UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. KIMBERLY ANN KOHLHAUSEN, Plaintiff, v. SUNY ROCKLAND COMMUNITY COLLEGE, *et al.*, Defendants.	CASE NO. 7:10-CV-3168 OPINION & ORDER [Resolving Doc. Nos. 22, 26]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this sex and marital status discrimination, harassment, and retaliation case, Defendants SUNY Rockland Community College ("SUNY Rockland"), the County of Rockland, the Board of Trustees of SUNY Rockland Community College, Ian Blake Newhem, Clifford Wood, Martha Rottman, Clifford Garner, and the SUNY Rockland Community College Federation of Teachers Local 1871 move to dismiss Plaintiff Kimberly Ann Kohlhausen's complaint for lack of jurisdiction and failure to state a claim. [Doc. 22; Doc. 24; Doc. 27; Doc. 35.] The Plaintiff opposes. [Doc. 30; Doc. 32.] For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the Defendants' motions to dismiss.

I. Background

Dr. Kohlhausen worked at SUNY Rockland Community College from 2003 until her termination in 2009. [Doc. 32 at 6.] In 2007, Kohlhausen was appointed Chairperson of the SUNY

Rockland English Department and approximately one year later was appointed to a tenure-track Instructor of Philosophy position. [Doc. 1 at 6.] Kohlhausen also joined the Federation of Teachers Union, in 2007, as a paying member.

During her employment at SUNY Rockland, Kohlhausen was variously supervised by Defendants Ian Blake Newhem, Martha Rottman, and Clifford Garner. As Kohlhausen's supervisors, Newhem, Rottman, and Garner reviewed her work and were responsible for recommending her for promotions, rehiring, and reappointment as Chairperson of the Philosophy and Religious Studies Departments. [Doc. 1 at 6-7.]

A. Newhem's Harassment

Kohlhausen says that when Newhem, who she says is an openly gay male, became her direct supervisor, he began to verbally abuse her using vulgar and demeaning language. [Doc. 1 at 7.] Kohlhausen says Newhem's offensive behavior escalated as time passed. In the summer of 2007, Kohlhausen says that Newhem played a pornographic video of a 17-year-old SUNY Rockland student while insisting that Kohlhausen watch. Beginning the fall of 2007, Kohlhausen asserts that she was subjected to verbal abuse and offensive name-calling: an alleged daily parade of horribles that is not repeated here. [*See* Doc. 1 at 7-8.] Newhem's alleged tirades included explicit threats to Kohlhausen's life, health, and job,[Doc. 1 at 7, 13-15, for example], and did not cease even when Kohlhausen was twice hospitalized for a severe kidney stone attack, [Doc. 1 at 8-9].

Kohlhausen's complaint also alleges that Newhem intruded into Kohlhausen's personal life. On repeated occasions, Kohlhausen says Newhem made comments such as, "he is no prize but neither are you," "you are a 51 year old spinster with a dried up bag of ovaries and a cat," or "you look like an old hag!" [Doc. 1 at 11.] When Kohlhausen and Defendant Garner, the Teachers Union

President, became romantically involved, Newhem reportedly "intensified" his harassment, and later reprimanded Kohlhausen after she and Garner ended their relationship. [Doc. 1 at 11-14.]

B. Complaints to the Teachers Union, SUNY Rockland Officials and Board of Trustees

Kohlhausen says she reported Newhem's behavior to Garner, Newhem's close friend, in Fall 2007. [Doc. 1 at 10.] Although Garner initially offered his assistance, Kohlhausen says the harassment from Newhem continued unabated and that at times Garner himself would participate in the harassment. Kohlhausen says Garner had "turned on her" for complaining of Newhem's behavior. [*Id.*] She additionally alleges that Garner discouraged her from filing a formal complaint, [Doc. 1 at 10], and that when she ultimately sought union assistance in filing a complaint against Newhem, Garner refused to represent her unless the complaint went through Newhem as Grievance Chair, [Doc. 1 at 15].

Kohlhausen also says she complained in June 2008 about Newhem's behavior to various SUNY Rockland officials, including the school's President and Vice President. [Doc. 1 at 16.] Kohlhausen says she then sent President Wood a letter asking that SUNY Rockland ensure her safety and prevent further harassment. [Doc. 1 at 18-19.] Rather than address her complaints, school officials allegedly disclosed the subject of Kohlhausen's complaints to third parties, thereby leading to further retaliation from Newhem. [Doc. 1 at 16.] Kohlhausen asserts that although President Wood noted his surprise that "Newhem hated them [women]," Wood ultimately concluded that the school's job was to help Newhem "grow up" and that Kohlhausen should refrain from her "doom and gloom." [Doc. 1 at 17.]

When, in October and November 2008, Kohlhausen again scheduled meetings with Rockland's President and Vice President to discuss Newhem's behavior. She says neither official

encouraged her to file a complaint, and that Wood instead participated in spreading rumors about her. [Doc. 1 at 21-22.] Kohlhausen says that when she reported Newhem's behavior to SUNY Rockland's Board of Trustees—by way of her father, a Board member—the Board, too, ignored her complaints. [Doc. 1 at 11-12.]

C. Anonymous Threats: Slashed Tires, Breaking and Entering, and "The Taco Bell Chihuahua Incident"

At various points throughout this period, Kohlhausen says the tires of her car were slashed. She reports that Newhem's car had been parked next to hers and another faculty member had observed Newhem walking around and looking inside Kohlhausen's car. [Doc. 1 at 19-20.] Kohlhausen also alleges two incidents in which someone broke into her office. The first occurred in December 2008, when an intruder accessed her office computer and potentially viewed confidential files and documents. [Doc. 1 at 24.] The second incident occurred in April 2009, when the intruder allegedly placed a confidential letter from Vice President Baker on her desk. Her bookshelves and a large picture from on her wall were also allegedly loosened, leading them to fall onto Kohlhausen as she sat down at her desk. [Doc. 1 at 31.] Many of these events occurred after the school had established an agreement requiring Newhem to avoid Kohlhausen. [Doc. 1 at 21.]

Moreover, in 2008 Kohlhausen says she began receiving harassing telephone calls from an anonymous male caller who she says "disguised his voice to mimic the Taco Bell 'Mexican Chihuahua[,]'" the fast food chain's former spokes-dog. [Doc. 1 at 19-20.] The Taco Bell Chihuahua threatened Kohlhausen, directing her to stay off the SUNY Rockland campus. Kohlhausen says she was forced to change her cell phone number as a result of these calls, and only gave the new number to a handful of SUNY Rockland administrators. Yet the Taco Bell Chihuahua somehow fetched this

new number and, Kohlhausen says, resumed the threatening phone calls throughout July and August 2008. [*Id.*] Kohlhausen reported these incidents to the Union and to Defendant Wood. [Doc. 1 at 20.]

D. The "JC Student Issue": Kohlhausen's Suspension and Termination

On December 2, 2008, Kohlhausen, through her attorney, requested that SUNY Rockland initiate a formal investigation into Newhem's alleged harassment. Kohlhausen says that the school did not investigate until February 2009, and that in the interim she experienced an increase in retaliation by school officials. [Doc. 1 at 24-25.]

On March 17, 2009, Kohlhausen emailed Dean of Students Suzanne Phillips, the Chairperson of SUNY Rockland's Behavioral Awareness and Intervention Committee, about "a series of disruptive incidents" by a student in Kohlhausen's class, "JC." She emailed copies to Rottman and Garner, her supervisors at the time. [Doc 1 at 27.] Kohlhausen also spoke with two Rockland instructors about the student in question, and later requested, without success, Union representation in connection with her report. [Doc. 1 at 27, 30.] As part of the school's investigation of this report, Rottman questioned several of Kohlhausen's students, in the classroom with "JC" present. [Doc. 1 at 30.]

Approximately one month later, on April 21, 2009, Wood informed Kohlhausen that the school's investigation into Newhem's behavior had concluded and had found no evidence to corroborate her harassment and retaliation allegations. [Doc. 1 at 31.] Nine days later, on April 30, campus officials came to Kohlhausen's classroom, told her that she had been suspended for the remainder of the academic year, and publicly escorted her off campus. [*Id.*] The school said it was suspending Kohlhausen because she had fabricated the "JC student issue" and could not function

in SUNY Rockland's collegial environment. [Doc. 1 at 32.] The school encouraged Kohlhausen to bring any remaining concerns to its attention. [*Id.*]

On May 13, 2009, the SUNY Rockland Board of Trustees permanently rescinded Kohlhausen's reappointment for the upcoming school year. [*Id.*]

Kohlhausen says these incidents have caused her extreme emotional distress, anxiety, fear, and humiliation, and that she has required treatment from several specialists. [Doc. 1 at 8-9 (Newhem's verbal abuse allegedly delayed Kohlhausen's surgery recovery), 34.] She now brings claims against the Defendants for: (1) discrimination, harassment, and retaliation in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and New York Human Rights Law; (2) discrimination and retaliation in violation of Title IX, 20 U.S.C. § 1681; (3) discrimination and retaliation in violation of Kohlhausen's First and Fourteenth Amendment rights, under 42 U.S.C. § 1983; and (4) intentional infliction of emotional distress under New York state law.

II. Legal Standard

Federal Rule of Civil Procedure 8 provides the general standard of pleading and only requires that a complaint "contain . . . a short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 does not require "detailed factual allegations, but it requires more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In deciding a motion to dismiss under Rule 12(b)(6), "a court should assume the[] veracity" of "well-pleaded factual allegations," but need not accept a plaintiff's legal conclusions as true. *Id.* Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility requirement is not a "probability requirement," but requires "more than a sheer possibility that the

defendant has acted unlawfully." *Id.*

To resolve a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may additionally consider evidence outside the pleadings. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.* (citing *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996)).

III. Title VII and New York Human Rights Law Claims

A. Individual Liability under Title VII

First, Defendants SUNY Rockland, the Board of Trustees, Rockland County, Newhem, Wood, and Rottman (collectively the "Rockland Defendants") contend that Kohlhausen's Title VII claims against any individual agents of SUNY Rockland Community College, the Rockland Board of Trustees, and the County of Rockland must be dismissed, arguing that individuals cannot be held liable under Title VII. [Doc. 24 at 15.] In response, Kohlhausen says that because Title VII includes "agents" within its definition of "employer," it contemplates suits against individuals.[1/]

Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person[.]" 42 U.S.C. § 2000e(b). The Second Circuit has concluded that Congress did not intend to hold individuals liable under Title VII. *Tomka v. Seiler*, 66 F.3d 1295, 1313-17 (2d Cir. 1995), *abrogated on other grounds by Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Dean v. Westchester Cnty. Dist. Attorney's Office*,

[1/] In her complaint, Kohlhausen brings Title VII claims against the Community College, the Board of Trustees, the Union, the County of Rockland, "and/or all agents of the employer." [Doc. 1 at 35, 37.] Kohlhausen says that allegations in the complaint support these claims as against the individual defendants, Rockland Dean Susan Deer, Vice President Morton Meyers, Board of Trustees Vice President Richard Kohlhausen, Melissa Roy, Vice President Bill Baker, and other Rockland "administrators or entities that may be revealed during discovery[.]" [Doc. 30 at 14.]

119 F. Supp. 2d 424, 428 (S.D.N.Y. 2000). Therefore, though actions of its agents may be imputed to SUNY Rockland, its Board, or Rockland County, the Court dismisses those claims to the extent Kohlhausen seeks to hold individuals liable under Title VII.

B. Prima Facie Case

Defendants Garner and SUNY Rockland Community College Federation of Teachers Local 1871(collectively the "Union Defendants") argue that Kohlhausen has not sufficiently pled a prima facie case of discrimination or retaliation against the Union, under Title VII or New York State Human Rights Law (NYHRL). "Because New York courts require the same standard of proof for claims brought under the NYHRL," *Leopold v. Baccarat*, 174 F.3d 261, 264 n.1 (2d Cir. 1999), the Court addresses these federal and state law claims together.

Where a plaintiff union member claims the union violated Title VII through a failure of representation, as Kohlhausen does, courts have incorporated the union's duty of fair representation as an element of the Title VII violation. *Agosto v. Corr. Benev. Ass'n*, 107 F. Supp. 2d 294, 304 (S.D.N.Y. 2000). This duty arises from a union's "statutory role as exclusive bargaining agent." *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 74 (1991). It applies to both private and public sector unions. *See id.* at 67.

In analyzing discrimination claims against a union, the Second Circuit has applied a test set forth by the Seventh Circuit in *Bugg v. Int'l Union of Allied Indus. Workers, Local 507*, 647 F.2d 595 (7th Cir. 1982). Under the *Bugg* test, a plaintiff must show: (1) the employer violated the collective bargaining agreement with respect to the plaintiff; (2) the union permitted that breach to go unrepaired, thereby breaching its own duty of fair representation; and (3) some indication that the union was motivated by discriminatory animus. *Id.* at 598 n.5; *accord Gorham v. Transit Workers Union of America*, No. 98-CV-313, 1999 WL 163567, at *3 (S.D.N.Y. Mar. 24, 1999),

aff'd, 205 F.3d 1322 (2d Cir. 2000) (adopting *Bugg* test). As to the second prong, a union has breached its duty of fair representation only when its conduct toward the plaintiff is "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

Kohlhausen argues that this Court should apply a more lenient test adopted by some district courts in this Circuit, that requires a plaintiff alleging Title VII union discrimination show that the union breached its duty of fair representation and was motivated by discriminatory animus. *See, e.g.*, *Doolittle v. Ruffo*, No. 88-CV-1175, 1996 WL 159850, at *4 (S.D.N.Y. Mar. 27, 1996). However, the Court concludes that the *Bugg* test appropriately calls for a showing that the union first had a duty to represent the plaintiff, and thus that fair representation is required. The Court therefore applies the *Bugg* test to Kohlhausen's discrimination claim against the Union.

This claim fails at the first step of the *Bugg* test. Kohlhausen never directly alleges that SUNY Rockland breached its collective bargaining agreement, nor does her complaint plead facts sufficient to support such a claim. Kohlhausen merely says that the collective bargaining agreement between the Union and SUNY Rockland governs her salary and conditions of employment. [Doc. 1 at 4.] In her claim for retaliation under Title VII Kohlhausen nebulously suggests that the *Union* failed to "enforce rights" under the collective bargaining agreement, [Doc. 32 at 19], but she does not allege any breach of the agreement that would trigger the Union's duty to enforce any such rights. Though Kohlhausen now contends that her complaint describes several instances in which SUNY Rockland violated the collective bargaining agreement, [Doc. 32 at 13 n.3], the Court finds no such allegation in the complaint itself. The Court therefore dismisses Kohlhausen's Title VII and state law discrimination claims as against the union.

Kohlhausen also brings a Title VII retaliation claim against the Union for failing to represent her in complaints against Newhem or in connection with the "JC student issue," for constructively

expelling her from membership after accepting her dues, for directing her to keep her complaints "off the record," and for threatening to hold a publicly humiliating hearing on Newhem's behalf. [Doc. 1 at 37]; *see* 42 U.S.C. § 2000e-3 (Title VII prohibits a union from discriminating against any member for opposing an unlawful employment practice).

To set forth a prima facie case of union retaliation, a plaintiff must plead sufficient facts to support three findings: (1) she engaged in protected activity under Title VII that was known to the union; (2) she suffered adverse union action; and (3) there was a causal connection between the protected activity and adverse action. *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991). "The term 'protected activity' refers to action taken to protest or oppose statutorily prohibited discrimination." *Cruz v. Coach*, 202 F.3d 560, 566 (2d Cir. 2000). The Union Defendants do not dispute that Kohlhausen engaged in Title VII protected activity. They argue only that Kohlhausen has not sufficiently pled adverse union action and consequently cannot make out a causal connection. [Doc. 27 at 19.]

Adverse union action is conduct "that affects the terms, privileges, duration, or conditions of employment." *Yerdon v. Henry*, 91 F.3d 370, 378 (2d Cir. 1996). A causal connection between a plaintiff's protected activity and adverse union action is established by evidence of temporal proximity, disparate treatment of fellow employees engaged in similar conduct, or retaliatory animus. *Agosto*, 107 F. Supp. 2d at 309.

Even if Kohlhausen has sufficiently pled adverse action, which the Court doubts,[2/] her retaliation claim against the Union fails for lack of a causal connection. Kohlhausen argues only that the Court should find a causal connection because Union's adverse actions "closely followed"

[2/]For example, Kohlhausen's allegation that Garner threatened to hold a publicly humiliating hearing does not establish adverse action. Kohlhausen does not allege that the mere threat of the hearing affected or could affect her employment, and the hearing itself never occurred.

her reports of Newhem's harassment and intimidation. [Doc. 32 at 21.] As to Kohlhausen's allegation that the Union constructively expelled her from membership, Kohlhausen does not say *when* this constructive expulsion occurred. The Court generally understands that Kohlhausen ceased her union membership when SUNY independently ended her employment. The Court thus cannot evaluate whether Kohlhausen's expulsion "closely followed" any protected activity. The causal inference afforded by temporal proximity is thus strongest as to the Union's alleged failure to pursue Kohlhausen's complaints against SUNY Rockland—a claim that must fail because Kohlhausen has not alleged a breach of the collective bargaining agreement that would trigger the Union's duty of representation in the first place. Stated otherwise, Kohlhausen does not allege that she had a contractual right to continued employment and does not allege that Union had the power to force SUNY Rockland to continue her employment.

Accordingly, the Court grants the Union Defendants' motion to dismiss Kohlhausen's Title VII and New York Human Rights Law union retaliation claims.

IV. State Sovereign Immunity

The Rockland Defendants collectively assert a sovereign immunity defense to Kohlhausen's New York State Human Rights Law, 42 U.S.C. § 1983, and intentional infliction of emotional distress claims.[3/] [Doc. 24.]

The State University of New York "is an integral part of the government of the State and

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[3/]Eleventh Amendment immunity is not a valid defense against a Title VII claim, as Title VII abrogates state sovereign immunity. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003).

Though the Defendants at one point urge this Court to dismiss claims against the County of Rockland under their sovereign immunity defense, [Doc. 25 at 10], they also acknowledge that the County, as a municipality, is not entitled to Eleventh Amendment immunity, [Doc. 24 at 7 n.3; Doc. 25 at 9 n.6]; s*ee also Northern Ins. Co. of N.Y. v. Chatham County, Ga.*, 547 U.S. 189 (2006). The Court thus denies any sovereign immunity defense asserted by the County.

Furthermore, the Rockland Defendants suggest that Defendant Garner is entitled to Eleventh Amendment immunity, as well, but Garner himself has not asserted such a defense. The Court thus denies any motion to dismiss Garner on the basis of sovereign immunity.

when it is sued the State is the real party." *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990) (citations omitted). The Defendants argue that because SUNY Rockland Community College and its Board operate as an entity of the SUNY system, they are entitled to sovereign immunity. *See, e.g.*, *Davis v. Stratton*, 575 F. Supp. 2d 410, 424 (N.D.N.Y. 2008) (Schenectady County Community College "is an entity of the SUNY system. Thus, no relief, either legal or equitable, would be available against SCCC."), *rev'd on other grounds*, 360 Fed. App'x 182 (2d Cir. 2010). In response, Kohlhausen argues that because community colleges are established and primarily funded by local sponsors, they are primarily municipal organs that cannot benefit from state sovereign immunity. The Court finds that despite such local funding, the degree of state funding for and control over SUNY Rockland Community College render the school an arm of the state.

In *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79 (2d Cir. 2004), the Second Circuit turned to "two factors that should guide the determination of whether an institution is the arm of the state: (1) the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity, and (2) the degree of supervision exercised by the state over the defendant entity." *Id.* (citing *Pikulin v. City Univ. of N.Y.*, 176 F.3d 598, 600 (2d Cir. 1999)) (internal quotations omitted). The first factor is the most important. *Id.* at 82 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994)). Finding both factors satisfied in that case, the *Clissuras* court deemed City University of New York (CUNY) senior colleges an arm of the state.

Guided by these two factors, this Court reaches the same conclusion with regard to SUNY Rockland Community College. First, there is some indication that responsibility for money judgments against Rockland Community College rests with the state. Though the New York Education Law sections governing community colleges do not explicitly authorize the state to pay settlements or judgments against SUNY community colleges, neither does the Law assign such

responsibility to the county or other local sponsor.[4/] The absence of an express payment authorization provision suggests that judgments rendered against the SUNY community college or its employees or trustees in their official capacities are simply paid out of the community college's operating budget, to which the state contributes one-third. *See* N.Y. Educ. Law §§ 6304(1)(a).

Second, the Education Law vests ultimate control over the operation of SUNY community colleges with the state. *See Clissuras*, 359 F.3d at 82. Though community colleges are established by local sponsors, the state board of trustees must ultimately approve their creation. N.Y. Educ. Law §6302(1). Of SUNY Rockland's ten-person board of trustees, the state appoints four, and the community college president is subject to approval by the state board of trustees. *Id.* § 6306. Moreover, though Rockland County exercises significant control over many aspects of the SUNY Rockland's finances and operation, it does so pursuant to state regulations that govern the college's administration and operation. These regulations, issued by the state university trustees, control curricula, standards for facilities, schedules, and the preparation of annual budgets that must ultimately be submitted to the state university trustees for approval. *Id.* at § 6304(1)(b)(iv). The state university trustees also report to the governor and state legislature annually regarding the status of community college programs. *Id.* at § 6304(1)(b)(iii). Finally, though local sponsors contribute at least one-third of the college's operating costs, *id.* §6304(1)(d), if they contribute in real or personal property or services, the state university trustees determine the value of that property or services. *Id.* at § 6304(c).

[4/] Though the New York Education Law provides that a community college's local sponsor shall indemnify and provide for the defense of the community college trustees, officers, and employees, N.Y. Educ. Law §§ 6308(2)(a), 6308(3)(a), these provisions govern indemnification of individuals and do not address suits against the community college itself or suits against employees in anything other than their personal capacities. *See Clissuras*, 359 F.3d at82 n.5; *see also Farid v. Smith*, 850 F.2d 917, 921 (2d Cir. 1998) (Eleventh Amendment provides no immunity for state officials sued in their individual capacities).

Accordingly, despite the fact that local sponsors are significant partners in the relatively independent operation of community colleges such as SUNY Rockland, the community colleges are "ultimately accountable to, and dependent upon, the state." *Clissuras*, 359 F.3d at 83 (quoting *Becker v. City Univ. of N.Y.*, 94 F. Supp. 2d 487, 490 (S.D.N.Y. 2000)). In light of this determination—and considering similar holdings in this Circuit, *see Davis*, 575 F. Supp. 2d 410; *see also Staskowski v. County of Nassau*, No. 05-CV-5984, 2006 WL 3370699, at *1 (E.D.N.Y. Nov. 16, 2006)—the Court finds SUNY Rockland enjoys Eleventh Amendment immunity, as an arm of the state.

As to the individual defendants, the Eleventh Amendment provides no immunity for state officials sued in their personal capacities. *Farid v. Smith*, 850 F.2d 917, 921 (2d Cir. 1998). And, federal courts may entertain suits against state officials in their official capacities where the plaintiff seeks to enjoin conduct that violates the federal Constitution. *Ex parte Young*, 209 U.S. 123 (1908); *Dube*, 900 F.2d at 595 (citing *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) ("a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury")). Such injunctive relief is not available for claims based on state law. *Dube*, 900 F.2d at 595.

To determine whether this limited exception to state sovereign immunity for equitable relief applies, "a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Ford v. Reynolds*, 316 F.3d 351, 355 (2d Cir. 2003) (citations omitted). Kohlhausen does seek declaratory and prospective relief: she asks this Court, in part, to restrain the Defendant from "providing negative, misleading, and/or disparaging references pertaining to the Plaintiff's employment." [Doc.

1 at 47-48.] Kohlhausen has also alleged an ongoing Fourteenth Amendment equal protection violation.[5/] [Doc. 1 at 45.] The prospective injunctive relief sought thus justifies exception to sovereign immunity for Kohlhausen's Fourteenth Amendment claim.

However, Kohlhausen claims only that the Defendants violated her First Amendment rights by discriminating against, suspending, and ultimately terminating Kohlhausen in retaliation for engaging in protected speech. [Doc. 1 at 44.] Based on this claim, the First Amendment violation culminated and ceased with Kohlhausen's termination; she has not alleged an ongoing First Amendment violation.

Kohlhausen may therefore bring state law, First Amendment, and Fourteenth Amendment claims against Newhem, Wood, and Rottman in their individual capacities. She may assert a Fourteenth Amendment claim under § 1983 against Newhem, Wood, and Rottman in their official capacities only to the extent she seeks prospective, injunctive relief for ongoing violations. *See Ford v. Reynolds*, 316 F.3d 351, 355 (2d Cir. 2003). Because she has not alleged an ongoing First Amendment violation, those § 1983 claims against Newhem, Wood, and Rottman in their official capacities are dismissed. Kohlhausen's state law claims against Newhem, Wood, and Rottman in their official capacities are also dismissed. *Dube*, 900 F.2d at 595.

V. Employee's Private Right of Action Under Title IX

The Rockland Defendants also move to dismiss Kohlhausen's Title IX discrimination claim.[6/] They argue that Title VII provides the exclusive cause of action for employees of federally-funded educational institutions who claim employment discrimination, and thus preempts Title IX in that context. [Doc. 24 at 18.] In response, Kohlhausen says that Title IX should serve as an additional

[5/] As the Court later addresses, Kohlhausen has abandoned her Fourteenth Amendment due process claim.

[6/] The Defendants do not move to dismiss Kohlhausen's Title IX retaliation claim.

protection against sex discrimination, where the employer educational program receives federal funding, regardless of any overlap with remedies available under Title VII. [Doc. 30 at 31.] Because this Court concludes that Title IX provides a private right of action against gender discrimination to employees of federally-funded educational institutions, and that this Title IX right of action is not preempted although a remedy under Title VII is also available, it denies the Rockland Defendants' motion to dismiss Kohlhausen's Title IX claim.

Title IX reads, in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). Circuit courts are split as to whether this language provides employees of federally-funded education programs a private right of action against gender discrimination. *See, e.g.*, *Jackson v. Birmingham Board of Education*, 309 F.3d 1333 (11th Cir. 2002) (no private right of action for employment retaliation under Title IX); *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995) (Title VII is the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded education institutions); *Preston v. Commonwealth of Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994) (Title IX implied private right of action extends to gender-based employment discrimination by federally-funded educational institutions). The Second Circuit has not addressed the question directly, and our sister courts in the Southern District of New York have divided over the issue, as well. *See Torres v. Pisano*, 116 F.3d 625, 630 n.3 (2d Cir. 1997). *Compare Vega v. State Univ. of N.Y.*, No. 97-CV-5767, 2000 WL 381430, at *3 (S.D.N.Y. Apr. 13, 2000) (money damages under Title IX are limited to students, as Title VII provides exclusive remedy for gender-based employment discrimination), *and Burrell v. City Univ. of N.Y.*, 995 F. Supp. 398, 408-10 (S.D.N.Y. 1998) (same), *with AB ex rel. CD v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144, 151-53

(S.D.N.Y. 2004) (Title IX permits employee of federally-funded educational institution to bring retaliation claim), *and Henschke v. N.Y. Hospital-Cornell Med. Ctr.*, 821 F. Supp. 166, 171-72 (S.D.N.Y. 1993) (Congress intended Title IX to serve as an additional protection against gender discrimination in federally-funded educational programs regardless of Title VII's reach).

Courts permitting gender-based employment discrimination claims under Title IX have generally relied upon three Supreme Court cases as supporting Title IX's broad scope: *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), *Franklin v. Gwinnett Cnty. Public Schools*, 503 U.S. 60 (1992), and *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1992). In *Cannon*, the Supreme Court considered a plaintiff's claim that she had been wrongfully denied admission to federally-funded medical schools and found an implied private right of action for gender-based discrimination under Title IX. 441 U.S. 677. The Court later held, in *Franklin*, that Title IX supported money damages in a student's claim of intentional sex discrimination by her coach and teacher. 503 U.S. 60. Additionally, the Court has upheld employment discrimination regulations passed under Title IX: in *North Haven*, the Court considered regulations interpreting Title IX's "no person" language to include employees as well as students. The Court ultimately upheld the regulations' ban on exclusion from participation, denial of benefits, or discrimination in employment, recruitment, consideration, and selection under federally-funded education programs or activities. Noting from a comprehensive review of its legislative history that Title IX was intended to apply to faculty and that the term "person" appeared, on its face, to include employees as well as students, the Court found that "Title IX proscribes employment discrimination in federally funded education programs . . . ." 456 U.S. at 535-36.

Some courts have thus found no reason to limit Title IX's implied private right of action to students, where regulations prohibiting discrimination enacted pursuant to Title IX apply to students

and employees alike. Focusing instead on Title IX's federal funding requirement, these courts have concluded that Title IX provides an additional remedy for employees of federally-funded educational institutions. *See, e.g., AB ex rel. CD*, 224 F.R.D. at 153; *see also North Haven*, 456 U.S. at 535 n.26 ("Moreover, even if alternative remedies are available and their existence is relevant, this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination.") (citations omitted).

Other courts have reached the opposite conclusion. Noting that Title VII was drafted before Title IX, these courts conclude that Congress intended Title VII to provide an exclusive cause of action for gender-related employment discrimination, excepting remedies in existence at the time of its enactment. They also conclude that allowing employees of federally funded education programs to sue under Title IX would upset Title VII's "carefully balanced remediation scheme[.]" *Burrell*, 995 F. Supp. at 409 (citing *Lakoski*, 66 F.3d at 754). For example, because Title VII requires administrative exhaustion but Title IX contains no such exhaustion requirement or notice provision, *Fitzgerald v. Barnstable Sch. Committee*, 129 S. Ct. 788, 796 (2009) (plaintiffs can sue directly under Title IX), these courts fear that finding a private cause of action under Title IX would permit employees of federally-funded educational institutions to bypass Title VII's jurisdictional hurdles and obtain different relief. Had Congress intended Title IX to provide another private right of action for employees claiming sex discrimination against federally funded educational institutions, the thinking goes, it would have said so explicitly. *Burrell*, 995 F. Supp. at 410, *Vega*, 2000 WL 381430, at *3. Under this line of reasoning, the *North Haven* and *Cannon* cases are read together to mean that an educational institution may be deprived of federal funds for discriminating against either students or employees, but that a private right of action exists only for students. *Burrell*, 995 F. Supp. at 408.

Recognizing the split in authority on this issue, this Court is nonetheless unpersuaded by the Defendants' argument that Title VII provides the sole cause of action for employees of federally funded educational programs. First, this Court concludes that Title IX's implied right of action extends to gender-based employment discrimination. The Supreme Court's extensive inquiry into Title IX's legislative history in *North Haven* identified employees of federally funded education programs, and employment discrimination in academia, as important focal points of Title IX. 456 U.S. 512. This Court's own review of Title IX's legislative history reveals a heavy emphasis on employment discrimination in educational institutions. In the House of Representatives, the legislation was proposed to combat, "at the faculty level[,] sex differences in rank and salary at colleges and universities" as well as disparities in student admissions standards. H.R. Rep. No. 92-554 (1972). In the Senate, the provisions that ultimately became Title IX were introduced as targeting "admissions procedures, scholarships, and faculty employment," and were introduced separately from "[o]ther important provisions in the amendment [that] would extend the equal employment opportunities provisions of Title VII . . . to educational institutions[.]" 118 Cong. Rec. 5803 (1972). And, subsequent proposals in Congress to limit Title IX's coverage of employment discrimination have failed. *North Haven*, 456 U.S. at 534.

The Supreme Court considered Title IX's statutory language and legislative history in *Cannon*, as well, when it found an implied private right of action under the Title. The *Cannon* Court noted that a private right of action was consistent with Title IX's "unmistakable focus on the benefitted class," and that it would aid the accomplishment of the Title's purpose "to provide individual citizens effective protection against [discriminatory] practice[.]" *Cannon*, 441 U.S. at 691, 704. Though *Cannon* considered facts distinguishable from the instant action—as that case involved a suit by a student—the Court's analysis was not explicitly limited to a *student's* private

right of action under Title IX. Indeed, the Court repeatedly stated that it was inferring a private remedy "in favor of individual persons[,]" *id.* at 691, or "persons discriminated against on the basis of sex," *id.* at 694, generally. "Individual persons" under Title IX, the Supreme Court would later note in *North Haven*, include both students and employees. 456 U.S. at 520-21. Noting the particular emphasis on employment discrimination in Title IX's legislative history, and finding the *Cannon* Court's analysis equally applicable to employees as "persons" under the Title, this Court holds that Title IX provides a private right of action for employees and students alike.

Second, the Court finds that a Title VII claim, where asserted, does not preempt an employee's private cause of action under Title IX. The Defendants argue that even if Title IX is found to provide a private right of action for employment discrimination, it should be preempted whenever a plaintiff has also brought an employment discrimination claim under Title VII. [Doc. 25 at 12.] To this end, the Defendants rely primarily on the argument that Title VII predates Title IX and thus, where available, was meant to provide an exclusive remedy for employment discrimination.

Though Title VII did predate Title IX, Title VII could not have been meant, at the time of its enactment, to provide the exclusive remedy for employment discrimination in educational programs, as the original version of Title VII contained a notable exemption for "educational institution[s] with respect to the employment of individuals to perform work connected with the educational activities of such institution[s]." 42 U.S.C. § 2000e-1 (1964) (Title VII § 702). It was not until the passage of the 1972 Education Amendments that Congress struck this exemption for employees of nonreligious educational institutions. 42 U.S.C. § 2000e-1 (1972) (Pub. L. 92-261). The same amendments eliminated exemptions for executive, administrative, or professional positions from the Fair Labor Standard Act's equal pay provisions, and notably created new

prohibitions on discrimination in federally-funded education programs or activities (now known as Title IX).

The force of the Defendants' argument thus diminishes upon considering that Title VII's prohibition on discrimination in education and Title IX were passed simultaneously, and that nothing in the language of either suggests that Congress meant one to operate to the exclusion of the other. Just as Congress could have said that it intended Title IX to supplement remedies available under Title VII, Congress could also have explicitly indicated that the 1972 amendments would secure Title VII as the exclusive remedy for employment discrimination. Congress said neither. Thus, given the broad scope of Title IX, and Supreme Court's recognition that multiple, often overlapping, remedies exist for employment discrimination, *North Haven*, 456 U.S. at 535 n.26, this Court concludes that Title IX is not preempted where a plaintiff also brings a claim under Title VII.

The Rockland Defendants additionally argue that both of Kohlhausen's Title IX claims should be dismissed as against Rockland County for failure to plead that the County receives federal funds. [Doc. 24 at 18 n.4.] However, the Defendants do not ultimately dispute that Rockland County does receive federal financial assistance. Kohlhausen asks to amend her complaint to assert federal funding to the County. She may correct this defect, if such allegation may be pled in good faith.

VI. 42 U.S.C. § 1983 Claims

The Rockland Defendants next challenge Kohlhausen's First Amendment retaliation claims, brought under 42 U.S.C. § 1983, for failure to show that she engaged in protected speech. [Doc. 24 at 22.] Specifically, the Defendants say that Kohlhausen cannot show that she spoke as a citizen rather than as an employee when she reported the disruptive behavior of a student in her class. [Doc. 24 at 22.]

In order to make out a First Amendment retaliation claim, a employee plaintiff must show

that (1) her speech was constitutionally protected; (2) she suffered adverse employment action; and (3) the constitutionally protected speech motivated the adverse action. *Gronowski v. Spencer*, 424 F.3d 285, 292 (2d Cir. 2005). To qualify as constitutionally protected speech, the employee must speak "as a citizen on a matter of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). The Supreme Court has held, in *Garcetti v. Ceballos*, that employees generally speak as employees when they "make statements pursuant to her official duties" or when performing tasks they are paid to perform. *Id.* at 421-22.

It is not disputed that Kohlhausen spoke on matters of public concern. [*See* Doc. 1 at 28 (Kohlhausen reported the behavior "in the wake of tragedies suffered at Columbine and Virginia Tech[.]").] However, Kohlhausen has not alleged sufficient facts to support a claim that she spoke in her capacity as a citizen, rather than as an employee. Kohlhausen's complaint states that she emailed the Dean of Students Suzanne Phillips and copied her supervisors, Rottman and Garner. In reporting the "JC student issue," Kohlhausen says she complied with SUNY Rockland protocol and by procedures learned in Excellence in Teaching and Learning classes at SUNY Rockland. [Doc. 1 at 28.] Kohlhausen also acknowledges that she emailed Phillips as the Chairperson of SUNY Rockland's Behavioral Awareness and Intervention Committee, which Plaintiff describes as the "resource for RCC faculty and staff by which they can report student behaviors of concern," and which was "developed to handle concerns exactly like" the one at issue. [Doc. 1 at 28.]

In *Weintraub v. Board of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196 (2d Cir. 2010), the Second Circuit found that a teacher's grievance criticizing a supervisor's failure to discipline a student had been made "pursuant to his official duties because it was part-and-parcel of his concerns about his ability to properly execute his duties as a public school teacher—namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and

classroom learning." *Id*. at 203 (internal quotations and citations omitted). Applying the *Garcetti* standard, the Court of Appeals held that the teacher's First Amendment retaliation claim failed. The court noted that its conclusion was additionally supported by the fact that the form of speech at issue—an employee grievance made pursuant to school district policy—had "no relevant citizen analogue." *Id.*

Here, Kohlhausen's complaint says only that she reported "a series of disruptive incidents" by a student in her classroom to her supervisors and to the chairperson of a committee established to deal with behavioral issues. [Doc. 1 at 27.] The complaint does not allege that the incidents were anything more than "disruptive" or more than a matter of classroom discipline. [Doc. 1 at 27-28.] Moreover, Kohlhausen acknowledges that she opted not to report the conduct "through channels available to private citizens," [Doc. 30 at 41], but rather to email a committee set up as a resource for faculty and staff, [Doc. 1 at 28]. That her email to Phillips, as chair of the committee, was sent voluntarily does not protect it. *Weintraub*, 593 F.3d at 203 ("[S]peech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer."). In sending an email concerning behavior or discipline in her classroom, to her supervisors and a school administrator, using channels available only to employees and not to citizens, Kohlhausen did not engage in protected speech.

Kohlhausen adds, however, that she expressed her concerns over the "JC student issue" to two co-workers. [Doc. 1 at 28.] As "[m]any citizens do much of their talking inside their respective workplaces," such comments may constitute protected citizen speech. *Garcetti*, 547 U.S. at 420. Indeed, as the lower court held in *Weintraub*, conversations with co-workers lie outside the scope of a teacher's employment duties where teachers have no official duty to discuss the issue with colleagues and further do not engage in such discussions through a school-instituted dispute

resolution process. *Weintraub v. Board of Educ.*, 489 F. Supp. 2d 209, 220 (E.D.N.Y. 2007) (issue not appealed). Thus, to the extent that Kohlhausen bases her First Amendment retaliation claim on her comments to her co-workers, she has sufficiently stated a First Amendment claim.

Kohlhausen ultimately argues that the Court should find reporting the "JC student issue" was protected speech for the policy reason that schools should encourage—not discipline—reporting of suspicious or disruptive behavior, in order to avoid potential tragedies. [Doc. 30 at 42.] On this point, Kohlhausen's challenge is really to *Garcetti* and its progeny, and her argument finds support from the *Garcetti* dissents by Justices Stevens, Souter, and Ginsberg. *See, e.g.*, 547 U.S. at 427 (Stevens, J., dissenting) ("The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong."). Indeed, as Kohlhausen argues, disciplining employees for reporting to the very committee created to give the school notice of potentially dangerous behavior disincentivizes use of the committee at all. *See id.* at 428 (Souter, J., dissenting) ("But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection."). Yet though this Court finds such arguments persuasive, it remains bound by the holding in *Garcetti* and its progeny, and thus, particularly given the heightened pleading standard of *Iqbal* and *Twombly*,[7/] must dismiss Kohlhausen's First Amendment claims to the extent they stem from reports to her supervisors or to Dean Phillips.

[7/]The *Iqbal* and *Twombly* interpretation of Rule 12(b)(6) has been correctly criticized as "contrary to many of the values underlying the Federal Rules" and "that the Court's preoccupation with defense costs is misplaced and its belittlement of case management as a way of cabining those costs is unpersuasive." Arthur Miller, *From Conley to Twombly to Iqbal: a Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 2 (2010).

The Rockland Defendants also move to dismiss Kohlhausen's Fourteenth Amendment procedural due process claim, arguing that the existence of pre- and post-deprivation remedies defeats that claim. [Doc. 24 at 25.] Kohlhausen does not oppose, and has therefore abandoned that claim. *See Hanig v. Yorktown Cent. Sch. Dist.*, 384 F. Supp. 2d 710, 723 (S.D.N.Y. 2005). Kohlhausen's procedural due process § 1983 claim is thereby dismissed.

Finally, the Union Defendants challenge Kohlhausen's Fourteenth Amendment due process and First Amendment claims, alleging that Kohlhausen must but cannot show that the Union Defendants conspired with SUNY Rockland to violate her constitutional rights. [Doc. 21 at 16.] Because Kohlhausen has abandoned her due process claim as against the Rockland Defendants, she cannot reasonably argue that the Union Defendants conspired with the Rockland Defendants to deprive her of due process. The Court grants the Union Defendants' motion to dismiss on those grounds.

Nor does Kohlhausen allege sufficient facts to support her First Amendment claim against the Union. Though she says that the Union failed to represent her in connection with the "JC student issue," [Doc. 1 at 30, 44], as the Court has previously discussed, Kohlhausen has not established that the Union owed Kohlhausen a duty of representation. Consequently, the Union's failure to pursue the "JC student issue," certainly does not rise to the level of plausibly suggesting a conspiracy between the Union and Rockland Defendants. The Court thus dismisses Kohlhausen's First Amendment claims against the Union Defendants as well.

VII. Intentional Infliction of Emotional Distress Claims

Lastly, the Court considers Kohlhausen's state law claim for intentional infliction of emotional distress, as against the County, the individual Rockland Defendants in their personal capacities, and the Union Defendants. The Defendants argue that Kohlhausen has not pled facts that

would establish such "extreme and outrageous conduct" necessary to support such a claim. *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 355 (N.Y. 1985). The Rockland Defendants additionally argue that much of the conduct alleged falls outside the one year statute of limitations for intentional infliction of emotional distress claims. [Doc. 24 at 32.]

The New York statute of limitations for intentional infliction of emotional distress is one year. N.Y. Civil Practice Law and Rules § 215(3). However, under the continuing violation doctrine, harm occurring outside the limitations period may serve as the basis for such an action where the plaintiff alleges a continuous harm extending into the limitations period. *White v. City of New York*, No. 09-CV-10127, 2010 WL 2697054, at *3 (S.D.N.Y. July 7, 2010). The series of events alleged to constitute continuous harm "must not be isolated and sporadic outbreaks of discrimination but a dogged pattern." *Id.* (internal quotations omitted).

Kohlhausen has alleged a series of related events, which run from summer 2007 through spring 2009, and thus into the limitations period. Her claim of prolonged harassment includes the assertion that in March 2009, Newhem made unscheduled visits to Kohlhausen's office to intimidate her, and that on April 20, 2009, Kohlhausen's office was broken into and her bookshelves and a large picture frame loosened so that when she sat down they crashed on top of her. [Doc. 1 at 31.] Kohlhausen says that a confidential letter from Rockland Vice President Baker was "strategically" placed on her desk, suggesting that Newhem or another of the Defendants orchestrated the incident. [*Id.*] Kohlhausen also alleges that the next day, Newhem began signing her up for over forty mental health, pharmaceutical, and infectious disease-related newsletters. [Doc. 1 at 31.]

When considered together with other incidents alleged by Kohlhausen, and particularly at this stage of litigation, these events sufficiently state a claim for intentional infliction of emotional distress. To be sure, the "extreme and outrageous conduct" standard is a high one. *Howell v. N.Y.*

Post, 612 N.E.2d 699, 702 (N.Y. 1993) (standard is "rigorous, and difficult to satisfy"). Nonetheless, Kohlhausen has pled facts which support an intentional infliction of emotional distress claim. In addition to Newhem's discriminatory conduct and extremely offensive language, Kohlhausen says she received several physical threats from Newhem, including threats to "kill and destroy her." [Doc. 1 at 7-9, 14.] Kohlhausen's complaint specifically alleges that in November 2007, Newhem yelled that he wanted to kick Kohlhausen in the uterus and smash her in the face, "just for being you." [Doc. 1 at 13.] The complaint further alleges that Newhem shouted at Kohlhausen, "don't fuck with me or you are dead. That email will be your suicide note and I'll slip it into your coffin as they lower you into the ground just so you'll always remember." [Doc. 1 at 15.] Additionally, Kohlhausen alleges that she repeatedly saw Newhem hanging around her car or going into her office unauthorized, and that in August 2008, Newhem slashed the tires of her car. [Doc. 1 at 20.] Kohlhausen says she expressed her fear of Newhem to SUNY Rockland administrators and trustees. Her complaint also alleges that Kohlhausen obtained an "agreement" from Newhem and other Rockland officials that Newhem would stay away from her—an agreement Kohlhausen alleges Newhem violated. [Doc. 1 at 21.]

The Court finds that Kohlhausen's complaint sufficiently alleges a longstanding campaign of intimidation and harassment "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *See Murphy v. American Home Products*, 448 N.E.2d 86, 90 (N.Y. 1983) (citing *Fischer v. Maloney*, 373 N.E.2d 1215, 1217 (N.Y. 1978) (adopting definition from Restatement (Second) of Torts § 46(1), comment *d*)); *see Eves v. Ray*, 840 N.Y.S.2d 105, 106 (N.Y. App. Div. 2007) ("deliberate and malicious campaign of harassment or intimidation" sufficient for intentional infliction of emotional distress (IIED) claim); *see also Shannon v. MTA Metro-North*

Railroad, 704 N.Y.S.2d 208, 219 (N.Y. App. Div. 2000) (pattern of harassment, intimidation, humiliation and abuse sufficient to state IIED claim). Kohlhausen has also sufficiently plead that Newhem knew his actions would cause emotional distress and that she actually experienced psychological and emotional harm from those actions. [Doc. 1 at 10, 15.] *Gay v. Carlson*, 60 F.3d 83, 89 (2d Cir. 1995) (plaintiff must also prove defendant's intent or knowledge, causal link, and severe emotional distress to establish IIED).

The Union Defendants separately contend that they cannot be liable for intentional infliction of emotional distress. They say that neither a breach of the duty of fair representation nor the Union's actions themselves support such a claim. [Doc. 27 at 22.] Kohlhausen alleges only that the Union failed to represent her, and that Garner commented to her: "don't flatter yourself, you are not hot enough to flip a gay guy," [Doc. 1 at 10.] The Court finds that these allegations fall far short of the strict standard for an intentional infliction of emotional distress claim against the Union Defendants.

VIII. Conclusion

For the foregoing reasons, the Court **GRANTS** the Rockland Defendants' motion to dismiss Kohlhausen's (1) Title VII claim as to individual defendants; (2) 42 U.S.C. § 1983 and state law claims as to SUNY Rockland and its board of trustees; (3) 42 U.S.C. § 1983 and state law claims as to the SUNY Rockland Defendants in their official capacities, except for Kohlhausen's Fourteenth Amendment equal protection claim; (4) Fourteenth Amendment procedural due process claim; and (5) First Amendment claims stemming from speech to Dean Phillips or to Kohlhausen's supervisors. The Court thus **DENIES** the Rockland Defendants' motion to dismiss as to Kohlhausen's remaining claims.

In addition, the Court **GRANTS** the Union Defendants' motion to dismiss Kohlhausen's (1)

Title VII and New York Human Rights Law union discrimination and retaliation claims; (2) Fourteenth Amendment procedural due process claims; (3) First Amendment claims; and (4) intentional infliction of emotional distress claim.

Finally, the Court permits Kohlhausen to amend her complaint, at this time, only to plead that the County receives federal funding for purposes of her Title IX claim. To the extent that Kohlhausen otherwise seeks to amend her complaint, the Court does not grant leave at this time. *See, e.g.*, *Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 73 (2d Cir. 1998) (decision to grant or deny motion to amend complaint is within the sound discretion of the trial court; denial of leave to amend upheld where amendment is based on facts known at time of pleading and would delay final disposition). Upon proper motion, the Court will separately consider future motions to amend.

IT IS SO ORDERED.

Dated: February 9, 2011

JAMES S. GWIN
UNITED STATES DISTRICT JUDGE