The JOC, which was not involved in the investigation, was told that termination was a *fait accompli* and would not be reversed, but the JOC requested it be changed to a termination "without cause" to protect Dr. Ali-Hasan's future job prospects. [PA-241, 260, 265].

Everyone who was present agrees that Dr. Ali-Hasan was shell-shocked. He did not have an inkling of any problems with any aspect of his performance or his behavior. [PA-260]

After his meeting with Valenti and Dr. Kowal, Dr. Ali-Hasan was prevented from going to his office to remove his personal belongings, including mementos of his daughter, thank you cards from patients, and medical literature. He was surrounded by police. He was told his material would be safeguarded, and he could arrange with Anna Bauer, who was head of Human Resources for both SPHP and SPHPMA, to retrieve them. [Id.]

Dr. Ali-Hasan met with Bauer. She provided more significant details as to why he was terminated. She said that someone called the 800-hotline number which triggered an HR investigation. She said the allegations

2. There is no vote of the Board in the record approving a termination "for convenience."

were that Dr. Ali-Hasan treated women unfairly and did not want to work with female technicians in the catheterization lab ["techs" in the "cath lab"]. She labelled this as "sex discrimination." [PA-261-262]

Dr. Ali-Hasan responded that he had excellent relationships with the two female technicians in the cath lab at Samaritan, cited specific instances of their work together, and said they would be witnesses on his behalf. The deposition testimony of one of the female techs confirmed this was true. [PA-261-262]

Bauer reaffirmed that petitioner's office was locked and that no one had access to his personal items. Yet when they returned together to get his personal belongings, everything was shredded. [PA-262]

Petitioner met with other leaders in the medical practice and the hospital. None of them could give him insight into why he was terminated. They all said, and Bauer the head of HR confirmed, that the usual procedures regarding physician discipline were not followed. [PA-252-264]

The Procedures for Terminating a Physician

Petitioner's contract, the by-laws of SPHPMA, and defendants' Code of Conduct, which is incorporated by reference in his employment contract, require petitioner to have the opportunity to respond to any disciplinary allegations, including the right to address the SPHPMA Board with counsel, and that his prior record, which was free of misconduct, be considered in determining the appropriate penalty. [PA-326-327, 329-330] Indeed, both

Anna Bauer, the head of HR, and the JOC agreed that Dr. Ali-Hasan should have been interviewed and given the opportunity to address the allegations in the so-called complaint. It is undisputed that did not happen. [PA-257, 261, 265 (contract provisions)]

Defendants were bound by the corporate by-laws of SPHPMA (petitioner was admitted to partnership in SPHPMA) which provide as follows in Article IV, ¶19: "No physician's employment by the Corporation may be terminated for cause unless such physician is first given the opportunity to appear before the Board at a duly convened meeting to present his/her case against such termination . . . The physician may bring one attorney to such meeting to represent him/her . . ." [PA-370] Bauer, testified that the investigation had to be conducted in accordance with the by-laws. [PA532-533]

The Agreement further, see ¶ IX(3)(b) [PA-109], *supra*, incorporates the Code of Conduct by reference. The Code of Conduct states that in the course of disciplinary action the following will occur: "In determining the appropriate level of discipline, the circumstances of the violation will be considered in light of the severity of the violation. Records of corrective action and related follow-up conferences are documented immediately following the violation. These documents are ***shared with the employee and the employee is given the opportunity to add comments."*** [PA-69, 215, 257 (emphasis added)]

The Code of Conduct further includes many other procedural safeguards and provides that the accused clinician will have the opportunity to meet with the investigators and decision-makers to address the issue.

[PA-350-351]. There is no evidence that any aspect of the Code of Conduct was adhered to, even though Baier testified that the requirements of the Code of Conduct were binding on St. Peter's just as they were on Dr. Ali-Hasan. [PA-215, 247]

The HR Investigation

The anonymous complaint was as follows [PA-133]:

> The caller stated for approximately two years, he/she witnessed Samer Ali-Hasan, physician, demean and demoralize employees who attempted to report their concerns. The caller stated he/she also witnessed Dr. Ali-Hasan enter the personal space of employees, while speaking to them in a 'scary' and intimidating manner. The caller stated Dr. Ali-Hasan's behavior was reported to his colleagues and upper management (names withheld). The caller stated Dr. Ali-Hasan's behavior temporarily improved. The caller stated in late June 2019 (exact date unknown), he/she ***was made aware*** of Dr. Ali-Hasan becoming upset with and screaming at a nurse about a patient issue. The caller abruptly terminated the line without providing additional information, and before the report number and call back date were given. [DEF25 (emphasis added)]

The defects in the HR investigation were pervasive and include:

- The investigation never unearthed any evidence that the event wherein Dr. Ali-Hasan allegedly screamed at a nurse even actually occurred. [PA-232-233 (quoting testimony of Baier that there was no evidence the incident actually occurred); PA-267-268]

- No evidence of prior complaints about Dr. Ali-Hasan was found. [PA-233, 268]. Baier testified: "Q. Did Anna Bauer ask you about whether there were any prior complaints concerning Dr. Ali-Hasan? A. I'm sure she did, but I could not point to a single one." [PA-432]. Other physicians who served in administrative positions echoed that assessment, as did Bauer. [PA-233, 268]

- The allegation of "invading personal space" was made by a lower-level administrator named Craig Knack in 2016, three years before the termination. The JOC dismissed Knack's concern as insubstantial. No other evidence of invading personal space was found during the investigation. [PA-217, 221, 233-234, 266-267]

- The investigation reports show that the investigation focused on whether Dr. Ali-Hasan mistreated women. The women who made statements negated that contention. Two female nurses reported excellent relationships with Dr. Ali-Hasan. The most senior cath lab technician at his deposition rejected the idea that any of the issues in the cath lab were gender-based. [PA-229-232, 244]

- In this regard, the statement of Edith Warrender, a registered nurse [PA-270], should be quoted at length [JA-233]:

> Work Environment – To be honest it has been a little rough here. Darcy Cassidy creates a lot of issues. She constantly bashes the Dr's, both St Peter's and Trinity. She is very negative.
>
> Working relationship with providers – I get along very well with both Dr. Ali-Hasan and Dr. Constantino. They both communicate very well with me and we are here for the patients. The only thing I could say is when Dr. Ali-Hasan does clinic, he likes things his way and he is very fast pace. I am ok with that as I trained with Dr. Odabashian and he is similar. Sometimes the techs clash with Dr. Ali-Hasan, but they also question why he wants an EKG etc. My thoughts are it is not up to the tech. Gina would get mad and so would Barbara. Barbara lost her computer cord and accused Dr. Ali-Hasan, he was offended.
>
> Witnessing provider demean or demoralize colleague – I have not. I have heard from Darcy where she would say have you heard that Dr. Ali-Hasan did this or that? She is creating the problems.
>
> Have you brought your concerns forward to upper management/HR? I have not because I haven't had any concerns.

> The only thing I have discussed previously with Matt Cirincione [Craig Knack's assistant] is I feel Darcy is manipulative and I was worried she could access my information and potentially sabotage me. At one point Darcy wanted me to do check in. I reached out to Craig and Lisa because I felt she was taking advantage of me. That is what she did with Melissa. She would come and go, get her hair done etc. and leave Melissa here. I didn't want that.
>
> Anything else?
>
> Shellie Burdick who just left would get sucked into the negativity by Darcy. A few weeks ago Dr. Ali-Hasan came out of a room looking for Darcy. She left for an appointment without telling him. Both Darcy and Dr. Ali-Hasan appear to have friction. She is very negative she puts her personal life out there and is focused on herself. Darcy would bash Samer. I was off Thursday, but was told there was an issue and Dr. Ali-Hasan was upset. Shellie put her arm around him and said its okay and he was angered. [PA 235][3]

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3. Some employees praised Dr. Ali-Hasan. There were three who did not, two men and one woman. However, their statements were related to things that could not plausibly establish sex discrimination, such as disagreement between a tech and Dr. Ali-Hasan concerning whether to call in a vascular surgeon (a judgment Dr. Ali-Hasan was entitled to make as a physician without being undermined by a technician) [PA-270-271]

This statement typifies the very slender reeds upon defendants founded their conclusion that Dr. Ali-Hasan mistreated women.

- The investigation reported the following: "On July 18, 2019, Anna Bauer notified Kelley Jaworski of HR [by email] that Rik Baier was already seeking to terminate Dr. Ali-Hasan's employment before the investigation was complete. Jaworski replied: 'I interviewed 3 colleagues yesterday from Troy however 2 them brought concerns forward regarding Darcy Cassidy and had no concerns regarding Dr. Ali-Hasan.'" [PA-232]

- The investigation found no problems of any kind with petitioner either at the Clifton Park or Albany locations, where he also worked, in addition to the Samaritan location in Troy. [PA-256, 269]

- The investigators remarkably failed to interview Cyrus Ferri, the director of the cath lab, who was the person most knowledgeable as to how the cath lab functioned. He testified at his deposition that he had no objections to any of Dr. Ali-Hasan's conduct. [PA229-236]

- The investigators did not interview the two female technicians, who worked with Dr. Ali-Hasan in the cath labs. [Id.] According to the deposition testimony of one of the techs, Dr. Ali-Hasan had excellent relationships with both of them. [PA-261-262]

- The persons to be interviewed were selected by Craig Knack who had an axe to grind with petitioner dating back to 2016. [PA-229]. A reasonable inference is that he did not select anyone who was favorably disposed to Dr. Ali-Hasan and deliberately circumscribed the scope of the investigation to leave out those most knowledgeable of Dr. Ali-Hasan's work in the cath lab.

- It was never determined whether the person who made the anonymous complaint was actually an employee of defendants, whether he or she worked with Dr. Ali-Hasan, whether he or she had personal knowledge of the allegations, or whether the person was simply relating what others told them, as suggested in the language of the complaint. [PA 226, 228, 233-235]

- Baier wrote an email seeking Dr. Ali-Hasan's termination before the investigation was even complete. [PA-268]

The word "witch hunt" is overused and, for many, it has lost its meaning. But this investigation had all the earmarks of a witch hunt. In the search for a witch, even the slightest allegation of witchcraft is accepted against the vast body of evidence that the witch does not exist. In the employment context in a large institution, it is always possible to find someone with a bad word to say about another employee, but that is not a reason to terminate someone's employment, particularly where the vast body of the evidence was in Dr. Ali-Hasan's favor.

Defendants' Business Justifications for Terminating Petitioner's Employment

The minutes of the Executive Committee of SPHPMA for July 22, 2019, state as follows: "Anonymous complaint from an employee at SPH regarding inappropriate behavior and invading personal space. An investigation has been opened. The final report has confirmed issues from a code of conduct perspective." [PA-128] There was no final report, and none was produced in discovery.

Rik Baier related to the Executive Committee Anna Bauer's description of what the investigation found. He was not involved in the investigation. Her description of the results of the investigation, referencing mistreating women, is the same as what she told Dr. Ali-Hasan. [PA-225, 237, 246, 249]

The JOC had no involvement in the investigation. The termination was presented to the JOC as a *fait accompli*. [PA-208-211, 216-219, 221-225, 239-242, 246-247] (numerous facts, including admissions of defendant, confirming that the JOC was not involved in the investigation and had no knowledge of its findings; therefore, any allegation that the JOC sought termination of petitioner's employment based on violations of the Code of Conduct, when the JOC was not even informed of such violations, defies credulity).

Nonetheless, Baier tried to pass the buck to the JOC, claiming it sought petitioner's termination. [PA-265-266] The positions of Baier and the JOC were self-contradictory.

No specific violation of the Code of Conduct was ever identified other than Anna Bauer's assertion that Dr. Ali-Hasan had engaged in sex discrimination. As pointed out above, the hearsay contentions of the anonymous complaint were never confirmed as based on actual fact.[4]

Other physicians with profound behavioral issues, in fact far more serious than anything Dr. Ali-Hasan was accused of, were ordered to undergo anger management training in lieu of being terminated. [PA-219, 238-239, 273] These physicians, one interventional cardiologist and one non-interventional cardiologist, were brought before the JOC to address these issues. The hospitalists had refused to work with the non-interventional cardiologist

4. Dr. Ali-Hasan was not terminated from employment due to lack of medical board certification. The minutes of an earlier meeting of the Executive Committee show the issue was considered but not acted upon because his contract stated he was entitled to notice and an opportunity to cure lack of board certification. See employment agreement, sections VII.C.6 (requiring board certification), IX.B.3.d (termination for failure to meet qualifications specified in VII.C), and IX.B.7 (notice and opportunity to cure) [R-297, 300, 302] Indeed, both Rik Baier, the administrator who sought his termination, and Dr. Phillip, the head of the JOC, emphatically stated that lack of board certification was not grounds for termination. [PA-126-129, 212, 213, 222-223, 275] Dr. Phillip, testified that the failure to discuss board certification was an oversight when Dr. Ali-Hasan was hired, and that Dr. Ali-Hasan did not misrepresent his credentials which included all the necessary prerequisites for the examination. Dr. Ali-Hasan was asked to become board certified, signed up to take the test, but was terminated from employment before sitting for the exam. He then passed the exam. [PA-649-650]. No action was taken against other physicians who were not board certified. [PA-212-213]

because of his explosive temper. No one, however, accused him of sex discrimination; he was not investigated by HR; and no one suggested he be terminated from employment. The mere allegation of "sex discrimination" was far more explosive than charging a physician with "anger management" issues. It differentiated the handling of the accusations against Dr. Ali-Hasan from the other cardiologists.

In contrast to the other physicians, Dr. Ali-Hasan was never called before the JOC to address any behavioral concerns. [PA-221] Dr. Phillip so testified. [PA-456] The minutes of the JOC show no such discussion, nor do the minutes show Baier as present at any JOC meetings during the period relevant to Dr. Ali-Hasan's termination. [PA-266] Dr. Phillip testified that no problems concerning how Dr. Ali-Hasan treated women were ever brought to the attention of the JOC. [PA-274]

At the end of the day, the aforementioned facts show that petitioner was terminated, as the Executive Committee minutes reveal, because of an anonymous complaint that was never substantiated but led to an investigation of "sex discrimination" and because of violations of the Code of Conduct that were never identified but presumably included "sex discrimination."

One thing is certain. Had Dr. Ali-Hasan been allowed to defend himself in accordance with the terms of the partnership agreement and the Code of Conduct, it is highly unlikely he would have been terminated from his employment. Those who raised the specter of "sex discrimination" to procure his termination would not permit him to defend himself because they knew the

allegation was manifestly untrue. They acted in bad faith to discharge Dr. Ali-Hasan from employment.

Thus, in this case, the bare unsupported allegation of sex discrimination was sufficient in and of itself to terminate Dr. Ali-Hasan's employment. The evidence shows that the allegation of sex discrimination was not used to further the purposes of Title VII but as an incendiary weapon in the workplace used to procure the termination of a high-quality employee a savvy bureaucrat didn't like.[5]

Opinions of the Courts Below

The District Court would have denied defendants' motion for summary judgment on the question whether he was terminated because of his sex. "Viewing the evidence in the light most favorable to Petitioner, a jury could reasonably find that his employment was terminated in response to allegations of sexual misconduct, following an irregular investigative process." [26a-27a] However, the District Court ruled that petitioner could not benefit from the Second Circuit's decision upholding a similar claim in *Menaker v. Hofstra University*, 935 F.3d 20

5. Petitioner believes Craig Knack, a lower-level manager of the cardiology group, engineered the termination. Knack tried to get Dr. Ali-Hasan disciplined for "invading his personal space"; the JOC rejected his claim. He tried to get Dr. Ali-Hasan fired for not being board certified; the Executive Committee took no action. The anonymous complaint was suspiciously similar to allegations he made. He selected the persons who would be witnesses in the investigation. And he was responsible for safeguarding Dr. Ali-Hasan's personal items but those were shredded or thrown out. [PA-217, 229. 250-251. 275]

(2nd Cir. 2019). Unlike academia, neither Dr. Ali's Hasan employer, SPHPMA, nor the hospital it was affiliated with (Saint Peter's Health Partners), were under even minimal pressure to engage in special vigilance concerning sex discrimination claims that could lead it to treat males accused of sex discrimination unfairly. [27a]

The Second Circuit agreed that anti-male bias was an essential element of a claim under *Menaker* and that some indication that males were being unfairly treated as a class was required. Lacking such proof, petitioner did not make a *prima facie* case of discrimination.[6] [5a-6a]

ARGUMENT

I. THE SECOND CIRCUIT HAS ADOPTED AN OUTMODED VIEW OF TITLE VII THAT IS CONTRARY TO PRECEDENT OF THIS COURT.

In *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), this Court held that Title VII is violated when a termination is based on sex. Gender bias against an individual or against men or women as a group in general

6. The Second Circuit further held that Dr. Ali-Hasan was not qualified for the position because his contract required him to be board certified and he wasn't at the time of his termination. [4a] This aspect of the Second Circuit's decision, unfortunately, is a clear misstatement of the record and of Dr. Ali-Hasan's position (which was described *supra* fn. 4) to avoid the fundamental issue in this case. There is nothing cited by the Second Circuit that contradicts the record evidence set forth in fn. 4. Further, rigid application of the McDonnell-Douglas criteria is not required. *See, infra, Tynes v. Fla. Dep't of Juvenile Justice*, 2023 U.S. App. LEXIS 32836, *13 (11th Cir. 2023).

is not required. In *Bostock*, homosexuality was entitled to protection regardless of whether male or female same sex relationships were involved. Taking an adverse employment action against someone because of their homosexuality was an action based on sex. Yet, there is nothing in the logic of *Bostock* that requires sexual activity to violate Title VII. Title VII can be violated by gender-based discrimination, but it need not be. All that the law requires is that sex be involved in some way. *Bostock* states, 140 S.Ct. at 1744-1745.

> [A]n employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule. . . . Sex wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.

The Second Circuit utilized pre-*Bostock* reasoning when it required some evidence of anti-male bias for a petitioner to prove that his employer violated Title VII when it terminated him from employment for "sex discrimination" in bad faith based on an irregular investigative process. However, Title VII does not require proof of anti-male bias or "reverse discrimination." Title VII is violated when the termination is based on sex.

Nor is Title VII limited to academia. It is a universal statute that applies across the entire spectrum of employment. For example, in *Menaker v. Hofstra Univ.*, 935 F.3d 20 (2nd Cir. 2019), the Second Circuit held that an employee of a university had a Title VII claim that he was terminated based on sex, though prior decisions of that Court involved students who brought Title IX claims.

In Title VII case, as this Court held in *Bostock*, the focus is on the treatment of an individual. It does not require studies of whether some industry or other has a history of mistreating a particular gender, which the Second Circuit inferred was the current practice in academia concerning males accused of "sex discrimination." *Bostock* states: "The statute tells us three times – including immediately after the words 'discriminate against' – that our focus should be in individuals, not groups. . . . The consequences of the statute's focus on individuals rather than groups is anything but academic." *Id.* at 1740-41.

In this case, terminating Dr. Ali-Hasan by attaching to him the label of someone who discriminates on the basis of sex is itself a termination based on sex. It may be that the employer had other reasons to terminate him but it would not have done so if he had not been accused of mistreating women on the basis of their sex. As *Bostock* counsels, the statute is violated as long as sex is taken into account.

There should be no temptation to conclude that this case is not ripe for adjudication in the Supreme Court because the Second Circuit cited to Dr. Ali-Hasan's initial lack of board certification to justify summary judgment for defendant. [4a] This is contrary to the record [see footnote

4] and recalls retiring Seventh Circuit Judge Richard Posner's advocacy for result-oriented jurisprudence. "When you have a Supreme Court case or something similar, they're often extremely easy to get around." https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html. In any event, even if one prong of the McDonnell-Douglas test is not satisfied, "[a] petitioner who cannot satisfy this framework may still be able to prove her case with what we have sometimes called a 'convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Tynes v. Fla. Dep't of Juvenile Justice*, 2023 U.S. App. LEXIS 32836, *13 (11th Cir. 2023).

Employers will of course respond that it is important for them to be able to terminate discriminators and harassers. But such an allegation made in bad faith is simply a weapon in the workplace to be utilized, not for legitimate Title VII purposes, but as a pretext to remove an employee some manager doesn't like. This is no different than, for example, firing an employee on the allegation that he had a diabetes-related blackout while driving a company vehicle. Because of the unlikely possibility that an employee could have had such an event and not had an accident, a jury could well infer that the allegation that led to the employee's termination was in bad faith and thus actionable as disability discrimination.

Similarly, if defendant had a good faith belief that Dr. Ali-Hasan in fact discriminated against women on the basis of sex, then the termination would have been justified. But it is not justified if the accusation of sex discrimination occurs with knowledge that it was most likely false. As the District Court wrote, it is most unlikely

sex discrimination was a bona fide reason for firing Dr. Ali-Hasan. [26a-27a]

The good faith standard is used throughout the law of Title VII. An employer has a *Farragher-Ellerth* defense if in fact an employee fails to use the employer provided mechanisms for raising a complaint of discrimination. The purpose of this is to allow the employer to investigate. If the investigation fails to unearth evidence of discrimination, firing the accused would be in bad faith. *Faragher v. Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293, 141 L. Ed. 2d 662 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998).

"Good faith" has been defined in other legal contexts as "honesty in fact." *A.I. Trade Fin. v. Laminaciones de Lesaca*, S.A., 41 F.3d 830, 837 (2d Cir. 1994). "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Restatement 2d of Contracts, § 205. Defendant's dishonesty in accusing Dr. Ali-Hasan of "sex discrimination" has been amply recited.

Certainly the parties to an employment contract do not expect the employer to lie repeatedly about its reason for terminating an employee and to disregard the findings of its own investigation. There is no good faith basis for an employment decision when there is dishonesty in the reason given for the decision. *See Coleman v. Donahoe*, 667 F.3d 835, 852 (7th Cir. 2012).

In *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308 (6th Cir. 2019), the Sixth Circuit considered defendant's argument that there was "'no evidence that [Maryville] did not honestly believe' that Babb's 'clinical errors' rendered her unfit to practice nurse anesthesiology," Id. at 315. The Court pointed out, however, that an employee can still overcome the "honest belief rule" by pointing to evidence that "the employer failed to make a reasonably informed and considered decision before taking its adverse employment action." *Id*. at 322. In the Court's view, petitioner did that by producing an expert affidavit that petitioner's actions were consistent with sound medical practice such that a reasonable anesthesiology practice would not rely on those to terminate an experienced nurse practitioner. "This case is thus distinguishable from the 'honest belief' cases cited by Maryville (which are themselves indicative of most of our 'honest belief' case law), where the employee advanced [merely] a 'bare assertion' that the facts the employer relied on in firing them were wrong or overstated." *Id*. at 323. *Accord*, *Chevron, Sandstad v. CB Richard Ellis*, *Inc.*, 309 F.3d 893, 899 (5th Cir. 2002); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 854 (4th Cir. 2001).

This Court and other Circuits have held that even the hiring of a so-called independent outside investigator does not shut the door on liability for discrimination or retaliation. *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) ("[I]f the independent investigation relies on facts provided by the biased supervisor—as is necessary in any case of cat's-paw liability—then the employer (either directly or through the ultimate decisionmaker) will have effectively delegated the factfinding portion of the investigation to the biased supervisor."); *Lowery v. CSX*

Transp., Inc., 690 F. App'x 98, 100 (4th Cir. 2017) (three different decision-makers all involved in chain of cat's paw liability); *Marshall v. Rawlings Co. LLC*, 854 F.3d 368, 380 (6th Cir. 2017) (flawed investigation not unrelated to assertions of biased supervisor); *Ludlow v. BNSF Ry. Co.*, 788 F.3d 794, 802 (8th Cir. 2015) (verdict for petitioner when investigator relied on facts provided by discriminator and failed to investigate retaliatory actions); *DeNoma v. Hamilton Cty. Court of Common Pleas*, 626 F. App'x 101, 110, 113 (6th Cir. 2015) (information flow involving discriminator generated genuine issues of material fact as to whether interview committee was a cat's paw in failure to promote); *Conrail v. United States DOL*, 567 F. App'x 334, 338 (6th Cir. 2014) (failure of independent decision-maker to be familiar with the relevant evidence); *Bishop v. Ohio Dep't of Rehab. & Corr.*, 529 F.App'x 685, 696 (6th Cir. 2013) (biased supervisor influenced the independent decision-maker); *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 351 (6th Cir. 2012) (supervisor's intent to cause termination of employee was a proximate cause of decision).

These cases illustrate the point that there is no need to insulate an employer from liability simply because it accused someone of "sex discrimination." Throughout Title VII jurisprudence, an employer may be held liable for reaching ill-founded conclusions about an employee in bad faith, as occurred in the case of Dr. Ali-Hassan.

II. THERE IS CONFLICT AMONG THE CIRCUIT COURTS, AND EVEN WITHIN THE SAME PANEL OF ONE CIRCUIT, AS TO WHETHER THERE MUST BE PROOF OF ANTI-MALE GENDER BIAS FOR THERE TO BE DISCRIMINATION ON THE BASIS OF SEX.

Doe v. Oberlin College, 963 F3d 580 (6th Cir. 2020), concerned an allegation that a male sexually attacked a female. There was no doubt the case involved sex. The majority of the panel held that the College's improper investigative response to the allegations of sexual misconduct could support an inference of sex discrimination. Even a "perplexing basis of decision" could support an inference of sex bias. *Id*. at 586-588.[7]

The dissent disagreed, arguing that the petitioner needed to prove that the procedural irregularities did not affect male and female students equally, or that there was some evidence anti-male outside pressure affected the investigation, or that statistical proof showed accused male students were found guilty more frequently than accused female students. *Id*. at 589-593. The Second Circuit appeared in Dr. Ali-Hasan's case to follow the logic of the *Oberlin College* dissent. However, this Court's decision in *Bostock* cannot be squared with an analysis requiring evidence of anti-male gender bias.

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7. Sexual harassment and sexual assault are not a basis for differentiating *Oberlin College* from Dr. Ali-Hasan's case which involved sex discrimination. If anything, a sexual assault is even more serious than harassment and would be more likely cause for immediate termination. Moreover, in the Title VII context, both of these concepts are simply variants of sex discrimination. *Bostock v. Clayton C*ty., 140 S. Ct. 1731, 1747 (2020).

Dr. Ali-Hasan does not have direct evidence of anti-male bias. He never has contended that he had such direct evidence. This is not a "reverse discrimination" case.

On the other hand, Dr. Ali-Hasan has powerful evidence that ***the mere accusation*** that he was engaged in sex discrimination differentiated his case from all other similarly situated cardiologists. First, the complaint against him was anonymous, in large part that he yelled at a nurse. The anonymous complaint was never substantiated. No other physician was disciplined based on an unfounded anonymous complaint. Second, following up on the anonymous complaint, the investigation focused on whether Dr. Ali-Hasan mistreated women. This was clearly an investigation of sex discrimination. Third, even though the investigation did not confirm Dr. Ali-Hasan engaged in sex discrimination, and the investigation was in fact defective, the head of defendants' HR department nonetheless explicitly reported Dr. Ali-Hasan was being terminated because he engaged in sex discrimination. Her report was transmitted to Rik Baier who passed it on to the Executive Committee. Fourth, there were two male cardiologists working in the same group as Dr. Ali-Hasan who were accused of the same type of behavior, but who were never accused of sex discrimination. They were sent for anger management classes and not disciplined (one even refused to attend the classes). Fifth, the very same minutes of the Executive Committee of SPHPMA, which noted Dr. Ali-Hasan's termination, cites serious allegations against two other physicians, including an instance of medical misconduct, yet there was no rush to judgment to fire those physicians even though there was evidence that the allegations were true. [PA-184]

In sum, Dr. Ali-Hasan was treated differently because of the ***mere accusation*** that he had engaged in sex discrimination. The allegation of sex discrimination was incendiary. It was used as a weapon in the workplace to terminate a physician that someone did not like. Taking sex into account in an employment decision is exactly what this Court in *Bostock* said will violate Title VII.

The Circuits are further divided as to how evidence in a case of this type should be analyzed. Some Circuits, for example the Second and Sixth Circuits, follow a rigid formula requiring overt "selective enforcement" against males or an "erroneous outcome" coupled with evidence of bias against males. Other Circuits, for example the Seventh and Ninth Circuits, reject the idea that there is a single set of alternative formulae that must be applied. The latter hold that the language of Title VII permits consideration of any mosaic of evidence which would establish that "the alleged facts, if true, raise a plausible inference that the [defendant] discriminated against the petitioner 'on the basis of sex'?" *Schwake v. Arizona Board of Regents*, 967 F.3d 940, 947 (9th Cir. 2020). *Cf., e.g., Doe v. Stonehill College*, 55 F.4th 302, 333 (1st Cir. 2022) (erroneous outcome test not satisfied because procedural flaws not attributable to "sex bias").

Recently the 11th Circuit joined the ranks of those looking at the mosaic of the evidence. *Tynes v. Fla. Dep't of Juvenile Justice*, 2023 U.S. App. LEXIS 32836, *13 (11th Cir. 2023) ("A petitioner who cannot satisfy this [McDonnell-Douglas] framework may still be able to prove her case with what we have sometimes called a 'convincing mosaic of circumstantial evidence' that would allow a jury to infer intentional discrimination by the decisionmaker.")

That approach is far more consistent with this Court's teachings in *Bostock*.

With respect to the meaning of procedural irregularities in cases involving allegations of misconduct related to sex, Judge Jordan's concurring opinion in *Doe v. Samford University*, 29 F.4th 675 (11th Cir. 2022), surveyed the law across all the Circuits and concluded: "as the number of irregularities increases, or the irregularities become more serious (for example, a failure to interview the accused's witnesses) or the erroneous outcome becomes more glaring, the needle starts to move toward plausibility." Id. at 697. The opinion agreed that dismissal was appropriate where the accused had an administrative hearing and an appellate process, and the procedural errors alleged were relatively minor within the context of those processes.

Petitioner does not believe it is possible to find a case where the procedural errors were as dramatic as in Dr. Ali-Hasan's case. In comparison to prior cases where the accused received some minimal procedural protections offered by their universities, Ali-Hasan received ***none***. Everything was kept secret from him. He was never advised of the charges against him. He was never interviewed. When he found out that he was being terminated for "sex discrimination" in violation of the Code of Conduct and offered witnesses who would contradict the claim of sex discrimination, he was refused.

The need for procedural protections was most acute in Dr. Ali-Hasan's case. He was accused in an anonymous complaint, which is far more susceptible to fabrication than when an accuser puts his or her name on the accusation

and gives specifics. All the applicable policies required SPHP and SPHPMA to hear Dr. Ali-Hasan's side of the story. Even though the decision-makers all acknowledged the need to follow those policies, Dr. Ali-Hassan was singled out and treated differently because he was accused of sex discrimination. All the witnesses agreed that the usual procedures involved in physician discipline were not followed.

The Second Circuit commented on the significance of this type of behavior in *Menaker*, 935 F.3d at 35: "Menaker claims that he received none of these procedural protections [in the university's policy]. Thus, as with the allegations in *Doe v. Columbia* [831 F.3d 46 (2d Cir. 2016)], Hofstra's termination of Menaker under such circumstances strongly suggests the presence of bias." *Id*. at 35. See 42 U.S.C. § 2000e-2(m) (an unlawful employment practice occurs when sex is "a motivating factor for any employment practice, even though other factors also motivated the practice.").

In *Menaker*, a tennis coach was accused of sexual harassment after denying a full scholarship to a player and after having been threatened by the player's father. The Second Circuit appeared to follow the reasoning of *Bostock* in holding that the petitioner stated a claim of discrimination under Title VII:

> [I]t is plausible that Kaplan's accusations [of sexual harassment] were motivated, at least in part, by Menaker's sex. While Kaplan's primary motivation may have been financial or vindictive, Title VII requires that we look beyond primary motivations. Indeed, courts

> must determine whether sex was a motivating factor, i.e., whether an adverse employment action was based, even "in part," on sex discrimination. ***Here, Kaplan did not accuse Menaker of just any misconduct; she accused him of sexual misconduct. That choice is significant, and it suggests that Menaker's sex played a part in her allegations.*** A rational finder of fact could therefore infer that such an accusation was based, at least in part, on Menaker's sex. [Emphasis added]

Menaker, 935 F.3d at 39.

Likewise, Dr. Ali-Hasan was not accused of just any form of misconduct; he was accused of sex discrimination. Nevertheless, the Second Circuit held that he could not state a claim under Title VII without evidence of anti-male bias.

Prior to Dr. Ali-Hasan's case, not all District Courts in the Second Circuit saw *Menaker* as requiring proof of anti-male bias. In *Wang v. Bethlehem Central School District*, 2022 U.S.Dist. LEXIS 14153 (N.D.N.Y 2022), Judge Kahn held that an inference of bias could be made where "an educational institution considers statements from individuals with relevant knowledge, but declines to explore such statements from persons supporting an accused. *Menaker*, 935 F.3d at 34. . . ." *Id.* at *85. Judge Kahn cited *Doe v. Haas*, 472 F.Supp.3d 336, 356-57 (E.D.N.Y. 2019), for the proposition that bias could be found against "a male student in disciplinary proceedings even absent allegations of public pressure regarding sexual assault claims." *Id.* at 84 fn. 19. *See, e.g., Comerford*

v. Village of North Syracuse, 2021 U.S. Dist. LEXIS 46299, at *84 (N.D.N.Y. 2021); *Marquez v. Hoffman*, 2021 U.S. Dist. LEXIS 62994, at *44 (S.D.N.Y. 2021).

The foundation has been laid in the Circuit and District Courts for this Court to intervene and explain when an allegation of discrimination explicitly related to sex is actionable because it is not being used for legitimate Title VII purposes but in bad faith as a weapon in the workplace to procure the dismissal of an employee someone didn't like. Without extending Title VII protections to such situations, public confidence in our civil rights laws is seriously undermined.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 1, 2024
Albany, New York

APPENDIX

TABLE OF APPENDICES

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED NOVEMBER 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

22-2669

SAMER ALI-HASAN, M.D.,

Plaintiff-Appellant,

v.

ST. PETER'S HEALTH PARTNERS MEDICAL ASSOCIATES, P.C. AND ST. PETER'S HEALTH PARTNERS,

Defendants-Appellees.[*]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of November, two thousand twenty-three.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
AMALYA L. KEARSE,
DENNY CHIN,
Circuit Judges.

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* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Appendix A

SUMMARY ORDER

Appeal from a judgment of the United States District Court for the Northern District of New York (Mordue, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Samer Ali-Hasan appeals from a judgment of the United States District Court for the Northern District of New York (Mordue, *J.*) granting summary judgment in favor of Defendants-Appellees St. Peter's Health Partners Medical Associates, P.C. and St. Peter's Health Partners ("Appellees"). On appeal, Ali-Hasan pursues a Title VII claim against Appellees for sex discrimination. Ali-Hasan was terminated from his position as a physician after Appellees received an anonymous complaint allegedly accusing Ali-Hasan of sex discrimination. According to Ali-Hasan, Appellees failed to investigate adequately the complaint—in contravention of the procedures delineated in Appellees' governing policies—due to their bias against Ali-Hasan as a male accused of sex discrimination and Appellees used the mere existence of such an accusation as justification to fire him. In Ali-Hasan's view, the accusation that Ali-Hasan engaged in sex discrimination was of such great concern to Appellees that they denied him any modicum of due process in the investigative and adjudicative processes that led to his termination. In ruling on Appellees' motion for summary judgment, the district court held that Ali-Hasan failed to point to evidence sufficient to show a *prima facie* case of sex discrimination. For the reasons

set forth below, we affirm the district court's judgment. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a challenge to a district court's "grant of summary judgment *de novo*, resolving all ambiguities and drawing all reasonable inferences" in favor of the party against whom summary judgment was sought. *Woolf v. Strada*, 949 F.3d 89, 92-93 (2d Cir. 2020) (internal quotation marks and citation omitted). A district court's grant of summary judgment should be affirmed "only if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* at 93 (internal alterations, quotation marks, and citation omitted). "A genuine dispute as to a material fact exists and summary judgment is therefore improper where the evidence is such that a reasonable jury could decide in the non-movant's favor." *53rd St., LLC v. U.S. Bank Nat'l Ass'n*, 8 F.4th 74, 77 (2d Cir. 2021) (internal quotation marks and citation omitted). To defeat summary judgment, a non-moving party "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion [for summary judgment] are not credible." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d Cir. 1993); *see also Davis v. New York*, 316 F.3d 93, 100 (2d Cir. 2002) ("[R]eliance upon conclusory statements or mere allegations is not sufficient to defeat a summary judgment motion.").

Ali-Hasan's sex discrimination claim is subject to the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.

Ed. 2d 668 (1973). Under that framework, the plaintiff bears the initial burden of demonstrating that: "(1) he was within the protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination." *Menaker v. Hofstra Univ.*, 935 F.3d 20, 30 (2d Cir. 2019) (internal alterations, quotation marks, and citation omitted). If the plaintiff satisfies those requirements, "the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for its action." *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) (internal quotation marks and citation omitted). If the defendant does so, the plaintiff is no longer entitled to a presumption of discrimination, but "may still prevail by showing . . . that the employer's determination was in fact the result of [the prohibited] discrimination." *Id.*

Ali-Hasan has failed to meet his *prima facie* burden. First, Ali-Hasan has not presented sufficient evidence from which a reasonable jury could find that he was qualified for the position at issue. Ali-Hasan was required to present evidence from which a jury could find that he "met the defendant's criteria for the position," *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 127 (2d Cir. 2004). Ali-Hasan's employment agreement, which was in effect at the times of his hiring and his termination, designates board certification in interventional cardiology as a qualification for the position. Yet, Ali-Hasan was not board certified in interventional cardiology at any point during his employment. Ali-Hasan's assertion that he was qualified irrespective of this contractual requirement is insufficient to raise an issue for trial, as "[w]hether job

performance was satisfactory depends on the employer's criteria for the performance of the job—not the standards that may seem reasonable to the jury or judge." *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 29 (2d Cir. 1997); *see also Woroski v. Nashua Corp.*, 31 F.3d 105, 109-10 (2d Cir. 1994) (noting that "*some* evidence is not sufficient to withstand a properly supported motion for summary judgment") (emphasis in original).

Next, even assuming that a reasonable jury could find that Ali-Hasan was qualified, his *prima facie* case still fails on the fourth prong, i.e., whether the circumstances of the adverse employment action Ali-Hasan suffered give rise to an inference of sex discrimination. Ali-Hasan's attempt to rely on our precedent in *Menaker v. Hofstra University* is unavailing in these circumstances. In that case, the plaintiff was terminated from his position at Hofstra University after the university received a letter from a female student accusing the plaintiff of sexual harassment. Determining that the only issue on appeal was the fourth element of the plaintiff's *prima facie* case, we held that "where a university (1) takes an adverse action against a student or employee, (2) in response to allegations of sexual misconduct, (3) following a clearly irregular investigative or adjudicative process, (4) amid criticism for reacting inadequately to allegations of sexual misconduct by members of one sex, these circumstances provide the requisite support for a *prima facie* case of sex discrimination." *Menaker*, 935 F.3d at 33. We were also careful to describe the circumstances in which the case arose, noting that "[t]he events at issue occurred against a general background of debate and criticism concerning the handling of allegations of sexual harassment and

misconduct by American universities, including Hofstra." *Id.* at 26.

The circumstances of Ali-Hasan's termination are not analogous to those in *Menaker*. Assuming *arguendo* that the theory we articulated in *Menaker* and subsequent cases such as *Vengalattore v. Cornell University*, 36 F.4th 87 (2d Cir. 2022), is applicable outside the educational context, Ali-Hasan has provided no evidence suggesting that Appellees were under "criticism for reacting inadequately to allegations of sexual misconduct by members of one sex." *Menaker*, 935 F.3d at 33. Instead, Ali-Hasan asks us to disregard this element, effectively reading it out of the *Menaker* analysis. We decline this invitation. But, even if we were to do so, Ali-Hasan would not prevail. While a plaintiff asserting a claim of sex discrimination may be able to raise an inference of discriminatory intent by "point[ing] to evidence closely tied to the adverse employment action that could reasonably be interpreted as indicating that discrimination drove the decision," *Sassaman v. Gamache*, 566 F.3d 307, 315 (2d Cir. 2009), Ali-Hasan has not provided *any* such evidence here. Unlike in *Sassaman*, where the plaintiff produced evidence showing that his supervisor made "an invidious comment about the propensity of men to harass sexually their female colleagues," *id.* at 312, nothing in the record here leads to an inference that Ali-Hasan's termination was motivated by sex bias. Thus, Ali-Hasan's framing of the questions on appeal—whether a policy of special vigilance is required in order to invoke *Menaker*, or whether other evidence can create an inference of discrimination—creates a false dichotomy, because his claim fails in either case.

Instead, Ali-Hasan relies on the allegedly "clearly irregular" nature of Appellees' investigation to raise an inference of discrimination. Even assuming *arguendo* that Appellees' investigation was "clearly irregular," Ali-Hasan has no basis for asserting that this factor can, on its own, create such an inference. Under our precedent, to state a *prima facie* case of sex discrimination, Ali-Hasan was required to present evidence that Appellees were under pressure concerning their treatment of sexual misconduct complaints or to provide other evidence from which a court could infer that his termination was motivated by sex bias. *See Menaker*, 935 F.3d at 33; *Sassaman*, 566 F.3d at 315. Because Ali-Hasan failed to do either, the district court properly granted summary judgment in favor of Appellees on the Title VII claim.[1]

* * *

We have considered Ali-Hasan's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

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1. Given that Ali-Hasan has failed to meet his *prima facie* burden, we decline to consider the parties' remaining questions on appeal—namely, whether Appellees offered a legitimate, non-discriminatory reason for Ali-Hasan's termination and, if so, whether Ali-Hasan demonstrated that such reasons were pretextual.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 22, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

19-CV-1589 (NAM/DJS)

SAMER ALI-HASAN, M.D.,

Plaintiff,

v.

ST. PETER'S HEALTH PARTNERS MEDICAL ASSOCIATES, P.C., AND ST. PETER'S HEALTH PARTNERS,

Defendants.

Hon. Norman A. Mordue, Senior United States District Court Judge:

MEMORANDUM-DECISION AND ORDER[1]

I. INTRODUCTION

Plaintiff Samer Ali-Hasan, M.D., ("Plaintiff") brings this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, alleging gender-based employment discrimination against St. Peter's Health Partners Medical Associates, P.C., ("SPHPMA") and

1. This case was reassigned to the undersigned on August 1, 2022. (Dkt. No. 60).

St. Peter's Health Partners ("SPHP") (collectively "Defendants"). (Dkt. No. 26). Now before the Court is Defendants' motion for summary judgment. (Dkt. No. 50). Plaintiff opposes the motion, and Defendants have replied. (Dkt. Nos. 55, 59). For the reasons stated below, Defendants' motion is granted.

II. BACKGROUND[2]

Plaintiff is a male physician who worked in Defendants' medical organization from June 2015 until his termination on July 31, 2019. (Dkt. Nos. 50-9, 55, ¶¶ 12, 21, 98). SPHP is a "not-for-profit integrated health care network that provides various medical services through its many affiliates." (*Id.*, ¶ 1). SPHPMA is "a multi-specialty physician group with various medical practices operating under [SPHP's] corporate umbrella." (*Id.*, ¶ 2). At the time of his termination, Plaintiff had an employment agreement ("the Agreement") with Defendants, which stated, *inter alia*, that Plaintiff "shall provide services in the specialty of Interventional Cardiology." (*Id.*, ¶¶ 21–22; Dkt. No. 55-4, p. 2).

Within Defendants' organizational structure is Albany Associates in Cardiology ("AAC"), a cardiology group operating out of private medical offices and hospitals in the Albany, New York area. (Dkt. Nos. 50-9, 55, ¶¶ 3–4;

2. Unless otherwise indicated, the facts herein are undisputed and have been drawn from Plaintiff's Statement of Undisputed Facts (Dkt. No. 50-9), Defendants' Response & Counterstatement of Material Facts, (Dkt. No. 55), and the parties' record submissions insofar as they are in admissible form.

Dkt. No. 50-5, ¶ 5). From 2015 to 2019, AAC employed approximately 15 to 20 physicians in one of two categories: 1) interventional cardiology; and 2) non-interventional cardiology. (Dkt. Nos. 50-9, 55, ¶ 5). Physicians in the first category require additional training and are board certified or at least eligible for certification just after completing their training. (Dkt. No. 55-13, p. 71; Dkt. No. 55-15, p. 9). As an Interventional Cardiologist, Plaintiff saw patients at AAC's office in Troy, New York, and performed interventional procedures at several Albany-area hospitals. (Dkt. Nos. 50-9, 55, ¶¶ 18–19). Most often, Plaintiff worked at Samaritan Hospital's catheterization laboratory ("Cath Lab") in Troy. (*Id.*, ¶ 20).

SPHPMA's Board of Directors delegates certain AAC management and oversight responsibilities to an Executive Committee. (Dkt. Nos. 50-9, 55, ¶ 8; Dkt. No. 50-5, ¶¶ 3–7). The Executive Committee makes determinations relative to hiring, firing, physician compensation, and other employment conditions. (Dkt. Nos. 50-9, 55, ¶ 9). In July 2019, SPHPMA's then-President Rik Baier ("Mr. Baier") served as an Executive Committee member. (Dkt. No. 50-5, ¶ 3).

AAC's "day-to-day administration and operation" is overseen by a Joint Operating Committee ("JOC") comprised of AAC cardiologists. (Dkt. Nos. 50-9, 55, ¶¶ 6–7). At times, the JOC may review patient cases and discuss concerns regarding physicians. (Dkt. No. 50-6, ¶¶ 13–22). However, "[t]he JOC does not make termination decisions with respect to physicians." (Dkt. Nos. 50-9, 55, ¶ 11). In July 2019, JOC members included: John

Filippone, M.D. ("Dr. Filippone"); Robert Phang, M.D. ("Dr. Phang"); and Gregory Bishop, M.D. ("Dr. Bishop"). (*Id.*, ¶ 7). Additionally, James Phillip, M.D. ("Dr. Phillip") served as JOC President. (*Id.*; Dkt. No. 50-2, p. 25).

Throughout Plaintiff's employment, "the JOC received a number of concerns regarding Plaintiff's clinical skills and interventional cardiology capabilities, including his performance in the Cath Lab." (Dkt. Nos. 50-9, 55, ¶ 29). For example, sometime in 2018, AAC cardiologist Jorge Constantino, M.D. ("Dr. Constantino") brought concerns to the JOC regarding the amount of radiation Plaintiff used as well as complications regarding their mutual patients. (*Id.*, ¶ 32; Dkt. No. 55-15, pp. 16–18). Additionally, JOC members Dr. Bishop and Dr. Phang, and cardiologists Alain Vaval, M.D. ("Dr. Vaval") and Eric Roccario, M.D. ("Dr. Roccario") "raised concerns at various points." (*Id.*, ¶ 31; Dkt. No. 50-6, ¶ 14; Dkt. No. 55-15, pp. 20–21; Dkt. No. 55-14, pp. 24–26). In his last year of employment, Plaintiff also had several patient cases brought before the SPHP morbidity and mortality conference—a forum "where patient complications or deaths are discussed and presented to a group of physicians." (Dkt. Nos. 50-9, ¶ 55, ¶¶ 46-47; Dkt. No. 50-6, ¶ 22; Dkt. No. 55-14, pp. 26–28).

At some point in 2018 or 2019, the JOC initiated a formal review of Plaintiff's interventional skills and patient cases. (Dkt. Nos. 50-9, 55, ¶¶ 39–41; Dkt. No. 50-6, ¶ 20). The JOC received information that another AAC cardiologist, Reid Muller, M.D. ("Dr. Muller"), "became concerned that Plaintiff's skills were inadequate" as Plaintiff purportedly "failed to bring one of Dr. Muller's

patients to the Cath Lab," and the patient deteriorated. (Dkt. Nos. 50-9, 55, ¶¶ 42–43; Dkt. No. 55-13, pp. 63–69). The JOC discussed Dr. Muller's concern at a meeting. (*Id.*, ¶ 44). Although no definitive action resulted, several physicians expressed an unwillingness to refer patients to Plaintiff. (*Id.*, ¶ 45; Dkt. No. 55-13, p. 68; Dkt. No. 55-15, pp. 17–18; Dkt. No. 50-6, ¶ 21). Dr. Muller and Dr. Constantino communicated that henceforth they would be sending their patients to other Interventional Cardiologists. (*Id.*).

In or about May 2019, the JOC became aware that contrary to the Agreement, Plaintiff was not "board certified" in interventional cardiology.[3] (Dkt. Nos. 50-9, 55, ¶ 52; Dkt. No. 50-5, ¶¶ 21–25; Dkt. No. 50-6, ¶¶ 21–26; Dkt. No. 55-13, pp. 65-66; *see also* Dkt. No. 55-4, pp. 2, 5). Dr. Phillip, the JOC President, was "shocked and surprised" as Plaintiff had already been working at AAC for four years. (Dkt. No. 55-13, p. 71). The JOC met with Plaintiff to discuss the issue. (*Id.*, p. 66). Plaintiff communicated that he would sign up to take the board examination, which is held only once a year. (*Id.*; Dkt. No. 55-2, ¶ 85). When Mr. Baier (SPHPMA's then-President) learned that Plaintiff lacked board certification, he began having discussions with the JOC about no longer allowing Plaintiff to work as an Interventional Cardiologist. (Dkt. Nos. 50-9, 55, ¶ 54; Dkt. No. 50-5, ¶¶ 21–26; Dkt. No. 55-18, p. 13).

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3. Section VII.C of the Agreement, titled "Physician's Qualifications," states that "[p]rior to providing Services and continuously through the Term of the Agreement, [Plaintiff] shall meet all of the following qualifications[:] . . . (6) Board Certification. Physician shall be board certified in the specialty of Interventional Cardiology." (Dkt. No. 50-5, p. 14).

Appendix B

At a June 24, 2019 meeting of the SPHPMA Executive Committee, Mr. Baier discussed terminating Plaintiff's employment. (Dkt. Nos. 50-9, 55, ¶ 63; Dkt. No. 50-5, ¶ 24). Mr. Baier explained that Plaintiff was not boarded in interventional cardiology. (Dkt. No. 55-18, p. 18). Mr. Baier also communicated that the JOC recommended giving Plaintiff a "120-day notice for no cause." (Dkt. Nos. 50-9, 55, ¶ 62; Dkt. No. 55-18, p. 18). Although the Executive Committee discussed Plaintiff's termination, no decision was reached at that time. (Dkt. Nos. 50-9, 55, ¶ 63; Dkt. No. 55-18, p. 18; Dkt. No. 50-8, ¶ 8).

JOC and Executive Committee members also received concerns from staff and physicians regarding Plaintiff's behavior. (Dkt. No. 50-5, ¶¶ 19–20; Dkt. No. 55-13, pp. 65, 69–70). For example, Mr. Baier was aware of multiple concerns, including from AAC's Director of Cardiology Craig Knack ("Mr. Knack") and others, that "Plaintiff would invade personal space and yell at staff." (Dkt. Nos. 50-9, 55, ¶ 50; Dkt. No. 50-5, ¶¶ 19–20).

On or about July 12, 2019, SPHP's Compliance Hotline received an anonymous telephonic complaint regarding Plaintiff. (Dkt. Nos. 50-9, 55, ¶ 63). That same day, Mr. Baier, Mr. Knack, and Defendants' Human Resources Business Partner Anna Bauer ("Ms. Bauer") received the following complaint summary:

> The caller stated for approximately two years, he/she witnesses Samer Ali-Hasan, physician, demean and demoralize employees who attempted to report their concerns.

> The caller stated he/she also witnessed Dr. Ali-Hasan enter the personal space of employees, while speaking to them in a 'scary' and intimidating manner. The caller stated Dr. Ali-Hasan's behavior was reported to his colleagues and upper management (names withheld). The caller stated Dr. Ali-Hasan's behavior temporarily improved.
>
> The caller stated in late June 2019 (exact date unknown), he/she was made aware of Dr. Ali-Hasan becoming upset with and screaming at a nurse about a patient issue.
>
> The caller abruptly terminated the line without providing additional information, and before the report number and call back date were given.

(*Id.*, ¶ 68; Dkt. No. 50-7, p. 10).

The complaint triggered a Human Resources investigation concerning the allegations. (Dkt. Nos. 50-9, 55, ¶ 73). Interviews were conducted on July 16, 2019, and July 17, 2019, with four individuals identified as having frequent contact with Plaintiff: Mr. Knack, Dr. Constantino, Edith Warrender, a Registered Nurse, and Melissa Vermilyea, an Administrative Liaison. (*Id.*, ¶¶ 74–75; Dkt. No. 50-7, ¶ 10). According to the investigation notes, both Mr. Knack and Dr. Constantino expressed concerns about Plaintiff's behavior. (Dkt. No. 50-7, pp. 19–21). Dr. Constantino also related concerns about Plaintiff's clinical skills. (*Id.*, pp. 20–21). Ms. Vermilyea,

however, described Plaintiff as "great," and reported no concerns. (*Id.*, pp. 21–22). Although Ms. Warrender indicated that she got along "very well" with Plaintiff, she acknowledged that Plaintiff "likes things his way and [] is very fast pace[d]" and that he sometimes "clash[ed]" with Cath Lab technicians. (*Id.*, pp. 22–23).

In June 2019, weeks before the July 12, 2019, complaint, three Cath Lab technicians, Bruce Coyne, Robert Rivera, Mardine Perrins, and a Cath Lab nurse, Cala Pellerin, were interviewed regarding an investigation unrelated to Plaintiff. (Dkt. No. 50-7, ¶¶ 12–13). During the interviews, Mr. Coyne, Mr. Rivera, and Ms. Perrins purportedly stated, *inter alia*, that Plaintiff discriminated against female staff. (*Id.*; Dkt. No. 50-7, pp. 25–26). They also reportedly expressed concerns about Plaintiff's clinical skills. (*Id.*). The comments about Plaintiff from the June 2019 interviews were considered in the investigation regarding the July 2019 complaint. (*Id.*). Plaintiff was not interviewed during the investigation or given a chance to respond to the allegations. (Dkt. No. 55-2, ¶ 61).

On or around July 18, 2019, Mr. Baier communicated to Ms. Bauer that he wanted to terminate Plaintiff's employment on July 19, 2019. (Dkt. No. 55-18, pp. 32–33). Mr. Baier's tenure as President was ending on July 31, 2019, and he indicated that he "wanted to actually have that conversation with [Plaintiff]" prior to leaving SPHMPA. (*Id.*, pp. 34, 44–45). Mr. Baier also informed the JOC members about the anonymous complaint, but he did not share the complaint summary or any investigation findings. (Dkt. No. 55-13, pp. 12–14; Dkt. No. 55-18, p.

35; Dkt. No. 55-14, pp. 32–34). The JOC requested that Plaintiff's employment be terminated, but "without cause" so as to "minimize the effect on [Plaintiff's] career." (Dkt. No. 55-13, pp. 13–14; Dkt. No. 55-18, p. 40; Dkt. No. 50-6, ¶¶ 28–30).

On July 22, 2019, Mr. Baier again met with the SPHPMA Executive Committee about terminating Plaintiff's employment. (Dkt. Nos. 50-9, 55, ¶ 89). Mr. Baier expressed that there were several ongoing concerns relating to Plaintiff, including issues with quality, board certification, and interpersonal issues. (*Id.*, ¶ 90; Dkt. No. 50-5, ¶ 35; Dkt. No. 50-8, ¶ 9). Mr. Baier also noted the anonymous complaint against Plaintiff alleging inappropriate behavior and invading personal space. (Dkt. Nos. 50-9, 55, ¶ 91). Mr. Baier stated that an investigation had confirmed Plaintiff's conduct issues and that the JOC recommended Plaintiff's employment be terminated without cause. (*Id.*, ¶¶ 91–92; Dkt. No. 50-5, ¶ 36; Dkt. No. 50-8, ¶¶ 9–10). Based on the information Mr. Baier provided, the Executive Committee voted to terminate Plaintiff's employment without cause. (Dkt. No. 50-5, ¶ 37; Dkt. No. 50-8, ¶¶ 10–11).

On Friday, July 26, 2019, Mr. Baier spoke with SPHPMA's Chief Operating Officer, Kellie Valenti ("Ms. Valenti"), who was taking over as interim President. (Dkt. No. 55-13, p. 32). Mr. Baier explained that Plaintiff's employment was being terminated without cause. (Dkt. No. 55-16, pp. 16–18; Dkt. No. 50-5, ¶ 39).

On July 31, 2019, Ms. Valenti and SPHMPA Executive Committee's President, William Kowal, M.D. ("Dr.

Kowal") met with Plaintiff at Samaritan Hospital. (Dkt. Nos. 50-9, 55, ¶ 95). Ms. Valenti informed Plaintiff that his employment was being terminated pursuant to the Agreement's "out clause." (*Id.*, ¶ 96; Dkt. No. 55-16, pp. 17–18). Ms. Valenti provided Plaintiff a letter indicating that his employment would terminate effective January 27, 2020—180 days from July 31, 2019. (Dkt. Nos. 50-9, 55, ¶ 98). The letter stated: "[t]his letter serves as notice that [SPHPMA] is terminating its employment agreement with you, dated April 30, 2018, in accordance with the terms of Section IX.B.1.[4] Your last day of employment will be January 27, 2020." (*Id.*, ¶ 99; Dkt. No. 50-7, ¶ 28).

According to Plaintiff, Ms. Valenti and Dr. Kowal told him at the meeting "that there was an anonymous complaint against [him] and that HR had done an investigation." (Dkt. No. 55-2, ¶ 20). They allegedly told Plaintiff that the SPHPMA board had made a unanimous decision to terminate his employment "for cause," but the JOC requested that it be changed to a "without cause" termination." (*Id.*). Ms. Valenti and Dr. Kowal allegedly refused to tell Plaintiff what the anonymous complaint was about, and said that pursuant to the Agreement's "out clause," they did not have to give Plaintiff a reason for his termination. (*Id.*, ¶ 21). Plaintiff alleges that the termination would not have occurred but for the "for cause" finding that resulted from the HR investigation.

4. Section IX.B.1 states "Termination for Convenience. The Agreement may be terminated for any or no reason by either party on at least 180 days' prior written notice. Provided, however, neither party may effect termination of the Agreement under this provision before [June 15, 2019]." (Dkt. No. 50-5, p. 17).

(*Id.*). Ms. Valenti and Dr. Kowal did not let Plaintiff address the allegations, and they directed him to speak with Ms. Bauer regarding his termination. (*Id.*, ¶ 22).

According to Plaintiff, he was "shell shocked" upon learning of his termination, as he never had received complaints or been given "any hint" that he might be disciplined. (*Id.*, ¶ 25). On August 2, 2019, Plaintiff met Ms. Bauer, who confirmed that the SPHP Compliance Hotline had received an anonymous complaint about him. (Dkt. Nos. 50-9, 55, ¶ 113). According to Plaintiff, Ms. Bauer said the allegations were that Plaintiff did not want to work with female technicians and was difficult to work with. (Dkt. No. 55-2, ¶ 32). Plaintiff disputed these allegations. (*Id.*). But Plaintiff was never "given any means of responding to the allegations by either SPHP . . . or SPHPMA." (*Id.*, ¶ 40).

III. STANDARD OF REVIEW

Summary judgment may be granted only if all the submissions, taken together, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing FED. R. CIV. P. 56(c)) (internal quotations omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). An issue of fact is material if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. A dispute is "'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (citations omitted). "Factual

disputes that are irrelevant or unnecessary will not be counted." *Id.* (citations omitted).

The moving party bears the initial burden of showing, through the production of admissible evidence, that no genuine issue of material fact exists. *See Salahuddin v. Goord*, 467 F.3d 263, 272–72 (2d Cir. 2006). To meet this burden, the moving party can demonstrate that the non-movant has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotext*, 477 U.S. at 322.

Where the moving party satisfies its burden, the non-movant must "point to record evidence creating a genuine issue of material fact." *Salahuddin*, 467 F.3d at 273 (citations omitted). However, the non-moving party must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Likewise, "[c]onclusory allegations, conjecture and speculation . . . are insufficient to create a genuine issue of fact." *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998).

Furthermore, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008). Nevertheless, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the

plaintiff." *Jeffreys v. City of N.Y.*, 426 F.3d 549, 554 (2d Cir. 2005). The non-moving party "must offer some hard evidence showing that [his] version of the events is not wholly fanciful." *Id.* (citations omitted).

IV. DISCUSSION

Plaintiff asserts two causes of action: 1) gender-based employment discrimination pursuant to Title VII; and 2) breach of contract pursuant to New York State law. The Court will address each in turn.

A. Title VII Gender Discrimination

Title VII makes it unlawful "for an employer . . . to fail to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). This requires a plaintiff to demonstrate his sex was a "substantial" or "motivating" factor contributing to the employer's decision. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) (citations omitted). Title VII employment discrimination claims are subject to the three-step burden-shifting analysis set forth in *McDonnell-Douglas v. Green*, 441 U.S. 792 (1973). First, a plaintiff must establish a *prima facie* case of discrimination by demonstrating that: "(1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination." *Weinstock v. Columbia University*, 224 F.3d 33, 42 (2d Cir. 2003) (citing *McDonnell-Douglas*,

411 U.S. at 802). Second, if the plaintiff presents a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Weinstock*, 244 F.3d at 42 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). Finally, if the defendant makes such a showing, the burden shifts back to the plaintiff, who "must then come forward with evidence that the defendant's proffered reason is a mere pretext for actual discrimination." *Weinstock*, 244 F.3d at 42.

Here, there is no dispute that Plaintiff is a male and thus a member of a protected class, and that his termination constituted an adverse employment action. Therefore, the Court turns to the two remaining elements of a prima facie case.

1. Plaintiff's Qualifications

"[T]he qualification necessary to shift the burden to [the] defendant for an explanation of the adverse job action is minimal; [the] plaintiff must show only that he 'possesses the basic skills necessary for performance of [the] job.'" *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 92 (2d Cir. 2001) *cert. denied*, 534 U.S. 951 (2001) (quoting *Owens v. N.Y.C. Housing Auth.*, 934 F.2d 405, 409 (2d Cir. 1991) (internal quotations omitted)). At the same time, however, "this burden is not inconsequential" and the plaintiff "must show that she met the defendant's criteria for the position." *Williams v. R.H. Donnelley Corp.*, 368 F.3d 123, 127 (2d Cir. 2004) (citing *Thornlev v. Penton Publ'g, Inc.*, 104 F.3d 26, 29 (2d

Cir. 1997)). "Moreover, employers have broad discretion to determine the necessary job qualifications." *Sulehria v. City of N.Y.*, 670 F. Supp. 2d 288, 309 (S.D.N.Y. 2009) (collecting cases).

In this case, Plaintiff's employment Agreement stated that he "shall provide professional services in the specialty of Interventional Cardiology" and that he "shall be board certified in the specialty of Interventional Cardiology."[5] (Dkt. No. 55-4, pp. 2, 5). Defendants assert that "[b]y signing the Agreement, Plaintiff acknowledged this required qualification[.]" (Dkt. No. 50-10, p. 30). Defendants argue that "Plaintiff's board certification in Interventional Cardiology was a contractually established condition of his employment." (*Id.*, p. 29). Defendants point to testimony from SPHMPA Executive Committee and JOC members that Plaintiff's lack of board certification was a "significant concern" and grounds for termination. (Dkt. No. 50-5, ¶¶ 21–25; Dkt. No. 50-8, ¶¶ 5–7; Dkt. No. 55–13, pp. 65–66, 70–72; Dkt. No. 50-6, ¶¶ 24–26).

Plaintiff admits that he was not board certified at any time during his employment. (Dkt. No. 55-2, ¶¶ 84–85). However, Plaintiff states that "lack of board certification was not an obstacle to [] working as an interventional cardiologist so long as [he] had the training[,]" which he received during his fellowship. (*Id.*, ¶ 84 (citations omitted)).

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5. By way of reference, New York State's regulations governing interventional cardiologists provide that "physicians shall all be residency trained and board certified, or meet accepted equivalent training and experience for physicians in their respective specialty[.]" 10 N.Y.C.R.R. § 405.29(d)(3)(i).

Furthermore, Plaintiff asserts that the Agreement "does not require him to be board certified at the inception of the contract or face termination of employment." (Dkt. No. 55, ¶ 55). Plaintiff points to Dr. Phillip's testimony that being board certified was not a requirement for practicing interventional cardiology. (Dkt. No. 55-13, pp. 70–72). Plaintiff states that "Dr. Phillip ***asked*** [Plaintiff] about board certification" but that Plaintiff was "never told that [he] was required to take the board certification exam or risk termination of employment." (Dkt. No. 55-2, ¶ 85).

The Court finds that Plaintiff did not meet Defendants' qualification criteria for the position of Interventional Cardiologist at the time of his termination. First, the Agreement clearly spells out the required qualifications and states: "[*p*]*rior to* providing Services and *continuously through* the Term of the Agreement, [Plaintiff] . . . shall be board certified in the specialty of Interventional Cardiology." (Dkt. No. 50-5, p. 14) (emphasis added). Thus, according to the Agreement's plain language, Plaintiff was not qualified for the position of Interventional Cardiologist at the time of his termination.

Second, Plaintiff's assertion that his lack of certification was not a "significant concern" is contradicted by the record evidence. (*See* Dkt. No. 55, ¶ 53; Dkt. No. 50-5, ¶¶ 21–25; Dkt. No. 50-8, ¶¶ 5–7; Dkt. No. 55-13, pp. 65–66, 70–72; Dkt. No. 50-6, ¶¶ 24–26). Indeed, even though Dr. Phillip testified that a physician without board certification was not strictly prohibited from doing Plaintiff's work, he explained that:

> [T]he people in this practice are board certified and our interventionalists are all board certified or at least board eligible to take it and sit for it. So everybody who does subspecialty in cardiology in this practice is board certified or at least board eligible so they can take their boards if they're not eligible to take it yet just from getting out of training. We kind of expect that from our associates, as do most places.

(Dkt. No. 55-13, pp. 71–72).

In other words, Defendants had an expectation, in accordance with industry custom and the Agreement, that Plaintiff be board certified. Dr. Phillip also stated that he was "shocked and surprised" after discovering that Plaintiff had been working four years without board certification, that Plaintiff's lack of certification should have been known "the first day he was hired" but that it was mistakenly "overlooked." (Dkt. No. 55-13, pp. 70–71).

Finally, although Plaintiff states that one AAC cardiologist failed a board examination, and another let his certification lapse, both individuals were non-interventionalists, unlike Plaintiff. (Dkt. No. 55-2, ¶ 85; Dkt. No. 55-13, p. 51; Dkt. No. 55-14, pp. 39–40). There is no evidence that Defendants relaxed or otherwise loosened the qualifications for other Interventional Cardiologists. By all indications, Plaintiff was the only Interventional Cardiologist without board certification, contrary to Defendants' expectations and the Agreement's express terms. (Dkt. No. 55-13, pp. 71–72; Dkt. No. 55-4, pp. 2, 5).

In sum, the undisputed facts show that Plaintiff was not qualified for the position of Interventional Cardiologist at the time of his termination. Accordingly, Plaintiff cannot establish a prima facie case and his Title VII claim must fail.

2. Inference of Discrimination

An inference of discrimination may be shown "through direct evidence of intent to discriminate, or by indirectly showing circumstances giving rise to an inference of discrimination." *Vega*, 801 F.3d 7at 87 (2d Cir. 2015) (citations omitted). In this case, Plaintiff alleges discrimination via the theory set forth in *Menaker v. Hofstra Univ.*, 935 F.3d 20 (2d Cir. 2019).[6] (Dkt. No. 26, ¶¶ 50–59).

In *Menaker*, a male tennis coach at Hofstra University was terminated following sexual harassment allegations made by a female student athlete. 935 F.3d at 27. The termination "occurred against a general background of debate and criticism concerning the handling of allegations of sexual harassment and misconduct by American universities, including Hofstra." *Id.* at 26. The plaintiff alleged that in response to the accusations and "pressure on Hofstra to react more forcefully to allegations of male sexual misconduct," the defendant, *inter alia*, "completely disregarded the process provided for in its written

6. There is no allegation or evidence Defendants treated Plaintiff less favorably than a similarly situated employee outside his protected group (i.e., male).

'Harassment Policy.'" *Id.* at 33–34. The plaintiff "claim[ed] that he received none of the[] procedural protections" and that his termination "under such circumstances strongly suggests the presence of bias." *Id.* at 35.

The Second Circuit ruled that an inference of discrimination may be drawn:

> where a university (1) takes an adverse action against a student or employee, (2) in response to allegations of sexual misconduct, (3) following a clearly irregular investigative or adjudicative process, (4) amid criticism for reacting inadequately to allegations of sexual misconduct by members of one sex[.]

Id. at 33 (discussing *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016)).

Here, Defendants assert that "*Menaker* does not apply to Plaintiff's case [because] there is no proof even suggesting that Defendants were subject to any criticisms for reacting inadequately to allegations of sexual misconduct by members of one sex." (Dkt. No. 59, p. 7). Defendants cite the declaration of former President Rik Baier, which states that "neither SPHP nor SPHPMA were under public pressure or scrutiny to react forcefully to allegations of sexual misconduct by male employees in or around July 2019." (Dkt. No. 50-5, ¶ 40).

Viewing the evidence in the light most favorable to Plaintiff, a jury could reasonably find that his

employment was terminated in response to allegations of sexual misconduct, following an irregular investigative process. However, Plaintiff has not adduced any evidence whatsoever that his termination took place amidst public pressure or criticism regarding Defendants' handling of sexual misconduct complaints. Accordingly, Plaintiff has failed to show any facts to permit a reasonable inference of discrimination via a *Menaker* theory, and his Title VII claim fails for this reason as well. *See N.Y. Univ.*, 438 F. Supp. 3d at 185–86; *Roe v. St. John's Univ.*, No. 19-CV-4694 (PKC/RER), 2021 WL 1224895, at * 23, 2021 U.S. Dist. LEXIS 63433, at *70–71 (E.D.N.Y. Mar. 31, 2021).

3. Plaintiff Cannot Show Pretext

Assuming arguendo that Plaintiff could make a prima facie case of gender discrimination, the burden shifts to Defendants to show a legitimate, non-discriminatory reason for his termination. Defendants assert that "[t]here is ample evidence in the record that Plaintiff's termination resulted from legitimate and ongoing issues regarding his clinical performance, lack of board certification, and interpersonal conflicts." (Dkt. No. 50-10, p. 29) (citing Dkt. No. 50-5, ¶¶ 17–35). For instance, Defendants point to evidence that Plaintiff had several issues with patients that were reviewed by SPHP's morbidity and mortality conference. (Dkt. Nos. 50-9, 55, ¶¶ 46–47; Dkt. No. 50-6, ¶ 22; Dkt. No. 55-14, pp. 26–28). They also cite evidence that multiple physicians and staff members had expressed concerns about Plaintiff's clinical skills and behaviors. (*See* Dkt. No. 50-6, ¶ 14; Dkt. No. 55-15, pp. 20–21; Dkt. No. 55-14, pp. 24–26; Dkt. No. 50-5, ¶¶ 19–20; Dkt. No. 55-13,

pp. 65, 69–70). Further, Defendants note evidence that, before any accusation regarding sex discrimination, they became aware that Plaintiff was not "board certified" in interventional cardiology and began taking steps toward removing him. (Dkt. Nos. 50-9, 55, ¶ 52; Dkt. No. 50-5, ¶¶ 21–25; Dkt. No. 50-6, ¶¶ 21–26; Dkt. No. 55-13, pp. 65-66; *see also* Dkt. No. 55-4, pp. 2, 5).

Based on the above evidence, the Court finds that Defendants have shown legitimate, non-discriminatory reasons for Plaintiff's termination, and the burden returns to Plaintiff to show that those reasons are pretextual. To establish pretext, "a plaintiff need only establish 'that discrimination played a role in an adverse employment decision.'" *Naumovski v. Norris*, 934 F.3d 200, 214 (2d Cir. 2019) (quoting *Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 157 (2d Cir. 2010)). "In other words, a Title VII plaintiff need only prove that the employer's stated non-discriminatory reason was *not the exclusive* reason for the adverse employment action." *Id.*

Plaintiff argues that Defendants' proffered explanations regarding his termination are pretextual because: 1) Defendants provided "shifting reasons" and no "straight answer" regarding his termination; 2) any claims about his medical skills being substandard are false; 3) Defendants credited "outdated" and "exaggerated" claims against him; 4) the anonymous complaint investigation was "defective"; 5) Defendants violated policy by failing to interview him or consider his lack of disciplinary history; 6) he had "strong evidence of positive performance"; and 7) the termination of employment was disproportionate to the alleged wrongdoing. (Dkt. No. 55-1, pp. 20–24).

Appendix B

After careful review of the record, the Court concludes that none of Plaintiff's arguments permit a reasonable finding of pretext. First, to the extent that Defendants provided multiple or "shifting" reasons, the record shows that there were, in fact, numerous legitimate reasons factoring into his termination—none of which are mutually exclusive, or in any way gender-motivated. (*See* Dkt. No. 50-10, pp. 5–6; Dkt. No. 50-5, ¶¶ 17–40). Insofar as Plaintiff claims that Defendants did not provide him with a "straight answer," the record shows that, on July 31, 2019, SPHMPA's acting President Valenti provided him a letter explaining that Defendants were terminating his employment pursuant to Section X.II.B "without cause." (Dkt. Nos. 50-9, 55, ¶ 98; Dkt. No. 50-7, ¶ 28). This was done to "minimize" the effect of the termination on Plaintiff's career. (Dkt. No. 55-13, pp. 13–14; Dkt. No. 55-18, p. 40; Dkt. No. 50-6, ¶¶ 28–30). Because Plaintiff's termination was deemed "without cause," Defendants determined that there was need to provide Plaintiff with a reason. (Dkt. No. 50-8, ¶ 11; Dkt. No. 50-5, p. 17; Dkt. No. 50-7, ¶ 14). Likewise, it follows that there was no reason to interview Plaintiff or consider his lack of previous discipline, as if the termination was *for cause.*

Further, to the extent Plaintiff argues that Defendants relied on "outdated" or "exaggerated" claims against him, the record shows no genuine dispute that these claims were made and were of concern to Defendants. (Dkt. Nos. 50-9, 55, ¶ 50; Dkt. No. 50-5, ¶¶ 17–20). For example, AAC's Director of Cardiology Craig Knack testified that he once had to ask Plaintiff to leave his office because he was "in my space" (Dkt. No. 55-11, pp. 48–49), an incident which echoes the allegations in the anonymous complaint that

Plaintiff "entered the personal space of employees" (Dkt. No. 50-7, p. 10). As another example, the investigation report cites a statement from Dr. Constantino that he believed that Plaintiff was "deliberately jeopardizing patients." (*Id.*, pp. 20–21; Dkt. No. 55-15, p. 43). Dr. Constantino explained, *inter alia*, that he meant Plaintiff "avoid[ed] patients that were sicker or more complicated," waiting to go to the Cath lab and allowing patients to deteriorate. (Dkt. No. 55-15, pp. 43–49). And the record shows that several other doctors raised similar concerns about Plaintiff's performance, which belies any claim of undue exaggeration. (*See* Dkt. No. 55-13, pp. 43, 62–70; Dkt. No. 55-14, pp. 10–13; Dkt. No. 55-15, pp. 16–18, 43–50; Dkt. No. 50-6, ¶¶ 13–22). Thus, Plaintiff has not adduced evidence to permit a reasonable finding that Defendants' cited reasons for his termination were inaccurate or false.

To the extent Plaintiff points to evidence of his merits as a doctor, such as favorable rating from patients and success growing the practice, such facts do not refute Defendants' well-documented concerns about his performance. (*See* Dkt. No. 55-13, pp. 43, 62–70; Dkt. No. 55-14, pp. 10–13; Dkt. No. 55-15, pp. 16–18, 43–50; Dkt. No. 50-6, ¶¶ 13–22). And while Plaintiff claims that other cardiologists had behavioral issues but were not terminated, there is no evidence that these doctors were similarly situated, i.e. that Defendants also had concerns about their clinical skills or board certifications. (Dkt. No. 55-2, ¶¶ 74–75; Dkt. No. 55-14, pp. 13–16, 32; Dkt. No. 53-13, pp. 14–17).

As discussed previously, Plaintiff's lack of board certification rendered him unqualified for the position.

Importantly, the record evidence shows that, in May 2019, weeks before the anonymous complaint, Defendants became aware that Plaintiff lacked board certification and began taking steps to remove him. (Dkt. Nos. 50-9, 55, ¶ 52; Dkt. No. 50-5, ¶¶ 21–25; Dkt. No. 50-6, ¶¶ 21–26; Dkt. No. 55-13, pp. 65-66; *see also* Dkt. No. 55-4, pp. 2, 5). Plaintiff's only allegation of sex discrimination concerns the investigation into the July 2019 complaint; however, the trajectory of his termination had been in motion for several weeks by that time. (*Id.*; *see also* Dkt. No. 26). The Court finds that this indisputable sequence of events surrounding Defendants' decision further undermines any reasonable finding of pretext.

In sum, the record shows that Defendants had longstanding clinical and behavioral concerns about Plaintiff which preceded the anonymous complaint against him (*See* Dkt. Nos. 50-9, 55, ¶ 63; Dkt. No. 50-5, ¶ 24). Plaintiff has failed to adduce evidence to reasonably infer that these concerns were unfounded or that they were not the exclusive reason for his termination. In other words, even viewing the evidence in the light most favorable to Plaintiff, a reasonable jury simply could not find that Defendants' concerns were pretextual and that gender discrimination played a role in Plaintiff's termination. Accordingly, Plaintiff's Title VII claim must be dismissed.

B. Breach of Contract

Finally, having dismissed Plaintiff's Title VII claim, the Court declines to exercise supplemental jurisdiction over Plaintiff's State law breach of contract claim. *See* 28 U.S.C. § 1367(c)(3) (providing that a district court "may

decline to exercise supplemental jurisdiction over [pendent state law claims] if . . . the district court has dismissed all claims over which it has original jurisdiction"); *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 170 (2d Cir. 2014) ("In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well.") (quoting *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998). Accordingly, Plaintiff's breach of contract claim is also dismissed.

V. CONCLUSION

For these reasons, it is hereby

ORDERED that Defendants' Motion for Summary Judgment (Dkt. No. 50) is **GRANTED;** and it is further

ORDERED that the Amended Complaint (Dkt. No. 26) is **DISMISSED** with prejudice; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

Dated: September 22, 2022
Syracuse, New York

/s/ Norman A. Mordue
Norman A. Mordue
Senior U.S. District Judge