

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JOHN DOE ¹ ,)	
)	
)	
Plaintiff,)	
v.)	Civil Action No.
)	
TRUSTEES OF DARTMOUTH COLLEGE,)	
)	
Defendant.)	

COMPLAINT AND JURY DEMAND

INTRODUCTION

1. This lawsuit arises out of the unjust and unlawful expulsion of plaintiff John Doe from Dartmouth College (“Dartmouth”) in April 2017.

2. In August 2016, Plaintiff had a sexual encounter with Sally Smith, another student at Dartmouth. Plaintiff was incapacitated by alcohol on the night in question, has no memory of his interactions with Sally Smith, and was not able to consent to any sexual activity.

3. In October 2016 Sally Smith made a complaint to Dartmouth, alleging that John Doe had physically harmed her during their night together in August 2016. Dartmouth opened an investigation into her complaints under its sexual misconduct policy, despite no allegation of sexual misconduct. John then alerted Dartmouth that Sally Smith had engaged in sexual contact with him while he was incapacitated by alcohol, and had also engaged in physical violence

¹ Plaintiff seeks to file this complaint and all pleadings under pseudonym due to the serious and false nature of the allegations against him and the privacy implications to both himself and Sally Smith, and has concurrently filed with this complaint a motion requesting such a designation. Plaintiff will file an affidavit, under seal, providing his name, address, and attesting to the accuracy of the facts alleged in the Complaint if the Court so requests.

against him. On its own, Dartmouth decided to investigate whether John Doe had engaged in nonconsensual sexual contact with Sally Smith.

4. In March 2017, Dartmouth decided that John had not engaged in nonconsensual sexual misconduct with Sally, but he had engaged in actions that could have caused her physical harm. Contrary to the evidence it had collected, Dartmouth decided that Sally had not engaged either in actions that could cause John physical harm, or nonconsensual sexual acts with John.

5. After substantial confusion on Dartmouth's part about the requirements of its own policies, the school sent John's case to its Committee on Standards for sanctioning. Dartmouth gave the Committee a limited and fragmented summary of the information gathered during the investigation, but refused to let John (or Sally) clarify the details of the events, appear before the committee, or submit any information for it to consider. Under Dartmouth's policies, in cases of either sexual misconduct or non-sexual conduct violations, students are guaranteed the right to present information to the body making the sanctioning decision.

6. After receiving a sanction of expulsion, John sought to appeal the findings and sanction. Dartmouth removed his case from the Committee on Standards and returned it to the sexual misconduct adjudicatory system for the appeal. In May 2017, John's appeal was denied and he was expelled from Dartmouth.

7. Plaintiff has suffered and will continue to suffer serious damages as a result of Dartmouth's actions, including but not limited to the loss of his Dartmouth degree, loss of other educational opportunities, the loss of job opportunities, reputational harm, and emotional distress.

JURISDICTION AND VENUE

8. This action arises out of Dartmouth's breach of its contractual and other obligations to the plaintiff, as well as its violations of Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681).

9. The plaintiff is an out-of-state resident, and the defendant is a resident of New Hampshire. The amount in controversy is over \$75,000.

10. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332.

11. Venue is proper in this district under 28 U.S.C. § 1391(b).

PARTIES

12. Plaintiff John Doe ("Plaintiff" or "John") is a U.S. citizen who resides outside of New Hampshire. At all times relevant to this complaint he was a student at Dartmouth College.

13. Defendant Trustees of Dartmouth College ("Dartmouth") is a partially federally-funded private liberal arts college in Hanover, New Hampshire.

FACTS

Plaintiff's Interactions with Sally Smith

14. Plaintiff met Sally Smith in the summer of 2016, while both were students at Dartmouth.

15. In or around late July 2016, Plaintiff and Sally Smith had a consensual sexual interaction. During that interaction, Sally Smith expressed to John that she was interested in sadomasochistic ("S&M") sexual practices, and began slapping him across the face.

16. On the night of August 4, 2016, Plaintiff attended a party hosted by his fraternity. The purpose of the party was to consume large quantities of alcohol. Plaintiff did not know that Sally Smith had been invited to the party.

17. Between 5:30pm-6:30pm on the night of August 4, 2016, John drank approximately 36 ounces of a drink that was predominantly hard alcohol. Plaintiff's last memory of the evening was throwing up into a trash can near his bedroom sometime between 6:30pm-7:00pm. He does not have any memory of seeing Smith that night.

18. Plaintiff woke up early in the morning of August 5, 2016, to find Sally Smith in his bed. The two engaged in consensual sexual intercourse. Sally Smith then informed Plaintiff that they had had a sexual encounter the previous night, which Plaintiff told her he did not remember. Smith told Plaintiff that things had gotten a bit "rough" the previous night.

19. Plaintiff had been incapacitated by alcohol the previous not, and had not been capable of consenting to sexual activity.

20. Smith got dressed and left Plaintiff's room, and Plaintiff went back to sleep.

21. When Plaintiff woke up later that morning, he was in pain. He noticed that he had bruises and scratches on his arms and back, that his nipple was bleeding, and that he was experiencing extreme pain in his genitalia.

22. Plaintiff received a text message from Smith with photographs of herself, demonstrating that she also had bruises on her body. In the text message she said the previous night had been "fun."

23. The two met to talk to that afternoon, and Smith told Plaintiff that the previous night they had engaged in rough foreplay, that both were slapping each other, that they had fallen off of the bed a number of times, and that Plaintiff had asked her to leave multiple times during the evening.

24. Plaintiff was extremely upset to learn what had happened when he was blacked out from alcohol the night before.

25. Smith then indicated she wanted to have sexual intercourse with Plaintiff, which Plaintiff declined.

26. Smith made comments to him about a friend of hers who had been falsely accused of sexual assault, and said she would never do such a thing to Plaintiff. She stated that if Plaintiff had sex with her that afternoon it would be helpful to his “case.” Plaintiff understood these comments to be a veiled threat that she would make a complaint against him if he did not have sex with her that afternoon.

27. Plaintiff was extremely uncomfortable when he saw Smith thereafter, and attempted to avoid her in social situations.

The Parties’ Complaints to Dartmouth

28. In October 2016, Smith filed a complaint of physical assault against John Doe with Dartmouth’s Title IX office, regarding the night of August 4-5. She explicitly told Heather Lindkvist (“Lindkvist”) the dean she spoke with, that the sexual behavior that night and the following morning was consensual.

29. Heather Lindkvist and the Director of Judicial Affairs had the authority, under Dartmouth’s Unified Disciplinary Procedures for Sexual Assault (“Unified Procedures”), to “determine that the claims other than those under this policy should be referred in their entirety to the disciplinary system of the Responding Person’s school.” For John Doe, the relevant disciplinary system would have been the Dartmouth College Committee on Standards, which handles allegations of non-sexual misconduct.

30. Although Smith had made no complaint of sexual misconduct against Plaintiff and had specifically informed Dartmouth that all sexual activity was consensual, Dartmouth notified John that it was launching an investigation under the Unified Procedures into whether he

violated Standard I of the Dartmouth Standards of Conduct (actions that could harm another student) and whether he violated Standard III of the Dartmouth Standards of Conduct (sexual misconduct).

31. Dartmouth hired a former prosecutor, Nancy Sheahan, to conduct an investigation into Smith's complaints pursuant to the Unified Procedures.

32. On November 2, 2016, John Doe filed a complaint against Smith for engaging in sexual acts with him on the night of August 4, 2016, when he could not consent because he was incapacitated by alcohol, and for physically assaulting him, resulting in the injuries he had when he woke up the morning of August 5, 2016. Dartmouth assigned Ms. Sheahan to investigate John's claims against Smith as part of her ongoing investigation into Smith's claims.

33. John and Smith both submitted to Ms. Sheahan photographs of their bodies on August 5, 2016, showing bruises and in John's case, scratches.

34. Smith submitted her text communications with friends and with John from August 5, 2016.

35. In her text messages to her friends early in the morning on August 5, 2016, Smith told one friend that the night before John had been "super blacked," (meaning blacked out from alcohol consumption), and noted to another that she could tell when he "blacked in" in the morning. In her text messages to John when he stated he could not remember anything from the previous night she replied, "yeah you were really really out."

36. In her interview with the investigator, Smith repeatedly attributed John's actions to his being drunk, and told the investigator that she had told John she knew he was "really out" on the night of August 4th.

37. In her interviews with Dartmouth administrators and the investigators, Smith stated that on the night of August 4-5, she engaged in sexual acts with John Doe, including kissing, “dry humping,” and performing oral sex on him in a shower.

38. Smith told the investigator “this is not a nonconsensual sex case.”

39. Smith told the investigator that on the night of August 4-5, she instigated a wrestling match with John Doe. She told the investigator she was on top of John Doe during their entire encounter.

40. Early in the morning of August 5, Smith texted a friend that she was “so so in to” the rough play she and John engaged in. She texted another “we were both enjoying rough playing around.” Later that afternoon she texted a friend and said her interaction with John was “both fully consensual.”

41. All of the referenced text messages from Smith were included in Ms. Sheahan’s investigation report.

42. On January 26, 2017, Ms. Sheahan provided John and Smith with copies of her preliminary investigation report, which included her factual findings.

43. On February 8, 2017, counsel for John Doe spoke to counsel for Dartmouth and asked if Dartmouth would honor a request from both students to end the investigation. Counsel for Dartmouth responded by email on February 9, 2017, and said that while Dartmouth would not end the investigation “[i]f the students reach a settlement, they may feel free to share information concerning the settlement with the investigator; and if the investigator makes a finding of responsibility, they may share such information with the sanctioning panel.”

44. Upon information and belief, or about February 9, 2017, counsel for Smith spoke to Ms. Sheahan and indicated that both parties had come to an agreement and wished to terminate the investigation.

45. On February 13, 2017 John Doe provided Ms. Sheahan with a detailed response to the report, highlighting the substantial evidence Sheahan failed to credit and numerous discrepancies in Smith's testimony.

46. On March 3, 2017, Dartmouth notified John Doe that he had been found responsible for a violation of Standard I (putting another student at risk of physical harm), but not responsible for a violation of Standard III (sexual misconduct). It also notified him that Smith had been found not responsible for violations of Standard I and Standard III.

The Sanctioning Process

47. On March 3, 2017, Interim Director of Judicial Affairs Katharine Strong sent John Doe a letter stating that she was convening a sanctioning panel pursuant to the Unified Procedures, and that he had one week in which to submit a statement of impact to the sanctioning committee.

48. The Unified Procedures clearly state, "If, prior to or during the investigation of a complaint under this policy, either party alleges a violation of other College policies or standards of conduct arising from the same set of facts, all claims will ordinarily be investigated and have responsibility determined by the Investigator assigned to investigate the complaint under this policy, with the sanction for any finding of responsibility for claims other than those under this policy determined by the disciplinary system of the Responding Person's school."

49. On March 9, 2017, John Doe notified Dean Strong that the Unified Procedures did not allow for a panel under that policy to decide his sanction for a violation of Standard I, and that a Committee on Standards Misconduct Panel was required to determine the sanction.

50. On March 10, 2017, John Doe submitted a sanctioning statement to Dean Strong. In that statement he noted that he and Smith had come to an agreement about what was necessary to resolve the situation, and that he would voluntarily stay off campus until she graduated. Upon information and belief Smith sent a similar letter to Dean Strong.

51. On March 10, 2017, Dean Strong told John that he was correct as to what the policies allowed, and stated that she would be creating a 1.5-page summary of the investigator's 531-page investigation report, and providing only that summary to the Committee on Standards to decide John's sanction.

52. Under Dartmouth's Standards of Conduct, when the Committee on Standards hears a case there is a hearing where the accused student "is entitled to request witnesses, to present information and argument, and to hear and question the information presented during a hearing." The Committee on Standards then makes findings of fact, determines whether there has been a policy violation, and determines a sanction.

53. Neither the Standards of Conduct nor the Uniform Procedures allow for a sanction to be imposed on a student based only on a 1.5 summary of findings prepared by a Dartmouth administrator.

54. In Doe's case, the 1.5 page summary failed to include substantial relevant evidence, for example, evidence gathered demonstrating that Smith told friends she had enjoyed her night with John Doe immediately thereafter, evidence that Smith was the one who initiated a

wrestling match that may have led to the parties' bruises, and evidence that Smith maintained contact with John Doe and repeatedly visited his residence in the weeks following the incident.

55. Most importantly, the summary failed to include the facts that the parties had come to an agreement about the situation, that both had inquired about having the investigation terminated without being completed, and that neither felt a sanction from Dartmouth was appropriate for John Doe.

56. Under both the Unified Procedures and the Committee on Standards procedures, when a student is being sanctioned for misconduct, he has the opportunity to appear before, or make a written presentation to, the panel or person deciding that sanction.

57. The Unified Procedures provide: "The Reporting and Responding Persons may each submit a statement of position to the Sanctioning Panel by providing a copy to the Director of Judicial Affairs within five (5) calendar days after the Director has notified them of the Investigator's determination of responsibility."

58. Dartmouth's Standards of Conduct set forth the procedures for hearings before the Committee on Standards. That document states "[r]esponding students are expected to attend their own COS hearing The purpose is to provide the student an opportunity to be heard and to provide the Cos relevant information on which to base a decision." With respect to how a COS sentence is determined, the Standards of Conduct state "[w]here, after a hearing, the COS finds a student responsible for one or more violations, it will then recommend a sanction to the Chair."

59. Unlike virtually every other disciplinary case heard at Dartmouth, Strong indicated that John's was to be decided without him having any opportunity to appear before or write to the person or people deciding his sanction.

60. On March 20, 2017, John sent Dean Strong an email arguing that under Dartmouth's policies he should be allowed to appear before the Committee on Standards panel, as all students whose cases are handled by the Committee on Standards are allowed to do. In the alternative, he asked to be allowed (and for Sally Smith to be allowed) to write a statement to the Committee on Standards panel.

61. On March 22, 2017, Dean Strong denied John's request.

62. On March 29, 2017, Dartmouth informed John that the Committee on Standards had imposed an immediate separation as sanction for his violation of Standard I.

The Appeal

63. The letter notifying John that he was separated from the school stated that both he and the complainant had the right to appeal the decision.

64. The letter stated that in order to appeal, John had to "set forth the specific grounds for reconsideration as described in the Unified Disciplinary Procedures for Sexual Assault."

65. On April 5, 2017, John Doe submitted an appeal of the investigator's findings and the Committee on Standards' sanction.

66. As grounds for the appeal of the investigator's findings John Doe pointed to the investigator's evident bias and failure to apply the required preponderance of the evidence standard as to both of the allegations he had made against Smith.

67. As grounds for the appeal of the sanction John Doe pointed to the extreme procedural irregularities in how the case was handled at the sanctioning stage, the fact that Dartmouth failed to provide the sanctioning panel with relevant evidence, and the disproportionate nature of the sentence compared with Dartmouth's past sentences for similar violations.

68. The appeal was heard by Rebecca Biron, Dean of the College at Dartmouth.

69. On May 2, 2017, Dean Biron upheld the Committee on Standards' decision.

70. Dean Biron had previously expressed biased views against men accused of sexual assault, and was not a neutral decision maker in John Doe's case.

71. In 2014, Dean Biron published an article titled "BEHIND CLOSED DOORS: RAPE, MURDER, AND THE MISPLACED CONFIDENCE OF MEN."

72. The article expressed an assumption that men are violent, stating: "[w]hat makes it so hard for some men to question their own assumptions and so easy for them to act boldly and brutally when faced with closed doors?"

73. In that article, Dean Biron equated a Dartmouth undergraduate student who was acquitted by a jury of allegations of non-consensual sex with a classmate to Oscar Pistorius, the South African athlete who admitted to shooting and killing his girlfriend.

74. Dean Biron concluded her article by stating: "We must demand of men, whether in college or not, a bit more self-doubt and a bit less self-confidence when they are faced with closed doors, whether they be physical, verbal, or figurative. The legal system values epistemological humility in order to protect the innocent; individuals should too."

75. These biases were highly inappropriate for an adjudicator of a case involving allegations of sexual misconduct and physical violence between a man and a woman, and upon information and belief influenced her decision to uphold the Committee on Standards' decision.

Pressure on Dartmouth to Respond Harshly to Allegations of Violence Against Women

76. During the pendency of the case against John Doe, significant attention at Dartmouth was focused on the issues of violence against women and sexual misconduct.

77. In 2016 and the first half of 2017 Dartmouth's student paper, The Dartmouth, published more than twenty articles about sexual misconduct, most focused on instances of sexual misconduct at Dartmouth and Dartmouth's handling of those incidents.

78. In February 2017, as reported by The Dartmouth, Dartmouth students staged performances addressing violence against women.

79. In March 2017, as reported by The Dartmouth, the federal government opened its third investigation into Dartmouth's handling of sexual misconduct cases. The first two complaints to the federal government were filed by students in 2013 and 2015, and remained open at the time the third complaint was filed.

80. In May 2017, as reported by The Dartmouth, there were numerous incidents of threats of violence against female students at Dartmouth.

81. As reported by The Dartmouth, students staged a rally to speak out about sexual violence on campus in response to the threats against Dartmouth women.

82. President Phil Hanlon responded to the May 2017 incidents by stating "sexual assault, gender-based harassment, interpersonal violence and stalking have no place in our community."

83. It was against this backdrop that Dartmouth investigated John Doe and Sally Smith's claims against one another, made its decision regarding Doe's responsibility, and expelled Doe from the school.

Consequences of Dartmouth's Decision

84. Plaintiff expected to graduate from Dartmouth in the spring of 2018.

85. When Dartmouth expelled Plaintiff, he was doing an internship with a company he hoped to work for after college. Because of the expulsion, he lost that internship, and presumably the opportunity to ever work with the company in the future.

86. As a result of Dartmouth's actions, plaintiff's ability to obtain his bachelor's degree will be delayed.

87. Plaintiff's academic and disciplinary record has been destroyed, and there is an extremely remote chance that he will be able to complete his undergraduate degree at any school in the United States of a similar quality to Dartmouth.

88. If he can complete his bachelor's degree, plaintiff will have endured substantial delay because of Dartmouth's actions.

89. Because of the expulsion on his record, the possibility that plaintiff will gain entry into graduate school is likewise remote.

90. As a result of Dartmouth's actions, Plaintiff has suffered stress and mental anguish.

91. Without appropriate redress the unfair outcome of Dartmouth's flawed disciplinary process will cause irreparable harm to plaintiff by not permitting him to complete his education at Dartmouth, impairing his ability to continue his education elsewhere, and impacting his ability to work in his chosen field should he complete his bachelor's degree.

CAUSES OF ACTION

I. Title IX

92. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

93. Pursuant to Title IX of the Education Amendments of 1972, Dartmouth is prohibited from subjecting plaintiff to a disciplinary proceeding where sex is a motivating factor in the decision to impose sanctions.

94. Pursuant to Title IX of the Education Amendments of 1972 Dartmouth is further prohibited from providing a disciplinary proceeding that is not prompt or equitable.

95. Upon information and belief, at least one Dartmouth administrator involved in John Doe's case held the belief that men are inherently violent, and that women making accusations of sexual misconduct are to be believed, even if a jury has found their story to lack credibility.

96. Dartmouth's employees made incorrect determinations of fact, ignoring substantial evidence presented that supported Plaintiff's claims against Smith and undermined Smith's claims against him.

97. Dartmouth's employees selectively enforced their policies so as to find the male student (John) responsible for policy violations while finding the female student (Smith), not responsible for policy violations despite substantial evidence demonstrating her responsibility. Dartmouth violated plaintiff's right to be free from discrimination on the basis of sex by subjecting him to a disciplinary proceeding marked by the aforementioned procedural flaws and gender bias, that resulted in the plaintiff being found responsible for a policy violation but not the female student.

II. Breach of Contract

98. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

99. Plaintiff paid Dartmouth sums of money for his education, and in return, the University contracted to provide Plaintiff with access to its undergraduate degree program.

100. The relationship between the parties is contractual in nature, and each party owes the other certain duties, some of which can be found in Dartmouth's written policies.

101. Dartmouth breached its contract with Plaintiff by instituting and prosecuting an investigation and adjudication in violation of its policies and procedures.

102. As a direct and proximate result of that breach plaintiff suffered the harms described above.

III. Breach of Covenant of Good Faith and Fair Dealing

103. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

104. Every contract contains within it an implied covenant of good faith and fair dealing.

105. Dartmouth breached that covenant by pursuing that investigation and adjudication in an unfair and biased manner.

106. As a direct and proximate result of that breach plaintiff suffered the harms described above.

Negligence

107. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

108. Dartmouth had a duty of care, imposed on it by its policies and voluntarily undertaken, to handle allegations of sexual misconduct and/or violence fairly and consistently.

109. Dartmouth breached that duty by pursuing its investigation and adjudication in a manner that deviated from its policies, and was unfair and biased.

110. As a direct and proximate result of that breach plaintiff suffered the harms described above.

* * *

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against defendant on all counts of this complaint. Plaintiff further requests that this Court:

1. Order defendant to reverse its finding that plaintiff violated its policies, and expunge his record;
2. Order defendant to reinstate Plaintiff as a student in good standing;
3. Award plaintiff damages and enhanced compensatory damages in an amount to be determined at trial;
4. Award plaintiff the reasonable costs of this action, including attorneys' fees;
5. Grant such other and further relief as this Court deems equitable and just.

PLAINTIFF DEMANDS A TRIAL BY JURY

Date: January 12, 2018

Respectfully submitted,

/s/ William E. Christie
WILLIAM E. CHRISTIE
NH Bar #11255
SHAHEEN & GORDON, P.A.
107 Storrs Street
Concord NH 03302
(603) 225-7262
wchristie@shaheengordon.com

RUTH O'MEARA-COSTELLO
(Mass. Bar. No. 667566)
NAOMI SHATZ (Mass. Bar. No. 677637)
ZALKIND DUNCAN & BERNSTEIN LLP
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020 (telephone)
(617) 742-3269 (fax)
rcostello@zalkindlaw.com
nshatz@zalkindlaw.com
Motions for admission pro hac vice pending

Attorneys for plaintiff John Doe