THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Amy M. Burnap

v.

Somersworth School District

Docket No. 2018-0624

BRIEF OF APPELLEE SOMERSWORTH SCHOOL DISTRICT

Brian J. S. Cullen (NH Bar No. 11265)
CullenCollimore, pllc
10 East Pearl Street
Nashua, NH 03060
(603) 881-5500
To be argued by: Brian J.S. Cullen

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STATEMENT OF THE CASE

The Plaintiff initially filed in the Rockingham County Superior Court a "Plea of Assumpsit." Docket No. 219-2016-CV-00168. Concomitant therewith, she filed a Charge of Discrimination with the New Hampshire Commission for Human Rights, asserting that her termination was based on her sexual orientation. After the Commission failed to make a finding in the statutory time period, the Plaintiff removed the action to Superior Court, adding claims of invasion of privacy, defamation, and intentional infliction of emotional distress. Docket No. 219-2017-CV-00201. The two cases were then consolidated.

On June 14, 2018, Defendant filed a Motion for Summary Judgment on all counts except the Assumpsit claim. Therein, Defendant argued that the tort claims were barred by RSA 507-B and that the lack of evidence of discriminatory animus compelled judgment in its favor on the claim under RSA 354-A. A copy of the Motion and accompanying Memorandum of Law and exhibits thereto is provided in Defendant/Appellee's Supplemental Appendix ("Supp. App.") at 1. After Plaintiff objected, Defendant filed a Reply, Supp. App. 107, to which Plaintiff filed a Sur-reply (Supp. App. 125).

The Court entertained oral argument on September 4, 2018. The Judge repeatedly inquired as to specific evidence that the District's decision to terminate Plaintiff was motivated by discriminating animus. *See e.g.*, Transcript at 27 (Record Appendix 42) ("what's the evidence that they were motivated by their dislike for her sexual orientation?") the Court concluded that there was no such evidence and granted the Motion in full, ruling that

the Plaintiff's tort claims were barred pursuant to RSA 507-B and finding that Plaintiff had failed to provide evidence sufficient to establish either that the District's ground for termination may have been pretextual or that the actual cause of her termination was due to discriminatory bias. This appeal followed. Of note, Plaintiff/Appellant has only appealed the Order insofar as it granted summary judgment on the discrimination claim under RSA 354-A. Plaintiff has not appealed the entry of judgment on the tort claims.

STATEMENT OF FACTS

The Superior Court adequately recounted the salient facts its Order, which facts were properly supported in the underlying Motion and documents filed therewith. Plaintiff does not directly challenge those findings, focusing her argument instead on the Court's conclusion that the facts, taken in the light most favorable to her, did not create trial worthy issues as to whether the stated reason for her termination was a pretext or that the true reason for her termination was discriminatory animus based on her sexual orientation. Plaintiff's Brief ("Pl. Br.") at 17. In this regard, Plaintiff has presented this Court with a truncated Statement of Facts, focusing on the investigation and School Board hearing.[1] Notably absent

[1] Plaintiff has taken some small liberties. For example, although Plaintiff asserts that Dean Carrington "took it upon herself to screen and conduct and investigation," Pl. Br. at 7 (citing App. 46), the record does not reflect that Carrington did anything more than record the reports made to her and forward her compilation to the Superintendent. As to the actual investigators, Plaintiff claims that they "failed to allow her to tell her side of the story" and "ignored evidence of possible motive and/or collusion," Pl. Br. at 8, but fails to support the conclusory statements with any specific

from Plaintiff's rendition (and the summary judgment objection) is any properly supported statement of fact that evidences that the reporting parties, the investigators, or the decision-makers harbored any discriminatory animus based upon Plaintiff's sexual orientation. The absence of such facts is fatal to Plaintiff's appeal.

A fuller accounting of the facts is set forth in the summary judgment papers. The facts critical to this Court's analysis include the following:

Plaintiff's Initial Hire

The Plaintiff was hired by the District as the Dean of Students in the Somersworth High School in July, 2015. Affidavit of Lori Lane ("Lane Aff.") Supp. App. 23 at ¶3. An administrative position, the Plaintiff's responsibilities included oversight of student discipline and enforcement of school rules and regulations. *Id.* In this capacity, she was to work closely with the principal and the guidance team. *Id*. The Plaintiff's sexual orientation was not a factor in the hiring decision. *Id.* at ¶4. Indeed, both the City of Somersworth and the District are renowned for their progressive views on LGBT issues as exemplified by the election of an openly gay mayor who happens also to be the middle school principal. Plaintiff believes the Superintendent was gay. Sup. App. 33.

The Initial Complaints

On Friday, January 15, 2016, Career Technical Center secretary Kerry Canard reported an incident to her immediate supervisor, Katelyn Carrington. Affidavit of Katelyn Carrington ("Carrington Aff."), Supp.

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evidence of such.

App. 26. Canard told Carrington that she had given the Plaintiff the finger when the Plaintiff had asked her to do some task, and the Plaintiff responded "I'm going to say something inappropriate. I probably shouldn't, but I will anyway. I prefer two or three." *Id.* at ¶4. Canard said that she was shocked upon realizing the connotation and conceded to Carrington that she called Burnap a "bitch" in response. *Id.* After that, Canard told Carrington, the Plaintiff brought her two small gifts (maple syrup and a pink monkey). *Id.* She said that she felt uncomfortable around the Plaintiff and was considering changing her hours to reduce their interactions. *Id.*

Carrington was unable to report the complaint to the principal, Sharon Lampros, that day as Lampros was in a meeting. Carrington Aff. ¶5. As she left school, however, Carrington saw Donna Robison and Erich Ingelfinger together in classroom. *Id.* at ¶6. Ingelfinger reported to Carrington that the Plaintiff had made an inappropriate sound and comment ("that's so hot") at the beginning of the school year when seeing two female staff (Lisa Sloan and Lesley Unger) greeting each other with a hug, accompanying the comment with a physical gesture. *Id.* Robison added that the Plaintiff had made a gay/straight joke in front of students just before Christmas, commenting "I don't do straight" when a student noted that a stocking on the wall was off center. *Id.*

On Tuesday, January 19 (Monday being Martin Luther King Day), Carrington orally reported the complaints to Superintendent Jeni Mosca, who said she would ask Lampros to review the matter. Carrington Aff. ¶7. On Friday, January, 22, 2016, another staff member (Sue Garand) relayed to Carrington an incident that occurred the day before (Thursday, Jan. 21).

Id. at ¶8. Specifically, Garand reported that just before a Guidance Administration Meeting, some team members were discussing the use of handcuffs on students with School Resource Officer Rick Campbell. *Id.* Officer Campbell put handcuffs on a female staff member who wanted to see if she could slip out of them. *Id.* Garand relayed that Plaintiff reportedly made "an orgasmic type sound" and stated "I am so turned on right now." *Id.* Carrington informed Lampros of this report and together they contacted Mosca. *Id.* at ¶9. Carrington also provided a written summary of the complaints. *Id.* *See* Affidavit of Jeni Mosca ("Mosca Aff."), Supp. App. 30, and Ex. 1, thereto (Supp. App. 34).

The Investigation

Mosca assigned Lampros and Title IX Coordinator Pamela MacDonald to investigate the complaints. Mosca Aff. ¶8. Both women were experienced administrators familiar with the conduct of investigations in general, even though neither had specifically investigated a sexual harassment claim. *Id.* Over the course of the following week, Lampros and MacDonald interviewed each of the complaining witnesses and several other staff members, gaining specific details of the Plaintiff's alleged actions. Affidavit of Pamela MacDonald ("MacDonald Aff.") Supp. App. 61. *See also* Plaintiff's Appendix ("Pl. App.") 139-59 (notes of witness interviews).

Lesley Unger reported to the investigators that at the start of the school year, the Plaintiff observed her and Lisa Sloan, two staff members, hugging. She later said to Unger: "I hope you don't mind me saying this, but when I see two beautiful women hugging and kissing [pause to bite

thumb] it is so hot." Unger was uncomfortable with this comment and felt it was inappropriate. MacDonald Aff. at ¶5 (Supp. App. 61).

Canard, reported that the Plaintiff frequently looked her up and down in what seemed to be a sexual manner. She related one such incident that occurred in the fall during Homecoming week, when Canard was dressed as Batman (consistent with the day's superhero theme). The Plaintiff looked her up and down in a manner Canard felt was "check[ing] her out" and made a noise signaling her approval and then walked away. Canard perceived these actions as sexual in nature and was uncomfortable. MacDonald Aff. at ¶7 (Supp. App. 62).

By January, 2016, Canard relayed, she was already extremely uncomfortable with the way the Plaintiff interacted with her. She related to the investigators the incident of January 12, 2016, which she had previously reported to Carrington, including giving Plaintiff the finger. She told the investigators that Plaintiff responded that she was going to say something "inappropriate" and quickly followed with a statement that she "preferred two or three." Canard interpreted the Plaintiff's comments as sexual in nature and was uncomfortable. Canard alleged that after the exchange, the Plaintiff began giving her gifts which also made her uncomfortable. MacDonald Aff. at ¶8 (Supp. App. 62).

Lampros and MacDonald also heard extensive reports concerning the January 21, 2016, Guidance Administration Meeting. There, they were told, the Plaintiff and five to six staff members were convened prior to the meeting "joking around" or "blowing off steam." Plaintiff was the only administrator present. After discussing how the SRO sometimes has to

handcuff students' wrists in one handcuff to prevent them from escaping the cuffs, Sloan asked him to demonstrate that on her. The attendees differed on the precise wording, but generally reported that the Plaintiff said something to the effect of "This turns me on," "This is so hot," or "Don't get me turned on" while watching this. She also allegedly "bit down on her knuckle and made an 'unh unh' noise." MacDonald Aff. ¶9 (Supp. App. 62-63).

Lampros and MacDonald interviewed the Plaintiff twice during the investigation. In the initial interview, the Plaintiff professed not to remember some of the events (like the hugging comment) but admitted to making the "two to three" finger comment and the "I don't do straight," saying both were jokes. She completely denied making any sexual comment at the GAM meeting. MacDonald Aff. ¶10 (Supp. App. 63).

After the first interview of Plaintiff the investigators spoke with Lisa Lucier. Lucier, a guidance secretary, reported that on January 22, 2016, the Plaintiff sat on a chair by her desk saying it was comfortable and, "it turns me on." Lucier perceived this as sexual in nature and was uncomfortable. She also stated that Plaintiff was demeaning in speaking with her about locating another staff member, telling Lucier she was "pretty smart for a blonde." MacDonald Aff. ¶12 (Supp. App. 63-64).

The investigators asked Burnap back for a second interview to address Lucier's claims. There, they felt the Plaintiff was "openly hostile" – kicking the door stop out from under the door and letting the door slam shut. The investigators found this conduct to be aggressive and intimidating. The investigators reported that the Plaintiff denied making

specific statements about the chair or the blonde joke. MacDonald Aff. ¶13 (Supp. App 64).

At the conclusion of the investigation Lampros and MacDonald prepared a lengthy report. The report included summaries of all of the witness interviews, including Plaintiff's tearful claim to have been the victim of sexual abuse. They concluded that "The evidence substantiates that [the Plaintiff] engaged in multiple occurrences of sexual innuendos with subordinates which have created an offensive and hostile working environment." They also said they believed her actions at the second interview were designed to retaliate against or intimidate them. They recommended termination. MacDonald Aff. ¶14 (Supp. App. 64). *See also* Mosca Aff. Ex. 2 (Supp. App. 36-49).

Mosca reviewed the report and agreed both with the conclusions and the recommendation. On February 8, 2016, she formally notified the Plaintiff that she would be pursing that recommendation with the School Board. Mosca Aff. ¶9 (Supp. App. 31).

School Board Hearing

The School Board held over the course of three evenings which the Plaintiff and twelve other witnesses testified regarding the allegations. The Plaintiff was represented by counsel and had an opportunity to examine the witnesses and present her own witnesses. The District witnesses admitted that they had been given and reviewed the Investigator's Report of Harassment and the Plaintiff's response thereto prior to testifying before the Board, something counsel repeatedly addressed to the Board. Mosca Aff.

¶11 (Supp. App. 31).

The testimony before the Board included the following:

Canard testified that the Plaintiff made an orgasm sound similar to the dinner scene in "When Harry Met Sally" when she was wearing her Batman outfit on "superhero day" (Sept. 28, 2015). *See* Transcript of School Board Hearing ("SB Trans.") at 73-74 (Supp. App. 67-68). She felt uncomfortable but didn't report it. *Id.* at 74-75 (Supp. App. 68). She said after the Plaintiff's January 12, 2016 "I prefer two or three" comment she actually had trouble sleeping and went to see her doctor. *Id.* at 77-78 (Supp. App. 68-69). She cried during this part of the testimony. *Id.*

Lucier testified that she considered the Plaintiff's blonde joke "demeaning" and "inappropriate and unprofessional" coming from one of her bosses. SB Trans. at 129-30 (Supp App. 70-71). She also reported that the Plaintiff told her that the chair in her office "turns me on," which she interpreted as sexual and which made her "very uncomfortable." *Id.* at 130-31 (Supp. App. 71).

Sloan testified that the Plaintiff was her supervisor. SB Trans. at 175 (Supp. App. 72). She said that after she (Sloan) greeted colleague Lesley Unger with a hug and kiss at the beginning of the school year, the Plaintiff said to her that there was something appealing about two attractive women hugging and kissing each other. *Id.* at 178 (Supp. App. 72). She testified that at the Guidance Administrator Meeting the Plaintiff made a "loud, guttural, um, like arousal sound." *Id.* at 180-81 (Supp. App. 73).

Garand also testified about the Guidance Administrator Meeting,

recalling that the Plaintiff said something like "that was so hot" or that "made her so hot" when seeing Campbell handcuff Sloan. SB. Trans. at 210 (Supp. App. 74). She stated that the Plaintiff then "bit down on her knuckle" and made an "orgasmic" sound. *Id.* at 210-11 (Supp. App. 74).

Unger testified that she saw the Plaintiff in her officer shortly after having greeted Sloan at the start of the year and that the Plaintiff reference their hug and kiss, bit down on her knuckle, and made a groaning sound that was "sexual in nature" SB Trans. at 236-37 (Supp. App. 75). She found it "incredibly uncomfortable." *Id.* at 237. She observed that had a man done that she would have reported it right away to the Principal, Lampros. *Id.* at 238 (Supp. App 75).

Lampros and MacDonald also testified (and were cross-examined) about their investigation and conclusions. *See, e.g.*, SB Trans. at 387-96 (Supp. App. 77-79).

The Plaintiff testified at length at the hearing. She admitted making the "I don't do straight" comment, SB. Trans. at 581, but largely denied the remaining allegations. She admitted making the "I prefer two or three" comment, but put a different spin on it: "To me, if somebody's going to flip me off, if they're really serious, if they're really pissed, flip me off two or three times." *Id.* at 552 (Supp. App. 80).

After the hearing the School Board issued a ten page written Decision (Supp. App. 49-59). The Board dismissed two of the charges, finding that the joke "I don't do straight" was not contrary to school policy and that the Plaintiff's conduct at the second interview was not retaliatory

or intended to intimidate. *Id.* They agreed, however, that the other incidents – the response to the staff greeting (hugging incident), the incidents with Canard, the comments to Lucier, and the comments at the guidance meeting - had violated school policies and created an offensive and hostile working environment. They voted to terminate her employment. *Id.*

Evidence of Bias

Each Board member attested that he or she did not consider the Plaintiff's sexual orientation at any time in making the decision to terminate the Plaintiff. *See* Affidavits of Board, attached to Summary Judgment Memorandum as Exhibit F (Supp. App. 82-100). Rather, each decided the issued solely based on the evidence and for the reasons set forth the Board's written decision. *Id.* The Plaintiff did not dispute their assertions. *See* Deposition of Amy Burnap, Exhibit G to Summary Judgment Memorandum at 59 (Supp. App. 104).

SUMMARY OF ARGUMENT

Plaintiff has identified three Questions for Review, although in her argument combines them into a single argument with two subparts. Defendant/Appellee will address each Question for Review in turn instead, albeit flipping the final two questions to address in a more logical order. As will be seen below, there the trial court correctly granted summary judgment in favor of the Defendant on Plaintiff's discrimination claim, properly determining that the Plaintiff had failed to establish either that the Defendant's proffered basis for termination – sexual harassment – was

pretextual or that the true reason for her termination was discriminatory animus based on Plaintiff's orientation. In fact, Plaintiff produced no evidence of discriminatory animus at any level. As such, the court's Order should be affirmed.

ARGUMENT

To establish a viable claim under RSA 354-A, a plaintiff must show that the defendant discharged her because of her protected class – here sexual orientation. RSA 354-A:7, I (2007). *See also Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 153 (1st Cir. 1990) ("The inquiry in a Title VII disparate treatment case is whether the defendant intentionally discriminated against the plaintiff on the basis of a protected attribute.").[2] In the absence of direct proof of discrimination, the Court must review the claim under the framework established in *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)*. *See Ray v. Ropes & Gray LLP*, 799 F.3d 99, 113 (1st Cir. 2015); *E.D. Swett, Inc. v. N.H. Comm'n for Human Rights*, 124 N.H. 404, 408-409 (1983) (noting adoption of federal burden-shifting analysis to state discrimination claims).

Under this analysis, a plaintiff must first show that "(1) she is a member of a protected class, (2) she was qualified for the position, (3) she was the subject of an adverse employment action, and (4) the position remained open or was filled by a person with similar qualifications." *Ray*,

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[2] Because standard is similar to that governing employer liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994), New Hampshire state courts rely on "cases developed under Title VII to aid in [their] analysis." *New Hampshire Dept. of Corrections v. Butland*, 147 N.H. 676, 679 (2002).

799 F.3d at 113. If the plaintiff meets this test, then the burden shifts to the defendant to provide "a legitimate, nondiscriminatory reason for the adverse employment action." *Conward v. Cambridge Sch. Comm*., 171 F.3d 12, 19 (1st Cir. 1999); *see also Ray*, 799 F.3d at 113. This does not require proving the truth of its claim, but merely providing a permissible reason for the termination. In addition, the defendant need not show that its decision was actually motivated by the proffered reason, it "must merely produce a nondiscriminatory reason." *Burns v. Town of Gorham*, 122 N.H. 401, 408 (1982) (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

If the defendant makes its showing, the burden shifts back to the plaintiff to offer sufficient evidence to create a genuine issue of material fact that the proffered reason is pretext for discrimination. *See, e.g*., *McDonnell Douglas v. Green*, 411 U.S. at 804; *Conward*, 171 F.3d 12, 19. Put succinctly by the First Circuit:

> **It is not enough for a Plaintiff merely to impugn the veracity of the employer's justification; [s]he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real and unlawful motive of discrimination.**

Mesnick v. Gen. Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991) (further citations omitted).

On appeal, the Plaintiff agrees that the parties carried their respective burden on the first two prongs of the analysis. Pl. Br. at 32 ("the parties do not contest Plaintiff established a prima facie case of discrimination and

Defendant provided a legitimate, non-discriminatory justification for terminating Plaintiff: sexual harassment"). Plaintiff instead focuses exclusively on the third prong of the *McDonnell Douglas* analysis – asserting that there were disputed facts that if accepted would create a genuine issue as to whether the District's stated reason for termination (sexual harassment) was pretextual and whether the true motivation for her termination was discriminatory bias. *Id*. A review of the record shows otherwise.

I. THE PLAINTIFF HAS NOT IDENTIFIED ANY GENUINELY DISPUTED ISSUES OF MATERIAL FACT.

As this Court well knows, summary judgment is appropriate where the record, viewed in the light most favorable to the non-moving party, shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. RSA 491:8-a. A fact is material only if it "affects the outcome of the litigation." *Weeks v. Co-operative Ins. Co*, 149 N.H. 174, 176 (2003). Here, Plaintiff challenges the Superior Court's finding that she had failed to present sufficient evidence to create a triable issue on the questions of whether: (1) the stated reason for termination was pretextual; and (2) the actual reason for termination was discriminatory animus. The Plaintiff asserts that there are genuine issues of material fact as to each of these issues. That is not so.

The Plaintiff has not identified any factual finding by the Superior Court that she contends is not properly supported by the record, nor has she specified any fact that she believes the court ignored. Rather, she provides an extensive list of questions regarding the inferences she feels should have

been drawn from the undisputed facts, intermingled with legal questions as the proper applications of the inferences she seeks. Pl. Br. at 17-19. For example, she posits the following:

- Whether the Cat's paw theory of discriminatory animus applied?
- Whether a determination had already been made prior to the investigation that Plaintiff had sexually harassed the individuals because of her sexual orientation and the investigation was a sham that served as a pretext to support the decision for termination.
- Whether finding Plaintiff guilty of allegations the Investigators did not asked Plaintiff about was based on Plaintiff's sexual orientation.

Pl. Brief at 17-19 (question 3, 7 and 12). A review of the enumerated list reveals that there are no disputed issues of fact; the Plaintiff merely contests that Superior Court's application of the undisputed facts to the law. *See* Pl. Br. at 16-17 (arguing that based on the evidence "inferences could be dawn as to whether Plaintiff was terminated because of her sexual orientation").

As set forth in the underlying Motion and supporting documents, there were no genuine issues of fact relating to the core issues in this case – pretext and animus. In the absence of disputed issues of material fact, the trial court properly proceeded to the legal analysis of the Plaintiff's claims, as should this Court.

II. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THE UNDISPUTED FACTS DID NOT SUPPORT PLAINTIFF'S CONTENTION THAT THE INVESTIGATION WAS A SHAM.

To succeed in proving that the stated reason for termination was pretextual, the Plaintiff cannot "merely impugn the veracity of the [employer's] justification," but "must produce sufficient evidence to create a genuine issue of material facts as to two points: 1) the employer's articulated reasons for its adverse actions were pretextual, and 2) the real reason for the employer's actions were discriminatory animus." *Ray*, 799 F.3d. at 113 (quoting *Azimi v. Jordan's Meats, Inc.,* 456 F.3d at 228, 246, 1st Cir. 2006). "In assessing pretext, a court's focus must be on the perception of the decisionmaker, that is, whether the employer believed its stated reason to be credible . . . ." *Azimi*, 456 F.3d at 246 (noting that employee's denial of wrong doing not sufficient to raise "inference of pretext" where employer undertook reasonable investigation, heard employee's side of story and decided that other side of story was more credible).

A review of federal cases underscores the significance of this burden. *See, e.g., Jordan v. Summers,* 205 F.3d 337, 343 (7th Cir. 2000). "In order to show pretext, [the Plaintiff] must demonstrate that [the Defendant's] proffered reason was a lie or completely lacks factual basis."); *Murray v. Kindred Nursing Centers West LLC*, 789 F.3d 20, 27 (1st Cir. 2015) ("The short of it is that nothing in this record suffices to support a finding of either knowing falsity or bad faith. Casting aspersions is not enough."); *Conward*, 171 F.3d at 19 ("In order to meet this burden, [the

plaintiff] must offer evidence showing that the defendant's proffered reason is a sham, and that that discriminatory animus sparked the defendant's actions.").

Importantly, even "evidence of a decisionmaker's mistaken judgment is not dispositive of the question of pretext unless that evidence would permit the factfinder to conclude that the stated nondiscriminatory justification for the adverse employment action was either knowingly false or make in bad faith." *Murray*, 789 F.3d at 27; *see also Rivera-Aponte v. Restaurant Metropol #3, Inc*., 338 F.3d 9, 11 (1st Cir. 2003) ("Whether a termination decision is wise or done in haste is irrelevant, so long as the decision was not made with discriminatory animus."). "Even if the reasons for [the employer's action] were mistaken, ill considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown." *Jordan v. Summers*, 205 F.3d at 343 (7th Cir. 2000).

Facing this heavy burden, Plaintiff offers two arguments: (1) the District conducted a sham investigation; and (2) the allegations did not support a finding of sexual harassment. Pl. Br. at 30-41. Neither contention withstands scrutiny.

A. <u>The Investigation Was Not A "Sham Investigation."</u>

Plaintiff correctly observes that a sham investigation in some circumstances can support a finding that the employer's stated basis for termination was pretextual. Pl. Br. at 30-41. Here, however, Plaintiff has not adduced sufficient evidence to demonstrate that the District's investigation was a sham.

To establish a sham investigation sufficient to raise a question of pretext, a plaintiff must to more than simply raise procedural issues or inconsistencies. *Wierman v. Casey's General Stores*, 638 F.3d 984, 997 (8th Cir. 2011) (citing *McCullough v. Univ. of Ark. for Med. Sciences*, 559 F.3d 855, 863 (8th Cir. 2009)) ("shortcomings in an investigation do not by themselves support an inference of discrimination."). *See also Fischbach v. District of Columbia Dept. of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("employer's failure 'to follow its own regulations and procedures, alone, may not be sufficient to support' the conclusion that its explanation for the challenged employment action is pretextual") (quoting *Johnson v. Lehman*, 679 F.2d 918, 922 (D.C.Cir.1982)). It is a reasonable, not perfect, investigation that is required. *See Luster v. Illinois Dept. of Corrections*, 652 F.3d 726, 733 (7th Cir. 2011). Indeed, "the employee must do more than just show that the process was 'poorly conducted.'" *Nekich v. Wisconsin Central Limited*, 290 F.Supp.3d 890, 899 (D. Minn. 2017) (quoting *Roeben v. BG Excelsior Ltd. P'ship*, 545 F.3d 639, 643 (8th Cir. 2008)). Rather, "[i]n a typical sham investigation, persons conducting the investigation fabricate, ignore, or misrepresent evidence, or the investigation is circumscribed so that it leads to the desired outcome (for instance, by deliberately failing to interview certain witnesses)." *Harden v. Marion Cnty. Sheriff's Dep't*, 799 F.3d 857, 864 (7th Cir. 2015). None of those factors are present here.

Plaintiff first asserts that Carrington made an initial investigation and improperly concluded that the Plaintiff's conduct constituted harassment, which she seems to imply tainted the Board's findings. Pl. Br. at 30, 34.

The facts don't support that assertion. At the outset, there is no indication that Carrington "conducted a further investigation for an additional week," as Plaintiff contends, or even any investigation at all. Pl. Br. at 30. Rather, the uncontested facts show that Canard disclosed her interactions with Carrington on January 15th, a Friday. Later that day, Ingelfinger and Robison disclosed additional observations of the Plaintiff. Their statements were unsolicited. Carrington orally reported the disclosures to Superintendent Mosca the very next business day (January 19, the Monday having been a holiday). There is no record support for the claim that Carrington took any other independent steps at that time. On Friday, January 22, 2016, Sue Garond informed her of Plaintiff's conduct at the Guidance Administrative Meeting. Carrington issued her report that day. Her report is purely factual in content and contains no conclusions or indication that she did any "investigation." *See* Pl. App. 136. Thus, nothing about Carrington's handling of the initial reports suggests that she participated in any "sham" investigation – she did nothing more than record and report the statements made to her to the proper supervisors.

Plaintiff next challenges the investigation by Lampros and MacDonald, stating that that: (1) the investigators knew the complaining witnesses better than they did the Plaintiff; (2) the witnesses spoke to each other before being interviewed Pl. Br. at 30-31. Preliminary investigations, however, are frequently conducted by persons familiar with the witnesses. Here, the investigators interviewed over a dozen people and interviewed the Plaintiff twice. Such an investigation compares favorably with the investigation found to be sufficient in *Luster v. Illinois Dept. of*

Corrections, 652 F.2d 726. There, the court noted that the investigator reviewed the incident reports and interviewed the plaintiff, his accuser, and two other witnesses. Like here, the plaintiff was interviewed twice. The federal appellate court rejected claims that the investigation was a sham, despite plaintiff's protests that the investigator was handpicked by the warden, did not check logs and did not review the scene of the incident, and uphold summary judgment for defense.

Finally – and fatally for Plaintiff's appeal – neither Carrington nor Lampros/MacDonald had the final say in the matter. Even if Carrington failed to comply with policy or the investigation by MacDonald and Lampros were lacking in some significant detail, none were the final decision makers with respect to Plaintiff's termination. Carrington merely recorded the reports she received and passed them along to the Superintendent. The investigators were tasked with investigating the complaints and making a recommendation. Ultimately, however, the Board held a three day hearing at which Plaintiff was represented by counsel, was able through counsel to cross-examine the witnesses at length (and did so), and testify on her own behalf. Even were there shortcomings in the underlying reporting and investigation – and it does not appear there were any – there is no basis by which to conclude that the Board hearing itself was a sham.

Plaintiff's cases for a different conclusion are unavailing. Plaintiff cites *Cote v. T-Mobile USA Inc.*, 168 F.Supp.3d 313 (D. Me. 2016), for the proposition that a "precipitous termination" can raise a question of fact as to whether the proffered reason was false. Pl. Br. at 38. There was nothing

"precipitous" about Plaintiff's termination. She was given notice both of the investigation and the hearing. The hearing lasted three evenings and included numerous witnesses, all of whom were examined by Plaintiff's counsel. The Board then considered the matter and issued its decision over two weeks after the last day of testimony. In contrast, in *Cote*, the plaintiff was terminated the day after she was interviewed and without any clear investigation of her defenses, which included a claim that her prior supervisor – who still worked for the company – had approved the conduct on which her termination was ostensibly based.

Mastro v. Potomac Elec. Power Co., 447 F.3d 843 (D.C. Cir. 2006), is likewise distinguishable. In *Mastro* the court was rightly concerned about an investigation into plaintiff's candor conducted by a person who had previously had a physical altercation with the plaintiff in which he had to be restrained, and who failed to even interview the plaintiff as part of his investigation. Here, Plaintiff has presented no evidence that MacDonald or Lampros had any bias against her. Moreover, they interviewed her twice. Finally, as noted, the Board then held a full and comprehensive hearing at which Plaintiff enjoyed every imaginable due process right. The Board even found in Plaintiff's favor on some of the claims, concluding that the "I don't do straight" comment was innocuous and that the evidence of an attempt to intimidate or threaten the investigators was insufficient to sustain a finding against her. Such conclusions hardly evidence a tainted process.

B. <u>The Board's Conclusion Was Adequately Supported.</u>

Plaintiff also argues that the decision was pretextual because, she claims, her alleged conduct did not violate did not "meet the test outlined in

their Policy [on] Sexual Harassment," Pl. Br. 35 (citing Policy "GBAA" – App. 199-202). That policy, however, expressly defines sexual harassment to include "conduct of a sexual nature when: . . . (3**) The unwelcome conduct has the purpose or effect** of unreasonably interfering with a person's work performance or **creating** an intimidating, hostile, **or offensive working environment**." App. 199 (emphasis added). The complaining witnesses testified that the Plaintiff "made an orgasmic sound" while stating "I am so turned on right now" upon seeing colleagues playing with handcuffs, commented to a teacher that seeing her hug and kiss another woman (in the manner of a beginning of the year hello) was "so hot" while biting down on her thumb, scanned a secretary up and down on dress-up day while making "approving" sounds and commented "I prefer one or two" to the same secretary when the secretary gave her the finger. Plaintiff does not deny that the witnesses informed the investigators of such conduct. Those reports amply satisfy the definition of sexual harassment in that they create an offensive working environment. Moreover, the conduct also could be found to violate the District's ethics policy – GBEA (App. 210) - which requires all staff to "Exhibit professional conduct both on and off duty."

III. THE SUPERIOR COURT CORRECTLY RULED THAT THERE WAS INSUFFICIENT – INDEED, NO – EVIDENCE OF DISCRIMINATORY ANIMUS.

Even if the investigation were lacking or the basis for termination suspect, the Plaintiff prevails only if she also proves that the real reason for her termination was discriminatory animus. The Superior Court correctly determined that "the evidence does not support a finding that the

Somersworth School District or its employees were motivated by discriminatory animus." Order at 12. Plaintiff concedes that she has no evidence that the Board – which made the final termination decision – harbored any animus towards her based on her orientation. Instead, she hopes to prevail on a "cat's paw" theory by which she contends that animus by the reporting parties might be attributed to the decisionmakers.

In support of this theory of liability, Plaintiff relies principally on *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), decided under an analogous statute protecting military personnel from discrimination in civilian employment. The problem with this reliance is that, as set forth in *Staub*, liability under this theory still requires proof that the employer's agents were motivated by discriminatory animus or bias. In *Staub*, such evidence was before the court in spades: the supervisors on whom the decision-maker relied openly proclaimed their hostility to plaintiff's military service and commitments, calling it a "strain on the department," and "a waste of taxpayers' money" and assigned him last minute shifts as payback for others having to cover his schedule when he was in the Reserves. 562 U.S. at 414.

Here, there is no such evidence. At most, Plaintiff complains that Robison and Carrington had "outward animus" toward Plaintiff, Pl. Br. at 20, citing (and inflating) an assertion that Carrington once made a face behind her back and Robison told others that the Plaintiff was incompetent. She has not introduced a single piece of evidence that any such animus was based on Plaintiff's orientation and, therefore discriminatory. In addition, Carrington and Robison were not key witnesses in the Board hearing.

Carrington was not a percipient witness and the Board concluded that the single charge supported by Robison's testimony (the "I don't do straight" comment) did not violate policy. Not only was there no evidence of *discriminatory* animus, the evidence is the opposite. Ms. Unger, for example, explained to the Board that had a man reacted to her greeting Ms. Sloan the way the Plaintiff had, "I would have gone straight to Sharon [Lampros] and said that was incredibly inappropriate. It would be like sexual harassment to me. If that was a man, that would be." *See* "SB Trans." at 238 (Supp. App. 119).

In addition, as Plaintiff concedes to establish liability under a "cat's paw" theory, the Plaintiff would not only need to establish that the complaining witnesses or investigators exhibited discriminatory animus, but also that the Board acted as the conduit of that prejudice. Objection at 30 (citing *Harlow v. Potter*, 353 F.Supp.2d 109, 116 (D. Me. 2009)). In this regard, the Plaintiff must show not only that an agent of the District sought her termination for discriminatory reasons, but that the District "act[ed] negligently by allowing the co-worker's acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation." *Velazquez-Perez v. Developer's Diversified Realty Corp.*, 753 F.3d 265, 274 (1st Cir. 2014).

The Plaintiff has not done so, offering instead only conclusory statements that the Board "accepted the statements/explanations of the witnesses without question" and "failed to credit Plaintiff's explanation." The Board, however, held a hearing over three days, heard from numerous witnesses, all of whom were subjected to extensive cross-examination by

Plaintiff's counsel, and ultimately rejected two of the charges of misconduct brought against her. That the Board decided against her is not alone sufficient to call the Board a "rubber stamp" and escape summary judgment. *See Vasquez v. Empress Ambulance Service, Inc.*, 835 F.3d, 267, 275-76 (2nd Cir. 2016) (employer not liable for "getting it wrong" unless negligently allowed self to be conduit for agent's discriminatory prejudice).

CONCLUSION

For the foregoing reason and those stated in the underlying pleadings, the Defendant respectfully requests that the Court uphold the trial court's grant of summary judgment in favor of the Defendant.

REQUEST OF ORAL ARGUMENT

The Defendant respectfully requests oral argument not to exceed fifteen minutes. Brian Cullen will represent the Defendant at oral argument.

Respectfully Submitted,

SOMERSWORTH SCHOOL DISTRICT

By their attorneys

CULLENCOLLIMORE, PLLC

Dated: May 6, 2019

By: /s/ Brian J.S. Cullen

Brian J. S. Cullen
(NH Bar No. 11265)
10 East Pearl Street
Nashua, NH 03060
(603) 881-5500
bcullen@cullencollimore.com

CERTIFICATE OF SERVICE

I certify that a copy of this filing was served via the Court's ECF filing system upon counsel of record.

Dated: May 6, 2019

/s/ Brian J.S. Cullen
Brian J.S. Cullen