

**Response of the EEOC Complainants**  
  
**to the**  
  
**Debevoise & Plimpton Report**

**February 5, 2018**

# Response of the EEOC Complainants to the Debevoise & Plimpton Report

## 1. Introduction

1. The Report of the Independent Investigation by Debevoise & Plimpton LLP led by Mary Jo White (“Report”) was issued on January 11, 2018. It examined the circumstances surrounding the EEOC Complaint our clients<sup>1</sup> filed against the University of Rochester (“UR”) in September 2017, which detailed a long campaign of sexual harassment by Professor Florian Jaeger centered on students in the Department of Brain and Cognitive Sciences (“BCS”), followed by several inadequate University investigations and retaliation against our clients.
2. Our detailed rebuttal to the Report’s clean bill of health for the University’s conduct must await the progress of the federal case before Judge David G. Larimer in the US District Court in Rochester; that is in its early stages. We summarize here the major reasons why we believe the Report’s methodology and findings are profoundly flawed.
3. The Report’s central defect is that it is a work of advocacy dressed in the garb of impartiality and “independence.” The University has paid \$4.5 million to one of the most sophisticated corporate defense firms in the world, with a long track record of using special investigations of this sort to get companies out of trouble, to defuse the public pressure that arose from our Complaint. The mostly respectful press coverage the Report has received<sup>2</sup> shows that it may have been a good “crisis communications” investment for UR. But the Report is fundamentally wrong and misleading, a major waste of the University’s educational resources.
4. Ms. White had a delicate task. She could not deny all the evidence against Jaeger that the Complaint laid out, because it is overwhelming. But any serious criticism of UR would have helped our pending lawsuit at the expense of the organization paying her firm a million dollars a month, which would undermine the implicit contract that keeps Debevoise at the forefront of law firms performing privately funded investigations.<sup>3</sup> Our analysis is that the Report is deftly “reverse engineered” to retain credibility for White as an investigator while

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<sup>1</sup> Dr. Richard Aslin, Dr. Elissa Newport, Dr. Jessica Cantlon, Dr. Bradford Mahon, Dr. Celeste Kidd, Dr. Steven Piantadosi, Dr. Ben Hayden, Dr. Sarah Heilbronner, and Dr. Keturah Bixby.

<sup>2</sup> This is not the place for a comprehensive analysis of Ms. White’s public life, but we note she has critics as well as supporters: [https://www.warren.senate.gov/files/documents/2015-6-2\\_Warren\\_letter\\_to\\_SEC.pdf](https://www.warren.senate.gov/files/documents/2015-6-2_Warren_letter_to_SEC.pdf); <https://theintercept.com/2017/02/17/a-corporate-defender-at-heart-former-sec-chair-mary-jo-white-returns-to-her-happy-place/>

<sup>3</sup> Just last week, the NFL announced another lucrative investigation by White into workplace conduct violations involving race and sex discrimination by Carolina Panthers owner Jerry Richardson.

giving the University minimum legal liability. The clever way she “split the baby” meant that a whole range of unacceptable conduct by Professor Jaeger was admitted, but the University was magically absolved of legal responsibility for (1) letting it occur, (2) taking no effective action when it received complaints about Jaeger, (3) mishandling its investigations and promoting Jaeger in the middle of them, and (4) retaliating against our clients for continuing to complain.<sup>4</sup> This was accomplished in four ways.

5. First, the Report focuses on rebutting a legal argument we did not make. Our fundamental argument is that Jaeger’s acts, plus the repeated failure of the University to address them, created a *hostile work environment* for women at BCS. Debevoise focused instead on whether Jaeger had committed sexual harassment against specific individuals – a straw man.
6. Second, it repeatedly misstates applicable law. For example, it asserts that a “hostile work environment” cannot be established unless the specific individuals who complain about it are themselves individually sexually harassed, according to a very strict (stricter than the law requires) definition of harassment. But courts have routinely found a hostile work environment in the sorts of facts the Complaint details about treatment of women at BCS. The Report itself concedes that many women altered their educational path to avoid Jaeger and his sexually charged behavior. A hostile work environment can be demonstrated by a *pattern of behavior* involving multiple people, not just an individual plaintiff, and can be *cumulative*. Debevoise wrongly claims the contrary.
7. Another example of Debevoise misstating legal standards to minimize the University’s liability is its handling of the University’s retaliation against our clients after they complained about Jaeger. An act of retaliation is one that is “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.”<sup>5</sup> Instead, the Report says that the only retaliatory acts that count must result in a concrete

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<sup>4</sup> We note the recent criticism of the investigation of Michigan State University conducted by another highly regarded former US Attorney, Patrick Fitzgerald, after Larry Nassar sexually abused multiple gymnasts and others while employed at its hospital. According to the New York Times, victims “have accused the university of failing to conduct a top-to-bottom, truly independent investigation, settling instead for a review by a legal team that was also trying to protect the school from any damage in the courts.” Michigan State portrayed Mr. Fitzgerald as reviewing the Nassar cases objectively even though he was hired to defend the university from lawsuits. Unlike White, Fitzgerald was never asked to produce a public report assessing MSU’s conduct. Nevertheless, as criticism of its handling of Nassar mounted, MSU defended itself by citing Fitzgerald’s work as an independent review of its operations. One of its trustees, Joel I. Ferguson, told the New York Times he agreed with criticism of Mr. Fitzgerald’s role: “We have the person who was defending us investigating us....There was a conflict.” White was explicitly hired to produce a public report, not to defend the University, but a conflict is inherent when any firm is paid large sums to provide a public bill of health about the organization that hired it. <https://www.nytimes.com/2018/01/27/us/michigan-state-nassar-fitzgerald.html>

<sup>5</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57, 126 S. Ct. 2405, 2409 (2006); see also *Vogel v. CA, Inc.*, 662 Fed. App’x 72, (2d Cir. 2016).

change in our clients' conditions of employment. That mischaracterization allowed White to transmute repeated acts of retaliation into mere "Missed Opportunities."<sup>6</sup>

8. Third, the Report elides, ignores or misstates facts that undermine the University's case. It is artfully done. Sentences in documents thought harmful to our clients are quoted in the Report, but the complete text more favorable to them does not show up in the exhibits. The Report proclaims failures in the Complaint that are not actually failures,<sup>7</sup> then soft-soaps weaknesses in the University's case. For example, the fact that Jaeger sent unsolicited photographs of his genitals and a pornographic image to two former students, or that Jaeger said to Kidd that he wanted to pull on a student's hair and that another student had nice lips that he wanted to "suck and bite," or that he commented on the taste of another student's vagina, are relegated to the footnotes.
9. A notable example of Debevoise accepting the word of others over our clients or witnesses is the Report's forgiving treatment of the conflicts of interest of Provost Robert Clark, which were raised in our federal Complaint. We contended there that Clark's intimate relationship with one of his direct reports "may have dulled [his] sensitivity to the perils Jaeger's behavior posed to students and UR's reputation." On page 109, the Report claims this relationship began only in September 2017 when Clark put a management plan in place to deal with the possible conflict of interest, so was irrelevant to his previous decisions backing Jaeger. This is untrue. According to University employees, Clark and his subordinate publicly presented themselves as a couple at the March 15-19, 2017 Strategic Planning Retreat for senior University staff in Naples, Florida, and their actual relationship began before this, likely in 2016. She left UR, where she had worked since 2014 at the Hajim School of Engineering headed by Clark, for another employer in October 2016. There she received flowers from Clark, who sometimes picked her up for lunch. Clark then hired her to be Director of External Relations in the Provost's Office, directly reporting to him, in May 2017, without allowing more qualified candidates to be interviewed. A management plan was put in place only in September 2017, after our Complaint was filed. To judge from the Report, Debevoise interviewed Clark and his subordinate and just took their word about their relationship.
10. Another example of its fundamentally pro-UR perspective is that the Report takes the word of Jaeger and some allies to conclude that although much of Jaeger's behavior that Kidd complained about more likely than not did occur, she welcomed some of it. The evidence cited for this conclusion is that Kidd herself sometimes talked with her colleagues about sex, and sometimes responded in a friendly manner to Jaeger. This is classic victim-blaming. One can talk about sex with one's peers and be a generally friendly and open person and still not

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<sup>6</sup> See Report, pp. 37-41. See also L. Carroll (Charles L. Dodgson), *Through the Looking-Glass*, Ch. 6, p. 205 (1934) (first pub. 1872) ("When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all.")

<sup>7</sup> See paragraph 70 *et seq.*

want to be on the receiving end of constant sexual comments from one's research advisor. The Report downplays evidence in its exhibits showing that Kidd found Jaeger's treatment unwelcome.<sup>8</sup> The Report consistently leans in the direction of UR: being less skeptical about its officials' explanations than our clients', and tones down evidence harmful to UR's case.

11. Fourth and finally, the Report simply waves away the fact that Ms. White had no testimony from the Complaint's most central players – our clients. Assessing fairly whether UR retaliated against them without talking to them is impossible. They are also vital sources of information about other key events. While their lawsuits are pending they could obviously not be subjected to private examination by Debevoise lawyers paid by the University, with no rules of civil procedure to protect them, producing testimony the University would naturally try to use against them in our federal case. This structural flaw, as we pointed out immediately after the Special Committee was created, has fundamentally undermined its investigation and the Report's claim to completeness or fairness.<sup>9</sup> Ms. White knew from the beginning that our clients would have to remain on the sidelines unless the University first resolved their claims. We sought such a resolution but were refused. Accordingly, we told her that we thought a report delivered under such circumstances would be fraudulent and that she should stop work and return the University's money. She takes offense at our calling her elaborate enterprise a fraud.<sup>10</sup> But while she acknowledges it would be preferable to have spoken to our clients, the Report still presents itself as rendering a settled verdict based on all relevant facts.
12. While one must admire the Report for the work invested, its lavish use of top-drawer lawyers and private investigators,<sup>11</sup> clear writing and polish, the investigation behind it was nonetheless rickety, lacking transparency and visible standards. What witnesses and evidence it decided to include or exclude, on what grounds, why it pursued some grounds of inquiry and not others, are not disclosed. Investigators pressed witnesses not to discuss their interviews publicly, though many were not University employees but volunteers and had every right to. Our clients, though central to the topic being investigated, are absent. The published Report disclosed the names of witnesses to whom Debevoise had given written promises of confidentiality. Its marshalling of facts and legal analysis lean consistently in favor of the University. All this confirms our concern from the outset that the

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<sup>8</sup> Report, pp. 81-83.

<sup>9</sup> In November, we wrote to White stating what a litigator of White's experience already would know – that no lawyer could advise a client to give private testimony to lawyers paid by the University and operating under no disclosed rules while their lawsuits against the University were in progress. Nevertheless, White announced to the public that the Complainants had sent a letter “declining to participate,” implying that the Complainants were trying to obstruct the investigation rather than behave as any rational party would during a litigation. See <http://www.rochester.edu/newscenter/message-board-trustees-special-committee/>

<sup>10</sup> Report, p. 27.

<sup>11</sup> White's team included top officials at Stroz Friedberg, a large corporate intelligence/private investigation firm in New York City. <http://www.rochester.edu/newscenter/message-board-trustees-special-committee/>

goal of the investigation was fundamentally to excuse UR for its systemic failings in dealing with Jaeger's misconduct – a "Whitewash."

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13. Before describing the shortcomings of the Report in detail, we emphasize again that our clients take no pleasure in having to air the problems described in the Complaint, which they tried at least 29 times to get the University to address before filing it. They have all spent a large portion of their working lives at UR and believe in its mission and potential. They are all active scientists who want to be in the lab or classroom, not dealing with lawyers. The younger professors among them had an active and exciting program of collaboration and looked forward to staying together and spending the rest of their careers at UR. To have to leave Rochester is painful. Nevertheless, they take heart that the policies to combat discrimination at UR they have been recommending since last year were largely adopted by the Report, and have also been endorsed by the Faculty Senate and Acting President Feldman. UR is now influencing a national conversation about how to combat sexism in academia. These are all positive developments, which our clients hope will strengthen the University.

## **2. The Report is wrong to absolve UR from legal liability for Jaeger's misconduct**

14. The Report argues that whatever bad things may have happened at UR, nothing that happened to our clients meets the definition of a hostile work environment or retaliation for having complained about a hostile work environment. This is legally incorrect.

### **A. Hostile Environment**

15. In its legal analysis of whether Jaeger's behavior created a hostile work or educational environment under Title VII and Title IX, the Report claims that he did not violate either University policy or the law. Both conclusions are wrong.

#### **1. University Policy**

16. References to violations of University Policy 106 in this case actually concern violations of two different UR policies covering sexually oriented interactions between faculty and students. The first, governing faculty-student sexual contact, is found in the Faculty Handbook, Section III. C. "Intimate Relationships." The other governs sexual harassment and is covered in Policy 106.
17. The Report, like the University's previous investigations and Jaeger's own defense of his actions, glosses over the fact that these are two different things and focuses overwhelmingly

on whether Jaeger's multiple student sexual partners violated the "Intimate Relationships" policy only.

18. The Report agrees with Jaeger, and UR's investigation of Jaeger, that he did not violate Faculty Handbook III.C's strictures about faculty-graduate student sexual contact, because at the time that he had sex with students known to our witnesses, this policy did not absolutely prohibit, but only "strongly discouraged," sexual contact of that sort. The Report confirms that Jaeger had sex with one graduate student, a prospective graduate student who ended up going to BCS, an undergraduate, a recent undergraduate, two UR faculty members and four visiting speakers (at least some of whom were graduate students), which was generally known among BCS graduate students. This raises the question of what the "strongly discouraged" threshold means to UR leadership or White. Would sex with 10, 100 or 1000 students be enough to find a violation? While White says Jaeger did not violate the "strongly discouraged" standard, we disagree.
19. But that is a side issue. Focusing only on the "Intimate Relationships" policy ignores what the Complaint actually says. Our clients have never cared about Jaeger's sex life, but they do care about the *effect his sexualized treatment of women at BCS had on the educational environment* – the hostile environment Jaeger created for women, which others at BCS aided and his superiors did not curtail. Like a magician using misdirection, Jaeger, the University and the Report have all tried to obscure this by focusing on the sexual contact policy.
20. Policy 106 enumerates specific acts of sexual harassment the University prohibits. Jaeger, according to the Report, *committed most of them*. Remarkably, however, the Report absolves him of committing legal sexual harassment. In the press conference following the Report's release, White was pressed on this point but evaded whether he had committed "sexual harassment," finally saying that Jaeger's acts "were offensive, inappropriate, and what I would call *'in the nature of sexually harassing acts.'*" With this strange locution it appears White was trying to avoid conceding that Jaeger committed sexual harassment despite the mountain of evidence assembled in her own Report.
21. Policy 106, in effect since 2007, is reprinted below as Exhibit 1. Below are excerpts from it that specify various kinds of sexual harassment that UR employees are required to avoid. These are followed by multiple examples of Jaeger's misconduct taken from the Report itself. It is overwhelmingly obvious that Jaeger violated these policies, yet the Report somehow manages to avoid this conclusion.

**Policy 106 prohibits: "Unwanted comments about an individual's body, clothing or lifestyle that have sexual implications or demean the individual's sexuality or gender"**

22. The Report states:

- “One student recalled that when she was stressed, Jaeger would joke that he should talk to her husband about how to relax her.”<sup>12</sup>
- Students received a party invitation email from him stating, “bring your loved ones, people you wanna make love to (I am not making any assumptions here), etc.”<sup>13</sup>
- He commented to a student that a woman visiting speaker would be “a great lay.”<sup>14</sup>
- Jaeger talked about another student in “sexual terms in front of professional colleagues” including students and faculty, which the student found “super mortifying.”<sup>15</sup>
- White credits that “Jaeger asked in front of a group of faculty members at a party in 2010 about which part of a student’s body another professor found attractive.”<sup>16</sup>
- White credits that Jaeger said he came to UR because of “legendary nude hot tub parties with students.”<sup>17</sup>
- “Jaeger ignored Kidd’s personal boundaries, made comments about students’ physical appearance to Kidd, or spoke with her frankly about sex, including about her sex life and sexual acts that he performed, or wanted to perform, on other women. Although Jaeger does not specifically recall these incidents, we credit that it is more likely than not that they occurred.”<sup>18</sup>
- “Jaeger used sexual language and told Kidd that the medication that one of his partners used made her vagina taste bad.”<sup>19</sup>
- “Jaeger told Kidd he wanted to pull on a student’s hair and another student had nice lips that he wanted to ‘suck and bite.’”<sup>20</sup>
- “Jaeger questioned Kidd about her past relationships and sex life, including joking about her ex-partner’s ethnicity, and to identify how many sexual partners she had.”<sup>21</sup>
- “Jaeger evaluated the sexual appeal of other women and warned Kidd against gaining weight.”<sup>22</sup>

**Policy 106 prohibits: “Unwanted sexual flirtations, leering or ogling; unwanted sexual advances or propositions”**

23. The Report states:

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<sup>12</sup> Report, p. 57.

<sup>13</sup> Report, p. 58.

<sup>14</sup> Report, p. 59.

<sup>15</sup> Report, p. 59-60.

<sup>16</sup> Report, p. 155

<sup>17</sup> Report, p 155.

<sup>18</sup> Report, p. 82.

<sup>19</sup> Report, p. 82.

<sup>20</sup> Report, p. 82.

<sup>21</sup> Report, p. 82.

<sup>22</sup> Report, p. 82.



- During a conference at the Linguistic Society of America Institute, Jaeger “leered at” a student and remarked “nice shorts.”<sup>23</sup>
- A student said “Jaeger would often stand close to her, and in 2007 or 2008, Jaeger touched her arm outside of Meliora Hall and said that ‘all people are ultimately selfish and people who aren’t are kidding themselves . . . everybody should be a hedonist.’”<sup>24</sup>
- A student said “Jaeger made ‘a pass’ at her while they were with a group of students and faculty at Lux in 2007.” “She also observed Jaeger flirting with other women.”<sup>25</sup>
- A student “asked to be added to the attendance list for a workshop, which Jaeger had said was full, Jaeger responded ‘are you putting on that man-melting face again?!? It’s a weapon. I have to run . . . escape from her grasp;)’”<sup>26</sup>
- “Jaeger leered at a student and mocked her clothing in a BCS classroom in front of several people.”<sup>27</sup>
- “Jaeger constantly bothered her and other students in their office and stole snacks, but she also described his banter with her and other students as “flirtatious” and recounted off-color comments she heard Jaeger make about women, such as, ‘She has a nice pair of assets.’”<sup>28</sup>
- He was flirtatious with students and blurred appropriate faculty-student boundaries.<sup>29</sup>

**Policy 106 prohibits: “Unwanted display of sexually demeaning objects, pictures or cartoons”**

24. The Report states:

- Jaeger sent an unwanted picture of his penis to a student.<sup>30</sup>
- Jaeger sent a pornographic image to another former student that made her uncomfortable.<sup>31</sup>

## **2. The law on sexual harassment and hostile work environment**

25. Our Complaint said that Jaeger created an environment that was hostile to women through a pattern of behavior that was demeaning and threatening to women. He engaged in numerous sexual relationships with students and visiting speakers which he flaunted to

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<sup>23</sup> Report, p. 60.

<sup>24</sup> Report, p. 59.

<sup>25</sup> Report, p. 58.

<sup>26</sup> Report, p. 60.

<sup>27</sup> Report, p. 60.

<sup>28</sup> Report, p. 64.

<sup>29</sup> Report, p. 29.

<sup>30</sup> Report, p. 58.

<sup>31</sup> Report, p. 58. The Report fails to note that such conduct could be a crime in New York. NY Penal Law § 235.05, Obscenity in the third degree.

students. He subjected students to sexual exhibitionism, regularly commented on the appearance and sex appeal of women scientists, flirted with female students, sent unwanted sexually explicit images to students, continued to pursue students after they had ended their relationships with him, and other sexual behavior that cumulatively made women, much more than men, avoid Jaeger, which hurt their educational and professional progress. The Complaint further argued that UR not only failed to take action against Jaeger, but publicly supported him while being on repeated notice, as the Report itself confirms, that he was committing acts clearly prohibited by Policy 106 and the law. Even after several former and current BCS students made UR aware of Jaeger's misconduct and the damaging effect it had on their educations, UR gave Jaeger a promotion and sent department-wide memos praising him and his contributions to the University.

26. White says none of this supports any valid legal claim against UR – that Jaeger's conduct and the University's response might be a "moral failing," but not a legal transgression. She is wrong, for the following reasons.

**a) The Report misstates how courts determine whether a work environment is hostile**

27. Trying to eliminate the University's legal liability, the Report uses a strategy of "divide and conquer": incorrectly isolating the incidents of sexual harassment that each individual witness described and deciding that these individual incidents did not each rise to the level of "severe," and then contending that these individual incidents may not be aggregated in deciding whether the overall environment was hostile to women. Its argument is that "Although the experiences of others are not irrelevant to a plaintiff's sexual harassment claim...the focus of any such claim should and would in a court of law be the plaintiff's own experiences."<sup>32</sup> Debevoise contends that none of our clients who asserted hostile environment claims (Bixby, Cantlon and Kidd) were themselves sufficiently harassed by Jaeger to sustain a sexual harassment claim against him, and thus that *all* claims relating to a hostile work environment must fail.
28. The first problem with this approach is that Debevoise has cherry-picked the facts it uses to conclude that legal harassment did not occur. In litigation supervised by courts, all parties are subject to the discovery process and have access to the same evidence. In this private investigation, there is no transparency about whom White interviewed or why, the questions she pursued or did not pursue, the evidence included or excluded and for what reasons. We know that she did not have access to all relevant evidence because she did not speak to any of our clients, and she also did not speak to some witnesses we know are relevant. We will not list every omission here, but for example, the Report claims that Professor Cantlon only experienced two sexually harassing comments directly from Jaeger. This leaves a false impression. In addition to those comments, Cantlon witnessed Jaeger making inappropriate

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<sup>32</sup> Report, p. 155.

comments to a number of students and witnessed Jaeger parade a number of sexual conquests around the department. Another example comes from Bixby. As recently as 2015, Jaeger made fun of sexual harassment training in front of her. The Report says that Jaeger criticized the training because it was ineffective. However, Bixby clearly remembers that Jaeger did not criticize the adequacy of the training. Rather, he said that “anyone could say anything about anybody” suggesting that victims who report harassment could well be lying.<sup>33</sup> These are both examples of acts that have legal significance in establishing the existence of a hostile work environment, which the Report improperly minimized.

29. The second problem with this approach is that it misstates the law about how courts determine whether a hostile work environment exists. The Supreme Court has held that this determination must take into account the “*totality of circumstances*,” not a single discrete act or factor.<sup>34</sup> Additionally, incidents of harassment not specifically directed at or even witnessed by a plaintiff are to be considered in determining whether she encountered a hostile work environment. That the plaintiff was not present for a sexist comment does not make it irrelevant. “Employees that work in close proximity hear, see, and thus experience the same discriminatory acts. Where they do not do so first-hand, they may do so second-hand.”<sup>35</sup> Derogatory jokes or comments learned second-hand can impact the work environment.<sup>36</sup>
30. Not only can the experiences of other harassment victims contribute to the creation of a hostile environment, but knowledge of those experiences may affect whether a plaintiff is right to judge subsequent incidents as hostile or abusive. In *Schwapp v. Town of Avon*,<sup>37</sup> the U.S. Court of Appeals for the Second Circuit (which covers New York) stated that this was a factual issue, to be judged by the trier of fact, “whether [the Plaintiff] was aware of other incidents relating to other minorities, and more significantly, whether in light of these incidents, the incidents [the Plaintiff] experienced directly ‘would reasonably be perceived and [were] perceived, as hostile or abusive.’”<sup>38</sup> To be clear, a “trier of fact” would be a judge

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<sup>33</sup> Report, p. 188.

<sup>34</sup> *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

<sup>35</sup> *Lamarr-Arruz v. CVS Pharms., Inc.*, No. 15-cv-04261 (JGK), 2017 U.S. Dist. LEXIS 157842, at \*14 (S.D.N.Y. Sept. 26, 2017) (“Shared work environments are echo chambers; employees gossip. . . . Thus, all employees experience the hostile effect of the same . . . slur.”).

<sup>36</sup> *Schwapp v. Town of Avon*, 118 F.3d 106, 111-12 (2d Cir. 1997) (citing *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 673, 675 (7<sup>th</sup> Cir. 1993); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 151 (2d Cir. 1997)). See also *Varughese v. Mount Sinai Med. Ctr.*, No. 12-CV-8812, 2015 WL 1499618, at \*61 (S.D.N.Y. Mar. 27, 2015) (“A plaintiff need not herself be the target of discriminatory comments in order for those comments to contribute to a hostile work environment; nor does the plaintiff need to hear such comments first-hand”); *Moore v. Metro. Transp. Auth.*, 999 F. Supp. 2d 482, 503 (S.D.N.Y. 2013) (“It is not necessary that offensive remarks or behavior be directed at individuals who are members of the plaintiff’s own protected class for those remarks to support a plaintiff’s claim.” (internal quotation marks omitted)).

<sup>37</sup> *Schwapp*, 118 F.3d 106.

<sup>38</sup> *Id.* at 112.

or jury who would have access to all relevant evidence, unlike White and her investigators, who were selected and paid by one party in a dispute and did not have access to all relevant evidence, including from our clients who experienced the hostile environment created by Jaeger.

31. Furthermore, the Report overemphasizes the severity of harassment required to support a claim of hostile environment. The legal standard for establishing a hostile work environment is not whether the environment is severe and pervasive, as White asserts, but severe OR pervasive.<sup>39</sup> Multiple court cases show that, as the Second Circuit has decided, “[w]hile the standard for establishing a hostile work environment is high, we have repeatedly cautioned against setting the bar too high, noting that while a mild, isolated incident does not make a work environment hostile, the test is whether the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse.”<sup>40</sup> The environment need not be “unendurable” or “intolerable.” *Id.* Nor need the harassment be so severe that the victims’ “psychological well-being” is damaged.<sup>41</sup> In short, “the fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious cases.”<sup>42</sup>
32. In summary, case law does not support the Report’s minimizing of the legal significance of Jaeger’s acts of harassment by asserting they must each hit the threshold of “harassing” a specific plaintiff before they count in establishing the existence of a hostile work environment. In fact, many different kinds of individual acts can contribute to creating a hostile work environment. UR itself recognized this no later than 2007, when its Policy 106 was changed to set out the long list of behaviors that employees must avoid, but Jaeger did not.

**b) The Report tries to excuse Jaeger’s sexually harassing behavior by claiming that he was harsh to men too. That misstates the legal standard.**

33. The Report states “At least ten female graduate students and post-doctoral fellows in BCS reported to us that they chose to avoid Jaeger, either socially or academically or both, in this period” and “more women than men would be put off.” However, it concludes that “it is difficult or impossible to disentangle the motivating factors that would be supportive of a

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<sup>39</sup> “[A] plaintiff need not show that her hostile working environment was both severe and pervasive; only that it was sufficiently severe or sufficiently pervasive, or a sufficient combination of these elements, to have altered her working conditions.” *Pucino v. Verizon Communs., Inc.*, 618 F.3d 112, 119 (2d Cir. 2010).

<sup>40</sup> *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 70 (2d Cir. 2000) (quoting *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997)) (internal quotations omitted); see also *Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007); *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003); *Feingold v. New York*, 366 F.3d 138, 150 (2d Cir. 2004); *Lehman v. Bergmann Assocs.*, 11 F. Supp. 3d 408, 420 (W.D.N.Y. 2014).

<sup>41</sup> *Fitzgerald v. Henderson*, 251 F.3d 345, 358 (2d Cir. 2001).

<sup>42</sup> *Whidbee*, 223 F.3d at 70 (quoting *Torres*, 116 F.3d at 631).

legal claim for sexual harassment (such as sexualized comments if they were pervasive) from those which would not (such as Jaeger's harshness as an academic critic)."<sup>43</sup>

34. First, to suggest that women more than men avoided Jaeger simply because they were too sensitive to tolerate his harsh academic criticism is offensive. It reinforces harmful – and potentially discriminatory – stereotypes about women who already find it difficult to be taken seriously in the sciences just based on their sex.
35. Second, this conclusion simply does not align with the experiences that witnesses described to us and included in signed witness statements. We spoke to both women and men who described Jaeger as harsh and as a bully. However, it is quite clear that in addition to Jaeger's other undesirable qualities, he was misogynistic: overly familiar and flirtatious with women in academic and professional settings, regularly objectifying women and undermining their credibility as scientists in front of their peers by focusing on their sexuality over their capability as scientists. Because this behavior was so well known, other professors and students in BCS took bets about which female graduate students Jaeger would sleep with first. One witness (who did not speak to Debevoise) told us that at a conference, years before our clients brought forward any complaints, upon finding out that she had studied at UR, the attendees immediately asked her what she knew about Jaeger sleeping with graduate students, instead of asking about her research. Many witnesses expressed similar experiences and their concern that Jaeger's widely known mistreatment of women in BCS was causing others in the field to focus on whether they had sex with him rather than their scientific credentials. It is in fact very easy to "disentangle" Jaeger's persistent sexually charged and harassing behavior affecting women from his behavior that sometimes bothered men. He targeted women in particular; he used sexual language and innuendo that were more potent against women than men; those who avoided him because of this behavior were overwhelmingly women. Debevoise spoke to ten women, we are aware of at least 16 women, who altered their educations to avoid or contain him.
36. Third, legal precedent clearly establishes that behavior affecting women particularly harshly because they are women, even if that same behavior is also hostile to men, states a claim for sexual harassment. "The mere fact that men and women are both exposed to the same offensive circumstances on the job site . . . does not mean that, as a matter of law, their work conditions are necessarily equally harsh."<sup>44</sup> A workplace inundated with pornographic images of women and sexual vulgarities is no less a hostile work environment for women because men also see them.<sup>45</sup> Likewise, sexual comments, harsh criticism, and other

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<sup>43</sup> Report, p. 161.

<sup>44</sup> *Petrosino v. Bell Atl.*, 385 F.3d 210, 221 (2d Cir. 2004).

<sup>45</sup> *Patane v. Clark*, 508 F.3d 106, 114-15 (2d Cir. 2007).

aggressive behaviors<sup>46</sup> directed at both men and women were understandably received differently by women than men when coming from Jaeger, who as the Report declares, was a well-known “womanizer,” also noting his “reputation for promiscuity, his penchant for making sexual comments, his flirtatiousness, his blurring of boundaries and his harsh demeanor in academic contexts.”<sup>47</sup>

37. As evidence that Jaeger treated men as badly as women, and therefore that he did not discriminate against women, the Report states that

one of Jaeger’s former male students (who was dating a past sexual partner of Jaeger’s) was offended when he jokingly asked how to – in an academic context – please Jaeger, to which Jaeger replied, “Why don’t you ask your girlfriend?” This particular example is noteworthy, not only because the remark was made to a man, who was not amused, but also because it demonstrates how Jaeger, although not starting the exchange, enjoyed pushing dialogue in ways that could and would cross lines for others.<sup>48</sup>

38. In fact, this was yet another example of Jaeger creating an environment hostile to women. The implication that the only way this student could please Jaeger was to have sex with him (as the girlfriend had previously) was sexualizing a normal professional interaction. That sent an impermissible signal both to the student Jaeger was talking to and the rest of the graduate students at BCS who would hear of this interaction. And since Jaeger had sex with women students, not men students, the butt of this joke, though made to a man, was women. Joking about trading sex for academic success, *i.e.*, illegal *quid pro quo* sexual harassment, with a man does not render the joke harmless to women.<sup>49</sup>

39. The Report also argues that the environment was not hostile to women in part because some women were not offended by Jaeger’s conduct.<sup>50</sup> This argument is illogical. Jaeger did not have to harass every woman he encountered for others to experience a hostile environment. Not every person in a neighborhood has to be mugged to spark a general fear of crime. As the Report itself states, a hostile work environment claim involves “both objective and subjective components.”<sup>51</sup> The subjective component requires that “the plaintiff *herself* ‘must subjectively perceive the work environment to be abusive.’”<sup>52</sup> The subjective perceptions of other women, who may or may not be offended even if the

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<sup>46</sup> “There is little question that incidents that are facially sex-neutral may sometimes be used to establish a course of sex-based discrimination—for example, where the same individual is accused of multiple acts of harassment, some overtly sexual and some not.” *Alfano v. Costello*, 294 F.3d 365, 375 (2d Cir. 2002).

<sup>47</sup> Report, pp. 158, 160.

<sup>48</sup> Report, pp. 57-58.

<sup>49</sup> This is not the only time Jaeger made light of the seriousness of sexual harassment. See his dismissal of sexual harassment training discussed above at paragraph 28.

<sup>50</sup> Report, p. 159.

<sup>51</sup> Report, p. 151.

<sup>52</sup> Report, p. 151 (emphasis added).

environment is objectively offensive, are immaterial to whether our clients or others were subjectively offended. Debevoise itself recognizes in the Report that this subjective element has significance.<sup>53</sup> In the relatively small community of BCS, at least 16 women lost educational opportunities because they *were* uncomfortable with Jaeger's misconduct. That a few women who associated with Jaeger were not put off by his behavior does not preclude the BCS environment being hostile to others.

40. In fact, the Report acknowledges the disparate impact of Jaeger's behavior on women compared to men in several places:

- The Report concedes that "A number of female graduate students from that time period told us that, as a result of Jaeger's reputation or behavior, they made a conscious decision to avoid him and the educational opportunities he offered, which we found to be very troubling."<sup>54</sup>
- "Some former female graduate students in BCS had to endure behaviors and inappropriate remarks that they should never have had to, at UR or at any educational institution."<sup>55</sup>
- "We found that some of the complaints' allegations were true, and Jaeger's behavior and statements, at times, were viewed by many (both male and female) as insensitive, unprofessional, cruel and occasionally containing sexual innuendo, and this perception, combined with Jaeger's reputation as a womanizer, *genuinely caused some female students to avoid him socially and academically.*"<sup>56</sup>
- "Some who were the subject of and/or heard these comments were uncomfortable, and Jaeger's off-color comments, mostly but not exclusively in social settings, played a part in some female students' decisions to avoid him."<sup>57</sup>
- "Overall we credit that each woman had a highly personal reaction to Jaeger's behavior and conduct, which included avoiding him to some extent. Although we cannot quantify the precise effect, avoiding Jaeger in an academic context caused some of these female students to miss out on certain educational opportunities – namely, the learning of computational methods that were Jaeger's expertise through foregoing certain classes, lectures or research opportunities."<sup>58</sup>
- "Our review also indicates that his particular mix of traits and behaviors was more offensive and off-putting to women than to men." "And we credit that it is very problematic for a variety of reasons that more women than men would be put off by a particular professor's traits and behaviors."<sup>59</sup>

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<sup>53</sup> Report, p. 157.

<sup>54</sup> Report, p. 29.

<sup>55</sup> Report, p. 40.

<sup>56</sup> Report, p. 47 (emphasis added).

<sup>57</sup> Report, p. 58.

<sup>58</sup> Report, p. 62.

<sup>59</sup> Report, p. 160.

41. Despite the fact that a shocking number of women lost educational opportunities because of Jaeger's behavior – not a shocking number of men – and that this was in large part due to the sexual elements of Jaeger's conduct, the Report nevertheless concludes that the harassment each individual faced was not "severe or pervasive enough" to meet the legal threshold for sexual harassment. We think this misstates the law of harassment, but even if White's argument was accepted, the Report has no convincing argument for why all these individual acts did not in the aggregate create a hostile work environment in BCS. The women who altered their educational paths to avoid Jaeger not only endured his misconduct aimed at them personally, but also witnessed his treatment of other women. Collectively these incidents created a hostile environment.<sup>60</sup> Even after the University was made aware that Jaeger was causing a hostile environment, it never took any public steps to criticize or discipline him so that students would know that Policy 106 was to be taken seriously. Instead it promoted him during the Nearpass investigation, and Provost Clark wrote a memorandum publicly praising him. This actively helped the hostile environment to persist.

### **3. The Report is wrong to absolve UR from legal liability for its retaliation against our clients after they reported Jaeger's misconduct**

42. The Report oversimplifies and misapplies the law of retaliation, dismissing the University's acts of retaliation against our clients as trivial and insignificant. Their complaints about the University's retaliation are styled as a kind of petulant frustration at the University's "failure to acquiesce to [their] views about how [the Jaeger] matter should have been handled."<sup>61</sup> This approach misstates the law and misapplies it to the facts of this case.
43. Retaliation claims are properly evaluated by a three-step process. First, a plaintiff must establish a prima facie case of retaliation by showing four things: "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the

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<sup>60</sup> The Report also claims that Jaeger's behavior has improved, and contends that because some or many of his current students do not object to his behavior, he did not create a hostile work environment. This has two key flaws. The first is that even if Jaeger's behavior is no longer problematic (which we do not accept), this would not alter his previous behavior that caused many women to change their educations to avoid him. These women, including some of our clients, are legally entitled to recourse even if he is no longer harassing other women. Secondly, there is evidence that Jaeger is still engaging in inappropriate behavior that causes women in particular to feel uncomfortable. In 2017 he was still attending student parties at conferences and drinking late into the night even after some students explicitly asked him not to attend their parties. At conference social events, some students are staying sober and awake until 4 am to patrol Jaeger's conduct because they are worried he will use his presence in student dorms to press them sexually. See for example Federal Complaint paragraph 373. Well before we filed our Complaint, witnesses told us that the "whisper network" which had already been operating about Jaeger for many years, was still actively warning women away from joining Jaeger's lab and even BCS. This was happening in 2016 and 2017, before our clients went public. See Federal Complaint paragraph 363.

<sup>61</sup> Report, p. 166.



adverse employment action.”<sup>62</sup> A plaintiff’s burden in this first step is intentionally modest.<sup>63</sup> Once the prima facie case is established, the burden then shifts to the defendant to advance a “legitimate, non-retaliatory reason for the adverse employment action.”<sup>64</sup> If this occurs, the third step of the process is that plaintiff must then present evidence that the defendant’s proffered, non-retaliatory reason is merely pretext for retaliation.<sup>65</sup> The Report avoids this burden-shifting analysis altogether. It does not go through the steps needed to back up its assertion that our clients lack valid retaliation claims.

#### **A. The Complaint’s account of retaliation is mostly ignored**

44. The Complaint sets out a substantial record of retaliation. First, our clients clearly engaged in “protected activity” – making sexual harassment complaints that the law encourages employees to bring forward and may not be punished for. They had reasonable concerns that Jaeger was sexually harassing students and creating a hostile work environment in their own department.<sup>66</sup> When the University’s investigations denying this seemed to be a whitewash, deliberately missing important witnesses<sup>67</sup> and distorting evidence from others,<sup>68</sup> they reasonably pursued the matter further, as the law permits. In return, University officials went through their emails, denounced many of them as liars at a BCS faculty meeting, kept them out of BCS hiring meetings and other departmental gatherings, said they were not capable of serving as departmental ombudsperson, made sure Heilbronner would no longer get a job she had been all but promised and for which she was objectively the strongest candidate, made it clear they should leave BCS, and frustrated their efforts to go as a group to the Rochester Institute of Technology. All of this amounts to a

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<sup>62</sup> *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005) (quoting *McMenemy v. City of Rochester*, 241 F.3d 279, 282-83 (2d Cir. 2001)). An “adverse employment action” does not require a change in terms or conditions of employment, but is defined by the courts as any act that would dissuade an employee from filing or pursuing a charge of discrimination. See also footnote 72 below.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000). Plaintiffs must show that the adverse actions against them would not have occurred but for their participation in a protected activity.

<sup>66</sup> The Report claims that our clients’ first report of Jaeger’s misconduct was protected, but not their subsequent actions, which it considers “vigilantism.”

<sup>67</sup> During the University’s investigations into Jaeger, our clients passed on reports from witnesses that Jaeger may have had sex with undergraduates. University counsel Catherine Nearpass did not pursue this, and our clients were later attacked by University administrators for spreading unfounded gossip on this topic, another example of retaliation against our clients. In fact, the Report substantiates that Jaeger had at least one sexual relationship with an undergraduate. Report, p. 26.

<sup>68</sup> When University Vice President and General Counsel Gail Norris spoke to BCS faculty about the Nearpass investigation and was quizzed about why Nearpass did not examine emails offered by Kidd, for example, Norris caused incredulity when she said written evidence was not necessary if someone who was present for an incident (including the accused) denied that it has occurred. She used the example of someone sending a racist email. If the alleged sender denied sending it, Norris did not think it was worth asking the complainant for the actual email. This seemed highly illogical and a flimsy standard of investigation to our clients present.

campaign of retaliation. Nevertheless, the Report dismisses this as legally insignificant because “no . . . Complainant accusing the University of retaliation experienced any change in his or her employment status that could qualify as ‘materially adverse.’”<sup>69</sup>

45. This misstates the correct legal standard. Contrary to Debevoise’s assertion, retaliatory acts are actionable even if they do *not* affect the terms and conditions of employment.<sup>70</sup> In the words of the Second Circuit Court of Appeals, “[p]rior decisions . . . that limit unlawful retaliation to actions that affect the terms and conditions of employment *no longer represent the state of the law.*”<sup>71</sup> Rather, retaliatory actions by the employer are considered “materially adverse,” and therefore actionable, when a reasonable person would be dissuaded from championing a charge of discrimination because of them<sup>72</sup> -- which is exactly what happened to our clients at UR. Because of the University’s persistent campaign against them, they felt strong pressure to stop raising concerns about the hostile work environment in BCS. Indeed, many of our clients have been driven to leave UR altogether, a purge that had behind the scenes support from high-ranking University officials. The Report claims that this does not constitute “adverse employment action” because their new jobs pay at least as well, but that is due to their qualities as scholars; the University cannot shield itself from legal liability just because they landed on their feet after being illegally shoved out.
46. The courts have also held that adverse actions by employers against employees who claim retaliation must be examined in the context in which they occur, “both separately and in the aggregate, as even minor acts of retaliation can be sufficiently ‘substantial in gross’ as to be actionable.”<sup>73</sup> “Context matters.”<sup>74</sup> To describe our clients’ Complaint, as the Report does, as an “attempt to characterize virtually every action taken by UR . . . as unlawful retaliation”<sup>75</sup> reveals the Report’s misunderstanding both of the breadth and gravity of the retaliation they have endured, and that it should be assessed cumulatively.
47. Our clients’ retaliation-based claims should also be considered in light of their hostile work environment claims. Because a hostile work environment must be evaluated by the totality of the circumstances, retaliatory hostility can and must be viewed in relation to the

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<sup>69</sup> See Report, p. 167. The fact that some of our clients were driven out of BCS by the hostility of DeAngelis and others in BCS, backed by senior administrators, and had to get jobs at other universities is claimed not to matter because their salaries at the new institutions are allegedly as good as what they had at UR.

<sup>70</sup> *Burlington No. & Santa Fe Rwy. v. White*, 548 U.S. 53, 64 (2006).

<sup>71</sup> *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010) (internal citations omitted; emphasis added).

<sup>72</sup> *Burlington No. & Santa Fe Rwy. v. White*, 548 U.S. at 57 (adverse employment actions are materially adverse when they are “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”).

<sup>73</sup> *Hicks v. Baines*, 593 F.3d at 165 (quoting *Zelnik v. Fashion Inst. of Tech.* 464 F.3d 217, 227 (2d Cir. 2006)).

<sup>74</sup> *Burlington No. & Santa Fe Rwy. v. White*, 548 U.S. at 69. For instance, a “schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.” *Id.*

<sup>75</sup> Report, p. 166.

underlying sexual harassment from which the hostile work environment originated. As the Second Circuit notes, “one type of hostility can exacerbate the effect of another.”<sup>76</sup>

48. Debevoise dismisses our clients for characterizing “virtually every action taken by UR” as retaliation, but ignores many obvious acts of retaliation in its analysis. For example:

- Starting in January 2017, DeAngelis and other UR officials attacked Aslin for allegedly securing Jaeger’s disinvitation to a conference at Georgetown University, and claimed that his emails showed that he had “lied” about this. DeAngelis’ claims about Aslin’s role in Jaeger’s disinvitation were wrong, and Aslin’s emails, while critical of DeAngelis’ effectiveness as department chairman, demonstrated no dishonesty by Aslin. DeAngelis’ public claims were persuasive to many BCS faculty and led to a serious rift between them and Aslin, as well as other faculty aligned with him.

The Report does not admit that DeAngelis’ claims were false, which would undercut the University’s defense to our clients’ retaliation claims. It sidesteps what we said in both the EEOC and federal Complaints – that women who knew of Jaeger’s misconduct have been spreading the word to other women via an informal whisper network for years, which is what spurred his disinvitation.<sup>77</sup>

- A related act of retaliation described in the Complaint against Aslin and our other clients was DeAngelis’s claim that UR students’ papers submitted to the Georgetown conference were accepted at a disproportionately lower rate because of the clients’ supposed intervention. In fact, the papers were “blind reviewed” and that claim was invented. Nevertheless, this falsehood persuaded some faculty that our clients had acted not only in bad faith, but actively to harm Jaeger’s students, a serious and hurtful blow to their reputations in BCS and beyond. The Report, despite its claim to be a comprehensive assessment of our Complaint, skips over DeAngelis’ reckless accusations rather than deal with material embarrassing to the University and harmful to its legal defenses.
- The Report states that Dean Peter Lennie disputes that UR tried to make it harder for our clients to move as a group to RIT. The notes provided by an RIT professor taken during his meeting with Lennie clearly indicate that this is what Lennie intended. The Report credits Lennie’s contrary account even though Lennie has a personal and institutional stake in appearing not to have retaliated.<sup>78</sup>

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<sup>76</sup> *Feingold v. New York*, 366 F.3d 138, 151 (2d Cir. 2004); see also *Terry v. Ashcroft*, 336 F.2d 128, 150 (2d Cir. 2003) (“hostile racial attitudes could have exacerbated the affect [sic] of retaliation-based or age-based hostility and vice versa.”).

<sup>77</sup> In fact, the director of the conference reached out to Aslin, not the other way around, after a number of students separately approached the director. Aslin refused to convey any information about the Jaeger investigation in that phone call. One student, based both on what she had heard through the whisper network and her own personal experience of Jaeger, told the director that she would not attend any conference events that Jaeger attended and that she did not think it was appropriate to have him around Georgetown’s students.

<sup>78</sup> Report p. 147.

These are further examples of how the Report minimizes or glosses over problems in UR's legal case, which raise doubts about its independence.<sup>79</sup>

## **B. Retaliation since the Complaint was filed**

49. Retaliation has continued against our clients since the Complaint was filed. As stated above, retaliation is any act by the employer that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."<sup>80</sup> President Seligman's first response to the Complaint was to accuse our clients of fabricating witnesses and allegations.<sup>81</sup> Recently he said their motivation for pursuing the case was financial greed, ignoring all of the efforts they made to solve the problem before filing, and his own unfulfilled promises to them to take corrective action.<sup>82</sup>

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<sup>79</sup> The Report also says our clients do not demonstrate the necessary "linkage" between their complaints about Jaeger's behavior and the retaliation that followed. Report, pp. 167-68. But it does not even articulate the legal standard involved. In fact, the standard for causation requires only a general proximity in time between a harassment complaint and the retaliation. *Kwan v. Andalex Grp., LLC*, 737 F.3d 834, 845 (2d Cir. 2013); *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 552 (2d Cir. 2010); *Dall v. St. Catherine of Siena Med. Ctr.*, 966 F. Supp. 167, 194-95 (E.D.N.Y. 2013). In this case, once our clients brought Jaeger's harassment to UR's attention, its retaliation occurred soon thereafter, easily satisfying their legal burden. *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110-11 (2d Cir. 2010); *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001).

<sup>80</sup> *Burlington No. & Santa Fe Rwy. v. White*, 548 U.S. at 57.

<sup>81</sup> "University of Rochester compares sexual misconduct complaint to discredited *Rolling Stone* report." <https://jezebel.com/university-of-rochester-compares-sexual-misconduct-comp-1803135808>

<sup>82</sup> Seligman stated: "There is really one conflict of interest in this case and that is on the part of the complainants and their attorney who have made it unequivocally clear that they're trying to extract from the university a huge financial settlement." <http://www.rochesterfirst.com/news/local-news/seligman-forcefully-defends-ur-after-report/912559386> A letter to the editor from our client Richard Aslin replied to Seligman's claim:

"Joel Seligman apparently doesn't understand conflict of interest, which occurs when a person who has the power to influence the outcome of a decision would themselves potentially benefit from that outcome. For example, if someone were accused of a crime, it would be a conflict of interest if the judge were a close friend or relative of the accused. It is not a conflict of interest for those filing a law suit to seek damages for their expenses, their legal fees, and their pain and suffering. Consider that each of the complainants in the Federal law suit against the University of Rochester in the Florian Jaeger matter has spent hundreds of hours of their time, totally uncompensated, to work through the policies and procedures of the University. Then they hired attorneys at their own expense to conduct investigations and formulate legal documents. All of this work on their part was in response to what the University itself should have done, but did not.

"In addition, there are real damages to the complainants by the actions (and inactions) of the University. They have each suffered from the disruption to their personal and professional lives. Their research productivity has been reduced or delayed, and in many cases they have had to seek employment elsewhere, with its attendant relocation costs. They have also been characterized as liars and as engaging in vigilante justice, when in fact they have been truthful and have followed University processes and procedures. Justice does not have a price tag, but it is also not free of costs. Mary Jo White's report was not produced pro bono. As a legal scholar, Joel Seligman knows that claiming conflict of interest when

50. UR – and now Debevoise – have repeatedly accused our clients of dishonesty by claiming that they intentionally exaggerated, mischaracterized or sensationalized Jaeger’s misconduct. That some of Jaeger’s students disagree with the experiences and interpretation of events experienced by our clients and witnesses does not transmute our clients’ sincere and well-founded views about Jaeger’s conduct into “exaggerations.” Many of the portions of the Complaint that the Report finds sensationalized are not our clients’ words or claims but the words of witnesses who have no stake in the litigation. For example, the Report criticizes the Complaint for referring to Jaeger’s lab as “cutthroat” or for stating that many students felt they had to socialize with Jaeger in order to work for him. This was the strongly felt experience of many witnesses who spoke to us and was not a fabrication or exaggeration by our clients to attack Jaeger.<sup>83</sup>
51. Since the filing the EEOC Complaint, UR administrators have repeatedly blamed our clients for the harm caused to the University’s reputation by Jaeger’s conduct and their lackluster response. The Report concludes, “Partly as a result of [Jaeger’s conduct], but also because of the broad dissemination of the *often exaggerated* descriptions of that conduct, the esteemed BCS faculty has been fractured and the University’s reputation has been harmed.”<sup>84</sup> This is wrong. Blaming our clients for the consequences to UR of public scrutiny of its handling of Jaeger, as the Report has done, is itself retaliatory. First, as stated above, Debevoise is wrong to assert that the Complaint “often exaggerated” Jaeger’s misconduct. Its examples of exaggeration, even if accepted (which we do not), are tiny in comparison to the mountain of evidence the Report itself accepts as true. Second, Jaeger’s reputation for misconduct had been widely circulated by a “whisper network” in the cognitive sciences before our clients took any action, so this degree of harm to the University precedes the Complaint and stems from the University’s inaction. Third, our clients repeatedly pressed UR administrators before filing their Complaint to take appropriate action against Jaeger, to acknowledge the harm experienced by more than a dozen women, and to improve its policies and practices. They contacted UR administrators at least 29 times before filing the Complaint and each time were rebuffed or ignored. They never wanted to make a public stand, but faced with the University’s stonewalling, correctly concluded that going public was the only way to overcome it.

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plaintiffs seek damages is simply an attempt to make us look greedy, when in fact the greedy party is Seligman himself, who benefited from the fiction that the University of Rochester was a safe and welcoming environment for students who he put at risk by his failed leadership. His salary last year was \$1.3 million. My UR salary last year was 1/10th of that. If Seligman believes it is a conflict of interest for the complainants to receive compensation in a legal settlement, perhaps he should personally pay for the Mary Jo White report rather than using institutional resources.” Letter from Richard Aslin to Channel 8 News, January 13, 2018.

<sup>83</sup> Report, pp 71-72.

<sup>84</sup> Report, p. 207.

52. The slew of changes the Report recommends to existing UR policies on sexual harassment and secret searches of student and faculty emails (mirroring what our clients already suggested for free); its catalogue of bad acts by Jaeger and “missed opportunities” by administrators; President Seligman’s immediate resignation after the Report’s release; indeed the decision to commission a \$4.5 million Report in the first place, all confirm that the University had problems it should have addressed before our clients filed their Complaint.
53. For White and Seligman to place the blame for the University’s current PR difficulties on those who came forward, at considerable and continuing personal cost, to blow the whistle on its failings discourages future victims from coming forward lest they be similarly dismissed and even demonized. This too is a form of retaliation. In an alternative universe where Ms. White was really independent, one might have seen an acknowledgment in the Report that our clients shone a needed light into areas that the University should have previously addressed, which the University’s inaction had made a necessary public service. They would have been credited for already suggesting the reforms White later researched and proposed, no doubt at the cost of hundreds of thousands of dollars in legal fees. Instead, the Report’s stance towards our clients is fundamentally critical and adversarial. This may assist the University’s litigation posture, but is not a sign of independence.

#### **4. Additional shortcomings**

##### **A. Delinking the University’s conduct from the law’s requirements**

54. In the same way that White admits Jaeger committed multiple acts contrary to University Policy 106 governing sexual harassment but says these were only “*in the nature of sexually harassing acts*” without legal consequence for UR, the Report concedes various missteps by the University in its investigation of Jaeger and handling of our clients’ complaints, but drains them of legal significance. It acknowledges “missed opportunities,” not legal wrongs. Some of these acts *were* legal wrongs.
55. For example, the Report acknowledges that the University was on notice of Jaeger’s sexual harassment as early as 2013 when Bixby reported “a situation that potentially involved sexual harassment or a hostile work environment directed at women” to DeAngelis, which put the University on notice of Jaeger’s misconduct.<sup>85</sup> The Report concedes that better training and sensitivity may have caused DeAngelis to recognize the complaint as potentially involving sexual harassment (but since DeAngelis reportedly sought the OOC’s advice on the subject, his personal ignorance should not have prevented the University from understanding the issue); and that DeAngelis should have reported Bixby’s complaint to the

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<sup>85</sup> See 29 C.F.R. § 1604.11(d) (“an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”).

Title IX office. Nevertheless, the Report does not connect these dots to determine the University breached its legal obligations under Title IX.

56. Below are some other shortcomings the Report acknowledges, without recognizing their legal significance. We believe they all contributed to the hostile work environment our clients and others encountered at BCS and/or illuminate failings in the University's Title VII and Title IX investigative processes, and should be considered in that light:

- The Report admits it is difficult for the Office of Counsel (OOC) to conduct an entirely independent investigation both in fact and appearance.<sup>86</sup>
- Jaeger's sexual relationship with a recent undergraduate/current employee should have been included in Nearpass's investigative report – it may have been relevant to the decision maker who had discretion.<sup>87</sup>
- Instructions regarding confidentiality about the Jaeger investigation were not always clear or uniform.<sup>88</sup>
- Nearpass refused evidence she should have considered (Facebook messages from Kidd).
- The OOC thwarted some of DeAngelis' efforts to make positive changes in BCS and if he had been allowed to take such actions (or if it had been made clear that he could have taken at least some of them) it is possible the situation in BCS might not have continued to deteriorate.<sup>89</sup>
- Changes to UR's intimate relationships policy was on the faculty agenda as early as 2010 but not acted upon until 2014 and if this change had occurred in 2010, Jaeger may not have served on a student's committee (with whom he had a sexual relationship) and that it would have been better if he had not served on it.<sup>90</sup>

## **B. The investigation's treatment of witnesses**

57. The Report says that its investigative team spoke to over 140 witnesses, the implication being that its conclusions are authoritative.

58. As previously discussed, our clients were not among them despite being central to the questions the Report investigates. Some Debevoise witnesses reported a positive experience from their interviews. Nevertheless, we also heard several criticisms worth noting.

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<sup>86</sup> Report, p. 34.

<sup>87</sup> Report, p. 34.

<sup>88</sup> Report, p. 34. Although the Report admits that the instructions regarding confidentiality were not clear and sometimes were not even provided at all, it nonetheless accuses our clients of violating confidentiality by speaking to former students about their experiences with Jaeger. However, the clients did so only after it was clear that Nearpass was not contacting all relevant witnesses. They also spoke to other BCS faculty which included two ombudspersons who were responsible for receiving such student complaints, and the Director of Graduate Studies who was responsible for the graduate program and the welfare of students (Report, p. 37).

<sup>89</sup> Report, p. 39.

<sup>90</sup> Report, p. 40.

59. Several people contacted by the investigation, likely included in the 140 number advertised, were surprised and confused to have been contacted. They thought they were so clearly irrelevant to the claims raised in our Complaint that they wondered if they had been included to pad the number of witnesses.
60. Another witness told us that her interview concentrated almost entirely on our clients' behavior *after* the Complaint was filed, not the events described in the Complaint which is what the inquiry was supposed to cover, and seemed aimed at finding "dirt" on them – not an indication of even-handed independence.
61. One witness said she was asked a series of questions aimed at pinning her down to a particular view of events, only for the Report to try to discredit her by quoting a document the Debevoise lawyers had all along that could be interpreted to support a different view. The story is involved, but bears telling because it shows how investigations can be used to advance a predetermined outcome. In her interview, this witness was asked repeatedly for a specific date when she began to avoid Jaeger. She said that she did not recall a specific week or month, nor did she say that she cut him off completely all at once. Nevertheless, the Debevoise lawyers persisted in trying to get her to commit to a specific date. Now she knows why. The Report cites an email that she sent to Jaeger a couple of years into her graduate school career requesting the use of his washing machine and offering to cook dinner in exchange, and also mentioning a bowling party at which she expected to see him. The Report contrasts the witness' testimony about her wanting to avoid Jaeger against this apparently contradictory email, concluding she found Jaeger less troublesome than she had claimed, thereby undermining her credibility.<sup>91</sup>
62. But this is fundamentally misleading. The investigators never asked the witness about the email, or any details about why she asked to use his washing machine or expected to see him at dinner and bowling. They never gave her the email to refresh her memory. In fact, the way the Report frames this story is inaccurate. The witness was friends with a graduate student living with Jaeger at the time, who had offered use of the house laundry facilities, but the witness did not feel comfortable doing so without first getting Jaeger's permission. The dinner mentioned in her email would not have been one-on-one with Jaeger; it would have included her friend and/or others. The bowling mentioned in the email refers to a recurring BCS outing to a bowling alley hosted by our client, Richard Aslin, to which both Jaeger and the witness would have already been invited. Debevoise could have easily obtained this context, and should have done so if its goal was a full and fair picture. Instead it never asked the witness about the email, but sandbagged her with a context-free and misleading account of the email in the Report, when she would have no chance to reply.

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<sup>91</sup> Report, p. 62.



63. Asking people to describe events from memory when the lawyer withholds a document that could refresh their memory is a classic technique for tying up witnesses in knots of imperfect recollection and discrediting them, in which the former senior federal prosecutors in charge of the Report must have ample experience. It is not generally used when people come forward voluntarily to an allegedly neutral, public-spirited inquiry. That Debevoise used this sort of “gotcha” interrogation adds to the evidence that its lawyers were not conducting open-minded fact-finding but were deliberately building a pro-University case.
64. We also note that Debevoise, despite promising confidentiality to witnesses who requested it, violated that promise with at least four witnesses, whose actual names it released publicly in the exhibits published with the Report. Exhibit 2 includes Debevoise’s explicit promises of confidentiality to two of its witnesses. Although Debevoise has issued no public apology or explanation, we understand that it claims the confidentiality breach was a mistake, which it corrected within several hours of the Report’s release. It has not replied to any press inquiries on this topic<sup>92</sup> and has not stated how many people downloaded the unredacted names from its server in the meantime; given the great interest in the Report’s release and the prominence given to it by Ms. White’s press conference that UR heavily promoted, this number was probably considerable. The outed witnesses are understandably dismayed that their confidentiality was breached, especially because they put aside serious doubts about the integrity and value of the Debevoise investigation to participate, and now fear public identification and retaliation from Jaeger and his allies. Some of the women outed believe that the breach was intentional, either to punish them for supporting our claim or for refusing to participate in Debevoise’s investigation.

### **C. The Report excludes or skews evidence**

65. Many specific facts relevant to analysis of the Complaint are also left out or misstated in the Report.
66. We do not know all the witnesses Debevoise spoke to, but the Report does not reflect testimony from several people who contacted us to describe similar experiences of unsatisfactory or hostile investigations by the Office of Counsel in response to complaints of sexual harassment by employees or students. While the Report recommends scrutiny of the University’s intrusive email search policies, which have permitted administrators to trawl through faculty email secretly for almost any reason (now the subject of a critical resolution before the Faculty Senate), it glossed over how widespread this intrusion has become. The Report did not respond to the examples we raised including that of an undergraduate who reported a sexual assault to find that the Title IX office quizzed her about a dispute with an unrelated hallmate two years ago which would only have been known to them through her emails, or that of possible examination of Board members’ emails by President Seligman.

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<sup>92</sup> <https://www.law.com/americanlawyer/sites/americanlawyer/2018/01/22/debevoises-mary-jo-white-concedes-error-in-rochester-report/>

67. We note other factual errors and elisions:
68. The Report confirms that Jaeger had sex with one graduate student, a prospective graduate student who ended up going to BCS, an undergraduate, a recent undergraduate, two UR faculty members and four visiting speakers (at least some of whom were graduate students). The Nearpass Report refused to investigate about the visiting speakers and missed the undergraduate student, proving that Nearpass did not get to the bottom of things. Yet the Report does not criticize Nearpass for this failing. Instead it criticizes our clients for not accepting the Nearpass Report as dispositive.
69. The Report includes Jaeger's allegations that Aslin talked to individuals at UCSD, Northwestern, and Princeton to denounce him, but Jaeger appears to be the only source for this claim, and it is false. Aslin never spoke to anyone at Northwestern or Princeton about his views of Jaeger. The only person he spoke to at UCSD was one of his former students, who had approached Aslin to ask why he was leaving UR. This individual is not a senior faculty member and, to Aslin's knowledge, was not involved in any search committee for any position for which Jaeger applied. Nevertheless the Report publishes Jaeger's assertion that "it rather unambiguously identifies Dick as the person who contacted someone at UCSD."<sup>93</sup> The Report leaves the reader with the impression that it has authoritatively found Aslin to be guilty of a smear campaign, when in fact it merely recycled Jaeger's allegations, without any apparent attempt to corroborate them with people at the other institutions.
70. The Report mangles one of the allegations in our Complaint in a way that appears intended to cast doubt upon its overall integrity. It repeats this mistake four times (see Report pp. 17, 29, 95-96, 161), and Ms. White continued to stress it during her press conference. The falsehood is claiming that our EEOC Complaint contends that Jaeger had had a sexual relationship with a 2015 prospective student, "Jane Doe," a claim that the Report says was "appropriately withdrawn in the federal complaint."<sup>94</sup>
71. In fact the EEOC Complaint took care *not* to allege a sexual relationship between Doe and Jaeger. The Complaint actually argued that due to (1) Jaeger's past behavior, (2) the fact that DeAngelis had already received Bixby's warning about Jaeger's misconduct in 2013, and (3) Doe's unusual and distraught behavior during her visit (when prospective students normally put their best foot forward), Nearpass should have interviewed her during her investigation into Jaeger. We included this story in the EEOC Complaint not to claim that Jaeger had sex with Doe, but to point out how she was an obvious witness whom Nearpass chose not to call.
72. Doe has confirmed to us that our treatment of her in the Complaint was appropriate. She told us that although Jaeger was not sexually inappropriate with her during her visit, she is unhappy that given his history, UR did not prevent her from staying with Jaeger in the first

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<sup>93</sup> Report, p. 130.

<sup>94</sup> Report, p. 161.

place. She also thinks that Nearpass should have contacted her during her investigation into Jaeger, given how upset she had appeared during her stay.<sup>95</sup>

73. We assume that when Debevoise noticed we had removed much of the content about Doe from the federal Complaint, which we did to simplify it and focus on new additional evidence, particularly testimony from five more women who had altered their educations to avoid Jaeger, it figured it had discovered a weakness in our EEOC Complaint to exploit. But the weakness the Report claims is not there. Either Debevoise is deliberately mischaracterizing the Complaint to make us look reckless, or its eagerness to oppose the Complaint has blinded it to what the Complaint actually says. Either way, this adds to the evidence that Debevoise was not balanced and independent, but was seeking to help fix the University's image problem without assisting our case against UR.
74. The Report acknowledges that its investigators did not speak to all of the witnesses we cited in the Complaint. Nevertheless, it refers interchangeably to people who participated in our investigation, and its investigation, as "witnesses." That device has allowed it to confuse readers about which witnesses spoke to which team of investigators, with the apparent goal of casting doubt on the integrity of the Complaint.
75. For example, the Report says that some "key" or "central" witnesses were upset with us for portraying their stories inaccurately. We believe this refers to two women whom we did *not* interview or characterize as witnesses, but still described anonymously in our Complaint based on the testimony of multiple other witnesses who had directly observed how Jaeger had behaved towards them. These two women are central to the Debevoise Report – which depends on a small number of witnesses who support Jaeger or oppose our clients – but were not at all central to our Complaint. We are not suggesting these women's experiences are unimportant; they are important. But our "central" or "key" witnesses were the ones who spoke directly to us, whom we cited frequently in the Complaint, and whose experiences formed its factual backbone.
76. The two women have evidently complained to White about how the Complaint describes them. They were *never* our witnesses, but because the Report implies that they were and transmits their complaints about us as if they were, it appears to be trying to cause readers to doubt the veracity of the numerous actual witness accounts documented in the Complaint.
77. The Report also relies on a statement in the acknowledgments of Ted Supalla's Ph.D. dissertation at the University of California San Diego in 1982 to make the case that our client Elissa Newport had a romantic relationship with him when he was her student.<sup>96</sup> It is true that Newport's and Supalla's relationship began when Supalla was a graduate student and

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<sup>95</sup> Witness Statement from Jane Doe, 12 October 2017.

<sup>96</sup> Report, p 80.

Newport was a professor at UCSD (they have now been married 37 years), but the implication that Newport engaged in inappropriate behavior or that their relationship involved a conflict of interest is false. She never supervised Supalla. She voluntarily recused herself from any supervisory or evaluative role in Supalla's graduate education, even though such recusals were rare 43 years ago. Debevoise could have easily established with UCSD that Newport did not supervise Supalla and had recused herself. It was wrong, lazy and a cheap shot, apparently aimed at equating Newport's conduct with Jaeger's, for White to make this claim.

## **5. Conclusion**

78. The Report lists a shocking number of "sexually harassing acts" by Jaeger, admits that no student should have experienced them, but nevertheless concludes that Jaeger and UR did nothing legally wrong. It acknowledges the suffering of the witnesses and our clients, but after spending \$4.5 million intended for higher education, offers them no real recourse. More than a year has gone by since our clients raised these concerns, during which the University took no substantive action to fix them.
79. The Report recommends new policies to improve the climate at UR, which follow closely what our clients had already recommended for free, including to President Seligman in a detailed memo from Aslin in November 2016. These policies should help UR. But in a fundamental sense, it is mind-bending to see Debevoise recommend them. The Report's central conclusion is that the University has consistently done everything the law demands. If so, why should it need any new policies? Why should it change behavior that already, in Debevoise's view, exceeds all legal requirements? A woman wondering today whether to take on the burden and uncertainty of complaining about another Jaeger would have to conclude from the Report that the University should and would behave towards her in just the same way it has towards our clients.
80. Finally, we offer some broader comments from our clients to the University. We have focused here on the legal aspects of the case for sexual harassment and retaliation. This is, of course, because we are in a lawsuit against UR, and Debevoise framed the Report to clear the University of any legal violations. But our clients also want to take this opportunity to speak to another aspect of this case: the moral and ethical principles of the University of Rochester, and indeed of universities everywhere. We have all heard in recent days about disturbing incidents of sexual harassment and retaliation and suppression of witnesses from Hollywood to Washington to corporations. Our clients have spoken out and stood their ground for so long because in their view, universities should be bastions of clear-sighted

moral values and protection and support for young students.<sup>97</sup> Professors are not merely supervisors; they are teachers, and bear responsibility for the training and the future of the students in their charge. It is therefore especially painful to hear Mary Jo White say that even she finds Jaeger's behavior "inappropriate, unprofessional and offensive,"<sup>98</sup> then deny that anyone in the University, from Jaeger to the Deans and the President, violated any rules.

81. Our clients therefore wish to end with one more plea to the University of Rochester: to stand up for its students, to take responsibility for its failures to do so earlier, and to become a model for how to emerge from a debacle to find a positive path forward.

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<sup>97</sup> Two of our clients were named "Silence Breakers" in *TIME* Magazine's 2017 People of the Year story in recognition of their role in this movement and of the great personal cost such silence breakers often bear by coming forward as our clients have done. <http://time.com/time-person-of-the-year-2017-silence-breakers/>

<sup>98</sup> <https://www.motherjones.com/politics/2018/01/inappropriate-unprofessional-and-offensive-but-not-breaking-any-of-university-of-rochesters-rules/>

# **Exhibit 1**

University of Rochester Policy 106

Subject: **Policy Against Discrimination and Harassment**

Applies to: All Faculty, Staff and Students. Bargaining unit members may also refer to their collective bargaining agreements.

I. Preamble and Equal Opportunity Statement

The success of the University of Rochester depends on an environment that fosters vigorous thought and intellectual creativity. It requires an atmosphere in which diverse ideas can be expressed and discussed. The University of Rochester seeks to provide a setting that respects the contributions of all the individuals composing its community, that encourages intellectual and personal development, and that promotes the free exchange of ideas.

To help establish and perpetuate an inclusive and open environment, all members of the University community are expected to support the University's Equal Opportunity Statement:

The University of Rochester values diversity and is committed to equal opportunity for all persons regardless of age, color, disability, ethnicity, marital status, military status, national origin, race, religion, sex, sexual orientation or veteran status, or any other status protected by law. Further, the University complies with all applicable non-discrimination laws in the administration of its policies, programs and activities.

*(Questions on compliance with the Equal Opportunity Statement should be directed to the particular school or department and/or to the University's Equal Opportunity Coordinator, University of Rochester, P.O. Box 270039, Rochester, NY 14627-0039. Phone: (585) 275-9125.) -- See HR Policy 100*

II. Policy Against Discrimination and Harassment

Any behavior, including verbal or physical conduct, that constitutes discrimination against or harassment of any student, faculty or staff member of the University community in any form is prohibited.

Retaliation is prohibited in any form against a person because he or she complained about conduct reasonably believed to be discrimination or harassment.

III. Policy Enforcement

All members of the University community (including faculty, staff and students) and all visitors (including patients and vendors) to University facilities and property (including, but not limited to, the campus, including but not limited to River Campus, the Medical Center campus, Strong Memorial Hospital, Eastman Dental Center, the Laser Laboratory for Energetics, Eastman School of Music, Memorial Art Gallery and offsite offices of faculty physicians) and at University sponsored activities must comply with this Policy Against Discrimination and Harassment while on University premises or at University events.

The University is committed to preventing unlawful discrimination, harassment and retaliation. Upon learning that such conduct has occurred, the University will take the necessary corrective action to prevent such conduct from reoccurring in the future. Violation of the Policy may result in disciplinary action up to and including separation from the University and/or exclusion from University programs and facilities. Individuals who complain about or give information in any form about conduct they reasonably believe to be discrimination or harassment will be protected from retaliation for making a complaint, giving information or filing a Report.

The University can only act to prevent unlawful discrimination, harassment and retaliation from reoccurring in the future if it is aware of such conduct. Therefore, each member of the University community should report discrimination, harassment or retaliation in accordance with the procedures described in Section V.

The Policy is not intended to regulate the content of speech, discussion and debate in the classroom, on Campus or in any University forum. It is not intended to regulate artistic and visual arts expression. The University will protect academic freedom and artistic expression in administering the Policy. Using speech to discriminate against those protected by this policy or speech that creates a hostile learning, working or campus living environment for those protected by this policy is prohibited.

#### IV. Definitions/Examples

##### A. *Discrimination*

Discrimination is (1) any conduct (2) that adversely affects or impacts an individual's or group's ability to function and participate as a member of the University community (3) because of their age, color, disability, ethnicity, marital status, military status, national origin, race, religion, sex, sexual orientation, veteran status, or other status protected by law, or because of their perceived or actual affiliation or association with such individuals or groups. Discrimination includes any behavior that is unlawful discrimination under applicable New York State and/or federal law.

Examples of prohibited discrimination include, but are not limited to, exclusion from or denial of access to services and/or resources on the grounds of a person's age, color, disability, ethnicity, marital status, military status, national origin, race, religion, sex, sexual orientation, or veteran status.

##### B. *Harassment*

Harassment is (1) any unwanted conduct (2) that is intended to cause or could reasonably be expected to cause an individual or group to feel intimidated, demeaned, abused or fear or have concern for their personal safety (3) because of their age, color, disability, ethnicity, marital status, military status, national origin, race, religion, sex, sexual orientation, veteran status, or other status protected by law or because of their perceived or actual affiliation or association with individuals or groups identified by such characteristics and (4) that could reasonably be regarded as so severe, persistent, or pervasive as to disrupt the living, learning, and/or working environment of the individual or group. Harassment includes any behavior that is unlawful harassment under applicable New York State and/or federal law.

Examples of harassment can include, but are not limited to, unwanted physical contact or threats of physical contact, intimidation, stalking, degrading and derogatory words, graffiti, pictures, jokes,



epithets, statements or stereotyping activities as well as other forms of verbal, visual or written messages of intimidation.

C. *Sexual Harassment*

Sexual Harassment is Harassment as defined in B that involves unwelcome conduct of a sexual nature. Depending on the circumstances, the following types of behavior may constitute Sexual Harassment:

- Unwanted comments about an individual's body, clothing or lifestyle that have sexual implications or demean the individual's sexuality or gender;
- Unwanted sexual flirtations, leering or ogling;
- Unwanted sexual advances and propositions;
- Unwanted display of sexually demeaning objects, pictures or cartoons in areas visible to other members of the University community;
- Threats or insinuations that an individual's refusal or willingness to submit to sexual advances will affect the individual's status, evaluation, grades, wages, advancement, duties or career development;
- Unwanted and intentional sexual touching, patting, pinching, or brushing another's body or clothing;
- Stalking, telephone or computer harassment, dating violence, sexual assault or date rape.

Section III C. of the Faculty Handbook deals with Consensual Relations and reads: "The University of Rochester strongly discourages any sexual or amorous relationships between members of the University community and those students over whom they have a direct, current supervisory or evaluative relationship. Such relationships, even when consensual, are problematic because they may result in favoritism or the perception of favoritism, which imperils the integrity of the educational environment. Such relationships may also lead to charges of sexual harassment."

D. *Retaliation*

Retaliation is any materially adverse action by the University that punishes a person for complaining about, giving information about or filing a Report alleging conduct reasonably believed to be discrimination or harassment. To be prohibited retaliation the action must (i) have occurred because of the complaint, information given or Report filed and (ii) dissuade a reasonable person from complaining about, giving information about or filing a Report concerning harassment or discrimination.

Examples of retaliation can include, but are not limited to, the following actions by the University when taken to punish or disadvantage an individual who has complained about or given information about or filed a Report concerning discrimination or harassment to the University:

- Unfair disciplinary action such as a written reprimand, demotion, or termination;

- An adverse change in work conditions, including a job reassignment or change in job duties or work schedule;
- An unfairly negative course grade;
- Increased or unequal monitoring of activities;
- An unfairly poor job or course evaluation;
- Ostracizing or withholding information from a complaining student or employee by supervisory personnel or faculty.

V. Procedures

A. *General*

The University takes all complaints of unlawful discrimination, harassment or retaliation very seriously. The University will take appropriate measures to prevent unlawful discrimination, harassment or retaliation.

A person who believes he or she has experienced harassment, discrimination or retaliation or is aware of such conduct occurring to another must report it. The individual may choose formal or informal means to report or address the issue (described in the following sections). However in choosing the approach to use, the reporting or complaining individual should understand that informal resolution processes, although often effective, do not normally result in disciplinary action taken by the University against someone who has violated this Policy. The formal resolution processes do often result in disciplinary action taken by the University against someone found to be a violator of this Policy.

No one will be required to make complaints to or file a Report with a person who may be the subject of the complaint/report or with whom the individual making the complaint or filing the Report is otherwise uncomfortable. There are many choices of people to whom complaints/reports can be directed (see following sections).

A supervisor or person with managerial authority who observes or learns of alleged unlawful harassment, discrimination or retaliation must inform Human Resources and the relevant administrator (see following sections).

The University itself acting through one of its administrators can prepare a Report, initiate an investigation under this Policy or initiate the informal resolution process.

B. *Informal Assistance – Intercessors.*

University Intercessors are counselors available to students, staff, or faculty to discuss complaints or questions about discrimination, harassment, retaliation and related issues and to educate the University community about such matters. An Intercessor may be consulted to help further direct an individual with a complaint or mediate or otherwise informally resolve an issue of possible discrimination, harassment or retaliation.

Intercessors may help mediate or facilitate an informal resolution of a problem. However, Intercessors do not have the power themselves to take disciplinary action. Speaking to an Intercessor,

although perhaps very helpful in resolving an issue, cannot result in disciplinary or corrective action taken against another individual. Speaking to an Intercessor does not constitute making a formal complaint and is not official notice to the University that there is a potential problem - that can only be done by means of one of the formal Report processes described in the next section.

Intercessors will, to the extent permitted by law, honor requests to keep matters confidential and take no further action, but if the Intercessor determines that there may be threat of future harm or a pattern of discriminatory or harassing behavior, he or she must report the incident to a responsible University administrator with the authority to investigate and take corrective action and may be required to file a Report even without the consent of the individuals directly involved.

### C. *Formal Resolution Procedures.*

#### *Reporting a Possible Policy Violation*

Any University employee, faculty member, student, patient or visitor who believes that he or she has experienced or knows of conduct reasonably believed to be discrimination, harassment or retaliation as defined in this policy should make a formal complaint to the University. To do so, he or she must fill out a Report form or ask an Intercessor, Human Resources, Dean or Department manager to fill out and process a Report.

If a manager, administrator or any other member of the University community has information that he or she reasonably believes indicates that unlawful harassment, discrimination or retaliation has occurred, even if based only on the statements of others, he or she must either fill out and file a Report to initiate an investigation pursuant to this Policy or report the potential violation of this Policy to any Human Resources Office.

Report forms are available on the University's Human Resources web page or from any Human Resources, Intercessor or Dean's Office. Reports under this Policy need not be on the official Report form so long as the report is made in writing and contains the name of the individual making the report, the date and a basic description of the behavior that is believed to violate this Policy. The completed form must be given to: (1) any Human Resources Office (2) any Dean's Office (3) the Office of the Provost or the Office of the Senior Vice President for Health Sciences, (4) any Dean of Students Office or (6) any Intercessor. If the Report is received by an administrator who is not the relevant administrator to process the Report, the receiving administrator promptly should convey the Report to the appropriate responsible Official (see following paragraph).

#### *Who Determines if the Policy is Violated*

A responsible Official ("the Official"), or a responsible administrative officer designated by the Official, will consider and act on all Reports or credible knowledge received that alleges conduct reasonably believed to be unlawful discrimination, harassment or retaliation in as timely a manner as possible under the circumstances.

If the complaint is against a staff person, the Official will be the Dean if employed in a school or the libraries, the Director is employed in Laboratory for Laser Energetics or the Memorial Art Gallery, the Chief Executive Officer of Strong Memorial Hospital if employed in the hospital, or the Provost or Vice-President of the division if employed in an administrative unit (or the Official's designee). If the complaint is against the relevant Official (or designee) or he/she may be seen as having a conflict of interest, the Provost will appoint a responsible administrator without a conflict who does not report to the relevant Official to act as the Official to consider the allegations.

If the complaint is against a faculty member or concerns a faculty process or department, the Official will be the Dean of the school where the faculty member complained about holds a primary appointment or where the process occurred or department resides (or the Dean's designee). If the complaint is against the Dean (or designee) or he/she may be seen as having a conflict of interest, the Provost or the Senior Vice President for Health Sciences will appoint a responsible administrator without a conflict who does not report to the relevant Dean to act as the Official to consider the allegations.

If the complaint is against a student, the Official will be the Dean of Students or other administrator designated as responsible for student discipline in the school where the student is enrolled. If the complaint is against the Dean of Students or administrator so acting or he/she may be seen as having a conflict of interest, the Dean of the School will appoint a responsible administrator without a conflict who does not report to the Dean of Students or administrator acting as a dean of students.

If the complaint is against the Provost or the Senior Vice President for Health Sciences, the Official will be the President. If the complaint is against the President, the complaint should be given to the Chair of the Board of Trustees and will be decided by the Board as it deems appropriate.

If the complaint is against a patient or visitor to the hospital, the Official will be the Chief Executive Officer of Strong Memorial Hospital (or designee).

If the complaint is against a visitor or vendor, the Official will be the Sr. Vice President for Finance and Administration (or designee).

#### *Temporary Protective Measures*

If under the circumstances it appears advisable in order to protect the working, learning, patient care or living environment for members of the University community or public confidence in the integrity of the University, temporary actions may be taken by the relevant Official (or designee) during the period after the incident through the final determination including any appeals by the University or relevant court, law enforcement or other governmental agency. Such actions include, but are not limited to, placing an individual on temporary leave of absence, excluding from programs and/or facilities, changing working, learning, patient care or living arrangements, or imposing conditions in the relevant University environment during the period after the incident or allegations through the final determination including any of any appeal by the University or relevant court, law enforcement or other governmental agency.

#### *Procedures for Considering Allegations against Students*

The Deans of Students (or administrator designated to handle student discipline) will follow established student disciplinary procedures to resolve complaints against students.

#### *Notifying Human Resources and Office of Counsel*

When a complaint, Report or alleged information indicates that a staff, faculty member, visitor or patient may have violated this Policy, as promptly as possible under the circumstances after receiving the information, the person receiving the information should inform Human Resources and the Office of Counsel.

*Procedures for Considering Allegations against Employees and Faculty undertaken by Human Resources and the Supervising Administrator*

There are three circumstances under which an investigation and action concerning possible violation of this Policy can be taken by Human Resources and the Supervising Administrator, including Department Chairs, of the person accused of violating the Policy without further investigation by or under the direction of the Office of Counsel, specifically:

1. An initial assessment by the Supervising Administrator in consultation with Human Resources determines that there has been no harassment, discrimination or retaliation assuming all of the facts are true as alleged by the complainant or other person reporting the behavior.
2. An initial assessment by the Supervising Administrator in consultation with Human Resources determines that there is no dispute about what happened or that the behavior constituted a violation of this Policy.
3. An initial assessment by the Supervising Administrator in consultation with Human Resources determines that the allegations constitute misconduct but not harassment, discrimination or retaliation prohibited by this Policy assuming all the facts are true as alleged by the complainant or other person reporting the behavior.

*Procedures for Considering Allegations against Employees, Faculty, Patients and Visitors undertaken by or under the direction of the Office of Counsel*

In all other cases, Office of Counsel will conduct an initial assessment of the allegations and advise the Official (or designee) whether or not the facts as alleged could constitute a violation of this Policy. If merited, Office of Counsel will assign an Investigator(s), a neutral person or persons charged with responsibility for conducting an impartial investigation of the facts. The Investigator will undertake the investigation on behalf of the University. The Investigator will inform anyone suspected of violating this Policy about any allegations or information indicating that he or she violated the Policy and will give him or her the opportunity to present information, including suggesting the names of those who might have additional relevant information.

The Investigator will interview such people and review such information as the Investigator deems relevant. Individuals are strongly encouraged to assist the Investigator, as the agent of the University and Official, by answering questions and giving information. Anyone who gives information to an Investigator will be protected from retaliation. The Investigator will ask people interviewed to sign written statements. If an individual refuses to sign a written statement, the Investigator will document the information received from the individual by means of a written summary.

The Investigator may interview anyone who the Investigator believes has knowledge of facts and circumstances relevant to determining the issues raised in the investigation. If the facts warrant, the Investigator can amend the allegations to reflect more accurately the behavior(s) that indicate a possible violation of this Policy.

Generally within 45 business days after being asked to conduct an investigation, the Investigator will make a written report of findings to the Official (or designee). The Investigator's role is not to recommend a response to the Report or a sanction, but to present the facts based on the investigation, including a full copy of any written statements gathered.

The Official (or designee) may ask the Investigator to find further facts, or may make a decision based on the Investigator's report. The Official (or designee) generally should act within five business days of receiving the Investigator's report. The Official (or designee) will inform the complainant, the person(s) alleged to have violated the Policy, Human Resources and the Office of Counsel of the decision. The determination, including any intended corrective action, will be shared with both the complainant and person alleged to have violated the Policy. The decision must be communicated in writing even if the decision is also communicated orally.

### *Appeals*

Any party may appeal the decision, within 15 business days of that decision. Appeals for cases in which the accused is a staff member, visitor or patient are to the Vice President and Secretary of the University. Appeals for cases in which the accused is a faculty member are to the Provost. Appeals for cases in which the accused is an officer are to the President. The purpose of the appeal is not to have a second investigation or review all the facts, but is limited to considering (1) evidence not previously available to the Investigator or the Official (or designee); (2) material defects in the process leading to the decision; or (3) severity or appropriateness of the imposed corrective action. An appeal must take the form of a written request delivered to the Office of the Vice President/Secretary, the Provost or President, as the case may be, stating the basis for the appeal. The Vice President/Secretary, Provost or President, as the case may be, will obtain the written record of the investigation and decision from the deciding Official. A decision on the appeal will be issued in writing normally within 15 business days after the day the appeal document is received. The decision of the Vice President/Secretary, the Provost or the President, as the case may be, shall be final. A copy of the decision on the appeal will be given to the person alleged to have violated the Policy, the complainant or person alleged to have been the subject of harassment, discrimination or retaliation, the Official who made the original decision, Human Resources, the Office of Counsel and any person with a need to know for purposes of implementing the decision.

A copy of the decision shall be placed in the personnel file maintained by Human Resources of any individual found to have violated this Policy.

Staff and faculty may not use the Human Resources Grievance Procedure (policy 160) or the Faculty Handbook grievance procedures to complain about harassment, discrimination or related retaliation or to challenge a decision on such matters by the Official, the Vice President and Secretary, Provost or President. All complaints or Reports involving harassment, discrimination or related retaliation are to be handled under the processes set forth in this Policy. However, no faculty member's tenure can be revoked or contract abrogated without following the tenure revocation process outlined in the *Faculty Handbook*.

### Confidentiality

University administrators and staff dealing with allegations of harassment, discrimination or retaliation understand the importance of confidentiality and will not disclose information learned in connection with an allegation or investigation except on a need to know basis in order to investigate and resolve the allegations or Report. Investigations, however, generally require obtaining information from people who know about the alleged event.

Individuals who want to discuss a possible incident of discrimination, harassment or retaliation with more assurance of confidentiality should contact:

- University Counseling Center (students or student spouses)
- Chaplains
- Employee Assistance Program (employees)

These counseling sources do not have the authority to investigate or officially take action to resolve complaints.

Individuals who want to discuss a possible incident of discrimination, harassment or retaliation in order to determine whether to report the incident for investigation may want to contact an Intercessor. Intercessors are counselors who understand the importance of confidentiality and who will, to the extent permitted by law, honor requests to take no further action. However, if the Intercessor determines that there may be some threat of future harm or a pattern of unlawful discriminatory, harassing or retaliatory behavior, he or she may report the incident to an administrator with the authority to take corrective action. Intercessors do not themselves investigate complaints or take corrective action, although they can mediate resolutions between involved parties with the parties assent.

### Records

The Office of Human Resources is charged with the responsibility to keep written records of all complaints and Reports alleging harassment or discrimination or related alleged retaliation against staff and faculty and their resolution. The Official (or designee) and, if there is an appeal, the Vice President/Secretary or Provost must also provide Human Resources with a copy of their written decisions. A copy of the decision will be kept in the Human Resources personnel file of a faculty or staff member found to have violated this Policy. A copy of the decision may be kept in the individual's departmental file. Investigation records will be kept in the Office of Counsel. Any disciplinary action taken will be reflected in the personnel file of the individual being disciplined. Records of complaints and Reports against students will be kept in the office of the administrator in the relevant school charged with oversight of student affairs.

Records will be maintained for six years.

### Time Limits

Where specific times are mentioned in this Policy within which actions are to occur, the specific times are not meant to be rigid limits. Variations in the time it takes to handle or decide matters may occur for different reasons, depending on availability of witnesses, information, or other valid factors. All personnel charged with acting on complaints or Reports under this policy shall use good faith to accomplish their work as quickly as time and circumstances allow.

### Harassment or Discrimination by Non-University Personnel

The University has the right to remove individuals from University property and events and to bar individuals from future access to University property or attendance at University events. This right includes, but is not limited to, circumstances in which the individual has been accused of, or found responsible for, discrimination, harassment or retaliation while on University property or in attendance at a University event.

*D. Committee on Inclusion and Diversity.*

The Committee on Inclusion and Diversity is an ad hoc committee that can be convened by the President in response to apparent incidents of discrimination or harassment. The membership of this Committee normally includes people from the following list: Intercessor, Representative of the Dean or Director of the division in which the alleged incident occurred or to which the individuals involved are most closely related, Associate Vice President for Human Resources, Human Resources Manager for Diversity and Inclusion, Chair of the College Diversity Roundtable (if the event involves the College) or person holding a similar position in another School, Vice Provost for Faculty Development and Diversity, Chair of the Campus Safety Advisory Committee, Director of the Interfaith Chapel, Director of University Facilities and Services and such other individual student, staff or faculty representatives as the President considers appropriate to the specific circumstances.

The Committee can meet with interested members of the University community to provide an opportunity for those who wish to express publicly their concerns and reactions to the incident, to decide if a community response is appropriate and to recommend such response, and to make a report to the President and the greater University community. The report may include recommendations for educational programs and efforts to facilitate understanding of the issues and circumstances that can lead to discrimination, harassment and misunderstanding in our diverse University environment and other initiatives to advance the Institution's educational mission and an inclusive environment.

Referral of an incident to the Committee will occur only with the consent of the complainant(s) involved or following the incident becoming a matter of widespread community knowledge and concern. Consideration by the Committee will not replace or limit the University investigation and action pursuant to this Policy.

See also:           #154 Corrective Disciplines  
                      #160 Grievance Procedures

See also:           Faculty Handbook  
                      Student Handbook  
                      Graduate Student Handbook  
                      Medical Student Handbook  
                      Residents/Fellows Manual for Medical and Dental Programs



## **Exhibit 2**

Emails from Debevoise & Plimpton promising confidentiality to two witnesses, later breached in the Report's exhibits

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]

----- Forwarded message -----

From: **Hogan, Mary Beth** <[mbhogan@debevoise.com](mailto:mbhogan@debevoise.com)>

Date: Sun, Oct 29, 2017 at 9:46 PM

Subject: RE: University of Rochester Sexual Harassment, Discrimination, and Retaliation case

[REDACTED]  
Cc: "White, Mary Jo" <[mjwhite@debevoise.com](mailto:mjwhite@debevoise.com)>

Dear [REDACTED]

Part of what we are doing in the investigation is looking at the University's response to all those, including you, who reached out with complaints or concerns. **We will protect your anonymity and that of others identified in your written statement** and we understand the correction you mention below. If we do talk, our practice is not to have interviews recorded as we have found that not doing so is generally more conducive to a more comfortable, open conversation. Of course, both of us are free to take notes if we do eventually talk. Please let me know how you would like to proceed. We look forward to hearing back from you.

Thank you,

Mary Beth

**From:** Hogan, Mary Beth mbhogan@debevoise.com  
**Subject:** Re: University of Rochester Special Committee Investigation  
**Date:** October 24, 2017 at 9:02 PM



**Cc:** Choudhury, Farhana fchoudhury@debevoise.com

I understand if you do not want to talk. But I do want to clarify something. We are not affiliated with the University in any way. Our client, the Special Committee of the Board of Trustees, which has both a student and faculty member, has instructed us very clearly to be independent and to find the truth, whether or not our findings ultimately hurt or help the University. No one outside our investigative team will even see our Report or know anything of our findings before we present it to the Board and the public on the same day.

I hope you will think about it.

Thank you very much.  
Mary Beth

Sent from my iPad

On Oct 24, 2017, at 8:39 PM, [REDACTED] wrote:

Mary Beth,

Thank you for understanding. Based on my experiences during the previous investigation(s), the recent response from U of R and President Seligman, and the response from Greg De Angelis, I do not feel safe discussing anything regarding my time at the University of Rochester with anyone affiliated with the university. Therefore, I do not wish to discuss this any further.

Best,

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

On Oct 22, 2017, at 4:52 PM, Hogan, Mary Beth <mbhogan@debevoise.com> wrote:

Thanks [REDACTED] can appreciate how you must feel. I hope that you will consider a brief phone call with me, so that our independent investigation has the benefit of your experience(s). We are speaking to a wide array of people and would very much appreciate your help. **You will remain anonymous.**

Thanks,  
Mary Beth

Mary Beth Hogan  
Debevoise & Plimpton LLP  
919 Third Avenue  
New York, NY 10022  
212 909-6996  
[mbhogan@debevoise.com](mailto:mbhogan@debevoise.com)

Sent from my iPhone

On Oct 20, 2017, at 8:53 PM, [REDACTED]

Good Evening Farhana Choudary,

Thank you for your email. At this time, I don't think I can offer anything to the special investigation. I have now spoken to so many people about my time at the University of Rochester, and I no longer have the energy to discuss this any further.

Best

Ugah,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On Oct 20, 2017, at 12:37 PM, Choudhury, Farhana <[fchoudhury@debevoise.com](mailto:fchoudhury@debevoise.com)> wrote:

Dear [REDACTED]

Good afternoon. I am working with Mary Jo White on the independent investigation of the allegations in the United States Equal Employment Opportunity Commission complaint filed by seven current and former University faculty members.

We understand that you may have information potentially relevant to this investigation. We were hoping you have time to speak by phone next Wednesday (October 25<sup>th</sup>), for about 90 minutes. If you could let me know if you have any 90-minute windows of availability on that day, that would be great.

We hope to hear back from you. Don't hesitate to let me know if you have any questions.

Thank you,  
Farhana Choudhury

<image002.jpg>

**Farhana Choudhury**

Associate

[fchoudhury@debevoise.com](mailto:fchoudhury@debevoise.com)

+1 212 909 6046 (Tel)

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