No. 24-

IN THE

Supreme Court of the United States

DR. DAVID B. PORTER,

Petitioner,

v.

BEREA COLLEGE; F. TYLER SERGENT,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a private college which receives federal funding always rely upon a "no state action" defense in denying its employee due process or procedural fairness in a Title IX disciplinary hearing?

PARTIES TO THIS PROCEEDING

Plaintiff-Petitioner:	Dr. David B. Porter
Defendant-Respondent:	Berea College
Defendant-Respondent:	F. Tyler Sergent

STATEMENT OF RELATED CASES

In the United States District Court for the Eastern District of Kentucky:

Dr. David B. Porter v. Dr. F. Tyler Sergent and Berea College, No. 5:19-455-KKC, Judgment Entered on August 4, 2020 (on FRCP 12(b)(6) motions to dismiss);

Dr. David B. Porter v. Dr. F. Tyler Sergent and Berea College, No. 5:19-455-KKC, Judgment Entered on September 28, 2022 (on FRCP 56 motions for summary judgment);

Dr. David B. Porter v. Dr. F. Tyler Sergent and Berea College, No. 5:19-455-KKC, Judgment Entered on September 25, 2023 (on FRCP 59(e) motion to alter or amend judgment).

In the United States Circuit Court of Appeals for the Sixth Circuit:

Dr. David B. Porter v. Dr. F. Tyler Sergent and Berea College, No. 23-5944, Judgment Entered on October 29, 2024.

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The Sixth Circuit opinion below is not published in the official reports but is available at 2024 WL 4604598 (Appendix at 1a). The District Court opinion addressing the Defendants' motions to dismiss is available at 2020 WL 4495465 (Appendix at 108a-138a). The District Court opinion granting the Defendants' motions for summary judgment is available at 2022 WL 4544688 (Appendix at 41a-105a). The District Court's opinion denying the FRCP 59(e) motion to alter or amend the judgment is available at 2023 WL 6217346 (Appendix at 18a-40a).

STATEMENT OF BASIS FOR JURISDICTION

Upon the appeal of the Petitioner Dr. David Porter, the Sixth Circuit entered judgment on October 29, 2024 affirming in part and reversing in part the final judgment of the United States District Court for the Eastern District of Kentucky in this matter. The Sixth Circuit opinion reversed the District Court's entry of summary judgment in favor of the Defendant Dr. Tyler F. Sergent on a defamation claim but affirmed the entry of summary judgment in favor of the Defendant Berea College on the Due Process and Retaliation claims. In the latter, the Sixth Circuit denied Porter's FRAP 35 Petition for En Banc Determination and FRAP 40 Petition for Panel Rehearing in an Order entered on January 13, 2025. (Appendix at 139a-140a).

This Court has jurisdiction to review this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 20 U.S.C. § 1681(a) of Title IX:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

2. 20 U.S.C. § 2000d of Title VI:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3. 42 U.S.C. § 2000e-2(a)(1) of Title VII:

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[.]

4. 42 U.S.C. § 2000e-3(a) of Title VII:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

5. First Amendment (as incorporated into the Petitioner's employment contract):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

6. Fifth Amendment (as incorporated into the Petitioner's employment contract):

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

7. Fourteenth Amendment (as incorporated into the Petitioner's employment contract):

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Porter claims Berea College fired him based on unlawful discrimination, including his opposition to reverse sex discrimination and unfairness in a coworker's Title IX hearing. The Sixth Circuit affirmed summary judgment against him. Its opinion conflicts with that of another Circuit and Opinions of this Court.

The Sixth Circuit opinion allowed a "no state action" defense to deny Porter any due process protections, despite (1) his contract guaranteeing him "constitutional" rights and "fair treatment" in any Title IX hearing, and (2) the school's acceptance of federal funding. This opinion conflicts with the Third Circuit rule that a private college must offer "federal procedural fairness" in a Title IX hearing. This opinion also differs from Supreme Court opinions concerning guaranteed constitutional protections where a school accepts federal funding.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Porter brought a state court suit versus each of the Defendants Berea College and Sergent in the Circuit Court of Madison County, Kentucky. The Defendants moved to consolidate the state court actions and then jointly removed the case to the United States District Court for the Eastern District of Kentucky pursuant to

28 U.S.C. § 1441 because Porter's amended complaint in state court pleaded federal questions for discrimination and retaliation under Title VII, Title IX and the ADEA, in addition to state law claims.

B. Facts[1]

Porter was a tenured psychology professor at Berea, a private college in Kentucky which admittedly accepts federal funding.[2] Porter's employment contract was subject to the terms of the Berea College Faculty Manual ("the Manual"). The Manual provided that Porter was entitled to "academic freedom" in his "teaching" in "the classroom" and in his "research" in his educational activities. (DC ECF 77-14, Page ID # 2355). As its basis of academic freedom, the Manual adopts "the substance and wording" of the American Association of University Professors' (AAUP) 1940 "Statement of Principles of Academic Freedom and Tenure". (*Id.*).

The Manual also stated that "the faculty member enjoys the Constitutional rights which belong equally to all citizens." (DC ECF 81-3, Page ID # 3730). The

1. The facts from the record as stated here cite to the District Court ECF ("DC ECF") document number and Page ID #, or are otherwise derived from the Sixth Circuit's Opinion and the District Court's Opinions and Orders, which are attached in the Appendix to this Petition.

2. In the proceedings below, Berea did not contest its acceptance of federal funding nor did it dispute the applicability of Title IX. Accordingly, this fact was acknowledged in the lower courts upon summary judgment. The record also reflects that Berea admitted this fact during discovery, for example, at Deposition of David B. Porter dated 1/14/2021, page 34, lines 18 through 24.

Manual further promised a person facing a disciplinary charge "shall be assured of fair treatment throughout" the process. (DC ECF 77-14, Page ID # 2358).

Students at Berea saw the school's Psychology Department as sitting in two camps: Porter, Dr. Wayne Messer and Dr. Robert Smith, as older, male, white professors in one, and Dr. Wendy Williams, Dr. Amanda Wyrick, and Dr. Sarah Jones, in the other. (DC ECF 77-3, Page ID # 1939 at 34:9-34:13). The three female professors were seen as "activists" more interested in shaping students' opinions in line with their own ideology regarding "diversity" and "political correctness." (*Id.*, Page ID # 1939 at 35:2-35:13). In their classes, the three women professors exhibited a discriminatory animus in classes toward older, white males, particularly Porter and Messer, to the point of making students uncomfortable. (*Id.*, Page ID # 1939 at 36:14-40:12).

Other anti-white-male bias which Berea exhibited included Dean Chad Berry stating that Berea sought to hire only "brown or black" applicants. (DC ECF 77-5, Page ID # 2054 at 30:11-33:15). One applicant Dr. Curtis Sandberg was told that he had risen as far as possible as a white male. (DC ECF 77-5, Page ID # 2053-2054 at 29:8-30:6). *See also* DC ECF 77-5, Page ID # 2052-2058 at 23:9-46:24 re: Messer's cataloging of six (6) campus events reflecting this bias). There was also documented discriminatory punishment of older white males for failing to attend a meeting but no punishment for younger female members who likewise failed to attend a mandatory meeting. (DC ECF 77-4, Page ID # 2008-2009 at 45:3-48:14, Page ID # 2008-2009 at 48:15-48:18; DC ECF 77-18, Page ID # 2647 at 24:7-25:13, Page ID # 2646-2650; DC ECF 77-15, Page ID # 2429-2430 at 61:4-62:18).

In 2017, Porter served as the faculty advisor for Messer in defending against a Title IX grievance that Williams, Wyrick, and Jones filed against him. The three claimed Messer discriminated against women in hiring and promoting, engaged in retaliation, and created a hostile workplace. After a Faculty Appeals Committee (FAC) hearing, Berea dismissed outright the charges against Messer for sex discrimination in hiring or promotion and for retaliation. However, Berea concluded Messer had created a "hostile" workplace because of three comments he had made over a two-year period. Berea demoted Messer from Department Chair and moved his office to the basement.

The record and the FAC Report show that Williams, et al., made multiple false claims against Messer. The FAC pointedly rejected charges that Messer was guilty of any anti-female discrimination in faculty hiring or promotion. (DC ECF 77-4, Page ID # 2001 at 15:7-15:21; DC ECF 78-10, Page ID # 3071) (e.g., "the Committee encountered no convincing evidence or testimony concerning a single specific instance of speech or conduct that would tend to support the allegation that Wayne's actions were guided by racial or gender-based bias"). The female professors also lied in claiming they had to use an alternative copier in the building in order to avoid Messer. (DC ECF 77-4, Page ID # 2008 at 42:25-43:16).

It was Williams who engaged in documented discrimination based on race, sex, and age, however. Prior to the Messer charges, Williams argued in a faculty hiring meeting that the department should not employ any more "old, white" men. (DC ECF 77-4, Page ID # 2002 at 20:14-21:7, Page ID # 2006 at 36:14-37:2). Williams then

purposely crafted her voting metrics to create a -0- rating for applicants and then disproportionately awarded older, white, males a -0- rating, thereby assuring female hires. (DC ECF 77-4, Page ID # 2006-2007 at 36:19-39:14). In a striking instance, Williams' discrimination resulted in the best qualified, but older, white male applicant, being rejected, and Jones, a young, white female, being hired instead. (DC ECF 77-4, at 65:21-65:25).

The female professors then refused to mediate with Messer and the Division Chair. (DC ECF 77-4, Page ID # 2007-2008 at 41:11-42:9). The complainants next refused to attend mandatory meetings with their male colleagues, causing a total breakdown in communication in the department. (DC ECF 77-4, Page ID # 2008-2009 at 45:3-48:14; DC ECF 77-18, Page ID # 2647 at 24:7-25:13).

The female professors' false charges against Messer violated the Manual's express terms. (DC ECF 77-14, Page ID # 2358) ("Fabricated charges of Violations or false testimony are serious offenses"). The three were never disciplined. Berea also bent the rules and quietly rescinded any requirement they attend departmental meetings. (DC ECF 77-18, Page ID # 2646-2650; DC ECF 77-4, Page ID # 2008-2009 at 48:15-48:18).

Even Berea's in-house counsel admitted that Williams' actions were groundless. (DC ECF 77-23, Page ID # 2895). Smith, Chair of the Institutional Review Board (IRB), wrote to the College president that Berea was wrong in permitting Williams' misbehavior. (DC ECF 77-12, Page ID # 2296, 2303-2304). He received no response.

Porter contended the allegations of Williams, et al., against Messer were false or overblown and that Messer's alleged acts were insufficient to create a hostile workplace or to warrant *any* punishment. Porter further criticized the unfairness of Berea's Title IX process to Berea officials, arguing that the female professors' false charges of sexual harassment and sex discrimination *deserved punishment*. Porter did so in correspondence with colleagues, with the Division Chair, with Berea administrators, and in an open letter to the campus.

Please review DC ECF 78-11, Page ID # 3075-3107; DC ECF 79-2, Page ID # 3465-3466 at 104:5-105:5 cataloguing in detail Porter's publicly-disseminated arguments opposing the false sex discrimination charges against Messer and denouncing Berea's unfair prosecution of Messer in the Title IX proceedings. His defiance made Porter the target of the three activist professors.

In 2018, Porter taught his PSY 210 class in Industrial/Organizational Psychology, where he and his students decided to conduct an in-class survey ("Survey") to assess academic freedom, freedom of speech, and hostile work environments within the campus community. The Survey posed 20 fictional scenarios, with respondents asked to decide if each scenario reflected a hostile work environment, and whether academic freedom applied. (DC ECF 78-13, Page ID # 3154-3175).

Porter drew half of the Survey's scenarios from his observations as Messer's adviser, but for each scenario he changed facts to disguise individual identities. The instructions stated "[no] claims are made about the relationship between these hypothetical situations and

actual occurrences here at Berea College or elsewhere." Emphatically, the disguised identities could not be traced to any person. (DC ECF 78-13, Page ID # 3169; DC ECF 77-4, Page ID # 2017 at 80:21-81:17).

Expert testimony proved that the academic purposes and content of the Survey were appropriate for Porter's PSY 210 Class. This included Porter's affidavit citing educational sources supporting these methods and the testimony and written report of expert witness Dr. Richard Osbaldiston, Chair of the Eastern Kentucky University Psychology Department. (DC ECF 76-2, Page ID # 1660-1662; DC ECF 77-20, Page ID # 2834 at 130:12-130:20; DC ECF 77-21, Page ID 2862-2893).

Porter did not submit the Survey to the college's Internal Review Board (IRB) because it did not deal with identified human subjects, making it a normal educational practice exempt from IRB review. The IRB Chair Smith wrote to the Dean that Porter was "on pretty solid ground from an IRB perspective" in not submitting it. (DC ECF 77-12, Page ID # 2294; *see also* DC ECF 77-21, Page ID 2862-2864, 2883-2891). Porter emphasized no student had to participate or identify himself. (DC ECF 79-2, Page ID # 3455-3456 at 74:2-75:5, Page ID # 3462 at 101:14-101:24; DC ECF 77-18, Page ID # 2661 at 80:2-80:4).

Porter launched the Survey on February 19, 2018. On February 20, 2018, Williams made a public Facebook post claiming the Survey's scenarios were about her and the other grievants in Messer's Title IX proceedings. (DC ECF 79-4, Page ID # 3551). Williams claimed the Survey included private information about her past chemotherapy in order to allege her cognitive impairment,

but, as her husband Sergent admitted, Williams' condition and treatment were already widely-known, and Porter had changed the descriptors to a different race and sex. (DC ECF 68-5, Page ID # 1437-1439 at 54:1-56:18; DC ECF 78-13, Page ID # 3169). It was Williams' own post which identified persons involved in Messer's Title IX proceedings. In her post, Williams condemned the purpose and contents of the Survey and exhorted supporters to "do more" than just reply on Facebook. Her supporters quickly responded with vitriol.

Williams caused the ensuing controversy. Only after Williams' post and her classroom complaints to students did the "chaos on campus" erupt. (DC ECF 77-4, Page ID # 2057-2058 at 44:23-46:12, Page ID # 2060 at 54:17-54:20; DC ECF 77-7, Page ID # 2123 at 19:18-21:1; DC ECF 77-13, Page ID # 2315 at 31:5-33:15). Williams' conduct was a "hecklers' veto" on steroids.

The Dean requested Porter remove the Survey and apologize to the campus. The Dean told Porter he would forward a list of problematic Survey scenarios for amendment, but he never did so. Porter withdrew the Survey and provided the Dean and President Lyle Roelofs with a draft apology. The President rejected Porter's apology because it "blamed others," then declared he would use the draft as further evidence against Porter. (DC ECF 79-2, Page ID # 3469-3474 at 144:3-149:25). Under pressure and wanting to protect his students, Porter issued a second "Mea Culpa" admitting to some flaws in his Survey. As expert witness Osbaldiston testified, however, no academic survey is flawless. (DC ECF 77-20, Page ID # 2806-2808, at 102:21-104:5).

On February 22, the Dean told Porter he would be charged with professional incompetence due to alleged "personal conduct which demonstrably hinders fulfillment of professional responsibilities," as well as creating a "hostile environment" and disclosing confidential Title IX information. (DC ECF 78-2, Page ID # 2935-2936).

The college Faculty Manual contains no offense of "breach of confidentiality", stating only that "every effort shall be made to ensure confidentiality . . . but complete confidentiality cannot be guaranteed, particularly if formal charges are filed." (DC ECF 77-14, Page ID # 2358).

Despite the Manual's mediation requirement for a meeting between the accused (Porter), the Division Chair (Dr. Jackie Burnside), and the Dean (Berry), (DC ECF 77-14, Page ID # 2361), the Dean rejected mediation. (DC ECF 77-18, Page ID # 2664 at 92:17-93:12). Instead, the Dean contacted Faculty Senate Committee (FSC) member Dr. John Carlevale, at 8:15 a.m. on February 22 demanding that in its regularly-scheduled meeting the FSC consider off-agenda charges against Porter, which the Dean personally presented. The FSC committee had never before served as a vehicle for termination proceedings. It was also a committee on which Williams served as member. (DC ECF 77-15, Page ID # 2418-2419 at 17:9-18:4).

The Dean refused to let Porter respond to the charges and called for an immediate vote recommending termination. (*Id*., Page ID # 2419 at 18:5-18:7, Page ID # 2423 at 36:8-36:20, Page ID # 2424, at 39:21-40:5). The FSC voted 5-1 for termination, after which the dissenting

voter Carlevale left. (*Id*., Page ID # 2423 at 37:4-37:8). The Dean then added additional charges against Porter, though the only charge discussed in Carlevale's presence was a "breach of confidentiality". (*Id*., Page ID # 2423 at 35:3-36:7).

Without prior notice, the President sent a letter to Porter stating he was "immediately" suspended, prohibited from communicating with students, and banished from campus. Meanwhile, Sergent, who was Williams' husband, was attempting to have the Student Government Association (SGA) rescind its vote to give Porter the "Annual Student Service Award" by sending a series of e-mails defaming Porter to members of the SGA Board.

Berea subjected Porter to its FAC hearing in which his accusers Williams and Wyrick submitted written statements but did not appear. Since Porter was accused of "harass[ment]" of female colleagues and creating a "hostile environment", in addition to the charge of incompetence, the Manual's procedural protection for each type of charge clearly applied. (DC ECF 77-14, Page ID # 2356-2364).

Under the Manual's "harassment" provision, Porter was guaranteed the right to cross-examination of witnesses, except upon "extraordinary circumstances". (DC ECF 77-14, Page ID # 2357). Under the Manual's "incompetence" provision, he could cross examine a witness except for "unusual and urgent reasons," or when the witness was unable to appear. (DC ECF 77-14, Page ID # 2364). Berea made no attempt to show that either exception applied. Porter was not allowed to cross examine either Williams or Wyrick.

Berea ignored other due process protections in its rush to judgment. The Dean acted as investigator, witness, and prosecutor even though he could fire any of the FAC members. Dr. Jay Baltisberger and Dr. Ed McCormack served on the FAC despite expressing a prejudgment against Porter. McCormack had been approached by a departmental superior and pressured to vote to convict Porter. (DC ECF 77-7, Page ID # 2124 at 22:6-22:15; DC ECF 77-17, Page ID # 2640).

The FAC's report recommended Porter's termination because he could not be trusted with "confidential" information and his "personal" conduct had hindered his "professional" responsibilities. (DC ECF 78-5, Page ID # 2964-2965). The President admitted that Berea offered no guarantee of confidentiality in Title IX cases (DC ECF 77-6, Page ID # 2108), but he fired Porter based on the FAC's stated ground of a breach of confidentiality. (DC ECF 78-20, Page ID # 3319).

C. Proceedings Below

Porter sued Berea for violating his contractual rights to academic freedom and due process, for discrimination, and for retaliation. Porter sued Sergent for defamation and retaliation. The Defendants had the consolidated case removed due to matters of federal question jurisdiction.[3]

In proceedings in the District Court, Porter contended his contract guaranteed constitutional protections,

3. The Sixth Circuit reversed the grant of summary judgment to Sergent on the state law defamation action (Appendix at 9a-15a), and that matter is not a subject of this Petition.

including due process and, specifically, the right to cross-examine Williams and Wyrick. Berea relied on a "no state action" defense, claiming that as a private college it owed Porter "no" due process protections whatsoever. (*See*, *e.g.*, DC ECF 78-1, Page ID # 2915, DC ECF 82, Page ID # 3745). The District Court sustained the "no state action" defense and granted summary judgment to Berea on Porter's due process claims. (Appendix at 80a-82a).

Both the District Court and the Court of Appeals avoided grappling with Porter's claim that the "no state action" defense is no longer valid when the College receives federal funding. The elision is crucial because both the District Court and Berea College relied wholly upon the no state action defense to Porter's Due Process claims. The District Court cited the reason at DC ECF 129, Page ID # 4564-4566. The District Court's holding in its Opinion and Order denying Porter's FRCP 59(e) motion is emphatic:

> The only due process that Porter was entitled to, however, is whatever due process is given by the terms of the Manual. Berea is a private entity, not a state actor; Porter is not entitled to whatever constitutional protections he claims to have.

(Appendix at 30a).

Berea College was equally dismissive in its Response in Opposition to Plaintiff's Motion for Summary Judgment:

> Because Berea is a private institution, these claims [i.e. due process in termination proceedings] derive solely from the Manual

> and are not co-extensive with constitutional due process requirements of state actions.

(DC ECF 80, Page ID #3587.) (Emphasis in original).

Berea College repeated the claim before the Court of Appeals by contending: " . . . nor is it required to provide Porter due process at all". (Doc. 29 at p. 56). (Emphasis in original).

The Sixth Circuit affirmed the District Court as to the no state action defense, perfunctorily finding that "the relevant agreement (namely the Faculty Manual and Employee Handbook) did not incorporate any federal constitutional guarantees." (Appendix at 9a).

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's Affirmance of the No State Action Defense Denying Porter Due Process Manifests a Conflict Between the Circuits and with this Court's Opinions, and Private Colleges Which Receive Federal Funding Should Not Be Allowed To Use the Defense to Deny Due Process Required Under the Civil Rights Laws.

The Sixth Circuit's embrace of the no state action doctrine to deny private college employees *any* due process protections grants these colleges limitless prosecutorial authority in disciplinary actions, contrary to Title IX. The Third Circuit expressly disagrees with such an approach, and this Court's own opinions suggest that a private college accepting federal funding must comply with federal civil rights laws to the same extent as public schools.

The scope of the issue is nationwide and numerous. For the 2023-2024 academic year, there were 1,697 private, nonprofit postsecondary institutions accepting federal financial aid, and 2,111 private, for profit ones. *See* Table at: https://nces.ed.gov/ipeds/trendgenerator/app/answer/1/1?sideid=4–%7C1%7C2%7C3 (from a government office website of the National Center for Educations Statistics).

Porter's due process claims represent a clean opportunity to address the repeatedly-asserted no state action defense to civil rights claims versus private schools, since the relevant facts are undisputed, the lower courts both rejected plain contractual language offering due process protections, and their "no state action" rulings were absolutely determinative on this particular issue.

1. The Sixth Circuit's Opinion is Incorrect, and the Third Circuit Has Ruled Differently by Requiring That Under Title IX a Private College Must Provide an Accused Basic Federal Procedural Fairness, Including the Right to Cross Examination.

Porter claims that Berea denied him any due process, particularly his right to cross examine witnesses, in violation of the federal Due Process Clause and of his employment contract. Porter did not allege a § 1983 claim.

The college's Faculty Manual guaranteed Porter the enjoyment of "Constitutional rights." (DC ECF 81-3, Page ID # 3730). The Manual also promised that Porter "shall be assured of fair treatment throughout" the Title IX process. (DC ECF 77-14, Page ID # 2358). The District

Court ruled the state action doctrine means "Porter cannot assert any Constitutional claims against the College" (Appendix at 80a) in his breach of contract claim, holding that the Manual's plain language recognizing Porter's "constitutional" rights "does not convert the College into a public university subject to constitutional requirements." (Appendix at 81a).

The Sixth Circuit adopted the District Court's reasoning in holding that "the relevant agreement . . . did not incorporate any federal constitutional guarantees." (Appendix at 9a).

This is rote reasoning. The Third Circuit rejected the Sixth Circuit approach in Title IX litigation in *Doe v. University of Sciences*, 961 F.3d 203 (3d Cir. 2020), and district courts in the Third Circuit have followed that approach since. The Third Circuit has deemed Title IX to afford basic due process protections where a private college accepts federal funding.

First, in the Third Circuit case of *University of Sciences*, a male college student brought an action against a private university alleging sex discrimination in violation of Title IX and a breach of contract after the school expelled the student for violating its sexual misconduct policy. In promises of due process much less-detailed than Berea promised Porter here, the Student Handbook at issue in *University of Sciences* stated the school will "[e]ngag[e] in investigative inquiry and resolution of reports that are adequate, reliable, impartial, prompt, fair and equitable[.]" *Id.* at 211-212. The school merely promised to "[s]upport] complainants and respondents equally[.]" *Id.* at 212. In the companion "Policy" of the school, the Title IX Coordinator was to

oversee "a prompt, fair, [and] equitable investigation and resolution process for reports of prohibited conduct[.]" *Id*. Contrary to Berea's more protective Manual, the University of Sciences Student Handbook further stated that "[p]rocedures and rights in student conduct [proceedings] are conducted with fairness to all, but do not include all of the same protections afforded by the courts." *Id*. (Emphasis added).

The plaintiff in *University of Sciences* alleged that in his Title IX proceedings the school prohibited him from confronting his accusers. *Id*. at 215. He also alleged the school employed the investigator who recommended his expulsion and that he was never given an adversarial evidentiary hearing. *Id*. The school claimed in its motion to dismiss that it had met its obligation to provide a "fair" proceeding when it allowed the accused to know the specifics of the charges, to meet with the investigator, to review witness statements, to present his own statement, and to appear before administrative panels post-conviction to determine his punishment and to appeal his expulsion. *Id*. at 215-216.

Under the Sixth Circuit's reasoning in Porter's case below, the state action doctrine barred him from contesting lack of due process against his school in the Title IX proceedings. Similarly, the school in *University of Sciences* contended it provided due process protections under its Handbook. The Third Circuit, however, in reviewing the grant of a motion to dismiss the breach of contract claim, noted that "[n]owhere in either the Policy or the Student Handbook is fairness defined, let alone explicitly defined. Because the fairness promised in the Student Handbook and the Policy must be given effect . . . we reject [the school's] circular argument". *Id*. at 212.

The Third Circuit acknowledged there has been historical reluctance by the courts to intervene in a school disciplinary proceeding, but the Court held the plaintiff's due process claim required review of applicable state law concerning basic procedural fairness in such proceedings. The court summarized Pennsylvania law in this respect, as follows:

> Procedural fairness is a well-worn concept. Pennsylvania courts have made clear that, at private universities, basic principles of fundamental fairness are adhered to when the students involved are given notice of the charges and evidence against them, are allowed to be present and to participate in the hearing assisted by faculty, to call their own witnesses and to cross-examine the witnesses against them, and are fully apprised of the findings of the hearing panel.

Id. at 214 (citing *Psi Upsilon v. University of Pennsylvania*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991)).

The Third Circuit additionally stated that "[i]n other private-university cases, Pennsylvania courts have similarly determined that fairness includes the chance to cross-examine witnesses and the ability to participate in a live, adversarial hearing during which the accused may present evidence and a defense." *University of Sciences*, 961 F.3d at 214 (citing *Boehm v. University of Pennsylvania School of Veterinary Medicine*, 573 A.2d 575, 582 (Pa. Super. Ct. 1990)).

Despite the defendant being a private university and despite the state action rule, the Third Circuit in *University of Sciences* held the Title IX plaintiff was entitled to "federal procedural fairness" including particularly the right to cross examine his accusers before a factfinding panel:

> As a private university, USciences is not subject to the Constitution's due process guarantees. Nevertheless, we observe that federal notions of fairness in student disciplinary proceedings are consistent with those recognized in Pennsylvania's jurisprudence. They require, at a minimum, rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school. And as in Pennsylvania, the basic elements of federal procedural fairness in a Title IX sexual-misconduct proceeding include a real, meaningful hearing and, when credibility determinations are at issue, the opportunity for cross-examination of witnesses.

Id. at 215-215 (emphasis added) (citing *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Doe v. Purdue University*, 928 F.3d 652, 663-664 (7th Cir. 2019)).

The Sixth Circuit decided Porter's due process claim directly contrary to the Third Circuit's holding in *University of Sciences*. While the Third Circuit recognizes basic federal procedural fairness in Title IX hearings, the Sixth Circuit and the District Court held the no state action defense forgave everything in Berea's blatant denial of "*any*" due process protections to Porter under Title IX.

The "unfairness" included Berea ignoring its stated procedures requiring the right of cross examination of accusers. Berea made no effort to show that any exception was applicable. Second, though the Manual required "fair treatment" of Porter in the proceedings, Berea not only disallowed Porter the right to cross examination, but it also allowed the Dean to act as accuser, investigator, and prosecutor, and permitted the seating of clearly biased members of the panel.

By relying on the no state action defense in assessing Porter's due process claims pertaining to Title IX, the courts below ignored "basic principles of fundamental fairness." Ironically, the very Kentucky opinion Berea relied on for its no state action defense cites the same cases the Third Circuit relied upon in *University of Sciences* to describe fundamental fairness under Pennsylvania law to be applied in a Title IX proceeding. *See Centre College v. Trzop*, 127 S.W.3d 562, 568 (Ky. 2003) (citing *Psi Upsilon*, 591 A.2d at 758; *Boehm*, 573 A.2d at 582).

Berea allowed crucial witnesses, Williams and Wyrick, to submit written statements only and avoid any sworn testimony or cross examination. Berea allowed its Dean to act as Prosecutor, witness, and investigator in prosecuting Porter. The panel had documented prejudgment bias against Porter. The Sixth Circuit waived the patent unfairness of the Title IX proceedings on grounds that Berea is private. On the other hand, the reasoning of the Third Circuit would have precluded the no state action defense from being determinative on Porter's due process claim.

This Court should resolve the difference between the "federal procedural fairness" approach of the Third Circuit in a private college's Title IX proceedings and the no state action defense conclusively applied below in the Sixth Circuit.

As noted above, this Court has also stated that principles of the Constitution should apply in the consideration of Title VI, Title VII, and Title IX employment discrimination claims against a private university in receipt of federal funding. *See Regents of University of California v. Bakke*, 438 U.S. 265, 284-285 (1978); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 305-310 (2023) (Gorsuch, J., concurring*); cf. Cannon v. University of Chicago*, 441 U.S. 677, 748 (1979) (Powell, J., dissenting).

In the Court's opinion in *Bakke*, Justice Powell stated: "[e]xamination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." 438 U.S. at 284. Justice Powell also noted that "supporters of Title VI repeatedly declared that the bill enacted constitutional principles", *Id*. at 285, and that Title VI included the "incorporation of a constitutional standard". *Id*. at 286. (Emphasis added).

The Court in *Cannon* held that Title IX authorizes a private right of action to sue a private college for discrimination. In his dissent, Justice Powell noted that "Title IX prohibits only purposeful discrimination such as would violate the Constitution were state action involved, a conclusion that seems forgone in light of our holding with respect to Title VI of the Civil Rights Act of 1964

in [*Bakke*]." *Cannon*, 441 U.S. at 748, at n.19 (Powell, J., dissenting).

Justice Gorsuch most emphatically discusses this reasoning in the context of Title VI in his concurring opinion in *Students for Fair Admissions*. While Justice Roberts' opinion of the Court focuses on Title VI forbidding race as a classification for admission at a private college such as Harvard, Justice Gorsuch's concurrence is explicit that under the Civil Rights Act a private college is subject to the same protections required under the Constitution. 600 U.S. at 305-310.

Regarding the import of the Equal Protection Clause, Justice Gorsuch noted that the justices in *Bakke* "argued that Title VI is coterminous with the Equal Protection Clause. Put differently, they read Title VI to prohibit recipients of federal funds from doing whatever the Equal Protection Clause prohibits States from doing." *Id.* at 305. Agreeing with the *Bakke* justices, Gorsuch stated that "Title VI applies to recipients of federal funds—covering not just many state actors, but many private actors too. In this way, Title VI reaches entities and organizations that the Equal Protection Clause does not." *Id.* at 308 (Emphasis added).

Likewise, in Porter's case, his contract and Title IX afford him the same protections provided under the Constitution, including the elements of basic procedural fairness, which include the right to cross examine the witnesses against him. The Sixth Circuit, though, gave blanket authorization for private colleges to deny "any" due process to its employees and students based on a "no state action" defense.

2. The Question Presented is Important. It is a Clean Vehicle for Review.

As noted above, there are at least 1,697 private, nonprofit postsecondary institutions accepting federal financial aid, and 2,111 private, for-profit ones doing so. Private college due process is a national issue under Title IX. It is one which arises often in state and federal courts. In addition to the Sixth Circuit opinion below and the Third Circuit's opinion in *University of Sciences*, the state action issue arose as to private colleges and due process protections in, *e.g.*, *Doe v. Brown University*, 43 F.4th 195, 206 (1st Cir. 2022), and in *Menaker v. Hofstra University*, 935 F.3d 20, 34 (2d Cir. 2019).

The "fundamental purpose of Title IX [is] the elimination of sex discrimination in federally funded education programs[.]" *Cannon*, 441 U.S. at 708, at n.42. This is a purpose equally applicable to both public and private schools.

Due process "mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285, 288 (1924) (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)). Due process "require[s] a proceeding which . . . follows forms of law appropriate to the case and just to the parties to be affected; and which, whenever it is necessary for the protection of the parties, gives them an opportunity to be heard respecting the justice of the judgment sought." *Endicott-Johnson*, 266 U.S. at 288.

A total disregard of any due process protections in private college disciplinary proceedings materially frustrates the purpose of Title IX. Under the Sixth Circuit's reasoning, an accused at a private college which accepts federal funds is never ensured a fair defense against false accusations of discrimination, unlike at a public college. This result undermines confidence in Title IX, as happened in the major due process disputes concerning the Office of Civil Rights controversial 2011 "Dear Colleague" letter. (This is in reference to President Obama's OCR's informal letter (since rescinded) to colleges, telling them they would have their federal funding reviewed unless they prosecuted sexual assault and sexual harassment cases versus male students more vigorously. That informal letter demanded the schools craft streamlined disciplinary procedures which had the effect of denying the accused ordinary due process, while mandating the burden of proof to be a mere preponderance of the evidence).

This case also represents a clean vehicle for this Court to address whether the no state action defense applies under Title IX to allow the denial of due process to an employee or student at a private college which receives federal funding.

The applicability of the state action doctrine is a question of law. *Cuyler v. Sullivan*, 446 U.S. 335, 342, at n.6 (1980). The facts relevant to this issue are undisputed. Berea below did not contest that it accepts federal funds and did not dispute the applicability of Title IX, and the record shows it to be a fact. The events in the disciplinary proceedings to which Berea subjected Porter

in terminating him are undisputed. The construction of the terms of the Manual governing its procedural promises is a question of law for the court under Kentucky law. *See*, *e.g.*, *Swyers v. Allen Family Partnership #1, LLC*, 694 S.W.3d 257, 263 (Ky. 2024) ("The interpretation and legal effect of a written contract presents a pure question of law"). Because of their rote recital of the state action doctrine, the Sixth Circuit and the District Court were plainly wrong in their torturous constructions of the Manual to omit any due process protections to Porter.

This Court should resolve the difference in Title IX due process ignored in the Sixth Circuit below compared to the Title IX due process recognized in the Third Circuit, the latter in accord with this Court's statements in *Students for Fair Admissions* and in *Bakke*. Until this Court emphatically holds that private schools receiving federal funding are bound by the same due process protections required of public schools, the "no state action" defense will continue to be asserted and result in private colleges' unchecked and continued unfair treatment of their students and employees in disciplinary proceedings.

CONCLUSION

A Supreme Court resolution of these conflicts is needed. The petition for a writ of certiorari should be granted in this case.

Respectfully submitted,

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Dated: April 14, 2025

APPENDIX

TABLE OF APPENDICES

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5944

DAVID B. PORTER,

Plaintiff-Appellant,

v.

F. TYLER SERGENT; BEREA COLLEGE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

OPINION

Before: GRIFFIN, KETHLEDGE, and BUSH, Circuit Judges.

KETHLEDGE, Circuit Judge. Professor David Porter sued his former employer, Berea College, for employment discrimination, retaliation, and breach of contract, and he sued his former colleague, Professor F. Tyler Sergent, for defamation, portrayal in a false light, and retaliation. The

district court granted summary judgment in favor of the defendants on all claims. We affirm in part and reverse in part.

I.

In describing the facts for purposes of summary judgment, we view the record in the light most favorable to Porter. *Sloat v. Hewlett-Packard Enter. Co.*, 18 F.4th 204, 207 (6th Cir. 2021).

David Porter, a white male in his late 60s, was a tenured professor of psychology and general studies at Berea College from 2005 until September 2018. In March 2017, a younger female colleague, Wendy Williams, initiated a Title IX complaint against the then-chair of the psychology department, Wayne Messer, for allegedly creating a hostile-work environment for women. Two of Williams's female colleagues later joined the complaint. Porter served as Messer's advisor throughout the grievance proceedings. In September 2017, a disciplinary board found Messer guilty, and Berea's president, Lyle Roelofs, removed Messer as department chair. Soon afterward, in email exchanges with President Roelofs and Dean Chad Berry, and in an open letter to campus, Porter said that the proceedings against Messer had been flawed and unfair.

In February 2018, for one of his psychology courses, Porter created a survey to measure "community perceptions and attitudes about academic freedom, freedom of speech, and hostile work environments under

civil rights law." The survey contained hypothetical scenarios based on Porter's observations of Messer's Title IX investigation. But the survey did not include any names, and its instructions disclaimed any "relationship between these scenarios and actual events, either here at Berea College or elsewhere." Porter shared the survey with a few of his colleagues, including Messer, who worried that it might be "highly inflammatory."

Porter later emailed the survey to all the students and faculty at Berea, which stirred controversy on campus. Williams posted on Facebook that she was "one of the not anonymous targets of [the] survey," and that the scenarios were a "biased portrayal" of her Title IX complaints. Dean Berry asked Porter to remove the survey from the internet, and Porter later sent a campus-wide email in which he apologized for the survey's flaws and for its negative impact on Berea's students and faculty.

On February 22, 2018, President Roelofs sent Porter a letter notifying him that Dean Berry had initiated disciplinary proceedings to seek Porter's dismissal. Attached to the letter was a "statement of grounds for dismissal," which asserted (among other things) that Porter's survey had harmed his students and colleagues. The letter itself cited a provision of Berea's Faculty Manual, which said faculty can be terminated for cause if they engage in "personal conduct which demonstrably hinders fulfillment of professional responsibilities." In the letter, Roelofs suspended Porter with pay and told him to stay off campus except to attend disciplinary hearings.

Appendix A

F. Tyler Sergent is a history professor at Berea, a faculty advisor to the Student Government Association (SGA), and Williams's husband. After Porter's suspension, the SGA voted to give Porter its annual Student Service Award. Sergent expressed his "vehement objection" to that decision in a series of emails to three students on the SGA Executive Committee and to another faculty advisor, Rachel Vagts. In the first email, Sergent said Porter should not receive the award because Porter had defended Messer's "racist, sexist, and homophobic comments" in the Title IX case. Sergent also accused Porter of making "sexist, disparaging remarks" about his female colleagues, and of falsely "disclosing personal medical records of one"—namely Sergent's wife, Williams. Sergent also said the students supporting Porter were "victims of manipulation by an unethical, unrepentant, academically dishonest person who is in process of rightly being fired from Berea College."

Vagts, the other faculty advisor, replied in agreement and copied Yabsira Ayele, another student on the SGA executive committee. But Ayele defended the SGA's decision, emailing the group that Porter was worthy of the award because of "his excellence in service to students." Sergent responded that he was "not inviting a debate with you or anyone else who would defend the unethical action of David Porter—they are indefensible." Ayele replied that he was entitled to his opinion; but Sergent responded that Ayele was not entitled to an opinion on this issue, and he warned Ayele "against burning bridges this early in your education, particularly for the wrong side of the cause." The SGA soon held a meeting and rescinded the award.

In April 2018, after a two-day hearing, a disciplinary committee led by Dean Berry recommended that Porter be terminated. President Roelofs later accepted the committee's recommendation and fired Porter. Thereafter Porter brought this suit, which the defendants removed from state court to federal. After discovery, the district court granted summary judgment in favor of the defendants. This appeal followed.

II.

We review the district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to Porter. *Sjöstrand v. Ohio State Univ.*, 750 F.3d 596, 599 (6th Cir. 2014). Summary judgment is proper only when the record shows that there is no genuine issue as to any material fact. *Id.* "An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.*

A.

Porter sued Berea College for age, race, and sex discrimination, and for illegal retaliation, all in violation of the Age Discrimination in Employment Act (ADEA), Title VII, and Title IX. He also brought state-law claims against Berea for breach of his employment contract.

1.

We begin with Porter's discrimination claims, in which he says Berea fired him because he is an older, white male. A plaintiff may raise a genuine issue of material

fact for such a claim by offering either direct or indirect evidence of discrimination. *See Willard v. Huntington Ford, Inc.*, 952 F.3d 795, 806 (6th Cir. 2020). Direct evidence "proves the existence of a fact without requiring any inferences." *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 548 (6th Cir. 2004). Evidence requires no inferences—and is thus "direct"—only if it pertains to the same supervisor and the same decision at issue in the plaintiff's claim. *Bledsoe v. Tenn. Valley Auth. Bd. of Dirs.*, 42 F.4th 568, 581 (6th Cir. 2022).

Porter cites two pieces of putative direct evidence here. First, he points to a comment that Williams allegedly made during a faculty hiring-committee meeting—namely, that "[t]he last thing we need in this department is any more old white guys." But Williams was not Porter's supervisor, and that comment did not pertain to his firing. Second, Porter cites an alleged comment by Dean Berry, namely that he would only hire "black or brown" faculty members. But that statement is not about Porter or about Berea's decision to fire him. Hence Porter lacks direct evidence of discrimination.

That leaves Porter's indirect evidence of discrimination, which we analyze using a burden-shifting regime. Under that regime, the plaintiff must first present a prima facie case of discrimination. If he does, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its decision. And if the employer does so, the burden shifts back to the employee to prove that the employer's stated reason was a pretext for unlawful discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

To make a prima facie case of discrimination, a plaintiff must show, as relevant here, "circumstances that support an inference of discrimination." *Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 283 (6th Cir. 2012). A plaintiff makes that showing if he presents evidence that his employer has "treated similarly situated, non-protected employees more favorably" than he was treated. *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 522 (6th Cir. 2008).

Here, to that end, Porter says that Berea treated older, white-male professors differently than it did younger, female professors when members of the two groups refused to attend mandatory meetings. Specifically, Porter offers evidence that Dean Berry disciplined two other older, white-male professors—by docking their pay and denying them promotions—for refusing to attend a mandatory diversity training; whereas, when three younger, female professors who brought the Title IX complaint against Messer all refused to attend a mandatory meeting with Porter and Messer, Dean Berry disciplined them not at all.

The conduct of these two groups of professors was indeed similar, and their treatment by Dean Berry notably dissimilar. Yet the district court accepted as a "mitigating circumstance[]" the female professors' claim that the meeting with Porter and Messer "would have involved coming face-to-face with a man they had accused of creating a hostile workplace and the man who had advised him." But on that point the court failed to view the facts in the light most favorable to Porter. For the older, white-male professors had reasons of their own for refusing, quite deliberately, to attend their meeting; and yet the district court adopted as "mitigating" the reasoning

offered by the other group of professors—without showing any of the same solicitude for the group aligned with Porter. Moreover, the point of the comparator inquiry is to draw an inference regarding the decisionmaker's motivation for the adverse employment action, not the employee's.

The problem with Porter's evidence, however, is that Porter himself was a member of neither comparator group. Porter was not one of the white, male professors disciplined for refusing to attend a meeting. And that means the comparison is not relevant for purposes of making his prima facie case. *See Romans v. Michigan Dep't of Hum. Servs.*, 668 F.3d 826, 837-38 (6th Cir. 2012). Nor has Porter offered other indirect evidence of discrimination. Berea was therefore entitled summary judgment on his discrimination claims.

2.

We next consider Porter's retaliation claim under Title IX, for which we apply the same burden-shifting regime. *Doe v. Univ. of Kentucky*, 111 F.4th 705, 716 (6th Cir. 2024). To establish a prima facie case for this claim, Porter must show that he engaged in "protected activity"; that Berea knew about that activity; that he suffered an "adverse school-related action"; and that "a causal connection exists between the protected activity and the adverse action." *Bose v. Bea*, 947 F.3d 983, 988 (6th Cir. 2020).

To amount to "protected activity" under Title IX, "a complaint must specifically accuse a recipient of

engaging in intentional sex discrimination[.]" *Goldblum v. Univ. of Cincinnati*, 62 F.4th 244, 253 (6th Cir. 2023). Here, as protected activity, Porter cites his criticisms of the disciplinary proceedings against Messer. But those criticisms concerned the fairness of those proceedings; Porter nowhere accused anyone of discrimination based on Messer's sex. Porter therefore did not make a prima facie case for retaliation under Title IX. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005). Summary judgment was proper.

3.

We make shorter work of Porter's claims against Berea for breach of contract, to which the court devoted fourteen pages of patient analysis before granting summary judgment in favor of the defendants. We affirm that grant for substantially the reasons stated by the district court: the relevant agreement (namely the Faculty Manual and Employee Handbook) did not incorporate any federal constitutional guarantees; Porter did not explain in his summary-judgment briefing (and has not explained here) exactly what provisions in the Manual and Handbook he thought Berea had violated, and why; and *McAdams v. Marquette University*, 2018 WI 88, 383 Wis. 2d 358, 914 N.W.2d 708 (Wis. 2018), has little if any relevance here.

B.

That leaves Porter's claims against Sergent for defamation, portrayal in a false light, and retaliation

under Kentucky law. We affirm the district court's grant of summary judgment as to the false-light and retaliation claims for substantially the reasons stated by the district court. But we disagree with the court's grant of summary judgment as to the defamation claim.

Porter claims that Sergent defamed him in emails to four student members of the SGA and to Sergent's co-advisor. To survive summary judgment on a defamation claim, a plaintiff must show that the defendant made a false statement about him; that the defendant negligently or intentionally communicated the statement to a third party; and that doing so caused injury to the plaintiff's reputation. *See Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky. Ct. App. 1981). Courts will presume that certain kinds of statements caused injury to a plaintiff's reputation based on their content alone, which makes them defamatory per se. *See Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 282 (Ky. 2014). Among those kinds of statements, in Kentucky, is a false statement that a person is "unfit[] to perform a job." *Id.*

In some contexts, however, Kentucky courts apply a "qualified privilege" of "common interest." *Id.* at 286. That privilege applies when the message's recipients share a "corresponding interest" with the speaker. *Id.* at 282. The privilege's purpose is to protect even defamatory per se statements when "the societal interest in the unrestricted flow of communication is greater than the private interest" against being defamed. *Id.* When a qualified privilege attaches, "even 'false and defamatory statements will not give rise to a cause of action unless maliciously uttered.'"

Harstad v. Whiteman, 338 S.W.3d 804, 813 (Ky. Ct. App. 2011) (citation omitted). The privilege negates the presumption of injury for statements that are defamatory per se, and the burden shifts back to the plaintiff to prove that the statements were made with "malice," which means "malevolence or ill will." *Toler*, 458 S.W.3d at 283. The privilege is "[n]ot an absolute defense," but its "protection can be lost through unreasonable actions amounting to abuse." *Id.*

On April 8, 2018, Sergent sent an email to three student members of the SGA's Executive Committee and his fellow faculty advisor, Rachel Vagts, in which Sergent expressed his "vehement objection" to the SGA's decision to give Porter the service award, and asked the group to "share this with everyone else on the executive committee for tonight's meeting." In the email, Sergent objected to Porter's defense of Messer in the Title IX proceedings, accused Porter of making "sexist, disparaging remarks" about the female faculty members who had brought the Title IX complaint against Messer, and asserted that Porter had "disclos[ed] personal medical records of one"—referring to Sergent's wife, Williams. Sergent then listed what he called the "reasons for which Porter has been suspended and is in the process of being fired," including "academic dishonesty," "gross ethical violations," "incompetence," and "manipulation of students." Sergent added that the students who nominated Porter for the award were "victims of manipulation by an unethical, unrepentant, academically dishonest person who is in process of rightly being fired from Berea College." He concluded that the "SGA can and ought to do better."

Student Yabsira Ayele replied with a defense of the SGA's decision. Sergent responded, in relevant part:

> I am not inviting a debate with you or anyone else who would defend the unethical action of David Porter—they are indefensible just like racism and any other of form discrimination—or any other faculty member who has caused harm to other members of our community. Rewarding those actions and the harm coming from them is not the Berean way. The administration has good reasons for suspension and the case will be adjudicated.
>
> I gave my advice and detailed my reasons for that advice. I have no doubt that you believe you are doing what is right. But there are people giving you advice who know a great deal more about this situation than you do.

Sergent also warned, "you do not want to be among a group of student leaders on the wrong side of Berea's history. Therefore, I urge the SGA to heed our advice."

Ayele responded, "You are entitled to your opinions and I am entitled to mine." He wrote that he was "disappointed" with Sergent's position and added, "[t]o threaten me is unethical. I do not know the entire situation and you don't either." Sergent then replied, in relevant part:

> Until you actually know something about the situation, there is no basis for debate or

> dialogue. I voiced my advice as part of my role as elected faculty advisor . . . . Clearly you have no interest in my advice or the advice of your other faculty advisor, both of whom know much more than you about a great many things directly related to this situation . . . .
>
> One last bit of advice: I would caution you against burning bridges this early in your education, particularly for the wrong side of a cause. Do not email me again regarding this issue.
>
> Dr. Sergent

The parties agreed at summary judgment that these emails are defamatory per se, which the district court noted "makes good sense" because they tended to "prejudice" Porter in his role as a professor. *See Shields v. Booles*, 238 Ky. 673, 38 S.W.2d 677, 680 (Ky. 1931). We agree: Sergent's statements that Porter was "unethical," "academically dishonest," "incompetent," and guilty of "manipulation of students" bear directly on Porter's "unfitness" to perform his job. *Toler*, 458 S.W.3d at 282.

Sergent argues these statements were either true or non-actionable opinion—asserting that his email simply restated Berea's grounds for dismissal, as attached to President Roelof's February 22, 2018 letter to Porter. But that letter nowhere called Porter "incompetent" or guilty of "manipulation of students." Nor has Sergent identified any Kentucky case that holds a similar statement to be

non-actionable opinion. Porter has thus made enough of a showing for each of the elements of defamation to survive summary judgment.

The district court nonetheless held that the emails were protected by the common-interest privilege—because, the court said, Sergent shared with the email's recipients an interest in giving the SGA award to a deserving person. But the court seemed to overlook that the privilege is "[n]ot an absolute defense." *Toler*, 458 S.W.3d at 283. For the privilege is negated if the speaker "abuse[d]" the privilege or acted with "malevolence or ill will." *Id.* And whether a speaker has done so is a question of fact for the jury. *Fortney v. Guzman*, 482 S.W.3d 784, 790 (Ky. Ct. App. 2015).

A jury could easily make those findings here. For example, given that Sergent's wife, Williams, was a party to the very proceedings in which Sergent said that Porter had made "sexist" (etc.) comments, a jury could reasonably find that Sergent's "vehement objection" to the SGA's decision was fueled by more than a concern that the best possible recipient be chosen for the Student Service Award. A jury could likewise find that Sergent's remarks toward Ayele—an undergraduate student—were abusive. Indeed, Sergent himself admitted that another colleague, Dr. Smith, had criticized Sergent's "improper behavior" and his "attempts to intimidate" Ayele. Smith also questioned Sergent's "judgment and fitness to continue as the SGA faculty advisor," and said that Sergent was "clearly too close to the situation to be objective." Sergent also admitted that—when he saw Porter on the street

about 18 months after the email exchange—Sergent had shouted, "F—you, Dave" without provocation. Viewing all this evidence in the light most favorable to Porter, especially, a jury could find all the facts necessary for Porter to prevail on his defamation claim. The district court erred in concluding otherwise.

We also observe, for purposes of remand, that surely not every shared interest is weighty enough to allow one person, as a matter of law, to say anything he likes in defamation of another. And the interest the court cited here—choosing the recipient of a student award—strikes us as questionable, at least as measured against the statements at issue here. We invite the court to revisit that determination (with the benefit of more focused briefing than we have here) on remand.

* * *

The district court's judgment is affirmed, except that its grant of summary judgment in favor of Sergent on the defamation claim is reversed. The case is remanded for further proceedings consistent with this opinion.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5944

DAVID B. PORTER,

Plaintiff-Appellant,

v.

F. TYLER SERGENT; BEREA COLLEGE,

Defendants-Appellees.

Before: GRIFFIN, KETHLEDGE, and BUSH,
Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and REVERSED IN PART.

Appendix B

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX C — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION, FILED SEPTEMBER 25, 2023

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY,
CENTRAL DIVISION

CIVIL ACTION NO. 5:19-455-KKC

DR. DAVID B. PORTER,

Plaintiff,

v.

DR. F. TYLER SERGENT AND BEREA COLLEGE,

Defendants.

Filed September 25, 2023

ORDER AND OPINION

*** *** ***

This matter is before the Court on a motion filed by Dr. David B. Porter to alter or amend (DE 131) the Court's September 28, 2022 Judgment (the "Judgment"). (DE 130.) For the following reasons, that motion is denied.

Appendix C

I. Facts

The facts of this case have been detailed in the Court's prior opinions in this matter. As such, the Court focuses on the facts most relevant to the instant motion.

A. Background of Case

This case involves Berea College (the "College") and its September 2018 decision to terminate David B. Porter, a tenured faculty member, after he released a survey to students and faculty. This survey included hypothetical scenarios based on real facts from a Title IX case against his friend and colleague, Wayne Messer. In 2017, Porter served as Messer's faculty advisor during the process which ultimately resulted in Messer being found responsible for creating a hostile work environment affecting the three women who worked in the College's psychology department—Wendy Williams, Sarah Jones, and Amanda Wyrick. Williams initiated the complaint against Messer, which was later joined by Jones and Wyrick. Porter believed that the College's disciplinary process had been unfair to Messer and sharply criticized it in an open letter to the campus and private correspondence with the College's president and dean. Porter's criticisms, however, were not addressed to his satisfaction.

During the spring 2018 semester, Porter decided that his Industrial/Organization Psychology course would develop a survey of "community perceptions and attitudes about academic freedom, freedom of speech, and hostile work environments under civil rights law." (Second Am.

Compl.[1] at ¶ 36.) This survey included twenty scenarios, many of which were based on matters and details disclosed during the proceedings against Messer—such as the personal information of the female members of the psychology department who brought the Title IX complaint. Porter failed to ask his female colleagues for permission to use details of the complaint and did not submit the survey to the College's Institutional Review Board for approval, as was common practice for the College's faculty. Porter did, however, send the survey to several other faculty members and was met with varying degrees of concern.[2] Porter nevertheless released the survey to the public.

The survey was met with immediate controversy, which prompted Chad Berry, the College's dean, to send out a campus-wide message requesting that Porter take down the survey and apologize to the community. Porter complied and later recognized the negative impact that the survey had on students, his female colleagues, and the campus as a whole—even admitting that his "efforts to disguise the incidents . . . were inadequate[.]" (DE 78-6.)

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1. As noted in the Court's previous opinion, Porter erroneously labels his second amended complaint as the "First Amended Complaint."

2. Messer himself stated that he had "mixed feelings" about the survey and was "a little worried it will be seen as highly inflammatory." (DE 78-14 at 11.) Another colleague informed Porter that some students were already "clearly distressed by the project[,]" while another told Porter that "anyone who knows anything about our Title IX fiasco" would recognize who each question in the survey was about. (*Id.*)

On February 22, 2018, Dean Berry issued a Statement of Grounds for Dismissal and identified ten grounds: four related to the survey's impact on students and six related to the impact on faculty and the campus community. (DE 78-2 at 5.) The Dean's statement cited a provision of the College's Faculty Manual (the "Manual") that states that faculty can be terminated for cause if they engage in "[p]ersonal conduct which demonstrably hinders fulfillment of professional responsibilities." (DE 77-14 at 15.)

To address these claims, Porter opted for a hearing before the Faculty Appeals Committee (the "FAC"), a committee composed of faculty members. Over the course of April 26, 2018 and April 27, 2018, the College and Porter argued their positions and the FAC ultimately recommended that Porter be terminated. Lyle Roelofs, the President of the College, subsequently agreed with the recommendation and determined Porter's employment with the College should be terminated. Porter appealed President Roelofs's decision to a committee of the College's Board of Trustees but was ultimately unsuccessful. Porter was officially terminated on September 30, 2018.

B. Dr. F. Tyler Sergent's Emails to the Student Government Association

Defendant F. Tyler Sergent is a history professor for the College who previously served as one of two faculty advisors to the College's Student Government Association ("SGA"). Sergent also happens to be married to Williams, the psychology professor who initiated the complaint against Messer. Following Porter's suspension

but before his termination, the SGA voted to award Porter with the Student Service Award. Using his university email address, Sergent sent an email to three of the SGA Executive Committee's student members and his fellow faculty advisor, Rachel Vagts, voicing his strong objection to the voting result. (*See* DE 68-3 at 6-9.) Vagts agreed, but Sergent continued to debate executive committee member Yabsira Ayele over his perspective on the issue. (*Id.* at 1-4.) Sergent informed Ayele of Porter's previous "sexist, disparaging remarks" about the three female faculty members involved in the Messer complaint, but eventually ended the conversation by telling him, "Do not email me again regarding this issue." (*Id.* at 1-2.)

C. Procedural History

Porter filed his original complaint in state court on January 29, 2019. In it, he brought claims against the College for breach of contract based on the Manual and unlawful discrimination under Kentucky state law. (DE 1-1 at 1-42.) On October 25, 2019, Porter filed a second amended complaint, which added federal claims for unlawful discrimination and retaliation under the ADEA, Title VII, and Title IX. (Second Am. Compl. at 156-213.) The Second Amended Complaint also included Sergent as a party, bringing claims against him for defamation, false light, and illegal retaliation under KRS § 344.280(1). (*Id.*) The College then removed the case to this Court, where the parties filed cross-motions for summary judgment.[3] The Court granted the Defendants' motions

3. The Court previously dismissed Porter's claims of negligent hiring, retaining, and supervising of Sergent, and liability under respondeat superior. (DE 29.)

for summary judgment and denied Porter's motion for summary judgment. (DE 129 at 55.) Accordingly, the Court dismissed the entirety of Porter's claims with prejudice. (DE 130.)

This Judgment is the subject of Porter's motion to alter or amend judgment.

II. Motion to Alter or Amend Judgment

A. Standard

Pursuant to Federal Rule of Civil Procedure 59(e), a party must file a motion to alter or amend judgment "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The standard for a motion under Rule 59(e) is "necessarily high." *Hewitt v. W. & S. Fin. Grp. Flexibly Benefits Plan*, CIVIL ACTION NO. 16-120-HRW, 2017 U.S. Dist. LEXIS 105097, 2017 WL 2927472, at *1 (E.D. Ky. July 7, 2017). The moving party may not use a Rule 59(e) motion as a tool to "re-litigate issues the Court previously considered." 2017 U.S. Dist. LEXIS 105097, [WL] at *1. A court may only grant a Rule 59(e) motion if the moving party sets forth (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in the controlling law; or (4) a manifest injustice. *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted). Further, "Rule 59(e) motions cannot be used to present new arguments that could have been raised prior to judgment." *Howard v. U.S.*, 533 F.3d 472, 475 (6th Cir. 2008). It "allows for reconsideration; it does not permit parties to effectively 're-argue a case.'"

Id. (quoting *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998) (explaining that a district court "may well deny the Rule 59(e) motion on that ground.")).

B. Analysis

Porter files his motion based on clear errors of law and fact. (DE 131 at 1.) He argues the Court erroneously found that: (1) Porter did not identify specific Manual provisions that the College breached; (2) Porter's retaliation claims against Sergent failed because Porter did not involve the Kentucky Human Rights Commission (KHRC); (3) Porter did not have a right to cross examine Drs. Williams and Wyrick; (4) statements respectively made by Roelofs, Dr. Robert Smith, and Messer were hearsay; (5) the Manual's right of confrontation and cross-examination of witnesses was limited to certain complaints; (6) the College's breach of confidentiality charge against Porter was valid; (7) Sergent was protected by qualified privilege; and (8) the Defendants' summary judgment could be sustained without "sworn denials." (*Id.* at 1, 3, 5-8.)

The Court will address each of these arguments in turn.

1. Specific Manual Provisions

Porter argues that the Court erred in finding that he did not identify any specific provisions of the Manual that provided him with a contractual right to academic freedom. (*Id.* at 1-2.) He claims that specific "Academic

Freedoms" guaranteed in the Manual were cited to in his memorandum in support of his motion for summary judgment, which referenced testimony from Dr. Mike Berheide. (DE 77-1 at 13-15.) Yet, upon investigation of the record, the Court can find no instance where Porter identifies specific provisions of the Manual that provided him with a contractual right to academic freedom. Porter only briefly mentions that Berheide allegedly "criticized the [College's] failure to insure academic freedom guaranteed by the [Manual]." (*Id.* at 13.) If anything, Berheide focuses his testimony on his dissatisfaction with the "administrative due process" elements of Porter's termination. (*Id.* at 14.) After reviewing Berheide's deposition testimony, the Court finds no identification of specific Manual provisions to support Porter's claim for breach of academic freedom.

Further, Porter alleges that he identifies specific academic freedom provisions in his reply in support of his motion for summary judgment. Again, the only section of the Manual that Porter broadly points to is the one titled Academic Freedom and Responsibility. (DE 81 at 13.) As previously discussed by the Court, nowhere does Porter "identify a single provision of the Manual that the College breached" regarding his academic freedom. (DE 129 at 46.) "A trial court is not required to speculate on which portion of the record the non-moving party relies, nor is there an obligation to 'wade through' the record for specific facts." *United States v. WRW Corp.*, 986 F.2d 138, 143 (6th Cir. 1993). He gestures to the ideals espoused in the section, but fails to identify any particular provision that was breached by the College. He additionally does

not specify whether the breached provision is in the Freedom in Teaching, Freedom of Research, or any other paragraph in the section.

It might follow that his alleged breached academic freedom right arose from the Freedom of Research paragraph—since the underlying matter was born from an awry research survey—but the Court finds no enforceable provision that guarantees academic freedom therein. In reality, the Court notes that the Manual states that "research and publications should not detract from the adequate performance of one's other academic duties[,]"and that "the faculty member should be careful not to introduce controversial matter which has no relation to the subject." (DE 81-3 at 5.) Accordingly, the Court did not err in finding that Porter did not identify specific provisions to support his breach of academic freedom claims.

2. Retaliation Claims against Sergent

Porter argues that the Court erred in dismissing his retaliation claims against Sergent because he had not involved the KHRC. (DE 131-1 at 3.) He claims that: (1) contacting the Equal Employment Opportunity Commission (EEOC) and receiving a letter to sue was sufficient action to sustain a participation clause claim under KRS 344.280(1); (2) his pleading sufficiently invoked KRS 344.280(1)'s opposition clause; and (3) the parties waived whether his inquiry with a governmental agency was sufficient. (*Id.* at 3-4.)

Porter relies on the Sixth Circuit's 1989 decision in *Booker v. Brown & Williamson Tobacco Co., Inc.* to support his first claim. 879 F.2d 1304 (6th Cir. 1989). In that case, the Sixth Circuit found that a plaintiff who filed retaliation claims under the Elliott-Larsen Civil Rights Act[4] had failed to invoke the law's participation clause because he did not involve a governmental agency. *Id.* at 1313. The Sixth Circuit explained that "the language of the statute should be read literally, and, therefore, the instigation of proceedings leading to the filing of a complaint or charge, including 'a visit to a government agency to inquire about filing a charge' is a prerequisite to protection under the participation clause." *Id.* (quoting *Polk v. Yellow Freight Sys., Inc.*, 801 F.2d 190, 200 (6th Cir. 1986)). Relying on this language, Porter claims that inquiry for KRS 344.280(1) purposes "may be made to either the KHRC or the [EEOC]." (DE 131-1 at 3.) This argument misstates the law.

The statute at issue states that it shall be unlawful for a person to: "retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter[.]" KRS 344.280(1). As previously discussed by the Court, "[i]n Kentucky, the [KHRC] must be involved . . . . to invoke statutory protection under the participation clause." *White v. Commonwealth*, NO. 2018-CA-001850-MR, 2020 Ky.

4. This statute is Michigan's equivalent to KRS 344.280(1).

App. Unpub. LEXIS 100, 2020 WL 748864, at *6 (Ky. Ct. App. Feb. 14, 2020). Further, the Sixth Circuit has also noted that "the focus is . . . whether the employer's decision to discharge was motivated by an improper desire to retaliate against an employee **for pursuing rights granted by the [Elliot-Larsen Act]**." *Polk*, 801 F.2d at 199 (emphasis added). As a result, a visit to a government agency "**to inquire about rights granted under the Act** is a protected activity." *Id.* (emphasis added). The key to the inquiry regarding whether the participation clause has been sufficiently invoked hinges on the motivation behind the plaintiff's activity.

Here, Porter invoked the authority of the EEOC and eventually received a right to sue letter. This letter serves as acknowledgment from the EEOC that the recipient has the right to sue their employer in federal court on federal discrimination grounds. It does not, however, consider the recipient's rights under *state* discrimination claims. Despite Porter's claim that an inquiry may be made to either the KHRC or the EEOC to sustain Kentucky's participation clause retaliation claim, he provides no authority to support that claim. The fact remains that there is no evidence in the record that the KHRC was involved at any time before Sergent's alleged retaliation. Accordingly, Porter did not "[make] a charge, [file] a complaint . . . or [participate] in any manner . . . **under this chapter**," KRS 344.280(1) (emphasis added), nor did he visit a government agency to inquire about rights granted under the Kentucky Civil Rights Act. Because Porter failed to do this, the Court did not erroneously find that his state law retaliation claims against Sergent failed.

Further, Porter argues that it sufficiently invoked KRS 344.280(1)'s opposition clause in its pleadings. The Court has noted that "a party may not raise new legal theories in response to summary judgment[.]" *Gray v. Charter Commc'ns, LLC*, No. 3:19-CV-686-DJHLLK, 2021 U.S. Dist. LEXIS 58802, 2021 WL 1186320, at *2 (W.D. Ky. Mar. 29, 2021) (citing *Bridgeport Music, Inc. v. WB Music Corp.*, 508 F.3d 394, 400 (6th Cir. 2007)). After investigating the record and Porter's Second Amended Complaint, the Court cannot find that Porter sufficiently invoked the opposition clause. Porter did not sufficiently allege that Sergent's actions were made in retaliation against Porter "because he [] opposed a practice declared unlawful by this chapter[.]" KRS 344.280(1). Nowhere does Porter specify how Sergent's alleged retaliation was due to Porter's opposition to unlawful acts under the KCRA. Accordingly, Porter did not sufficiently invoke the opposition clause for his retaliation claim.

Porter also argues that neither defendant raised objection to the sufficiency of his inquiry with a government agency, and so the Court must not consider that information when making its decisions on summary judgment. (DE 131-1 at 4.) This argument is without merit. Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Court was entitled to examine the record and Porter's showing of evidence when deciding the pending summary judgment motions. Given there is caselaw about the requirements of bringing

participation clause claims under KRS 344.280(1), the Court was within its power to examine whether Porter had shown sufficient evidence to convince a reasonable jury that he properly involved a governmental agency in order to bring his retaliation claim. Accordingly, the Court did not err in considering the sufficiency of Porter's inquiry with a government agency.

3. Right to Cross Examine Drs. Williams and Wyrick

Porter argues that the Court erred when it found that he did not have a right to cross examine Williams and Wyrick under the terms of the Manual. (DE 131-1 at 3.) He claims that the Court's decision is "at odds with the inherent requirements of administrative due process, under the terms of the parties' private contract and pursuant to the ordinary principles of adjudicative fairness espoused in constitutional text and jurisprudence." (*Id.*) The only due process that Porter was entitled to, however, is whatever due process is given by the terms of the Manual. Berea College is a private entity, not a state actor; Porter is not entitled to whatever constitutional protections he claims to have. The Manual is clear about when accused faculty members have the right to cross-examine witnesses. The relevant provision states: "The faculty member and advisor should have the opportunity to question all persons who **testify orally** and to confront all who *testify* adversely." (DE 77-14 at 18 (emphasis added).)

As previously explained, neither Williams nor Wyrick testified orally. Instead, both faculty members submitted

written statements. The plain language of the Manual makes it clear that, in this case, Porter has no right to cross-examine either faculty member. Porter raises issues of fairness of this policy in his motion to alter judgment, (DE 131-1 at 5) but the College correctly notes that this is the first time that he has raised this argument. This new argument is untimely as Rule 59(e) motions are for reconsideration, not reargument. *See Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (explaining that Rule 59(e) motions do not permit parties to effectively reargue a case and district courts can deny motions on those grounds). Because the Manual's plain language does not grant Porter a right to cross-examine faculty members who submit written statements, the Court did not err in finding that he possessed no right to cross-examine Williams and Wyrick.

4. Hearsay Statements

Porter points to two instances in which the Court found statements to be hearsay. The first instance arose when the Court addressed Porter's claim regarding the College's breach of confidentiality charge against him. Here, the Court found that a statement by Roelofs in a letter regarding the outcome of the proceedings against Messer was hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. Fed. R. Civ. P. 801(c). A statement offered against an opposing party and was "made by the party's agent or employee on a matter within the scope of that relationship and while it existed[,]" however, is considered non-hearsay. Fed. R. Civ. P. 801(d)(2). As this particular

claim was against the College, Roelofs was an employee of the College at the time this statement was made, and the statement involved a matter within the scope of Roelofs' employment, the Court finds that this statement by Roelofs was not hearsay.

Even if Roelofs' statement was considered non-hearsay, it does not change the outcome of Porter's motion for summary judgment. The Court properly noted that this statement was the "sole evidence" Porter submitted in support of this particular due process claim. Nothing in the record suggests that Roelofs, as the College's president, had expertise in the interpretation of the Manual's terms. Further, the plain language of the Manual imposes a confidentiality requirement on College employees as it clearly states, "[E]very effort shall be made to ensure confidentiality and the privacy of the parties involved [in violations]." (DE 77-14 at 12.) By Porter's own admission, he could have been much more prudent in crafting his survey to protect the privacy of the female faculty members involved in the prior Title IX proceedings. (DE 78-6.) Porter, accordingly, relies solely on Roelofs' statement to support this breach of contract theory. Placed against the plain language of the Manual, Porter's claim cannot survive and the Court did not err in granting summary judgment for the College.

Porter also alleges that the Court erred when it found that two statements by Robert Smith and Messer were both inadmissible hearsay statements. Smith's statement was an email that stated that Sergent should "recuse" himself from the SGA Award process, (DE 68-2 at 1) and

Messer's statement was testimony in which he claimed that Roelofs told him that Sergent was not "speaking as a representative of the College." (Aug. 17, 2021, Messer Dep. at 123:14-21.) These statements arose in the course of Porter's argument of state law claims against Sergent—not the College—to demonstrate that Sergent acted with malice when advising the SGA. These statements do not fall under the party opponent exception to the hearsay rule because the opposing party in this claim is Sergent, not the College. As a result, neither Smith, Messner, nor Roelofs were acting as agents or employees of Sergent and these statements were correctly found to be inadmissible hearsay. Even if these statements were considered as non-hearsay, the evidence overwhelmingly leans against Porter's claim as previously examined in the Court's opinion. Accordingly, the Court did not err in finding that these statements were both inadmissible hearsay statements.

5. Confrontation and Cross-Examination Limitations

Porter argues that the Court erred in finding that the rights to confrontation and cross-examination under the Manual were limited in scope. Specifically, Porter takes issue with the Court finding that these rights were limited to "complaints of personal conduct violating the College's policies concerning (i) harassment, (ii) sexual misconduct, (iii) prohibited discrimination and (iv) the College's policy on consensual relationships between employees and students." (DE 77-14 at 10.) He claims that there is "no such limiting language" in the paragraph detailing the rights, (DE 131-1 at 6) but that completely ignores the context of that paragraph.

These rights and procedures are found in one continuous section of the Manual titled "Procedures for Reporting, Investigating, and Hearing Alleged Violations of Certain College Policies." (DE 77-14 at 10.) The "Violations" that are constantly referenced throughout this section are expressly identified as "complaints of personal conduct violating the College's policies concerning (i) harassment, (ii) sexual misconduct, (iii) prohibited discrimination and (iv) the College's policy on consensual relationships between employees and students." (*Id.*) The Court cannot ignore the context from which the rights to confrontation and cross-examination arise. Accordingly, the Court did not err in limiting these rights to those specific complaints listed in the Manual.

6. Breach of Confidentiality Charge

For the reasons discussed above in Part II(B)(4) of the Court's opinion, Porter's claim regarding the College's breach of confidentiality charge fails. The plain language of the Manual establishes that faculty members have a contractual duty to use "every effort . . . to ensure confidentiality and the privacy of the parties involved" in Title IX proceedings. (DE 77-14 at 12.) Even if the Court considered Roelofs' statement as non-hearsay, Porter's claim fails in light of the Manual's express provisions. Further, Porter admits that confidentiality matters are addressed by the College's Title IX Coordinator—not the College's president. (DE 131-1 at 7.) Accordingly, the Court did not erroneously find that Porter's claim against the College for its breach of confidentiality charge could not survive summary judgment.

7. Sergent's Qualified Privilege

Porter argues that the Court erred in finding that Sergent's actions to deny the grant of the Student Service Award were protected by qualified privilege. (DE 131-1 at 7.) Porter claims that he met his burden of proving abuse of privilege because there was already a presumption of malice from Sergent's defamatory per se statements. (*Id.*) Because of this presumption, Porter would have the Court find that no additional evidence of abuse was necessary. This claim misstates the law of qualified privilege.

The qualified privilege of common interest applies when "the communication is one in which the party has an interest[,] and it is made to another having a corresponding interest." *Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 282 (Ky. 2014). As previously explained by the Court's prior opinion, Kentucky law recognizes that the common interest privilege applies in the employment context, including in the academic setting. *Id.* at 283; *Haas v. Corr. Corp. of Am.*, NO. 2014-CA-001143-MR, 2016 Ky. App. Unpub. LEXIS 313, 2016 WL 1739771, at *4 (Ky. Ct. App. Apr. 29, 2016); *Harstad v. Whiteman*, 338 S.W.3d 804, 810 (Ky. Ct. App. 2011); *see also Booher v. Bd. of Regents, N. Kentucky Univ.*, Civil Action No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404, 1998 WL 35867183, at *16 (E.D. Ky. July 22, 1998) (applying the common interest privilege to statements made to students by the chairperson of a university's academic department). Qualified privilege of common interest applied because Sergent, an SBA advisor, had an interest in telling the SBA executive board, who had an interest in preserving the integrity of its award,

relevant information pertaining to the prospective award recipient. Once the defendant establishes that a qualified privilege applies, the privilege *negates the presumption of malice* and reputational injury. *Toler*, 458 S.W.3d at 283. The burden then shifts to the plaintiff to prove abuse of that privilege.

Porter argues that because the Court noted in a footnote that "malice" can be one form of "abuse of privilege," he has already met his burden because there was originally a presumption of malice. That is incorrect. The presumption of malice due to defamatory per se statements serves to support Porter's defamation and false light claims, but as explained, that presumption of malice is negated if qualified privilege applies. As a result, it falls to Porter to bring forward other evidence to establish an abuse of privilege—which can, as the Court noted, come in the form of malice. To accept Porter's argument would defeat the point of qualified privilege protections because it would essentially provide *no* protections in cases of defamatory per se statements. Accordingly, the Court did not err in finding that Sergent was protected by qualified privilege against Porter's state law claims.

Further, Porter alleges that the Court erroneously dismissed evidence that "Sergent acted maliciously for his own purposes" in the College's Answers. Previously, the Court found that the Answer to the initial Complaint was "no longer relevant." (DE 129 at 50.) Porter argues that this was erroneous because "state court [admissions] continue as binding authority after Berea's removal to federal court." (DE 131-1 at 8.) Despite its claim that this

argument is supported by "copious authority," Porter does not cite any authority for the Court. (*Id.*) Nevertheless, even if the Court considered statements in the original complaint, the outcome does not change. The Court already noted that "the nonmoving party cannot respond by merely resting on the pleadings," and so Porter cannot rely on the College's Answer in its response to Sergent's motion. *Wiley v. United States*, 20 F.3d 222, 225 (6th Cir. 1994). It was Porter's burden to prove an abuse of privilege, and "the question of privilege is a matter of law for the court's determination." *Landrum v. Braun*, 978 S.W.2d 756, 758, 45 12 Ky. L. Summary 9 (Ky. Ct. App. 1998). Accordingly, the Court did not err in finding that Porter did not meet his burden to prove that Sergent abused his privilege.

8. Sworn Denials for Summary Judgment

Porter argues that summary judgment against him cannot be sustained absent some sworn denials. (DE 131-1 at 8.) In order to defeat a summary judgment motion, the nonmoving party must "show sufficient evidence to create a genuine issue of material fact." *Prebilich-Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 442 (6th Cir. 2002). In other words, the nonmoving party must present sufficient evidence to permit a reasonable jury to find in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Entry of summary judgment is appropriate "against a party who fails 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." *Celotex*

Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). While Porter presents hypothetical examples of sworn statements that the College *could* have put forward as evidence, the fact that the College declined to does not defeat its summary judgment motions. As discussed extensively in the Court's prior opinion, Porter failed to present sufficient evidence that would permit a reasonable jury to find in favor of his claims. Accordingly, the Court did not err in granting summary judgment against Porter.

III. Bill of Costs

After the Court entered its Judgment against Porter, the College tendered a Bill of Costs. (DE 132.) The College requested that a total of $11,232.95 be assessed against Porter. This amount consisted of $400.00 in fees of the Clerk and $10,832.95 in fees for printed or electronically recorded transcripts necessarily obtained for use in the case. Porter objects to the College's Bill of Costs and argues that: (1) the College's bill should be limited to its own depositions and to the Clerk's fee for removal; and (2) Porter should not have to pay for the additional five (5) days of Porter's six-day deposition. The Court is not persuaded by either argument.

Under 28 U.S.C. § 1920, the Court may tax "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case." The plain language of the statute does not limit taxing to a party's own depositions. Porter argues that there is "no need to purchase hard copies" because parties live in an "age of electronic

documents." (DE 139 at 1.) If this was truly the case, Congress would not have included the express language permitting taxable costs "for **printed or electronically recorded** transcripts[.]" 28 U.S.C. § 1920(2) (emphasis added). Further, Porter takes issue with the length of Porter's six-day deposition. Nothing in the record suggests that the six days were unnecessary or excessive. In fact, the College relied upon excerpts from the full deposition in the filing of its dispositive motions and responses. (DEs 78-8, 80-2.) Accordingly, the Court finds the requested amount by the College reasonable and sufficiently documented.

IV. Conclusion

The Court hereby orders as follows:

1. Porter's motion to alter or amend (DE 131) the Court's Judgment (DE 130) is DENIED;

2. The College's Bill of Costs (DE 132) is APPROVED;

3. The Clerk of the Court is DIRECTED to tax the costs in the total of $11,232.95 against Porter in favor of the College;

4. Porter's motion to set aside the College's bill of costs (DE 135) is DENIED; and

5. The case SHALL remain DISMISSED and STRICKEN from the docket.

This 25th day of September, 2023.

/s/ Karen K. Caldwell
KAREN K. CALDWELL
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION, FILED SEPTEMBER 28, 2022

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY,
CENTRAL DIVISION

CIVIL ACTION NO. 5:19-455-KKC

DR. DAVID B. PORTER,

Plaintiff,

v.

DR. F. TYLER SERGENT AND BEREA COLLEGE,

Defendants.

Filed September 28, 2022

OPINION AND ORDER

This matter is before the Court on the cross-motions for summary judgment filed by Plaintiff David B. Porter (DE 69; DE 77), and Defendants Berea College (DE 78) and Tyler Sergent (DE 63). For the reasons stated in this opinion, Porter's motion is DENIED, the College's motion is GRANTED, and Sergent's motion is GRANTED.

Appendix D

Background

This action arises from Berea College's September 2018 decision to terminate David B. Porter, a tenured faculty member, after he released a survey to students and faculty that included hypothetical scenarios based on real facts from a Title IX case against his friend and colleague, Wayne Messer.

Porter has been a tenured, full-time professor in psychology and general studies at Berea College (the "College") since 2005. In 2017, there were three women in the College's psychology department—Wendy Williams, Sarah Jones, and Amanda Wyrick. At that time, Porter was also a member of the department, and Messer was the department chair. Williams initiated a Title VII/IX complaint against Messer, which was later joined by Wyrick and Jones. Porter served as his faculty advisor during the process which ultimately resulted in Messer being found responsible for creating a hostile work environment in September 2017.

The College's Disciplinary Proceedings Against Porter

Porter believed that the College's disciplinary process had been unfair. He penned an open letter to the campus expressing that view as well as his disappointment with the result of Messer's case. Porter also criticized the College's process and expressed his belief in the unfairness of the proceedings against Messer in correspondence with the College's president and dean. But Porter's criticisms were not addressed to his satisfaction.

Appendix D

During the spring 2018 semester, Porter taught a course called Industrial/Organization Psychology. He taught the course for many years and as part of that course, regularly released surveys to the campus. After the contentious proceedings against Messer, Porter decided that the course would develop a survey of "community perceptions and attitudes about academic freedom, freedom of speech, and hostile work environments under civil rights law." (Second Am. Compl.[1] at ¶ 36.)

The survey included twenty scenarios, many of which were based on matters disclosed during the Title IX proceedings against Messer. While the survey did not use the names of any of the proceeding's participants and changed the gender, race, and other personal characteristics in the scenarios, it included the personal information of the female members of the psychology department who brought the complaint against Messer. Porter did not ask his female colleagues for permission to use the details of their complaint against Messer and did not submit the survey to the College's Institutional Review Board for approval. Porter did, however, send the survey to several other faculty members, including Messer. In his response, Messer stated that he had "mixed feelings" about the survey and was "a little worried it will be seen as highly inflammatory." (DE 78-14 at 11.) Another colleague expressed concerns about what impact the survey would have on students, relaying to Porter that "[s]ome are clearly distressed by the project" and that the

1. Porter erroneously labels his second amended complaint as the "First Amended Complaint."

survey would make students feel that they have to take sides "in a war they shouldn't even know is happening." (DE 78-14 at 12.) The colleague also told Porter that "[r]egardless of how anonymous or 'fictional' you try to make the questions/scenarios sound, it seems clear to anyone who knows anything about our Title IX fiasco who each question likely involves." (*Id.*)

The students in Porter's course asked if the survey's scenarios were based on real events, but he never told the students about the connection to Messer's disciplinary proceedings. And even though Porter was aware that at least some students in the course were concerned about the effect the survey would have and were uncomfortable with it, Porter released the survey on February 19, 2018.

The survey immediately caused controversy on campus. That day, Williams published a post on Facebook about the survey:

> I've said this elsewhere, so I'll post it here, too. As one of the not anonymous targets of this survey I can tell you that I, and the other women who filed (and won-at every level of the process) the hostile work environment complaint on which this survey is based, would be thrilled with some support on this. Every scenario in the survey is either a biased portrayal of what we claimed in our complaint, or it was given by the defense to show that we were the biased ones or that we were cognitively compromised in our judgment, or it was given as examples

> of how other people had done much worse so the behavior we objected to isn't *that bad* in comparison to 'real' hostile environments. Let me repeat again-we won at every stage of the process. Yet despite the conclusion of that process three months ago (after 9 months of the process) this is another attempt to silence us (and those like us). That said, if this kind of behavior by a colleague in response to losing a Title IX complaint is tolerated by the community, then this is certainly one way to make sure no one ever brings another [civil rights] complaint on this campus. If you feel upset by this unethical use of students under the guise of 'research' or the not subtle attack on your female colleagues/faculty, please do more than write it here. If you want to know more ways to help, let me know.

(Second Am. Compl. at ¶ 41.) The next day, Chad Berry, the Dean, sent a campus wide message requesting that Porter take down the survey and apologize to the campus community. Porter removed the survey, and sent Dean Berry and Lyle D. Roelofs, the President, a draft apology later that day. Porter alleges that they "rejected the draft out of hand" because it "blamed others." (Second Am. Compl. at ¶ 45.)

Porter later recognized the negative impact the survey had on students, his female colleagues, and the campus community. He acknowledged that some of his students were "deeply distressed" by the survey and felt like they

were forced to pick sides. He also agreed that the survey "ignited great turmoil and consternation," that he "should have gone about developing this survey differently" and his "efforts to disguise the incidents . . . were inadequate," that the survey obviously "might trigger emotional responses and feelings of re-victimization," and that the survey caused "anxiety and distress . . . for [his] female colleagues." (DE 78-6; DE 78-7.)

On February 22, 2018, Dean Berry issued a Statement of Grounds for Dismissal. (DE 78-2 at 5.) In the statement, the Dean identified ten grounds for dismissal, four related to the survey's impact on students and six related to the impact on faculty and the campus community. The Dean's statement cited a provision of the College's Faculty Manual (the "Manual") that states that faculty can be terminated for cause if they engage in "[p]ersonal conduct which demonstrably hinders fulfillment of professional responsibilities." (DE 77-14 at 15.)

As an initial step in the College's disciplinary procedure, Dean Berry presented the charges to a faculty disciplinary committee, and the committee agreed that the charges against Porter should go forward. The President then suspended Porter and reassigned his classes to other faculty members.

At the next stage, Porter opted for a hearing before the Faculty Appeals Committee (the "FAC"), a committee composed of faculty members. The hearing was held over two days on April 26, 2018, and April 27, 2018. Dean Berry presented the case for terminating Porter,

while Porter and his advisor presented his defense. Both sides called witnesses, introduced documents into the record, and submitted closing arguments in writing. After considering the evidence and arguments, the FAC ultimately recommended that Porter be terminated. The President subsequently considered the FAC's recommendation, agreed with it, and determined Porter should be terminated.

Porter appealed the decision to a committee of the College's Board of Trustees. The committee considered the record, briefs from each side, and issued a decision upholding Porter's termination. Porter was subsequently terminated on September 30, 2018.

The Faculty Manual

Each year, the Dean sends a salary increase letter to faculty members, notifying them of their salary increase for the upcoming academic year. The letter states that "[t]he terms and conditions of your employment remain subject to the provisions of the Berea College Faculty Manual and the Berea College Employee Handbook." (DE 77-24 at 2.) The Faculty Manual (the "Manual") includes the procedures used to dismiss a faculty member "for cause" based on professional incompetence.

Dr. F. Tyler Sergent's Emails

Defendant F. Tyler Sergent is a history professor for the College who previously served as one of two faculty advisors to the College's Student Government Association

("SGA"). Sergent also happens to be married to Williams, the psychology professor who initiated the complaint against Messer. Following Porter's suspension but before his termination, the SGA voted to award Porter with the Student Service Award. Using his university email address, Sergent sent the following email dated April 8, 2018, to three of the SGA Executive Committee's student members and his fellow faculty advisor, Rachel Vagts:

> I just heard that the SGA Senate has voted to give David Porter the SGA Service Award this year. I am compelled to let you know my issues with and vehement objection to this decision. I ask that you please share this with everyone else on the executive committee for tonight's meeting.
>
> I am aware that some of Porter's supporters among students – who have publicly said they will support him "no matter what to the bitter end" – are also involved in SGA. I'm surprised how they are able to convince others in SGA that Porter's actions aren't so bad. That's the first issue I want to address with some background and details. Porter supported Wayne Messer throughout a Title IX/VII complaint this last year that was upheld against Messer at every level, including appeals, in which Messer was found guilty of creating a hostile work environment for racist, sexist, and homophobic comments. Messer was removed as the chair of the Psychology Department and removed from

his office near the other Psychology faculty members as an outcome of his actions. Porter argued on Messer's behalf that the racist, sexist, homophobic comments were academic freedom and that Messer had the right to say those things to colleagues and students. This took place from February until the present, as Porter has continued to express this view about the case that was fully adjudicated several months ago. In the process of this case, Porter also publicly in writing and in testimony made sexist, disparaging remarks about each of the three female faculty members in Psychology, including disclosing personal medical records of one, which he characterized falsely, rising to the level of slander, libel, and defamation.

The reasons for which Porter has been suspended and is in the process of being fired for cause center on five major wrongful acts.

First is academic dishonesty. The survey he sent out to the whole community was not a valid survey, and he was well aware of that, and made it available to the entire campus community anyway. Even after being told to remove it because of its invalidation (for reasons explained below), he refused.

Second is gross ethical violations. In the survey, Porter included actual cases from this past year's Title IX/VII case against Messer.

That is a serious violation of professional ethics in itself. To make it even more unethical, Porter falsely stated in the discloser [sic] section of the survey that the scenarios were not based on any actual events.

Third is incompetence along with manipulation of students. Porter also sent the survey out with students' names attached without having gotten those students express permission, and many among those students had already expressed their own ethical concerns about the survey. Porter has continued to manipulate students – like those in SGA supporting this award – to rally for his cause. Hero-worship is not education; this cultish approach to answering for his unethical acts is yet another level of unethical behavior and breach of the student-teacher relationship.

Fourth is refusal to abide by IRB ([Institutional Review Board) and college policies for research. Porter refused to send his survey to the IRB for review as required by college policy (and APA standards for research and ethics). When the IRB did review the survey at the request of the administration, against Porter's objections, the IRB rejected the survey as unethical for the reasons stated above.

Fifth is harm to human subjects (and the campus community). The people whose

personal and private information was made public in the survey have been seriously harmed by Porter's actions and are having to seek care for both physical and mental health that has been damaged willfully by Porter. Contrary to what some students may have claimed, Porter has not apologized for this harm and has made no effort to repair the harm he has caused. By extension, Porter's continued manipulation of students to support him – no matter how much in the wrong he is – has caused serious (if not permanent) rifts between groups of students, and the animosity has spilled over into other classroom space, other campus spaces, and social media. Porter is actively fueling this animosity, among students and among faculty members.

The second issue at stake, however, regarding the SGA service award is that the SGA not be reactionary in its decisions. The service award is a serious matter and should not be victim to manipulation by students who themselves are victims of manipulation by an unethical, unrepentant, academically dishonest person who is in process of rightly being fired from Berea College. That students like him is irrelevant; this his colleagues dislike him is irrelevant. Evaluate Porter – and other nominees for the award – as you would evaluate anyone: based on what they do and how they treat others. In this case, giving a service

> award to David Porter would add additional injury to those who Porter has already injured. This in itself would outweigh the good SGA has accomplished all year long.
>
> Because there are remarkable people at Berea College who are worthy of the SGA service award and whose continuous work is always for the good people at all times (i.e., not unethical, not harmful, not malicious, not getting fired), I'm hoping SGA Senate will reconsider its decision. I know BOR has not yet voted on the matter. As one faculty advisor to SGA and voting member of the Senate and BOG, I will vote against this nomination. I've been so impressed with the work of SGA since my coming to Berea in 2011, and especially over the last two years when I've had the pleasure to work directly and closely with SGA leadership and members. On this particular matter, SGA can and ought to do better.

(DE 68-3 at 6-9 (emphasis in original).)

Vagts voiced her agreement and copied Yabsira Ayele, another student member of the executive committee. In response to Ayele's defense of the award, Sergent later responded:

> Yabsira,
>
> There are so many faculty and staff members who do this and much more for students and do

so without bringing harm to other members of our community and without ever being accused of unfairness or unethical actions. That is the reason for my strong objection to the SGA in my capacity as faculty advisor. If you do not think other faculty members have done every good thing you attribute to David Porter plus much more, than you are uninformed about the unending, tireless work and support the rest of us give to students in and day out.

I am not inviting a debate with you or anyone else who would defend the unethical action of David Porter – they are indefensible just like racism and any other of form discrimination – or any other faculty member who has caused harm to other members of our community. Rewarding those actions and the harm coming from them is not the Berean way. The administration has good reasons for suspension and the case will be adjudicated.

I gave my advice and detailed my reasons for that advice. I have no doubt that you believe you are doing what is right. But there are people giving you advice who know a great deal more about this situation than you do. You should heed their advice.

To be clear, SGA has two faculty advisors, and we are both in agreement with our objections. We are attempting to keep the SGA from

> making a mistake today that will not only bring additional harm to those already harmed and hurting but that will be recorded for all time in Berea College history. I'm an historian and Rachel Vagts is an archivist and the head of the college archives – you do not want to be among a group of student leaders on the wrong side of Berea's history. Therefore, I urge the SGA to heed our advice.

(DE 68-3 at 3-4.)

Sergent replied to another email from Ayele, which expressed his disappointment in Sergent's stance:

> Yabsira,
>
> Until you actually know something about the situation, there is no basis for debate or dialogue. I voiced my advice as part of my role as elected faculty advisor. Again, I am not the only one, and so you need to include Rachel Vagts in your messages.
>
> Clearly you have no interest in my advice or the advice of your other faculty advisor, both of whom know much more than you about a great many things directly related to this situation. So I hope you at least listen to those around you among the SGA leadership who are wiser and better informed.

> One last bit of advice: I would caution you against burning bridges this early in your education, particularly for the wrong side of a cause.
>
> Do not email me again regarding this issue.

(DE at 68-3 at 1-2.)

Procedural History

Porter filed his original complaint in state court on January 29, 2019. In it, he brought claims against the College for breach of contract based on the Manual and unlawful discrimination under Kentucky state law. (DE 1-1 at 1-42.) On October 25, 2019, Porter filed a second amended complaint, which added federal claims for unlawful discrimination and retaliation under the ADEA, Title VII, and Title IX against the College. (Second Am. Compl. at 156-213.) The Second Amended Complaint also included Sergent as a party, bringing claims for defamation, false light, and illegal retaliation under KRS § 344.280(1). (*Id.*) The College then removed the case to this Court, where the parties have filed their cross-motions for summary judgment.[2]

2. The Court previously dismissed Porter's claims of negligent hiring, retaining, and supervising of Sergent, and liability under respondeat superior. (DE 29.)

Appendix D

Analysis

I. Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden and must identify "those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citation and quotation marks omitted). All evidence, facts, and inferences must be viewed in favor of the non-moving party. *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). "In order to defeat a summary judgment motion, . . . [t]he nonmoving party must provide more than a scintilla of evidence," or, in other words, "sufficient evidence to permit a reasonable jury to find in that party's favor." *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 268 (6th Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

II. Porter's Statutory Civil Rights Claims Against the College

In Counts IV and V of his complaint, Porter asserts claims for age, race, and sex discrimination and for illegal retaliation under the Age Discrimination in Employment Act (ADEA), Title VII, Title IX, and the Kentucky Civil Rights Act (the "KCRA"). The College argues in its motion

for summary judgment that Porter's claims are fatally deficient on several grounds. First, it argues that Porter's federal civil rights claims are time-barred. Second, it argues that even if his claims are not time-barred, Porter has failed to establish either a pattern-or-practice claim, individual disparate treatment claim, or retaliation claim. The Court addresses each argument in turn.

A. Porter's Federal Civil Rights Claims Are Not Time-Barred

In its motion for summary judgment, the College first argues that Porter's federal civil rights claims are time-barred. The ADEA and Title VII require plaintiffs to file a complaint within 90 days of receiving a "right to sue" letter. 42 U.S.C. § 2000e-5(f)(1); *Garrett v. Structured Cabling Sys., Inc.*, 2010 U.S. Dist. LEXIS 102538, 2010 WL 3862994, *2 (E.D. Ky. Sept. 28, 2010). Title IX claims must be filed within a year of the adverse action. *Lillard v. Shelby Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996). Porter's ADEA, Title VII, and Title IX claims were filed on October 25, 2019, more than a year after his termination on September 30, 2018, and eleven months after the receipt of his "right to sue" letter on November 27, 2018.

However, under Federal Rule of Civil Procedure 15's relation back doctrine, Porter's claims are not time-barred. Under Rule 15, an amended complaint relates back to the date of the original pleading when the amendment asserts a claim "that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading." FED. R. CIV. P. 15(c)(1)(B). In other words, "a court will permit

a party to add even a new legal theory in an amended pleading as long as it arises out of the same transaction or occurrence," even if the claim would otherwise be time-barred. *Hall v. Spencer Cnty.*, 583 F.3d 930, 934 (6th Cir. 2009) (citation and quotation marks omitted). "When applying this standard to the facts of a given case, we give meaning to those terms 'not by generic or ideal notions of what constitutes a "conduct, transaction, or occurrence," but instead by asking whether the party asserting the statute of limitations defense had been placed on notice that he could be called to answer for the allegations in the amended pleading.'" *Id.* (citation omitted).

Here, both Porter's original complaint and second amended complaint are based on the same nexus of facts and actions. The original complaint was based on the same allegations of unfairness and discrimination in the College's termination of Porter. Porter's original complaint included claims for unlawful discrimination under KCRA. His federal claims under the ADEA, Title VII, and Title IX are based on the same operative facts and thus relate back to the date of his original complaint, January 29, 2019, which was within the 90-day period required for ADEA and Title VII claims, and the one-year statute of limitations for Title IX claims. Accordingly, Porter's federal statutory civil rights claims are not time-barred.

B. Porter Cannot Bring a Pattern-or-Practice Claim

The College argues that Porter cannot state a pattern-or-practice claim for discrimination because such claims

are not available to individual plaintiffs. (DE 78-1 at 20-21.) Porter alleges that the College "has participated in and supported a pattern and practice of illegal discrimination based on age, race, and sex against white males over the age of 40 in the College's employment, discipline, and termination of members of the faculty in the psychology department and in the overall faculty of the College." (Second Am. Compl. at ¶ 135.)[3] But in his response to the College's motion for summary judgment, Porter does not appear to argue that he can bring a pattern-or-practice claim. Instead, he argues that evidence of a pattern or practice of discrimination is "relevant and admissible to show the requisite 'background circumstances' in a reverse-discrimination case such as this." (DE 79 at 23.)

The Sixth Circuit Court of Appeals has held that

> [T]he pattern-or-practice method of proving discrimination is not available to individual plaintiffs. We subscribe to the rationale that a pattern-or-practice claim is focused on establishing a policy of discrimination; because it does not address individual hiring decisions, it is inappropriate as a vehicle for proving discrimination in an individual case. . . . However, pattern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment under the *McDonnell Douglas* framework.

3. Unless otherwise stated, citations to the complaint refer to Porter's Second Amended Complaint found in the record at DE 1-2 at 156-213.

Bacon v. Honda of America Mfg., Inc., 370 F.3d 565, 575 (6th Cir. 2004).

Notwithstanding his apparent argument to the contrary, Porter's complaint seems to assert a pattern-or-practice claim. Throughout Count IV of the complaint, Porter alleges that individual instances of discrimination against him were part of the College's pattern or practice of discrimination on the basis of age, race, and sex. (Second Am. Compl. at ¶¶ 135-36, 141, 149, 158.) Because he is an individual plaintiff, Porter cannot bring a pattern-or-practice claim for discrimination under the ADEA, Title VII, Title IX, or the KCRA. To the extent that he asserts such claims, they are dismissed. However, pattern-or-practice evidence may be used to prove Porter's individual claims for disparate treatment under the *McDonnell Douglas* framework.

C. Porter Has Not Submitted Sufficient Direct or Indirect Evidence to Establish a Disparate Treatment Claim

Both federal and Kentucky law prohibit employers from discriminating against individuals based on age, race, or sex when making certain employment decisions. 29 U.S.C. § 623(a)(1) (ADEA) (prohibiting age-based discrimination); 42 U.S.C. § 2000e-2(a) (Title VII) (prohibiting race- and sex-based discrimination); Ky. Rev. Stat. § 344.040(1)(a) (prohibiting age, race, and sex-based discrimination). Federal law also prohibits sex-based discrimination in educational settings. 20 U.S.C. § 1681(a) (Title IX). Here, Porter claims that the College

violated the ADEA, Title VII, Title IX, and the KCRA by "suspending him, banishing him from campus, and ultimately terminating his employment without adequate cause" based on his age, race, and sex. (Second Am. Compl. ¶ 136.)

When alleging unlawful discrimination, employees typically assert "disparate treatment" claims. A disparate treatment claim is an assertion that the employer treated the individual employee less favorably than other similarly situated individuals because of the employee's membership in a protected category—precisely what Porter has asserted in his complaint.

To survive a motion for summary judgment on an employment discrimination claim, a plaintiff may seek to raise a genuine issue of material fact by offering either direct or indirect evidence of discrimination in accordance with the *McDonnell Douglas* burden-shifting framework. *Thomas v. Clarksville Montgomery Cnty. Sch. Sys.*, No. 3:19-cv-00956, 2022 U.S. Dist. LEXIS 69851, at *8-9 (M.D. Tenn. Apr. 15, 2022); *see also Snyder v. Pierre's French Ice Cream Co.*, 589 F. App'x 767, 770 (6th Cir. 2014) (applying *McDonnell Douglas* to ADEA claims); *Serrano v. Cintas Corp.*, 699 F.3d 884, 892 (6th Cir. 2012) (holding a plaintiff may prove a disparate treatment claim through either direct or circumstantial evidence); *Hashem-Younes v. Danou Enters.*, 311 F. App'x 777, 779 (6th Cir. 2009) (applying *McDonnell Douglas* to Title VII claims); *Arceneaux v. Vanderbilt Univ.*, 25 F. App'x 345, 347 (6th Cir. 2001) (applying Title VII analytical framework to Title IX claims); *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 576 (Ky. 2016) (holding that the *McDonnell Douglas* framework applies to claims under the KCRA).

Appendix D

1. Direct Evidence

Direct evidence is "evidence that proves the existence of a fact without requiring any inferences." *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 548 (6th Cir. 2004); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (*en banc*) (cleaned up). "In this instance, that would mean evidence that, if believed, requires a finding that" the College's adverse employment decisions against Porter happened "at least in part because of" Porter's age, race, or sex. *Brewer v. New Era, Inc.*, 564 F. App'x 834, 838 (6th Cir. 2014). Direct evidence may "take the form, for example, of an employer telling an employee, 'I fired you because you are disabled [or elderly].'" *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998).

In this case, Porter appears to assert there is direct evidence of discrimination in the form of a statement made by a member of the College's psychology department sometime before March 2017.[4] (*See* DE 79 at 21-22.)

4. In his response brief, Porter argues that "past discriminatory comments can be considered as 'direct evidence' that a discriminatory bias was a motivating factor in the employer's decision to terminate an employee," and asserts that he "pled and proved these comments." (DE 79 at 21.) However, he fails to point to any "specific portions of the record" where the Court might find these comments or the evidence that purportedly proves them. *See Bormuth v. Cty. of Jackson*, 870 F.3d 494, 500 (6th Cir. 2017). The Court is therefore left to assume that Porter is referring to the comments made by a member of the College psychology faculty that he refers to on the next page of his brief.

Porter alleges that during a selection panel meeting where professors were discussing potential faculty hires, a psychology professor stated that "[t]he last thing we need in this department is any more old white guys". (Second Am. Compl. at ¶ 24.) According to Porter, this isolated statement is sufficient direct evidence to support his claim because "[t]he Sixth Circuit has held in that [sic] past discriminatory comments can be considered as 'direct evidence' that a discriminatory bias was a motivating factor in the employer's decision to terminate an employee." (DE 79 at 21.) In support of his argument, Porter cites the Sixth Circuit's unreported decision in *Brewer v. New Era, Inc.*, 564 Fed. App'x. 834 (6th Cir. 2014).

In *Brewer*, two New Era, Inc. employees sued for age and race discrimination after they were terminated along with six other employees in the wake of the 2008 recession. *Id.* at 837. Two or three months before the layoffs were announced, a corporate officer (who was also the son of the company's owner) told the plant manager responsible for hiring and firing decisions that the plaintiffs were "too old" and "needed to retire." *Id.* The Sixth Circuit held that summary judgment in favor of the company was improper because those statements "could arguably constitute direct evidence of age discrimination." *Id.* at 839. The court emphasized that even though the person who made the statements "was not closely involved in the selection of employees to lay off," the statement was made just a couple of months before the plaintiffs were terminated, and were specifically about the plaintiffs and their ability to continue working. *Id.*

But the facts of *Brewer* are materially distinct from this case in at least three ways. First, the statement in *Brewer* was "made specifically about" the plaintiffs and directly stated that their age made them unfit for employment, whereas the alleged discriminatory statement in this case was about unidentified third parties and did not make any reference to the plaintiff's fitness for his position. *See Brewer*, 564 Fed. App'x. at 839. In other words, the statements in *Brewer* made clear that the *plaintiff's* age made them unfit to continue working, whereas the statement in this case made clear that Williams believed the *potential hires'* age, race, and sex made them unfit to be hired. Second, the statements in *Brewer* were made to the plant manager, who was the person responsible for deciding to terminate the plaintiffs, by a corporate officer and son of the company's owner. Here, the statement was not made by or to a person with any role in the decision-making process for the adverse actions taken against Porter. *See Bledsoe v. TVA Bd. of Dirs.*, 42 F.4th 568, 581 (6th Cir. 2022) ("Discriminatory remarks . . . are direct evidence of discrimination only when they come from a supervisor with at least a meaningful role in the decision[-] making process.") (cleaned up). And third, the statements in *Brewer* occurred two or three months before the plaintiffs were fired, a period during which the company was deciding who to terminate, whereas the statement in this case was made at over a year before any adverse actions were taken against Porter, a period long before those actions were even contemplated.[5]

5. Though he does not identify when Williams allegedly made the statement about not hiring "old white guys," Porter's complaint makes clear that it would have been prior to the civil

The statement allegedly made by Williams is not direct evidence of discrimination by the College. The statement was not made in reference to Porter's continued fitness for his position, was not made to persons who were involved in the decisions to take adverse actions against Porter, and was temporally removed from the adverse actions against Porter. Even when considered in the light most favorable to Porter, the connection between Williams's statement and the adverse actions against Porter are far too tenuous to constitute direct evidence of discrimination.

2. Indirect Evidence/McDonnell Douglas *Framework*

Since Porter has failed to produce direct evidence, his discrimination claims are evaluated using the *McDonnell Douglas* burden-shifting framework. Under the traditional version of this framework, a plaintiff claiming that he was unlawfully terminated on the basis of age, race, or sex must establish a prima facie case of discrimination by showing: "(1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment decision; (4) he was replaced by someone outside the protected class or treated differently than similarly situated non-protected employees." *Nelson v. Ball Corp.*, 656 F. App'x 131, 134 (6th Cir. 2016) (quoting *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 391 (6th Cir. 2008)). If the plaintiff meets his burden and establishes a prima facie discrimination case, the burden

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rights grievance brought against Dr. Messer in March 2017, which is a year and a half prior to Porter's termination. (Second Am. Compl. at ¶¶ 22-24.)

shifts to the employer to offer a nondiscriminatory reason for the adverse action. *Bledsoe*, 42 F.4th 568 at 581 (citation omitted). The plaintiff then must show that the employer's reason is pretext for discrimination. *Id.*

When a plaintiff alleges "reverse discrimination," as Porter does in his race and sex discrimination claims, "he bears the heightened burden of demonstrating that he was intentionally discriminated against despite his majority status." *Nelson*, 656 F. App'x at 134 (cleaned up). Thus, in a reverse discrimination case the first prong of the prima facie test has been modified to require "that the plaintiff demonstrate 'background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" *Id.* at 134-35 (citations omitted).

3. Porter Has Failed to Establish a Prima Facie Case Under the McConnell Douglas *Framework*

The College argues that Porter has failed to provide any evidence of discrimination against him. Porter argues that he has established a prima facie case of discrimination by presenting evidence of (1) discriminatory comments made by a fellow faculty member and (2) the College's past disciplinary actions involving older, white male faculty. (DE 79 at 22.) According to Porter, this comment and the College's actions establish a prima facie discrimination claim because they show that "the College was more concerned with political correctness against Dr. Porter's protected class, than with . . . [his] 'fitness' for the job."

(DE 79 at 22.) The Court disagrees. Even taking his allegations as true, the evidence Porter cites does not show that his age, race, or sex was a factor in the College's decisions against him.

Porter first points to comments allegedly made by Williams. According to Porter, during a meeting where the College's faculty was considering applicants for faculty positions, Williams's stated that the psychology department did not need any more old, white males. (Second Am. Compl. at ¶ 24.) He also alleges that Williams disproportionately rated white, male applicants lower than other applicants during the faculty's selection process. (*Id.*)

First, while Williams's comment was potentially reflective of personal discriminatory bias, it does not indicate any bias or discriminatory animus by the College. She was not acting on behalf of the College when she made her statement, and Porter has not offered any reason as to why her potential bias should be imputed to the College. In his response brief, Porter states that *Pettway v. Logistics Solutions Group*, Civil Action No. 3:17-cv-73-DJH-CHL, 2020 U.S. Dist. LEXIS 34442 (W.D. Ky. Feb. 28, 2020) "includes a valuable analysis of how the employer's or decisionmaker's adoption of the discriminatory or retaliatory animus of one or more of its employees means that evidence of those employee's improper statements or conduct should be considered evidence" that the employer discriminated against the employee. (DE 79 at 22.) However, Porter makes no effort to explain how that analysis applies to this case. "It is not

sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (citation and quotation marks omitted). But once again, that is precisely what Porter has done. On this issue, his response to the College's motion "is bereft of any legal argumentation," and he has therefore waived any argument regarding the College's liability for Williams's allegedly discriminatory comments. *Doe v. City of Detroit*, No. 18-11295, 2020 U.S. Dist. LEXIS 27752, at *15 (E.D. Mich. Feb. 19, 2020) (citing *McPherson*, 125 F.3d at 996).

Even if he did not waive arguments on the issue, a theory of "cat's paw" liability is inapplicable here. As *Pettway* explains, "[w]hen a supervisor with alleged discriminatory animus is not the decision-maker, a plaintiff can still demonstrate discrimination with direct evidence by establishing a 'causal nexus between the ultimate decision-maker's decision to [demote] the plaintiff and the supervisor's discriminatory animus.'" *Pettway*, 2020 U.S. Dist. LEXIS 34442, at *26-27 (quoting *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 350 (6th Cir. 2012)). That nexus can be established through evidence of "cat's paw" liability, which requires the plaintiff to show that "[b]y relying on th[e] discriminatory information flow, the ultimate decisionmakers acted as the conduit of [the supervisor's] prejudice—his cat's paw." *Chattman*, 686 F.3d at 350 (citation and quotation marks omitted). "[I]f a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action,

then the employer is liable . . . ." *Staub v. Proctor Hosp.*, 562 U.S. 411, 422, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011) (emphasis in original).

But the Supreme Court's decision in *Staub* did not resolve whether cat's paw liability can be predicated on actions taken by co-workers, rather than supervisors, *Staub*, 562 U.S. at 422 n.4, and the Sixth Circuit has not extended the cat's paw theory of liability to employment discrimination claims involving the actions of non-supervisory employees, *Shazor v. Pro. Transit Mgmt.*, 744 F.3d 948, 956 (6th Cir. 2014). Further, the Court is unaware of any district court in this circuit holding that cat's paw liability applies to the actions of a co-worker, rather than a supervisor. To the extent that Porter intended to claim that a cat's paw theory applies in this case, his claim is without legal support.[6] Williams's comment does not show any discriminatory bias in the College's decision to take

6. Even if it was applicable to this case, evidence of Williams's bias is not enough to sustain a cat's paw theory. "[A]n in-depth and truly independent investigation" that shows the decision-maker acted "based on an independent evaluation of the situation . . . defeats a cat's paw claim . . . when the investigation 'determin[es] that the adverse action was, apart from the supervisor's [discriminatory animus], entirely justified.'" *Marshall v. Rawlings Co. LLC*, 854 F.3d 368, 380 (6th Cir. 2017) (citation omitted). Here, the College conducted a thorough investigation of the actions that ultimately led to Porter's termination. Even if Williams's allegations against Porter were motivated by bias and intended to cause an adverse action against him, the College's investigation "result[ed] in an adverse action for reasons unrelated to [Williams]'s original biased action." *Staub*, 562 U.S. at 421. Accordingly, the College is not liable under a cat's paw theory. *Id.*

adverse action against Porter, and thus does not help him establish a prima facie case under *McDonnell Douglas*.

Porter next appears to argue that the College's allegedly disparate treatment of similarly situated younger, female professors establishes a prima facie case of age discrimination. When a plaintiff attempts to sustain a discrimination claim based on differential treatment, he must show that he was "treated differently than similarly situated non-protected employees." *Nelson v. Ball Corp.*, 656 F. App'x at 134 (citation and quotation marks omitted). "Generally, to be considered similarly situated, employees 'must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" *Voltz v. Erie Cnty.*, 617 F. App'x 417, 427 (6th Cir. 2015) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)).

As best the Court can tell, Porter argues that the College selectively brought disciplinary charges against older, white male professors, but not younger female ones. (DE 79 at 24.) "To succeed with this type of argument, [Porter] must provide 'evidence that other employees, particularly employees outside the protected class, were not disciplined even though they engaged in substantially identical conduct to that which [the College] contends motivated its discipline of [Porter].'" *Miles v. S. Cent. Hum. Res. Agency, Inc.*, 946 F.3d 883, 893 (6th Cir. 2020) (citation omitted). But as explained below, the conduct of the younger female professors cited by Porter is not "substantially identical" to his own.

Appendix D

In addition to his own discipline, Porter points to three instances in which the College took disciplinary action against older, white male faculty members. The first occurred in 2013 when "two senior white male professors" were punished with "restrictions on pay, benefits, and academic promotion" after they failed to attend a mandatory faculty diversity training. (Second Am. Compl. at ¶ 19.) The second occurred in 2015. In that instance, a faculty member had discussed "her difficulties and traumas related to several unsuccessful pregnancies" during a faculty meeting regarding health insurance, and later a "senior, white male faculty member in the same department as the female faculty member expressed his sympathy and condolences for her traumas" when he saw her in a Walmart store. (*Id.* at ¶ 20.) The College "charged him with a breach of confidentiality and forced him to resign." (*Id.*) And the third instance is the discipline Messer received for creating a hostile work environment.

In contrast to the College's actions against these older, white male faculty members, Porter points to ways in which younger, female professors allegedly engaged in misconduct that went unpunished. First, he alleges that Williams engaged in "unlawful racial, age, and gender discrimination" by giving white male applicants disproportionately lower ratings when evaluating them for faculty positions in the department. Second, Porter alleges that in the Title IX proceeding against Messer, two of the professors "grossly exaggerated" a claim that hostility in the psychology department forced them to use a different copier. (Second Am. Compl. at ¶ 25.) And third, he alleges that the female members of the psychology

department refused to meet face-to-face with the rest of the department following Messer's Title IX proceeding, even though College administrators had directed them to do so. (*Id.* at ¶ 29.)

Though the younger female professors were "treated differently," they did not engage in the substantially identical conduct as Porter or the other older, white male professors. Each instance cited by Porter involves entirely different conduct, and each involved (or would have involved) different disciplinary charges. The only instances that are even arguably similar are the two senior, white male faculty members who were disciplined for not attending a mandatory diversity training and the younger, female professors who refused to meet in-person with Porter and Dr. Messer, even though the College had directed their department to meet face-to-face following the Title IX proceeding against Messer. Though in both situations professors refused to attend a required meeting, the instances are distinguishable. The female professors were initially required to meet with the rest of the psychology department, but the College administrators later rescinded that requirement. Thus, there were differentiating circumstances that distinguish the employer's treatment of them.

Further, there were mitigating circumstances that distinguish the College's treatment of the female professors. The meeting they refused to attend would have involved coming face-to-face with a man they had accused of creating a hostile workplace and the man who had advised him throughout proceedings based on those

allegations. Even if refusing to attend the meeting was a technical violation of faculty rules, the context and nature of the meeting explains why the College did not bring disciplinary charges for that violation.

Neither the statements made by Williams nor the College's disciplinary actions are circumstantial evidence of age discrimination. Porter has thus failed to meet his burden to establish a prima facie case under the *McDonnell Douglas* framework, and accordingly, the College is entitled to summary judgment in its favor on Porter's claims for age, race, and sex discrimination.

4. The College Has Proffered a Legitimate, Non-Discriminatory Reason for Terminating Porter, and He Has Failed to Show Pretext

Even if Porter established a prima facie case, the College has articulated a legitimate, non-discriminatory reason for his termination, and Porter has failed to show that reason is pretext for discrimination. "Employers who provide a legitimate, non-discriminatory reason for their [employment] decision will be entitled to summary judgment unless plaintiffs can rebut the employer's explanation by demonstrating pretext." *Bartlett v. Gates*, 421 F. App'x 485, 488 (6th Cir. 2010). At this stage, the employer does not have to show its decision was motivated by the proffered reason, only that the non-discriminatory reason is legally sufficient to justify the adverse employment action taken against the plaintiff. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

If the employer gives a sufficient non-discriminatory reason, then the presumption created by the prima facie case is rebutted, and the burden shifts back to the plaintiff to demonstrate that the employer's proffered reasons were pretext for unlawful discrimination. *Bledsoe*, 42 F.4th 568, 2022 U.S. App. LEXIS 20724, at *20. To do so, the plaintiff "need only produce enough evidence . . . to rebut, but not to disprove, the defendant's proffered rationale." *Shazor*, 744 F.3d at 957; *see also Chen v. Dow Chemical Co.*, 580 F.3d 394, 400 n.4 (6th Cir. 2009) ("At the summary judgment stage, the issue is whether the plaintiff has produced evidence from which a jury could reasonably doubt the employer's explanation.").

The College's stated reason for terminating Porter was his "preparation and dissemination" of the survey, which it described as "personal conduct which demonstrably hinders fulfillment of professional responsibilities" and was charged as a violation of the Manual. (DE 78-2 at 5, 7.) According to the College, Porter's actions violated the terms of his employment and caused harm to students, the campus community, and the College. The College has thus met its burden to proffer a legitimate, non-discriminatory reason for its actions against Porter. *See, e.g., Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006) (holding allegations of misconduct and failure to follow procedure were legitimate, non-discriminatory reasons for discharge).

Porter has failed to demonstrate that the College's proffered reasons were pretext. To demonstrate pretext, he must show that the College's allegations of misconduct

"(1) had no basis in fact; (2) did not actually motivate the adverse action; or (3) w[ere] insufficient to warrant" his termination. *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 421 (6th Cir. 2021). Porter appears to argue that he has provided evidence of the second factor—that the alleged misconduct did not actually motivate his termination.

Porter's first argument is the same argument that he advanced in support of his prima facie case—he points to the previously described remarks of Williams and College's past disciplinary decisions. (See DE 79 at 22.) And for the same reasons, his argument fails.

Porter also argues that the College's proffered reason is pretext because "it was a protected academic activity for Dr. Porter to change the names or identities of the subjects referred to in the Survey in the context of addressing or criticizing the College's Title IX procedures" and "the Faculty Manual expressly disavows any 'guarantee' of confidentiality in Title IX proceedings." (DE 79 at 22-23.) But Porter has failed to explain how either of these points demonstrates that the College's proffered reasons for terminating him were pretext for age, race, or sex discrimination. It is not at all clear that he engaged in protected academic activity, and the College addressed that claim at great length in the proceedings against him. (DE 78-5 at 16-20.) Porter's conclusory assertion that his actions were protected academic activity is insufficient to show that the College's proffered reasons for his termination were pretextual.

Porter's assertion that he had no obligation regarding confidentiality in Title IX proceedings also does not hold water. As explained in the proceedings against him, the Manual states that "every effort shall be made to ensure confidentiality and the privacy of the parties involved but confidentiality cannot be guaranteed." (DE 78-5 at 10.) This provision does not support Porter's contention that because there is no guarantee of confidentiality, he could not have committed misconduct by disseminating personal information from a Title IX proceeding in the survey. Even if Porter was not required to maintain confidentiality regarding Title IX proceedings, he was required to refrain from personal conduct that would hinder his ability to fulfill his professional responsibilities. And the College asserted that his dissemination of personal information from a Title IX proceeding hindered his ability to fulfill his professional responsibilities because it "caus[ed] emotional distress to persons within and outside of the department," "perpetuat[ed] and exacerbate[ed] a hostile environment within the Psychology Department," and "frustrat[ed] efforts to restore effective working relationships in the department." (DE 78-2 at 6-7.) Porter is incorrect that the College's position on the confidentiality issue is "untenable," and it does not show that the College's reasons for his termination were pretext for discrimination.

Porter has not only failed to establish a prima facie case of unlawful discrimination, but has also failed to rebut the College's legitimate, non-discriminatory reasons for its actions. He has offered no evidence showing that the College terminated him because of his age, race, or sex. Accordingly, the College is entitled to summary judgment on Porter's disparate impact claims under the ADEA, Title VII, Title IX, and the KCRA.

D. Porter's Illegal Retaliation Claims Fail for the Same Reasons as His Discrimination Claims

In Count V of his complaint, Porter brings claims against the College for illegal retaliation in violation of the ADEA, Title VII, Title IX, and the KCRA, alleging that the College retaliated against him for his role in the Title IX proceedings against Dr. Messer and his subsequent criticism of the College's Title IX policies. In its motion for summary judgment, the College argues that Porter's retaliation claims fail as a matter of law because (1) retaliation claims are unavailable to persons who represented an accused in a separate Title IX proceeding, and (2) he has failed to produce evidence of any causal nexus between his participation in Dr. Messer's proceedings and his own termination. (DE 78-1 at 23-25.)

Illegal retaliation claims in ADEA, Title VII, Title IX, and KCRA actions are analyzed using the same framework as a disparate treatment claim.[7] The plaintiff can establish retaliation through direct or circumstantial evidence, and when only circumstantial evidence is proffered, it is subject to the same *McDonnell Douglas*

7. The Supreme Court of Kentucky "interpret[s] unlawful retaliation [claims] under the KCRA consistent with the interpretation of unlawful retaliation under federal law." *Brooks v. Lexington-Fayette Urban Hous. Auth.*, 132 S.W.3d 790, 802 (Ky. 2004). "Thus, the standards for evaluating federal Title VII retaliation claims also generally apply to [Porter]'s KCRA retaliation claim." *Thompson-Mooney v. Metro. Sec. Servs.*, Civil Action No. 5:21-194-DCR, 2022 U.S. Dist. LEXIS 141431, at *24 (E.D. Ky. Aug. 9, 2022) (citation omitted).

framework used to assess discrimination claims. *Spengler v. Worthington Cylinders*, 615 F.3d 481, 491 (6th Cir. 2010). A prima facie case of retaliation is established by showing that: (1) the plaintiff engaged in protected activity when he made his age discrimination complaint; (2) the defendant knew about his exercise of the protected activity; (3) the defendant took adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *Id.* at 491-92.

Here, Porter has not produced any direct evidence, so his retaliation claims are analyzed under *McDonnell Douglas*. Porter's evidence and arguments for retaliation are the same as for his discrimination claims, (DE 79 at 21-24), and they fail for the same reasons. He has failed to establish a prima facie case of discrimination because he has not produced evidence showing a causal connection between any protected activity and his termination; the College has proffered a legitimate, non-discriminatory reason for his termination; and Porter has failed to show that the proffered reason was pretext for retaliation. Accordingly, the College is entitled to summary judgment on Porter's claims for illegal retaliation, and those claims are dismissed with prejudice.

III. Porter's State Law Claims Against the College

A. Porter's Breach of Contract Claims Against the College Do Not Survive Summary Judgment

Porter raises three separate breach of contract claims against the College: (1) breach of contract for

suspension of employment in violation of the required due process and his academic freedom (Count I); (2) breach of contract for termination of employment after denial of administrative due process (Count II); and (3) breach of contract for termination of employment in violation of his academic freedom (Count III). Thus, Porter's breach of contract claims are intertwined with his two overarching arguments that the College denied him due process and academic freedom.

To establish a breach of contract claim in Kentucky, a plaintiff must show 1) the existence of a contract, 2) a breach of that contract, and 3) the breach of that contract caused damages. *EQT Prod. Co. v. Big Sandy Co., L.P.*, 590 S.W.3d 275, 293 (Ky. Ct. App. 2019). In interpreting a contract, courts look to the contract's plain language. *Kentucky Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 694 (Ky. 2016). Courts analyze the plain language of the contract based on "its ordinary meaning and without resort to extrinsic evidence." *Id.* (citations and quotation marks omitted).

Parties do not dispute that the Manual constitutes a contract but rather if the College breached any provision of the Manual. The Court's analysis will therefore focus on whether Porter has submitted sufficient evidence to establish that the College breached its obligations under the Manual. For the reasons given below, Porter's breach of contract claims do not withstand the College's motion for summary judgment.

Appendix D

1. The Constitution and the Policies of External Organizations Do Not Bind the College

In bringing all three breach of contract claims, Porter partially relies upon allegations that the College has not complied with the Constitution or the policies of the American Association of University Professors ("AAUP"). Such reliance is misplaced.

a. The Constitution

At the outset, the Court notes that, as a private institution, the College is not a state actor bound by the Constitution. *See e.g., Doe v. Transylvania Univ.*, Civil Action No. 5:20-145-DCR, 2020 U.S. Dist. LEXIS 63965, 2020 WL 1860696, at *5 (E.D. Ky. Apr. 13, 2020) ("Transylvania is a private university; thus, there is no state actor or state proceeding.") "Typically, a plaintiff needs to assert that the constitutional violation was 'committed by a person acting under state law' to allege a violation of a constitutional right." 2020 U.S. Dist. LEXIS 63965, [WL] at *8 (citation and quotation marks omitted). Because the Constitution does not apply to the College, Porter cannot assert any Constitutional claims against the College under the auspices of a breach of contract claim.

Porter argues that the Constitution governs the College's actions because the Manual provides, "[T]he faculty member enjoys the Constitutional rights which belong equally to all citizens." (DE 81 at 13; DE 81-3 at 5.) The Manual, as written, simply states that faculty

members maintain Constitutional rights equivalent to those of other citizens; the plain language of the Manual does not convert the College into a public university subject to Constitutional requirements. Instead, the College only has the duty to comply with the obligations—including its internal processes for suspending and terminating tenured faculty—created by the Manual. As evidentiary support that the Constitution applies to the College, Porter cites to the deposition testimony of Mike Berheide, his faculty advisor during his proceedings. (Berheide Dep. at 11:12-18.) Berheide testified that "[t]here are no differences" between protections of academic freedom offered at the College versus at the University of Kentucky, presumably equating the Constitutional rights enjoyed by professors at a private institution to those employed at public institutions. (*Id.* at 96:12-16.) This is not a factual statement but an "improper legal conclusion" inappropriate for consideration at summary judgment. *See Cutlip v. City of Toledo*, 488 F. App'x 107, 121 (6th Cir. 2012).

The cases that Porter cites in arguing that his Constitutional rights were violated are inapposite. *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019), *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2020), and *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001) all involve public universities, which, unlike the College, are state actors subject to the Constitution. While *McAdams v. Marquette University*, 2018 WI 88, 383 Wis. 2d 358, 914 N.W.2d 708 (2018) involves a private university, that case analyzes a faculty manual specific to that particular institution and is irrelevant to the Court's analysis of an entirely different contract.

To the extent that Porter premises his claims on alleged Constitutional violations, those claims are unfounded.

b. The AUUP

By the same token, the policies and procedures of other entities do not displace the contractual language of the Manual. Porter appears to argue that the policies and procedures of AAUP dictate the College's own internal processes because of a footnote found within the Manual's section on academic freedom: "The substance and the wording of this statement are drawn in part from the 1940 Statement of Principles on Academic Freedom and Tenure, developed by the Association of American Colleges, and the American Association of University Professors." (DE 77-1 at 13 n.4; DE 81-3 at 5.) The footnote only provides that the Manual "draw[s]" upon a statement from the AAUP in that particular section, i.e., that portion of the Manual reflects language drafted by the AAUP. The footnote plainly does not incorporate the AAUP's statement into the Manual, or imply that the AAUP's policies and procedures are binding on the College. Indeed, the Manual explicitly says, "The College is *bound only by its own procedures and policies*, not by the policy statements of any external organization." (DE 79-8 at 3 (emphasis added).) An argument that the Manual adopts the policies and procedures of the AAUP wholesale is contrary to the language of the Manual. To the extent Porter depends upon deviations between the College's policies and that of the AAUP in alleging his breach of contract claims, those claims fail.

Accordingly, the Court grants summary judgment for the College as to all of Porter's breach of contract claims based on violations of the Constitution and the AAUP's policies and procedures.

2. Porter Has Not Established Breach of Contract Claims Based on Violations of Due Process

At different times throughout his summary judgment briefing, Porter raises numerous due process theories as to how the College breached the Manual in suspending and ultimately terminating his employment. Due to the scattershot way Porter has presented his theories for Counts I and II, the Court has consolidated those theories in an effort to decipher Porter's position. None of these theories succeeds under the summary judgment standard.

a. Porter's Suspension

As it relates to his suspension, Porter contends that the College breached the Manual when it failed to give him "prior notice" of his suspension or a "reasonable basis" for its decision to suspend him. To support this contention, Porter points to the following Manual provision: "The faculty member shall be suspended only if continuance threatens immediate danger[8] to persons or property." (DE

8. Porter also argues that "immediate danger" may only "pertain to direct threats of physical injury to persons or property." (DE 79 at 14 n.3.) However, the Manual does not define "immediate danger" as such or otherwise provide a definition for "immediate danger." Most glaring, Porter has not submitted any evidence that supports his interpretation of "immediate danger."

79-8 at 4.) Absent from this clause is any explicit obligation that the College provide Porter with prior notice of his suspension or a reasonable basis for doing so.

Even if such requirements existed, the undisputed evidence shows that the College fulfilled them. The College provided Porter with prior notice of his suspension in a letter from President Roelofs. (*See generally* DE 78-2.) The letter stated, in part, "In view of the gravity of grounds for dismissal advanced for consideration by Dean Berry and the Faculty Status Council, and concerns regarding the immediate welfare of students, I have determined that you are immediately suspended, with pay, from all teaching and professional responsibilities[.]" (*Id.* at 2.) The letter attached Dan Berry's Statement of Grounds for Dismissal, which noted the impact of the survey on the College's students, faculty, and community. (*Id.* at 5-7.) Porter has not submitted any evidence to dispute that he received this letter and its corresponding documentation. Therefore, Porter has not produced sufficient evidence to support that the College breached the Manual by suspending him in violation of due process.

To the extent Porter raises Count I based on violations of due process, the Court grants summary judgment for the College, and the claim is dismissed on that ground.

b. Porter's Termination

In claiming that his termination proceedings did not comport with due process, Porter cites to a litany of ways that the College allegedly breached the Manual. The best

the Court can tell, Porter contends that the breaches are as follows: (1) he was not permitted to confront and cross-examine Williams or Wyrick (DE 77-1 at 14); (2) faculty members involved in Porter's proceedings failed to disclose their bias and conflicts of interest (DE 77-1 at 7-8, 13, 18-19; DE 81 at 10-11); (3) the College used the incorrect evidentiary standard in the proceedings (DE 77-1 at 13); (4) no witness was placed under oath (DE 77-1 at 14); (5) the College failed to investigate or offer proof of certain charges against Porter (DE 77-1 at 14); (6) the College failed to call certain witnesses to testify (DE 77-1 at 14); (7) the College only "charged" him with breach of confidentiality, which is a non-existent charge (DE 77-1 at 21, 24); (8) the College refused to engage in "mediation" prior to initiating his suspension and the termination process (DE 79 at 14); (9) the Dean failed to voice disapproval of Porter's survey until after Porter posted the survey (DE 81 at 10); (10) Porter did not have an attorney present during his proceedings (DE 81 at 14); (11) the College forbid Porter's faculty advisor from "object[ing], summariz[ing], or interrogat[ing] witnesses" (DE 79 at 3; DE 81 at 14); (12) the College failed to consider "[p]ost chemotherapy cognitive impairment and its treatment (as well as treatment for anxiety/depression)" in assessing witness credibility (DE 79 at 5); and (13) the College misinterpreted "personal conduct which demonstrably hinders fulfillment of professional responsibilities" (DE 79 at 12). As outlined further below, no theory successfully establishes that the College breached the Manual in terminating Porter by violating due process.

Appendix D

i. Confrontation and Cross-Examination of Witnesses

In claiming that the College violated due process because it did not allow Porter to confront or cross-examine Williams and Wyrick, Porter points to two separate provisions in the Manual. Both are inapplicable.

The first provision states, "Except in extraordinary circumstances, the respondent is entitled to confront the accuser(s) and any witnesses at the hearing." (DE 77-14 at 11.) However, according to the plain language of the Manual, that procedure only applies to "complaints of personal conduct violating the College's policies concerning: (i) harassment, (ii) sexual misconduct, (iii) prohibited discrimination, and (iv) the College's policy on consensual relationships between employees and students" as well as "other matters involving alleged violations of college policy where no specific investigative or hearing procedures have been designated." (*Id.* at 10.) Parties do not dispute that the action against Porter was a dismissal "for cause" based on professional incompetence and governed by the procedures established in the Manual's Appendix B. (*See* DE 77-1 at 15; DE 79-8 at 3; DE 81 at 5; DE 80 at 7-8.) Therefore, this provision did not govern Porter's proceedings, and he was not entitled to confront witnesses pursuant to that provision.

The second provision says, "The faculty member and advisor should have the opportunity to question all persons who *testify orally* and to confront all who *testify* adversely." (DE 77-14 at 18 (emphasis added).) Parties

likewise do not dispute that Williams and Wyrick did not testify orally in person but rather submitted written statements against him. (DE 77-1 at 14; DE 78-1 at 13.) Accordingly, the provision did not apply, and Porter was not entitled to confront or cross-examine witnesses under this provision. To the extent Porter relies on this theory in raising Count II, his breach of contract claim fails.

ii. Failure to Disclose Bias and Conflicts of Interests

Porter claims that the College violated due process by failing to disclose the bias of three faculty members who were involved in his termination proceedings and their conflicts of interest. (DE 79 at 14-15.) The faculty members are Dean Berry; Ed McCormack, a FAC member who presided over Porter's hearing; and Jay Baltisberger, the Chair of the FAC. Porter does not cite to any provision within the Manual guaranteeing that the committee presiding over a faculty member's disciplinary proceedings will be free from bias. Nor does he point to any provision requiring that those involved in such proceedings disclose any preexisting bias or conflicts of interest. Absent a corresponding contractual provision, Porter cannot establish, as a matter of law, that the College breached the Manual in this way.

Porter alleges that Dean Berry impermissibly acted as an investigator, prosecutor, and witness in the proceedings, all while supervising members of the FAC. (DE 77-1 at 14.) Once again, Porter does not identify any provision that prohibited Dean Berry from maintaining

multiple roles throughout the proceedings or supervising other members of the FAC at the same time. Because no provision prohibits this procedure, Dean Berry's participation in the proceedings did not breach the Manual.

Even if impartiality is an inherent requirement of the College's dismissal procedures, Porter has not produced sufficient evidence that McCormack and Baltisberger were biased. According to Porter, McCormack was biased due to the influence of his peers. (DE 77-1 at 7-8, 24.) Baltisberger was allegedly biased because he received an advanced copy of the survey before it was posted, and President Roelofs later appointed him as the Chair of the FAC. (*Id.* at 18-19.) To support a showing of McCormack's bias, Porter only submitted evidence of a conversation between McCormack and his colleague, Caryn Vazzana, in which Vazzana described Porter's survey as "[c]ompletely . . . inappropriate." (*Id.* at 7-8; Ayele Dep at 22:6-15.) At most, this is evidence of Vazzana's bias, not McCormack's. And, in attempting to establish Baltisberger's bias, Porter references an email from Baltisberger to President Roelofs and Dean Berry where Baltisberger voices his concerns that the survey "opened a confidential matter to the public" and involved students in an "almost malicious and deceptive" way. (DE 77-17 at 2.) In the email, Baltisberger notes that although he received the survey in advance, he did not review it before Porter distributed the survey. (*Id.*) Notably, Porter does not point to any evidence that demonstrates *how* Baltisberger's advanced receipt of the survey and his concerns about the survey

impacted his ability to act as an unbiased FAC chair.[9] Without "affirmative evidence to support [his] position;" Porter has not sufficiently shown the bias of McCormack and Baltisberger. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 584 (6th Cir. 1992).

For this reason and the reasons provided *supra*, Porter's claim that the College breached the Manual by failing to disclose the bias of participants involved in his termination proceedings cannot survive summary judgment.

iii. Breach of Confidentiality Charge

Porter also complains that the College violated due process when it "charged" him with breaching confidentiality because he revealed information disclosed in the proceedings against Messer. (DE 77-1 at 21.) Porter maintains this "charge" does not exist. (*Id.*) Porter does not tie this claim to any provision in the Manual prohibiting the College from disciplining a faculty member for breaching

9. Separately, evidence shows that before the FAC hearing, Baltisberger, indeed, disclosed to Porter, Dean Berry, and others that he both received the survey in advance and subsequently raised concerns about the survey in an email to President Roelofs and Dean Berry. (DE 78-23 at 2-3.) Porter has not submitted any evidence showing that he objected to Baltisberger's participation in the hearing despite this knowledge. Because Porter did not object prior to the hearing, this argument is also waived. *Edwards v. Hambel*, No. 2003-CA-000940-MR, 2005 Ky. App. Unpub. LEXIS 260, 2005 WL 3116096, at *2 (Ky. Ct. App. Nov. 23, 2005) ("A waiver is defined as the intentional and voluntary relinquishment of a known right.")

confidentiality or a provision otherwise specifying the "charges" the College may bring against a faculty member. Porter only points to language providing that, during Title IX proceedings, "complete confidentiality cannot be guaranteed, particularly if formal charges are filed." (DE 77-14 at 12.) However, Porter conveniently omits the first portion of that clause, which dictates "[i]n the reporting, investigating, and hearing of alleged Violations, *every effort shall be made to ensure confidentiality* and the privacy of the parties involved." (*Id.* (emphasis added).) As previously explained and as relevant here, that clause plainly does not bar the College from disciplining a faculty member for failing to uphold confidentiality or from finding that a breach of confidentiality is an indicator of professional incompetence. Moreover, Porter has not produced evidence demonstrating that he made an "effort . . . to ensure confidentiality" as the Manual requires. For purposes of summary judgment, such "[c]onclusory allegations, speculation, and unsubstantiated assertions are not evidence." *Hawkins v. Helton*, CIVIL ACTION NO. 20-135-DLB, 2021 U.S. Dist. LEXIS 169915, 2021 WL 4097274, at *6 (E.D. Ky. Sept. 7, 2021) (citation and quotation marks omitted). Without evidence that the Manual forbid the College for bringing this charge against Porter, the Court cannot find that the College breached the Manual.

The sole evidence Porter submits in support of this claim is a statement from President Roelofs in a letter discussing the outcome of the proceedings against Messer. President Roelofs states, "I have scanned our policy documents in vain for any requirement of confidentiality,

and so I do not have the latitude to impose it." (DE 77-6 at 1.) However, this statement constitutes hearsay, and "hearsay evidence cannot be considered on a motion for summary judgment." *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994). Given the lack of evidence to support Porter's breach of contract theory, the Court grants summary judgment for the College as to that claim.

iv. Refusal to Mediate

Next, Porter contends that the College violated due process by refusing to engage in mediation before suspending and terminating him. (DE 77-1 at 20, 24.) But Porter does not recognize any provision in the Manual that requires mediation in these circumstances. Instead, Porter raises a provision that states, "Once the question of competence or effectiveness has arisen, the Division Chair, the Academic Vice President and Dean of the Faculty, and the faculty member, shall discuss the matter in a personal conference." (DE 77-1 at 20; DE 79-8 at 3.) However, the evidence Porter himself cites undisputedly establishes that he met with Dean Berry and Jackie Burnside (the Division Chair) prior to his suspension to the discuss the survey. (Burnside Dep. at 93:13-95:5.) Because Porter has not submitted any other evidence showing that the College breached this provision of the Manual, this particular breach of contract theory fails, and the Court grants summary judgment for the College regarding that claim.

v. Lack of an Attorney

Porter also alleges that the College violated due process because he did not have an attorney present at his hearing, while the College had its own lawyers. (DE 81

at 14.) Porter also does not show any part of the Manual that entitled him to an attorney during his disciplinary proceedings. Instead, he cites to a provision stating that "[i]f any party has an attorney present, then the College may also have an attorney present." (DE 77-14 at 11.) First, this provision simply does not apply because it is not found in the procedures for "for cause" dismissals but in the procedures governing complaints of harassment, sexual misconduct, discrimination, and violations of the College's consensual relationship policy. (*Id.* at 10-11.) Further, the provision plainly does not state that the inverse is true—if the *College* has an attorney present, then the *party* may also have an attorney present. Regardless, the Court may not consider this claim, as Porter raised it for the first time in his reply brief. *See Madison Cap. Co. v. Smith*, Civil Action No. 07-27-ART, 2009 U.S. Dist. LEXIS 36662, 2009 WL 1119411, at *3 (E.D. Ky. Apr. 27, 2009) ("As an initial matter, this argument is not properly before the Court because it was raised for the first time in a reply brief."). Therefore, the Court grants summary judgment for the College as to this breach of contract theory.

vi. Erroneous Interpretation of Professional Competence

Under the terms of the Manual, the College may dismiss a faculty member for cause for "[p]ersonal conduct which demonstrably hinders fulfillment of professional responsibilities." (DE 77-14 at 15.) Porter contends that "[t]he in-class activity of constructing and publicizing a legitimate Psychology study cannot be 'personal conduct which . . . hinders fulfillment of professional

responsibilities.'" (DE 79 at 12.) However, he submits no evidence to support his assertion. A "[m]ere conclusory allegation[]" such as this cannot withstand summary judgment. *Moore v. Cnty. of Muskegon*, 70 F.3d 1272 (Table) [published in full-text format at 1995 U.S. App. LEXIS 35534, 1995 WL 697200 at *1 (6th Cir. 1995). The Court grants summary judgment for the College as to this breach of contract claim.

vii. Remaining Theories

As for the remaining theories. Porter does specify the provisions of the Manual the College breached in allegedly using the incorrect evidentiary standard in the proceedings; failing to place witnesses under oath; failing to investigate and offer proof of certain charges against Porter; failing to call certain witnesses to testify; prohibiting Porter's faculty advisor from "object[ing], summariz[ing], or interrogat[ing] witnesses;"[10] and failing to adequately assess witness credibility. Porter also does not identify the provision that the Dean breached in allegedly failing to timely voice his disapproval of Porter's survey.[11] As a matter of law, the Court cannot find that the College breached contractual provisions that do not exist within the Manual. Accordingly, the Court grants

10. In any event, the undisputed evidence shows that Porter himself was allowed to object during the hearings. (Berheide Dep. at 81:4-5.)

11. This theory also fails because Porter only raised it in his reply brief. *See Madison Cap. Co.*, 2009 U.S. Dist. LEXIS 36662, 2009 WL 1119411, at *3.

summary judgment for the College to the extent that Count II depends on these theories.

To the extent Porter raises Count II based on violations of due process, the Court grants summary judgment for the College, and the claim is dismissed on that ground.

3. Porter's Breach of Contract Claims Based on Violations of Academic Freedom Similarly Fail

Porter also raises Count I and Count III based on the theory that the College breached the Manual because it violated his academic freedom in suspending and terminating him. Similar to many of the breach of contract claims Porter raised on due process grounds, Porter does not identify a single provision of the Manual that the College breached. Instead, he states to ideals of academic freedom contained in the Constitution and the policies of the AAUP. (*See* DE 77-1 at 24; DE 79 at 13, 19; DE 81 at 10-11). As explained above, the Constitution and the policies of external organizations do not govern the College. Consequently, Porter has not produced sufficient evidence beyond his bare assertions that the College violated his academic freedom. To the extent Porter raises Counts I and III based on violations of academic freedom, the Court grants summary judgment for the College.

Accordingly, the Court grants summary judgment for the College as to all of Porter's breach of contract claims. Counts I, II, and III are dismissed.

IV. Porter's State Law Claims Against Sergent

Porter brings three state law claims against Sergent, arising out of Sergent's emails regarding Porter's eligibility to receive the SGA Award: (1) a defamation claim (Count VI); (2) a false light claim (Count VII); and (3) a retaliation claim under KRS § 344.280(1) (Count VIII). All three claims fail.

A. Sergent's Statements Are Protected by Qualified Privilege

To survive summary judgment on a defamation claim, a plaintiff must submit sufficient evidence of (1) a "false and defamatory statement" about the plaintiff; (2) a publication of that statement; (3) injury caused to the plaintiff's reputation; and (4) "fault amounting at least to negligence" on behalf of the defendant. *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 282 (Ky. 2014); *Smith v. Martin*, 331 S.W.3d 637, 640 (Ky. Ct. App. 2011). If a statement is defamatory per se, courts presume malice and injury to the plaintiff's reputation without proof of special damages. *Toler*, S.W.3d at 282. Defamatory per se statements include comments on a plaintiff's "unfitness to perform a job" or allegations "having a tendency to prejudice [the plaintiff] in his trade, calling, or profession." *Id.*; *Gerstle v. Moore*, No. 2002-CA-001403-MR, 2004 Ky. App. Unpub. LEXIS 762, 2004 WL 259213, at *2 (Ky. Ct. App. Feb. 13, 2004) (citation and quotation marks omitted); *see also Boles v. Gibson*, No. 2003-CA-001064-MR, 2005 Ky. App. Unpub. LEXIS 300, 2005 WL 32810, at *2 (Ky. Ct. App. Jan. 7, 2005) (finding that comments regarding

the employee's "qualifications, efficiency or competency" were defamatory per se).

However, if the defendant establishes that a qualified privilege applies, the privilege negates the presumption of malice and reputational injury, and the defendant is protected from liability. *Toler*, 458 S.W.3d at 283. Once a defendant establishes a qualified privilege, the burden shifts to the plaintiff to prove abuse of that privilege.[12] A plaintiff may prove an abuse of privilege upon a showing of:

> "(1) the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter; (2) the publication of the defamatory matter for some improper purpose; (3) excessive publication; or (4) the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

Id. at 284. "[T]he question of privilege is a matter of law for the court's determination." *Landrum v. Braun*, 978 S.W.2d 756, 758, 45 12 Ky. L. Summary 9 (Ky. Ct. App. 1998) (citation and quotation marks omitted).

As an initial matter, the Court notes that the parties do not appear to disagree that the statements in Sergent's

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12. Case law seems to recognize that "malice" is one form of "abuse of privilege" in the qualified privilege analysis. The Court conducts the analysis accordingly.

emails are defamatory per se, which makes good sense. (DE 63-1 at 20; DE 68 at 11.) At bottom, those statements bear on whether Porter was qualified to receive the SGA Award due to the actions he took during the course of his employment as a professor for the College. Sergent's allegations regarding Porter's "five major wrongful acts" that resulted in his suspension therefore "hav[e] a tendency to prejudice" Porter in his role as a college professor. *Gerstle*, 2004 Ky. App. Unpub. LEXIS 762, 2004 WL 259213, at *2. Instead, parties dispute if the qualified privilege of common interest applies, relieving Sergent of liability.

The qualified privilege of common interest applies when "the communication is one in which the party has an interest[,] and it is made to another having a corresponding interest." *Toler*, 458 S.W.3d at 282. Kentucky law recognizes that the common interest privilege applies in the employment context, including in the academic setting. *Id.* at 283; *Haas v. Corr. Corp. of Am.*, NO. 2014-CA-001143-MR, 2016 Ky. App. Unpub. LEXIS 313, 2016 WL 1739771, at *4 (Ky. Ct. App. Apr. 29, 2016); *Harstad v. Whiteman*, 338 S.W.3d 804, 810 (Ky. Ct. App. 2011); *see also Booher v. Bd. of Regents, N. Kentucky Univ.*, Civil Action No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404, 1998 WL 35867183, at *16 (E.D. Ky. July 22, 1998) (applying the common interest privilege to statements made to students by the chairperson of a university's academic department).

Regardless of whether Porter could ultimately establish the elements of a defamation claim against

Sergent, the qualified privilege of common interest applies because of the corresponding interests of Sergent and the recipients of his emails. As the faculty adviser of the SGA and despite that fact that he was married to Williams, Sergent and his co-adviser had an interest in providing relevant information about the potential recipient of the SGA Student Service Award to ensure that the executive committee's decision was well-informed. The executive committee had a corresponding interest in bestowing the award to a deserving recipient based on the information available to it. *Cf. Booher*, 1998 U.S. Dist. LEXIS 11404, 1998 WL 35867183, at *16 ("As the chairperson of an academic department talking with students, [Defendant] would have an interest in providing information about procedures for pursuing a sexual harassment grievance and an appeal of a grade; the student would have a corresponding interest."). Because these emails arose in the employment context, the invocation of the common interest privilege in this case is consistent with Kentucky law. *Booher*, 1998 U.S. Dist. LEXIS 11404, 1998 WL 35867183, at *16; *Toler*, 458 S.W.3d at 282; *Haas*, 2016 Ky. App. Unpub. LEXIS 313, 2016 WL 1739771, at *4; *Harstad*, 338 S.W.3d at 810.

Since Sergent has demonstrated that the qualified privilege of common interest applies, the burden shifts to Porter to demonstrate that Sergent abused the privilege. Porter has not met his burden. Porter cites to several pieces of evidence that he contends show malice on Sergent's part. On its face, none of the evidence relates to the four areas of abuse articulated under Kentucky law. All pose issues of admissibility or accuracy.

First, Porter contends that Sergent advised the Board of Residents ("BOR"), not the SGA. (Sergent Dep. at 35:5-17.) To support this contention, Porter points to Sergent's statements that he was not on the student senate committee and did not attend SGA executive committee meetings because it "wasn't part of [his] job." (*Id.* at 33:1-7;41:24-42:5; 90:20-22.) This is a mischaracterization. In actuality, Sergent testified that he was an advisor for the SGA, which includes the BOR. (*Id.* at 35:5-17.)

Second, Porter argues that the College denied that Sergent was acting on behalf of the College in its Answer to his Complaint. (DE 68 at 10.) The Answer to the initial Complaint is no longer relevant. The Second Amended Complaint is the operative complaint, and therefore, the College's Answer to the Second Amended Complaint is its operative answer. This answer does not speak on whether Sergent was acting on behalf of the College. In any event, "the nonmoving party cannot respond by merely resting on the pleadings," and Porter cannot rely on the College's Answer in its response to Sergent's motion. *Wiley*, 20 F.3d at 225.

Third, Porter claims that Sergent's "evasive" answer to a question in his deposition establishes his malice. (DE 68 at 10.) When asked if he had "gotten any criticism from any administrator about these emails," Sergent responded, "About the emails? Yeah, not that—I mean yeah, not that I can think of." (Sergent Dep. at 30:21-24.) Porter does not explain *how* this response was evasive or relates to any abuse of privilege. Without further support, the Court cannot find that the College abused its privilege based on this evidence alone.

Next, Porter references an email from Robert Smith, another faculty member, in which Smith states that Sergent should "recuse" himself from the SGA Award process. (DE 68-2 at 1.) He also cites testimony from Messer, who said that President Roelefs told him that Sergent was not "speaking as a representative of the college." (Aug. 17, 2021, Messer Dep. at 123:14-21.) Both statements are inadmissible hearsay inappropriate for consideration on summary judgment. *Wiley*, 20 F.3d at 226.

Finally, Porter argues that a subsequent confrontation between him and Sergent proves Sergent's malice. (DE 68 at 11.) A year and a half *after* Sergent sent the emails at issue, he directed an expletive to Porter when he encountered Porter, his partner, and his dog on the sidewalk. (Sergent Dep. at 94:8-95:2.) While this incident is undisputed, a passing comment made a year and a half later cannot show that Sergent acted with malice at the time he sent the emails, as is relevant here.

Because Porter has not met his burden to show that Sergent abused the common interest privilege, Sergent's emails were privileged, and Porter cannot maintain a defamation claim against Sergent. The Court grants summary judgment for Sergent as to that claim.

B. For the Same Reasons, Porter's False Light Claim Fails

To establish a false light claim, the plaintiff must prove (1) "publicity that unreasonably places [him] in a false

light before the public;" (2) the false light would be "highly offensive to a reasonable person;" and (3) the defendant "had knowledge of, or acted in reckless disregard as to the falsity" of the publicity. *Stewart v. Pantry*, Inc., 715 F. Supp. 1361, 1369 (W.D. Ky. 1988); *McCall v. Courier-J. & Louisville Times Co.*, 623 S.W.2d 882, 887 (Ky. 1981). A plaintiff cannot fulfill the "publicity" requirement unless "the matter is made public by communicating it to the public at large or to so many persons that the matter must be regarded as *substantially* certain to become one of public knowledge." *Tucker v. Heaton*, Civil Action No. 5:14-CV-00183-TBR, 2015 U.S. Dist. LEXIS 83180, 2015 WL 3935883, at *8 n.3 (W.D. Ky. June 26, 2015) (citation and quotation marks omitted) (emphasis in original); *Robison v. Watson*, No. CIV.A. 2010-211 WOB, 2012 U.S. Dist. LEXIS 133748, 2012 WL 4217050, at *10 (E.D. Ky. Sept. 19, 2012).

Because qualified privilege applies to false light claims, Porter's false light claim fails for the same reasons as his defamation claim. *Warinner v. N. Am. Sec. Sols., Inc.*, No. CIV.A.3:05-CV-244-S, 2008 U.S. Dist. LEXIS 44316, 2008 WL 2355727, at *3 (W.D. Ky. June 5, 2008) (applying qualified privilege to false light claim under Kentucky law).

In the alternative, Porter's false light claim also fails because he cannot fulfill the publication requirement. Sergent did not distribute the emails to the public at large. Instead, he only sent emails to four students on the SGA Executive Committee and his co-advisor, Rachel Vagts. (*See* DE 68-3 at 6; Sergent Dep. at 34:15-17.) Emails sent

to a small, insular group focused on a singular issue are not "*substantially* certain" to become "public knowledge." *Tucker*, 2015 U.S. Dist. LEXIS 83180, 2015 WL 3935883, at *8 n.3. Porter argues that "the proof is that many, many people received and read the emails." (DE 68 at 11.) But Porter presents no proof to establish that the emails were disseminated on such a large scale. "[T]he failure to present any evidence to counter a well-supported motion for summary judgment alone is grounds for granting the motion." *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009) (citation and quotation marks omitted). Accordingly, absent further evidence, the Court grants summary judgment for Sergent as to the false light claim.

C. Porter's Retaliation Claim Does Not Fulfill the Necessary Statutory Requirements

Porter also raises a retaliation claim under KRS § 344.280(1) against Sergent. KRS § 344.280(1) states:

> It shall be an unlawful practice for a person, or for two (2) or more persons to conspire: (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, *or* because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing *under this chapter.*

Ky. Rev. Stat. Ann. § 344.280(1) (emphasis added). KRS § 344.280(1) consists of two clauses, the opposition

clause (the first clause) and the participation clause (the second clause). *White v. Commonwealth*, NO. 2018-CA-001850-MR, 2020 Ky. App. Unpub. LEXIS 100, 2020 WL 748864, at *6 (Ky. Ct. App. Feb. 14, 2020). "In Kentucky, the [Kentucky Commission on Human Rights] must be involved . . . to invoke statutory protection under the participation clause." *Id.*

Porter appears to bring his retaliation claim under the participation clause. In his Second Amended Complaint, he alleges that his participation arises out of his role as Messer's adviser during his disciplinary proceedings. (*See* Second Am. Compl. ¶¶ 193-96.) However, in his response to Sergent's motion for summary judgment, he appears to raise an additional theory: Sergent retaliated against him because Porter "made a charge or filed a complaint" that the College's Psychology Department targeted him in an "unlawful . . . scheme to get them fired because they were 'old, white men.'" (DE 68 at 14.) Because "a party may not raise new legal theories in response to summary judgment," the Court will not consider this additional theory. *Gray v. Charter Commc'ns, LLC*, No. 3:19-CV-686-DJH-LLK, 2021 U.S. Dist. LEXIS 58802, 2021 WL 1186320, at *2 (W.D. Ky. Mar. 29, 2021) (citing *Bridgeport Music, Inc. v. WB Music Corp.*, 508 F.3d 394, 400 (6th Cir. 2007)).

As for Porter's initial theory, Porter has not submitted any evidence establishing that Messer's disciplinary proceedings constituted "a proceeding[] or hearing *under this chapter*," i.e., under KRS § 344.010, *et seq.* Ky. Rev. Stat. Ann. § 344.280(1) (emphasis added.) Nor has

he submitted evidence that the Kentucky Commission on Human Rights was involved in the disciplinary proceedings whether through the filing of a charge or otherwise. Because Porter has failed to meet the statutory requirements necessary to raise a retaliation claim under KRS § 344.280(1), the Court grants summary judgment for Sergent as to that claim.

Conclusion

For the reasons stated in this opinion, the Court hereby ORDERS as follows:

1. Plaintiff David B. Porter's motions for summary judgment (DE 69; DE 77) are DENIED;

2. Defendant Berea College's motion for summary judgment (DE 78) is GRANTED;

3. Defendant F. Tyler Sergent's motion for summary judgment (DE 63) is GRANTED;

4. The entirety of Plaintiff David B. Porter's claims are DISMISSED with prejudice;

5. The Court will enter a judgment consistent with this opinion; and

6. All other outstanding motions are DENIED AS MOOT, and this matter is STRICKEN from the Court's active docket.

This 28th day of September, 2022.

/s/ Karen K. Caldwell
KAREN K. CALDWELL
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION, FILED SEPTEMBER 28, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION

CIVIL ACTION NO. 5:19-455-KKC

DR. DAVID B. PORTER,

Plaintiff,

v.

DR. F. TYLER SERGENT AND BEREA COLLEGE,

Defendants.

Filed September 28, 2022

JUDGMENT

*** *** ***

In accordance with the Opinion and Order entered contemporaneously, the Court hereby ORDERS and ADJUDGES as follows:

Appendix E

1. Plaintiff David B. Porter's motions for summary judgment (DE 69; DE 77) are DENIED;

2. Defendant Berea College's motion for summary judgment (DE 78) is GRANTED;

3. Defendant F. Tyler Sergent's motion for summary judgment (DE 63) is GRANTED;

4. Plaintiff David B. Porter's claims are DISMISSED with prejudice;

5. All other outstanding motions are DENIED AS MOOT;

6. This matter is STRICKEN from the Court's active docket; and

7. This judgment is FINAL and APPEALABLE.

This 28th day of September, 2022.

/s/ Karen K. Caldwell
KAREN K. CALDWELL
UNITED STATES DISTRICT
JUDGE EASTERN DISTRICT
OF KENTUCKY

APPENDIX F — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION, FILED AUGUST 4, 2020

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY,
CENTRAL DIVISION

CIVIL ACTION NO. 5:19-455-KKC

DAVID B. PORTER,

Plaintiff,

v.

TYLER F. SERGENT and BEREA COLLEGE,

Defendants.

Filed August 4, 2020

OPINION AND ORDER

This matter is before the Court on Tyler F. Sergent's motion to dismiss (DE 5) and Berea College's motion to partially dismiss (DE 7). For the reasons stated below, Sergent's motion to dismiss is **DENIED**, and Berea College's motion to partially dismiss is **GRANTED**.

Appendix F

I. BACKGROUND

This case is brought by Dr. David Porter, a former psychology professor at Berea College. Porter originally filed two suits in Madison Circuit Court—one against Berea College ("Berea") and one against Dr. Tyler F. Sergent, a current professor at Berea. The lawsuits were later consolidated and removed to federal court.

Porter's Second Amended Complaint, which is titled "First Amended Complaint," states the following facts and allegations. (DE 1-2 at 156-213.) Porter contends that Berea supports "extreme political correctness" and has a pattern and practice of discriminating against old, white, male faculty who run afoul of campus activists or grievants. Porter claims that Berea's alleged patterns and practices are supported by past incidents involving old, white, male faculty. One of the incidents he describes forms the foundation of this lawsuit.

Porter, who is a 70-year old white male, was previously employed as a psychology professor at Berea College. While working in that capacity, Porter served as a faculty advisor in a civil rights grievance filed by three psychology professors—Dr. Wendy R. Williams, Dr. Amanda Wyrick, and Dr. Sarah Jones—against Dr. Wayne Messer, a white, male psychology professor. The three female professors asserted that Messer discriminated in hiring and promoting, retaliated for discriminatory reasons, and created a hostile workplace environment based on race, gender, or sexual orientation. Berea ultimately dismissed the charges against Messer for retaliation

and discrimination in hiring and promotion. However, Berea found that Messer had created a hostile workplace environment based on sex and sexual orientation. Berea cited to three incidents over a two-year period involving Messer that created such environment.

Porter served as Messer's advisor throughout the grievance hearing and appeals. Porter argued that Messer's actions were not severe or pervasive enough to create a hostile workplace environment on the basis of sex or to warrant punishment against him. Following the proceedings, Porter expressed his "disappointment with the unfairness of the College's disciplinary process" and attempted to discuss with Berea its "unfair lack of administrative due process and its misapplications of workplace policies and procedures in [Messer's] case."

Thereafter, Berea employed W. Scott Lewis, an expert in collegiate workplace administration, to advise it about its policies and procedures regarding workplace hostility. Lewis prepared a report for Berea. Porter claims that the report "supported" his prior criticisms. Porter alleges that

> [a]s part of its pattern of lack of transparency, and of extreme 'political correctness,' and in another failure to defend the protected academic freedom of its faculty, the College refused to release Dr. Lewis' report, embargoed it, kept it confidential, and took no responsible actions to implement its recommendations or to address Dr. Porter's prior criticisms of the College.

(DE 1-2 at 164.)

The following year, Porter was teaching PSY 210, Industrial / Organizational Psychology, when he decided to engage his class in a survey (the "Survey") to assess "attitudes about academic freedom, freedom of speech, and hostile work environments under civil rights law." Porter had regularly used surveys in this course in the past to obtain "archival and survey data to assess college policies, practices, and programs and to identify areas where there were opportunities for improvement." The Survey posed twenty scenarios, and the respondents were asked to read the scenario, decide if it reflected a hostile work environment, and decide whether academic freedom should protect the action taken. Porter drew half of the survey's scenarios from the issues, arguments, and events he observed while serving as faculty adviser in Messer's proceedings, but he skewed the true identities of the individuals involved in those proceedings.

Porter asserts that before disseminating the Survey, he shared drafts of it with "many other faculty members and received feedback from six of them." He states that none of these individuals expressed breach of confidentiality or ethical concerns, but two of them did express some concern about the controversy the Survey might elicit. He also provided a copy of the Survey to Dean Chad Berry.

Despite the underlying concerns expressed, Porter launched the survey on February 19, 2018 and made it accessible to the entire student body and faculty. The same day, Dean Berry asked Porter to meet and discuss the survey, and Porter promptly agreed. Additionally,

Williams—one of the female professors who filed the civil rights grievance against Messer and one of the subjects of the survey—made a Facebook post expressing her extreme displeasure with Porter's actions. Porter states that the post "incorrectly claim[ed] that all of the fact patterns in the Survey's scenarios were expressly about her and the other grievants in Dr. Messer's proceedings, that the Survey improperly made allegations of cognitive impairment against her, and that the Survey intended to punish and silence them." Williams post also "revealed the identities of persons she believed were involved to the entire campus community" and encouraged individuals to help address the situation.

The following day, Dean Berry publicly requested that Porter remove the survey and apologize to the campus community. Thereafter, Porter states that he received a phone call from Dean Berry who told him that he would forward a list of problematic survey scenarios so that the survey could be amended. But Dean Berry never forwarded any list. Porter asserts that he provided Dean Berry and President Roelofs with a draft of an apology "[w]ithin hours[,]" but President Roelofs rejected the draft because it blamed others for Porter's actions.

Two days later, Dean Berry informed Porter that charges of incompetence would be brought against him. Porter asked to discuss the matter, but "Dean Berry stated that the time for discussion had ended two days earlier when [Porter] had not immediately withdrawn the Survey and apologized to the campus." The charges against Porter were presented to the Faculty Status

Committee ("FSC"), which agreed by majority that the charges against Porter were supported. Thereafter, Porter was suspended and prohibited from communicating with students.

The following month, Porter "authored and sent an e-mail to each of the grievants in which he offered his sincere apology for any hurt that Dr. Porter may have unintentionally caused or that they may have perceived or suffered as a result of Dr. Porter's preparing and disseminating the Survey." Jones—one of the grievants—accepted his apology.

In April 2018, despite his suspension, the Student Government Association ("SGA") voted to award Porter with the Student Service Award. Sergent—who was one of the faculty advisors of SGA and husband to Williams—used his college email address to send a series of emails to the SGA board members. Porter alleges that "in a retaliatory attempt to discredit Dr. Porter in front of the students and to injure Dr. Porter's academic career at the College," Sergent made the following false statements in his initial email to SGA (the "SGA Email"): (1) he falsely accused Porter of racist, sexist, and homophobic comments and conduct as a professor at the school; (2) he falsely accused Porter of improperly disclosing and mischaracterizing Williams' personal medical information in an attempt to defame her in order to disparage and discredit her personally and professionally; (3) he falsely accused Porter of committing academic fraud and gross violations of professional ethics in preparing and disseminating the Survey; (4) he falsely stated that Porter was an

incompetent psychology professor who had improperly and unprofessionally manipulated his students for his own purposes; (5) he falsely stated that Porter violated the College's Institutional Review Board's ("IRB") academic research requirements by refusing to submit the Survey to IRB for review prior to its dissemination; (6) he falsely accused Porter of committing academic fraud and gross violations of professional ethics by willfully causing mental and emotional harm to his students and colleagues in an effort to divide the campus community for his own political reasons, without apology; and (7) he falsely accused Porter of being an unethical, unrepentant, academically dishonest person who is in the process of rightly being fired from Berea. Porter further contends that Sergent implicitly and expressly threatened one of the SGA members who responded to Sergent's initial email.

Following the email exchange, Porter asserts that Berea "interpret[ed] the SGA award requirements, based on no rule or precedent, to prohibit giving the SGA award to a faculty member on suspension for an alleged workplace-related offense." Thereafter, Porter appeared for a hearing before the Faculty Appeals Committee ("FAC"). Dean Berry served as both a witness and prosecutor at the hearing, despite Porter's objections. Porter contends that the FAC improperly adopted a "preponderance of the evidence" standard and refused to allow him to present his defense over the course of two days. Porter then describes incidents during the proceedings, which he asserts show "blatant bias contrary to the Faculty Manual and administrative due process involved."

The FAC ultimately issued a report stating, among other things, that Porter should be terminated because he cannot be trusted to handle confidential information and his personal conduct has hindered his professional responsibilities to the extent that he should be dismissed. President Roelofs affirmed the FAC Report's recommendation and ordered Porter's termination. Porter appealed the decision to the Berea College Board of Trustees Executive Committee, which ultimately affirmed President Roelofs' decision.

Based on the foregoing events, Porter filed suit against Berea and Sergent. Porter asserts the following claims against Berea: (1) breach of contract for suspension from employment in violation of the required due process and Porter's academic freedom (Count I); (2) breach of contract for termination of Porter's employment for incompetence after the college's denial of the required administrative due process (Count II); (3) breach of contract for termination of Porter's employment in violation of his academic freedom (Count III); (4) violations of Title VII, Title IX, the ADEA, and the Kentucky Civil Rights Act ("KCRA") for employment discrimination (Count IV); (5) violations of Title VII, Title IX, the ADEA, and the KCRA for illegal retaliation (Count V); (6) negligent hiring, retaining, and supervising of Sergent (Count IX); and (7) liability in respondeat superior (Count X). Porter also asserts the following claims against Sergent: (1) defamation per se and per quod (Count VI); (2) false light (Count VII); and (3) violations of the KCRA for illegal retaliation (Count VIII).

Presently before the Court are motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) filed

by Sergent and Berea. Sergent's motion to dismiss seeks to dismiss all claims against him, and Berea's motion to dismiss seeks to dismiss Counts IX and X. (DE 5, 6-1, and 7.) The Court finds below that Sergent's motion to dismiss should be denied, and Berea's motion to dismiss should be granted.

II. ANALYSIS

To survive a Rule 12(b)(6) motion to dismiss, the complaint must assert sufficient facts to provide the defendant with "fair notice of what the... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citation and internal quotation marks omitted). A complaint must also "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). "A complaint should be dismissed pursuant to Rule 12(b)(6) only if there is no law to support the claims, if the alleged facts are insufficient to state a claim, or if on the face of the complaint there is an insurmountable bar to relief." *Browning v. Pennerton*, 633 F. Supp. 2d 415, 429 (E.D. Ky. Jun. 22, 2009) (citing *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697 (6th Cir. 1978)). "When considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff." *Drain v. Nicholson*, No. 1:07-cv-690, 2008 U.S. Dist. LEXIS 1932, 2008 WL 123881, at *1 (S.D. Ohio Jan. 10, 2008). "However, the Court need not accept as true

legal conclusions cast in the form of factual allegations if those conclusions cannot be plausibly drawn from the facts, as alleged." *O'Hair v. Winchester Police Dep't*, No. 5:15-cv-097-DCR, 2015 U.S. Dist. LEXIS 96013, 2015 WL 4507181, at *2 (E.D. Ky. July 23, 2015).

A. Count VI: Defamation Claim Against Sergent.

Sergent seeks dismissal of Porter's claim for defamation. Sergent asserts that the statements he made in the email exchange with the SGA board members were true or nonactionable opinions and covered by a qualified privilege. (DE 6-1 at 7-20.) Porter's Second Amended Complaint asserts that several statements in the SGA Email are defamatory. The Court finds that, taking as true all factual allegations in the complaint and drawing all inferences in favor of Porter, the Second Amended Complaint does state a claim for defamation.

A claim for defamation requires the showing of four elements: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by that publication. *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 281-82 (Ky. 2014), as corrected (Apr. 7, 2015). Under Kentucky law, truth is an absolute defense to a defamation claim. *Smith v. Martin*, 331 S.W.3d 637, 640 (Ky. Ct. App. 2011). The defense applies to statements that are true or substantially true. *Nat'l Coll. of Kentucky, Inc. v. WAVE Holdings, LLC*, 536 S.W.3d 218, 222 (Ky. Ct. App.

2017). Statements of opinion are also absolutely privileged except where the statement "implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Loftus v. Nazari*, 21 F. Supp. 3d 849, 853 (E.D. Ky. 2014). "[E]ven if a speaker discloses the facts on which he bases his opinion, the statement may nonetheless be defamatory if the disclosed facts are incomplete, incorrect, or if his assessment of them is erroneous." *Cromity v. Meiners*, 494 S.W.3d 499, 503 (Ky. Ct. App. 2015).

1. At least one of the statements identified by Porter cannot wholly be considered an opinion and has not been shown to be true.

In the present case, Porter identifies several statements, which he asserts rise to the level of defamation. (DE 1-2 at 205-07.) Sergent contends that Porter's claim for defamation should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because the statements made by Sergent were either true or nonactionable opinions and subject to a qualified privilege—which is addressed below. (DE 6-1 at 7-20.) To state a claim for defamation, Porter's Second Amended Complaint has to identify a single false, defamatory statement meeting the elements described above. While some of the statements identified by Porter may be true and others could be considered nonactionable opinion, the Court finds that at least one of the statements made in the SGA Email cannot wholly be considered an opinion and has not been shown to be true.

In the SGA Email, Sergent stated:

> In the process of [the Messer] case, Porter ... publicly and in writing and in testimony made

> sexist, disparaging remarks about each of the three female faculty members in Psychology, including disclosing personal medical records of one, which he characterized falsely, rising to the level of slander, libel, and defamation.

(DE 6-2 at 4.) Porter asserts in his Second Amended Complaint that this statement is false, and at the motion to dismiss stage, the Court must accept as true all factual allegations in the complaint and must draw all inferences in a light most favorable to Porter.

With respect to this statement, Sergent does not directly assert truth or opinion in defense. Instead, Sergent takes issue with Porter's characterization of the statement in the complaint. (DE 6-1 at 10-11.) The Second Amended Complaint states that the SGA email "falsely accus[ed] Dr. Porter of improperly disclosing to the public the personal medical information of Dr. Williams in an attempt to defame her in order to disparage and discredit her personally and professionally." Sergent asserts that Porter's characterization of the email is incorrect, and instead, the email states that "during the process of the Messer case, Dr. Porter 'disclo[ed] personal medical records of [a female Psychology faculty member], which he characterized falsely, rising to the level of slander, libel, and defamation.'" (DE 6-1 at 11.)

While it is true that the email makes no mention of Williams directly and does not state that Porter's disclosure of the medical records was done "in an attempt to defame Williams in order to disparage and discredit her

personally and professionally," the email does state that Porter publicly disclosed the personal medical records of a psychology professor and characterized them falsely, rising to the level of slander, libel, and defamation. Porter Second Amended Complaint asserts that this statement is false. Presumably, Sergent's position is that truth protects his statement. However, there currently is not enough evidence showing that the statement is true or substantially true. Accordingly, at this point, Porter's claim for defamation should not be dismissed.

2. Qualified Privilege.

Sergent further asserts that the statements identified by Porter are subject to a qualified privilege. (DE 6-1 at 16-19.) Porter asserts that the privilege does not apply, and even if it did, his complaint asserts facts that are sufficient to establish actual malice. (DE 11 at 15-19.)

Under Kentucky law, an individual's communication is privileged where it is "one in which the party has an interest and it is made to another having a corresponding interest." *Toler*, 458 S.W.3d at 282 (internal quotation marks and citations omitted). When the privilege applies, the burden is on the plaintiff to prove actual malice or abuse of the qualified privilege. Abuse of the qualified privilege may be shown in several ways, including a showing of:

> (1) the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter; (2) the publication of the defamatory

> matter for some improper purpose; (3) excessive publication; or (4) the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

Id. at 284 (internal quotation marks omitted).

Assuming that a qualified privilege applies with respect to Sergent's statements, Porter's Second Amended Complaint asserts actual malice. The complaint alleges that Sergent's email was sent to the SGA board members to retaliate against Porter for his support of Messer—who was the subject of a civil rights grievance filed by three female psychology professors, one of which was Sergent's wife—and for his dissemination of the Survey, which contained several fact scenarios drawn from the issues, arguments, and events presented throughout the Messer proceedings. The Survey was disseminated to the entire campus community. The complaint alleges that Sergent sent the SGA Email knowing of the falsity of the statements therein. Porter also alleges that Sergent had "sinister or corrupt motives, hatred, revenge, personal ill will spite and desire to injure and retaliate" against him for his past actions. In the alternative, Porter pleads that Sergent published the false and defamatory statements due to "gross indifference and recklessness and wanton or willful disregard of Dr. Porter's right to personal security including his uninterrupted entitlement to enjoyment of his good reputation in the community." (DE 1-2 at 206-07.) The complaint also alleges that Sergent threatened an undergraduate with personal academic and career

damage if he did not heed Sergent's recommendation to rescind the SGA Service Award. In support of this argument, Porter cites a portion of the email chain where Sergent states to the student:

> Clearly you have no interest in my advice or the advice of your other faculty advisor, both of whom know much more than you about a great many things directly related to this situation. So I hope you at least listen to those around you among the SGA leadership who are wiser and better informed. One last bit of advice: I would caution you against burning bridges this early in your education, particularly for the wrong side of a cause.
>
> Do not email me again regarding this issue.

(DE 1-2 at 176.)

While the Court does not agree with Porter's characterization that the email reflects a threat of "academic and career damage," the overall content of the email combined with the other assertions in the complaint are sufficient to allege actual malice. Accordingly, at this time, Porter's claim for defamation should not be dismissed based on Sergent's assertion of a qualified privilege.

B. Count VII: False Light Claim Against Sergent.

Sergent also seeks dismissal of Porter's claim for invasion of the right to privacy based on portrayal in

false light. Sergent asserts that Porter cannot show his claim for false light because he cannot show that the statements were made in a public manner. Sergent also asserts that the statements were truthful or nonactionable opinion and that the same qualified privilege that applies in the defamation context also applies to Porter's false light claim. (DE 6-1 at 19-20.) Porter contends that the complaint's allegations are sufficient to state a claim for false light. (DE 11 at 19-21.) The Court finds that, taking as true all factual allegations in the complaint and drawing all inferences in favor of Porter, the Second Amended Complaint does state a claim for false light.

As stated above, at least one of the statements identified by Porter cannot wholly be considered an opinion and has not been shown to be true. Thus, dismissal of Porter's false light claim on the basis that the statements were truthful or nonactionable opinion is not appropriate.

Similarly, as stated above, assuming the qualified privilege applies, Porter's complaint alleges actual malice. Thus, Porter's claim for false light should not be dismissed based on Sergent's assertion of a qualified privilege.

To show a claim for false light, the plaintiff must show that "(1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the publisher had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed." *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 888 (Ky. 1981). Such claims require that the "publicity ... put plaintiffs in

a false light *before the public*." *Stewart v. Pantry, Inc.*, 715 F.Supp. 1361, 1369 (W.D. Ky. 1988) (emphasis in original).

Sergent asserts that Porter cannot show that the statements were put forth in a public manner. Sergent argues that since the emails make clear that they were sent to the SGA board members, consisting of six people, there are not sufficient facts to state a claim for invasion of privacy based upon "false light" publicity. (DE 6-1 at 19-20.)

The complaint alleges that Sergent published the statements "to more than one member of the SGA board in order to portray Dr. Porter in a false light and to attribute to him characteristics, conduct or beliefs that are false and which placed him before the public in a false position that is highly offensive to a reasonable person of this Commonwealth." (DE 1-2 at 208.) There is actually no indication on the face of the complaint of how many individuals received the subject email. In Sergent's motion to dismiss, he states that the email was sent to a "six-member" audience including members of the SGA board and a co-advisor, but the initial email appears to have been sent to only four people. Additionally, the email states "I ask that you please share this with everyone else on the executive committee for tonight's meeting." (DE 6-2 at 4.) At this point, it is not entirely clear how many people received the email communications from Sergent.

Porter contends in his response to Sergent's motion to dismiss that "there is an exception to the requirement that publicity be communicated to the public at large or

to so many persons that the matter must be regarded as substantially certain to become one of public knowledge [if] the representation was communicated to a smaller group of persons, including the plaintiff's employer, friends, or family, with whom the plaintiff has a special relationship." (DE 11 at 20 (quoting Richard E. Kaye, Cause of Action for False Light Invasion of Privacy, 33 Causes of Action 2d 1, at § 8 (2007 & Supp. 2019).)

The Court need not determine right now whether under Kentucky law, false light claims may be shown if "the representation was communicated to a smaller group of persons, including the plaintiff's employer, friends, or family, with whom the plaintiff has a special relationship" because, based on the allegations in the complaint, the Court finds that Porter has stated a claim for false light. While it may be deduced in discovery that the statement was not made publicly such that Porter's claim for false light is not supported by the evidence, it is too early for the Court to make that determination. The face of the complaint states a claim for false light, and accordingly, it should not be dismissed at this time.

C. Count VIII: Claim for Illegal Retaliation Under the KCRA Against Sergent.

Sergent also seeks dismissal of Porter's claim for illegal retaliation under the KCRA. He asserts that Porter's complaint does not show that he has suffered an adverse employment action, as required under the KCRA. Sergent contends that to the extent Porter "intended to allege that the emails led to the SGA's decision not to give

him the Student Service Award (an allegation that does not appear in the Complaint), ... he still fails to articulate any adverse employment action to support his retaliation claim" because the Student Service Award "does not result in a significant change in the terms and conditions of employment and cannot constitute an adverse action." (DE 6-1 at 21-22.) Porter argues that the "retaliation need only be 'materially adverse' to Dr. Porter. It need not affect the terms and conditions of his employment at the College." He additionally asserts that Sergent's "malicious defamation of Dr. Porter and the resulting injury to his reputation, alone, constitute actionable retaliation under the KCRA." (DE 11 at 5.) The Court finds that the complaint states a claim for illegal retaliation, however, the issues cited by the parties may be appropriately decided on summary judgment.

Under the KCRA,

> It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:
>
> > (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter ....

Ky. Rev. Stat. Ann. 344.280. Retaliation claims under the KCRA are interpreted consistently with

unlawful retaliation claims under federal law. *Brooks v. Lexington-Fayette Urban Cty. Hous. Auth.*, 132 S.W.3d 790, 801 (Ky. 2004), as modified on denial of reh'g (May 20, 2004). To establish a retaliation claim under the KCRA, a plaintiff must demonstrate: (1) that he engaged in an activity protected by the KCRA; (2) that the exercise of his civil rights was known by the defendant; (3) that thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Id.* at 803 (internal quotation marks omitted) (quoting *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 877 (6th Cir. 1991)).

In the present case, Sergent asserts that Porter has failed to allege an adverse employment action. Porter contends that his complaint specifically alleges that Sergent retaliated against him in an attempt to discredit him in front of the students and to injure his academic career, resulting in rescission of the Student Service Award. He argues that Sergent's actions are "materially adverse," and thus, he has stated a valid claim for retaliation under the KCRA.

An adverse employment action is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). Such action, "in most cases inflicts direct economic harm." *Id.* at 762. "[A] plaintiff must show that a reasonable employee

would have found the challenged action materially adverse[.]" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219, 370 U.S. App. D.C. 74 (D.C. Cir. 2006) (internal quotation marks omitted).

Although Porter does not specifically mention the rescission of the Student Service Award in Count VIII, he does state that:

> [u]pon hearing of the SGA's vote to give Dr. Porter the award, Dr. Sergent was again very angry and spiteful toward him and wanted to derail the SGA's decision. Dr. Sergent wanted to punish Dr. Porter and to retaliate against him for his past support of Dr. Messer and for his dissemination of the Survey, which Dr. Sergent hastily and incorrectly inferred to be an "attack" on his wife for her prior grievances against Dr. Messer.

(DE 1-2 at 210.) Additionally, elsewhere in the complaint, Porter alleges that the subject emails led to the rescission of the SGA award and were an attempt to discredit Porter in front of his students and injure his academic career at the College. (DE 1-2 at 171-77.)

Determining whether the rescission of the Student Service Award qualifies as a "materially adverse" employment action is not appropriate at this time. Although the Court is doubtful that the loss of the Student

Service Award qualifies as an adverse employment action under the KCRA, the Court does not have enough information regarding the nature of the award to make that determination. While there is some authority supporting that the denial or rescission of an award can constitute a "materially adverse" employment action, those cases deal with awards that were directly tied to changes in the employee's payment, benefits, or status. *See Saunders v. Mills*, 172 F.Supp.3d 74, 93 (D.D.C. 2016) (The denial of a performance award was a "materially adverse" action "because it could impact an employee's 'compensation and tangible benefits' and could dissuade a reasonable worker from filing or supporting a complaint of discrimination."); *Bolduc v. Town of Webster*, 629 F.Supp.2d 132, 152-53 (D. Mass. 2009) (Rescission of a commendation was an adverse employment action because the receipt of the award would have weakened a decision-maker's recommendation that the plaintiff be fired.) Additionally, with respect to Porter's argument that Sergent's "malicious defamation of Dr. Porter and the resulting injury to his reputation, alone, constitute actionable retaliation under the KCRA[,]" the Court questions whether Kentucky law supports that loss of reputation constitutes an adverse employment action under the KCRA. The Court has been unable to locate binding precedent stating that loss of reputation qualifies as an adverse employment action under Kentucky law. The Court has, however, located precedent from other jurisdictions where the courts have stated that loss of reputation does not constitute an adverse employment action. *See, e.g., Fisher v. Dep't of Veterans Affairs*, No. 08-10748, 2009 U.S. Dist. LEXIS 55452, 2009 WL 1885072, at *2 (E.D. Mich. June 30, 2009) ("Purely subjective

injuries, such as dissatisfaction with a reassignment, public humiliation, or loss of reputation or prestige do not constitute adverse employment actions."); *Stewart v. Evans*, 275 F.3d 1126, 1136, 348 U.S. App. D.C. 382 (D.C. Cir. 2002) ("Furthermore, public humiliation or loss of reputation does not constitute an adverse employment action under Title VII."). *But see, Zuzul v. McDonald*, 98 F. Supp. 3d 852, 869 (M.D.N.C. 2015) ("Allegations that retaliatory actions caused the loss of professional reputation can constitute adverse employment actions for purposes of employment retaliation claims.") The Court would welcome further arguments regarding this issue on summary judgment.

The Court finds that Porter has stated a claim for illegal retaliation under the KCRA against Sergent. "A complaint should be dismissed pursuant to Rule 12(b)(6) only if there is no law to support the claims, if the alleged facts are insufficient to state a claim, or if on the face of the complaint there is an insurmountable bar to relief." *See Browning*, 633 F. Supp. 2d at 429 (citing *Rauch*, 576 F.2d at 697). Here, there is some law to support Porter's claims, Porter has alleged sufficient facts to state a claim for illegal retaliation under the KCRA, and there is no insurmountable bar to relief on the face of the complaint. Accordingly, dismissal of this claim is not appropriate at this time.

D. Berea's Motion to Dismiss.

Berea has filed a motion to partially dismiss, which seeks to dismiss Counts IX and X of Porter's Second

Amended Complaint. (DE 7.) Count IX lists a claim for negligent hiring, retaining, and supervising of Sergent, and Count X lists a claim for respondeat superior liability. Berea asserts that these claims should be dismissed for four reasons: (1) Porter's claims are untimely; (2) Porter fails to plead any facts connecting Berea to his claims against Sergent; (3) Berea cannot be held vicariously liable under the KCRA because Porter has failed to allege an adverse action that occurred as a result of Sergent's emails; and (4) respondeat superior liability is not an independent cause of action. (DE 7 at 5.)

Porter, in his response, admits that the claims are untimely. However, he asserts that equitable tolling should apply because Berea fraudulently or misleadingly concealed these causes of action against it. Porter additionally asserts that the complaint alleges sufficient facts to state a cause of action against Berea for negligent hiring, retaining and supervising of Sergent, that the complaint alleges sufficient facts to show an adverse employment action resulting from illegal retaliation, and that the complaint sufficiently pleads the issue of Berea's respondeat superior liability. (DE 15.)

The Court finds that Porter's Count IX claim for negligent hiring, retaining, and supervising of Sergent should be dismissed because it is untimely, and Porter has not established that equitable tolling should apply. Additionally, the Court finds that Count X—liability in respondeat superior—should be dismissed because respondeat superior liability is not an independent cause of action. Moreover, as Count X relates to Porter's

defamation and false light claims, it is untimely, and Porter has not established that equitable tolling should apply. Accordingly, the Court grants Berea's motion to partially dismiss. Since the Court finds that these claims should be dismissed for the aforementioned reasons, the Court will not consider the other arguments raised by the parties.

1. Count IX: Negligent Hiring, Retaining, and Supervising of Sergent.

Berea seeks to dismiss Porters Count IX claim on the basis that it is untimely. A Court may appropriately dismiss a claim for failure to comply with the statute of limitations if the complaint "shows that the action was not brought within the statutory [limitations period]." *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 702 (6th Cir. 1978); *see also Gibson v. American Bankers Ins. Co.*, 91 F.Supp.2d 1037, 1040 (E.D. Ky. 2000) ("[T]he prevailing rule is that a complaint which shows on its face that relief is barred by the affirmative statute of limitations is properly subject to a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted."). Claims for negligent hiring, retaining, and supervising are "derivative of—and dependent upon—the underlying tort of the supervisors' subordinates" and thus claims for negligent hiring retaining and supervising accrue "at the same time as the common law [] claim[s] upon which [they are] based." *Hoskins v. Knox Cty., Kentucky*, No. CV 17-84-DLB-HAI, 2018 U.S. Dist. LEXIS 42694, 2018 WL 1352163, at *21 (E.D. Ky. Mar. 15, 2018).

In the present case, Porter's claim for negligent hiring, retaining, and supervising is based on Sergent's

alleged defamatory conduct. The complaint states that this conduct occurred on April 8-9, 2018. (DE 1-2 at 207.) Under Kentucky law, defamation and false light claims are subject to a one-year statute of limitations. *See Papa John's Intern., Inc. v. McCoy*, 244 S.W.3d 44, 19 (Ky. 2008); *see also* Ky. Rev. Stat. Ann. § 413.140 (applying one-year statute of limitations for actions "for libel or slander"); *Salyer v. Southern Pov. Law Ctr., Inc.*, 701 F. Supp. 2d 912 (W.D. Ky. 2009) (false light claim governed by one-year statute of limitations for defamation). Accordingly, the statute of limitations on Porter's claim for negligent hiring, retaining, and supervising expired on April 9, 2019.

Porter filed his Second Amended Complaint on November 14, 2019, over six months after the expiration of the statute of limitations. Porter does not disagree that a one-year statute of limitations applies to claims for defamation and false light or that his claims were brought beyond one-year after the date of the alleged conduct. Instead, he argues that the limitations period should be equitably tolled because Berea fraudulently and misleadingly concealed these causes of action against it. Porter asserts that he "sought to sue the College and Dr. Sergent separately in state court to keep the two Defendants from pointing fingers at each other in front of a jury." However, despite Porter's objections, the cases were consolidated. Porter contends that he was not aware of the negligent hiring, retaining, and supervising claim against Berea until Sergent asserted a qualified privilege in defense to the claims against him. Porter argues that he should be able to bring these claims because Berea was deceptive when it denied "knowledge of and support of Dr.

Sergent's defamatory statements." (DE 15 at 3-8.) This denial appears to be based on Berea's Answer to Porter's initial complaint. In its Answer, Berea—in responding to Porter's specific allegations—stated that "Sergent acted on his own without consulting the administration" and it did not "conspire[] or enable[] Sergent's posts." (DE 1-1 at 126 and 143.)

Equitable tolling is generally only available "'when a litigant's failure to meet a legally mandated deadline unavoidably arose from circumstances beyond that litigant's control.'" *Zappone v. United States*, 870 F.3d 551, 556 (6th Cir. 2017) (quoting *Jackson v. United States*, 751 F.3d 712, 718 (6th Cir. 2014). Five factors are considered in evaluating whether equitable tolling may be appropriate: (1) the plaintiff's lack of notice of the filing requirement; (2) the plaintiff's lack of constructive knowledge of the filing requirement; (3) the plaintiff's diligence in pursuing his rights; (4) an absence of prejudice to the defendant; and (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement. *See id.* The Sixth Circuit further makes clear that "a litigant carries the burden of establishing [his] entitlement to equitable tolling." *Id.* "Absent compelling equitable considerations, a court should not extend limitations by even a single day." *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000) (citing *Johnson v. United States Postal Service*, 863 F.2d 48 (Table), 1988 WL 122962, at *3 (6th Cir. Nov.16, 1988)).

Porter's argument that equitable tolling should apply is unpersuasive. Porter essentially asserts that

he is entitled to equitable tolling on the Count IX claim against Berea based on Sergent's assertion of a qualified privilege with respect to the claims asserted against him. Porter's argument that Berea was somehow deceptive in its Answer is entirely unsupported. Moreover, both Berea and Sergent are free to assert whatever defenses may be available to them, regardless of whether those defenses conflict with one another. Porter's claim for negligent hiring, retaining, and supervising was identifiable from the outset—there is no indication that Berea attempted to conceal that Sergent was its employee during the events of this case. Just because Porter did not anticipate that certain defenses would be raised does not justify equitable tolling. Nothing prevented Porter from bringing this claim within the applicable statute of limitations. Accordingly, equitable tolling is not warranted.

It is evident from the face of the complaint that Porter's Count IX claim is barred by the applicable statute of limitations. Accordingly, this claim is dismissed with prejudice.

2. Count X: Respondeat Superior Liability.

Berea seeks to dismiss Porter's Count X claim on the basis that it is untimely as it relates to Porter's defamation and false light claims. (DE 7 at 5.) Additionally, Berea asserts that it should be dismissed because respondeat superior liability is not an independent cause of action.

The statute of limitations for respondeat superior liability claims is based on the statute of limitations for

the underlying claim on which the claim for respondeat superior liability is based. *See B.L. v. Schuhmann*, 3809 F.Supp.3d 614 (W.D. Ky. 2019). Here, Porter's claim for respondeat superior liability is based on his claims against Sergent for defamation, false light, and illegal retaliation.[1] As stated above, defamation and false light claims have a one-year statute of limitations. *See Papa John's*, 244 S.W.3d at 49; *see also* Ky. Rev. Stat. Ann. § 413.140 (applying one-year statute of limitations for actions "for libel or slander"); *Salyer*, 701 F. Supp. 2d at 912 (false light claim governed by one-year statute of limitations for defamation).

Here, the defamatory conduct occurred on April 8-9, 2018, and the statute of limitations expired a year later on April 9, 2019. Porter did not assert this claim for respondeat superior liability until November 14, 2019. Again, Porter does not disagree that a one-year statute of limitations applies to claims for defamation and false light or that his claims were not brought within one-year of the alleged conduct. Instead, he contends that equitable tolling should apply. (DE 15 at 3-8.)

For the same reasons stated above, equitable tolling is not warranted. Nothing prevented Porter from bringing this claim within the applicable statute of limitations. It is evident from the face of the complaint that Porter's Count X claim, as it relates to Porter's defamation and false light

1. Illegal retaliation under the KCRA has a five-year statute of limitations. Although the statute of limitations has not run on this claim, Count X is otherwise dismissed because respondeat superior liability is not an independent cause of action.

claims, is barred by the applicable statute of limitations. Accordingly, this claim will be dismissed with prejudice.

Porter's Count X claim is additionally dismissed because respondeat superior liability is not an independent cause of action. *See Vonderhaar v. AT&T Mobility Services, LLC*, 372 F. Supp. 3d 497, 2019 WL 1120117 *13 (E.D. Ky. March 11, 2019) ("[T]he doctrine of respondeat superior is not a cause of action. It is a basis for holding the [Defendant] responsible for the acts of its agents.") Count X is specifically listed in Porter's complaint as a separate cause of action titled "Respondeat Superior Liability." Listing respondeat superior liability as a separate count in a complaint is inappropriate under the law of this jurisdiction. Thus, Count X should be dismissed. *See id.*

III. CONCLUSION

Based on the foregoing, the Court **HEREBY ORDERS** as follows:

(1) Sergent's motion to dismiss (DE 5) is **DENIED**.

(2) Berea College's motion to partially dismiss (DE 7) is **GRANTED**.

(3) Counts IX and X are **DISMISSED**.

(4) Pursuant to Docket Entry 9, Berea shall file its answer to Porter's Second Amended Complaint within ten (10) days of the entry of this order.

Appendix F

Dated August 4, 2020.

/s/ Karen K. Caldwell
KAREN K. CALDWELL
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JANUARY 13, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5944

DAVID B. PORTER,

Plaintiff-Appellant,

v.

F. TYLER SERGENT; BEREA COLLEGE,

Defendants-Appellees.

Filed January 13, 2025

ORDER

BEFORE: GRIFFIN, KETHLEDGE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full

court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk