THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0624

AMY M. BURNAP

v.

SOMERSWORTH SCHOOL DISTRICT

BRIEF OF PLAINTIFF / APPELLANT

AMY M. BURNAP

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2. **Did the Court improperly Grant Defendant's Motion for Partial Summary Judgment when under the Cat's Paw Theory of Liability an Inference of Discriminatory Animus and Pretext Can be Drawn where Discriminatory Motivation and Retaliation Tainted the Outcome.** [Notice of Decision; September 21, 2018, Order on Defendant's Motion for Partial Summary Judgment, Supplement ("Sup. pp. 1-15")].

3. **Did the Court improperly Grant Defendant's Motion for Partial Summary Judgment when a Reasonable Fact-Finder Could Draw an Inference and Determine the investigation was a sham and not worthy of belief whereby the Defendants did not Adhere to its Own Policy, ignored evidence, were biased and disseminated the confidential Report to all witnesses which supported Defendant's desired outcome?** [Notice of Decision;

September 21, 2018, Order on Defendant's Motion for Partial Summary Judgment, Supplement ("Sup. pp. 1-15")].

STATEMENT OF THE FACTS/CASE

BACKGROUND: Plaintiff, Amy M. Burnap with a career in education spanning 25 years was hired by Defendant Somersworth School District as Dean of Students at Somersworth High School for the 2015/2016 school year. Plaintiff is a member of a protected class of Lesbian, Gay, Bisexual, and Transgender individuals, i.e. non-traditional gender presentation. Plaintiff replaced the former Dean of Students, Katelyn Carrington ("Carrington") who was on maternity leave and would return in November as Dean of the Career Technical Center. Without prior notification, Plaintiff was abruptly suspended from her position of Dean of Students on January 22, 2016 based on a complaint of sexual harassment. (Appendix page 162 ("App. p. 162")).

COMPLAINT: The initial statement drafted by Carrington was sent to Superintendent Jenny Mosca ("Mosca") on January 22, 2016 which reported four incidents. The first incident reported on January 14, 2016 occurred on January 12, 2016. The second incident reported on January 15, 2016 occurred at the end of August 2015 and was based on hearsay. The third incident occurred in December of 2015, and the fourth incident occurred on January 21 and was reported on January 22, 2016. (App. p. 136). Carrington did not immediately notify Principal Lampros ("Lampros") who was in Florida and instead notified Mosca on January 19, 2016 who indicated she would speak to Lampros which did not occur until

January 22, 2016. (App. p. 46, Transcript page 20 ("Tr. p. 20")). During this eight-day period, Carrington took it upon herself to screen and conduct a further investigation. Id. Three of the alleged statements by complainants Kerry Canard ("Canard") and Donna Robison ("Robison") against Plaintiff were entered on the same day yet Canard and Robison indicated they had no idea how this happened. (App. p. 56, Tr. p. 82), (App. p. 74, Tr. pp. 270-273). Carrington indicated both Canard and Robison came into her office together to make the statement against Plaintiff and indicated there were other people in her office when the initial complaint was relayed to her on January 14, 2016 and assumed it got out. (App. p. 45, Tr. pp. 15-17), (App. p. 50, Tr. p. 37). Not one of the four statements in the complaint indicated any of the employees had been sexually harassed by Plaintiff. (App. p. 136). Mosca met with Lampros, Pamela MacDonald ("MacDonald"), the Title IX coordinator and Carrington and the decision to investigate thus followed a meeting at the SAU office on January 22, 2016. (App. p. 88, Tr. pp. 357-362). (App. pp. 162, 200).

INVESTIGATIVE INTERVIEWS: Mosca gave Lampros the role of lead investigator and MacDonald the second investigator. The investigators interviewed eleven (11) witnesses on January 25, 2016 at the SAU office during 15-minute increments. (App. p. 139). During the interviews not one witness indicated or claimed they had been sexually harassed by Plaintiff nor did anyone claim there was unwelcome conduct or that any alleged conduct by Plaintiff had the purpose or effect of unreasonably interfering with their work performance or created an intimidating, hostile, or

offensive working environment nor was any of the alleged conduct directed at any employee. Id. The investigators agreed no one specifically stated they felt sexually harassed, intimidated or the conduct was intimidating, hostile or offensive or interfered with their work performance. (App. p. 98, Tr. pp. 434-435). The investigative interview statements of all eleven (11) witnesses indicated they had all spoken to each other prior to being interviewed. (App. p. 139).

Plaintiff was interviewed on January 25 and 28, 2016. (App. p. 165). The Investigators failed to allow Plaintiff to tell her side of the story and did not ask about key allegations leveled against her and ignored evidence of a possible motive and/or collusion. (App. pp. 93-95, Tr. pp. 385-396), (App. pp. 172-183). Plaintiff was asked to substantiate and/or refute allegations without any context associated with them. (App. p. 103, Tr. pp. 453-455), (App. pp. 120-121, Tr. pp. 545-551), (App. p. 165). Plaintiff struggled to understand the questions being asked as there was no context provided and it was like a puzzle with a thousand pieces where you do not know the picture and you have no other pieces. (App. pp. 165-169, 205). Plaintiff answered all the investigators questions and because there was not any context to their questions was not able to give any further information. The investigators did not ask Plaintiff any follow-up questions or request that Plaintiff explain anything. Id. and (App. pp. 106-107).

The investigators found Plaintiff culpable for allegations in which she had no memory or knowledge and indicated because Plaintiff did not deny the allegations, they therefore must be true. (App. pp. 99-100, Tr. p.

439-443). Plaintiff was not asked about several of the charges that were a basis for her termination yet was found guilty of the allegations. (App. p. 87, Tr. p. 343), (App. pp. 93-94, Tr. pp. 389-393). The investigators indicated because they had known all the accusers longer the allegations against Plaintiff had to be true. (App. p. 88, Tr. p. 341), (App. p. 107, Tr. p. 482).

INVESTIGATION: Lampros was not a trained investigator nor a skilled person in investigations and her training was limited to workshops. (App. p. 93, Tr. pp. 387-388), (App. p. 116, Tr. p. 521). MacDonald attended two all-day Title IX workshops for training and stated that she was not a "professional investigator" and not a lawyer and did the best that she could, was sure she made some mistakes, and also indicated she had never conducted a sexual harassment investigation. (App. pp. 110-114, Tr. pp. 495-508).

The investigators indicated all the witnesses interviewed with the exception of Plaintiff were persons they had worked with or known for a long time and they all made what the Investigators described as consistent statements. (App. p. 107, Tr. p. 482). Lampros indicated it was based on her basic experience and knowledge having worked with many of them for years, knowing them personally, knowing their strengths and weaknesses and it would not make a difference if they had all spoken to each other prior to being interviewed. (App. p. 86, Tr. p. 341).

The investigators applied their personal bias regarding certain allegations without questioning Plaintiff. (App. p. 87, Tr. p. 343). Lampros stated that she was so shocked and stunned by Plaintiff's direct

response to a comment/allegation Plaintiff made [I prefer 1 or 2] that she never asked Plaintiff what she meant by it. Id. and (App. p. 95, Tr. pp. 394-395). Lampros indicated there were a couple of meanings which the comment could mean which were sexual in nature that she chose to apply. Id. MacDonald indicated she felt as though a pattern of grooming was going on with Plaintiff toward the witnesses, showing up when no one is around, making people feel uncomfortable which Plaintiff was never asked about. (App. pp. 112-113, Tr. pp. 502-505). Despite this, MacDonald also indicated after all of the interviews not one of the witness/accusers stated Plaintiff sexually harassed them. (App. p. 113, Tr. p. 507).

The investigators made a claim of retaliation against Plaintiff alleging that during the investigation Plaintiff was openly hostile, aggressive and intimidating by the way Plaintiff participated in the interviews. (App. pp. 182-183). Lampros claimed Plaintiff came in for the second interview on January 28, 2016 and in an attempt to dislodge the doorstop holding the door open kicked it with her foot and came in the room and frumped down in the chair. (App. pp. 105-106, Tr. pp. 463-464). MacDonald stated this action "was very intimidating. I – um – to be honest, I was sitting there shaking." (App. p. 108, Tr. p. 486).

POLICY AND PROCEDURE: The Reporting Procedure of the District's Sexual Harassment Policy is very clear; if any employee believes they have been the victim of sexual harassment the alleged act(s) should be reported to the building principal who will notify the Superintendent immediately without screening or investigating the report within 24 hours. (App. p. 199). The investigators did not follow school district GBAA-

Sexual Harassment-Employee/Staff policy. Id. The words of the school district policy are clear and should be followed. Id. The policy forbids "unwelcome sexual advances, requests for sexual favors, sexual physical conduct or conduct of a sexual nature [that is] made a term or condition of an individual's employment . . . the basis for decisions affecting a person's employment; or . . . has the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile or offensive working environment." Id.

SCHOOL BOARD HEARING: During the first night of the school board hearing on March 1, 2016, Carrington testified the Confidential Report of Complaints of Unlawful Harassment, Plaintiff's Counsel's Response to the Report, and the witness interview statements were electronically disseminated by the District's attorney to all eleven (11) witnesses prior to testifying. (App. pp. 51-52, Tr. pp. 41-43). Defendant's attorney and superintendent's reasoning for electronically disseminating the confidential report were:

Defendant's Attorney:

> It was not until Plaintiff asked for a hearing and demanded that all of the witnesses testify that the report was given to the witnesses in preparation for their testimony. (App. p. 115, Tr. p. 512).

Superintendent Mosca:

> When they were asked to be on the witness list it was important for them to have the information that they needed. We gave them a copy of their interview sheet that pertained to them and then gave them a copy of everything because we felt it was important for them

to have the information they needed and pulling parts and pieces of information was difficult to do." (App. p. 119, Tr. p. 532).

The School district policy requires that privacy and confidentiality be maintained to protect confidentiality and privacy of both the complainant and the alleged wrongdoer. (App. p. 210). The school district's policies also protect privacy and confidentiality. District policy GBEA—the Staff Ethics policy—states that the school must, "Maintain all privacy and confidentiality standards as required by law." Id. Policy GBAA (6) —the employees sexual harassment policy—also requires confidentiality: … the District will respect the confidentiality of the complainant and the person(s) against whom the complaint is filed as much as possible… (App. p. 199). The testimony of all the witnesses now differed radically from the testimony documented during the initial interviews where no one indicated they had been sexually harassed. (App. p. 115, Tr. pp. 512-513), (App. p. 119, Tr. P. 532). The testimony at the school board hearings now supported the findings outlined in the Confidential Report which they all received prior to testifying and everyone now testified to being sexually harassed. (App. pp. 172, 186).

FINAL FINDINGS: The final Confidential Report of Complaints of Unlawful Harassment indicated Plaintiff was terminated for sexual harassment in addition to engaging in other unprofessional conduct in violation of board policy, including during her second interview in response to additional charges, which the investigators determined constituted retaliation against the investigators. (App. p. 183). The interview notes of Plaintiff are devoid of any mention of the alleged retaliatory behavior. (App. p. 165).

The School Board Decision found Plaintiff engaged in unwelcome conduct, inappropriate behavior and communication of a sexual nature which had an effect of creating an offensive working environment at the GAM meeting, the exchange of seeing two women hugging in August of 2015 which Plaintiff did not remember anything about, "I prefer two or three," two gifts and comments on Super-Hero day [Plaintiff was never asked about what she meant by the comment, the gifts or super hero day], and the comment "she was pretty smart for a blond." (App. pp. 188-196). The School Board dismissed from consideration the comment, "I don't do straight" and after hearing and weighing the testimony of Lampros, MacDonald and Plaintiff, Defendant School Board credited the testimony of Plaintiff and found Plaintiff did not engage in retaliatory conduct. (App. p. 194).

The Court, in its decision indicated Plaintiff had not elucidated specific facts that would allow jurors to conclude that the investigation was intended to cover up sexual orientation discrimination or that it was a sham demonstrating pretext. (Sup. pp. 13-16). This Appeal followed.

SUMMARY OF THE ARGUMENT

The Court improperly Granted Defendant's Motion for Partial Summary Judgment when applying the totality of the circumstances, there is evidence in the record that demonstrates there are numerous valid material facts in dispute and inferences which must be drawn in favor of Plaintiff which should be decided by the trier of fact/jury and not the judge. Plaintiff has elucidated facts where evidence in the record creates trial worthy issues as to whether Defendant's stated reason for terminating

Plaintiff; sexual harassment, is a pretext versus Plaintiff's termination was discriminatory animus based on her sexual orientation include: Disseminating the final confidential report to all witnesses prior to testifying; ignoring the fact that all witnesses had spoken to each other during the week before they were interviewed; whether the cat's paw theory of discriminatory animus applied; ignoring Defendant's sexual harassment policy; bias of investigators; determination of sexual harassment prior to conducting the investigation; proximity in time of filing initial report; unfounded/unsupported claim of retaliation by investigators; inconsistent testimony of witnesses; finding Plaintiff guilty of allegations not questioned about which could lead to a finding that would support recovery if found to be true by a jury.

The Court improperly Granted Defendant's Motion for Partial Summary Judgment when under the Cat's Paw Theory of Liability the record supports Defendant's identified employees from a tight knit group harbored outward animus toward Plaintiff and provided conflicting versions regarding their initial allegations on the statement, who all spoke to each other for a week prior to the investigation interviews, who all added the same sexually charged language at the end of benign statements, who all changed their testimony and provided inconsistent testimony after receiving a copy of the final confidential report, and made an unsubstantiated claim of retaliation and admitted bias and application of their own interpretation of what they believed Plaintiff meant. Based on the totality of the circumstances an inference of discriminatory animus which tainted the outcome and thus pretext can be drawn whether this animus was the

catalyst that led to Plaintiff's termination and whether it was based on her sexual orientation. The jury is free to accept or reject this contention.

The Court improperly Granted Defendant's Motion for Partial Summary Judgment when the findings in the report do not support Defendant's district policies, where evidence was ignored and the investigators neglected to determine if collusion or camaraderie, motive or bias may have shaped the testimony of the witnesses upon which their findings were based. In addition, Plaintiff has elucidated facts which would enable a jury to find Defendant's real and unlawful motive of discrimination was further evidenced by the fact the confidential report was disseminated to all witnesses prior to testifying which supported Defendant's desired outcome. These facts coupled with the inferences that can be drawn therefrom would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up Defendant's real and unlawful motive of discrimination.

ARGUMENT

I. THE COURT IMPROPERLY GRANTED DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT WHEN THERE WERE NUMEROUS MATERIAL FACTS IN DISPUTE THAT SHOULD HAVE BEEN PRESENTED TO THE TRIER OF FACT TO WEIGH THE EVIDENCE, DRAW REASONABLE INFERENCES AND MAKE THE ULTIMATE FACTUAL FINDING WHETHER DEFENDANT'S PROFFERED REASON FOR TERMINATION; SEXUAL HARASSMENT, WAS MERE PRETEXT FOR UNLAWFUL DISCRIMINATION BASED ON PLAINTIFF'S SEXUAL ORIENTATION.

The role of a Judge is to be a decision maker as to legal issues and the role of the trier of fact/jury then becomes the decision maker as to factual issues. The trier of fact/jury decides what facts the evidence has established and draws inferences from those facts to form the basis for their decision. A genuine dispute of a material fact is an issue that must be decided in order to resolve a controversy that a reasonable person would recognize as germane to a decision to be made and relates directly to the conflict at hand. A fact is material if it affects the outcome of the litigation or is significant or essential to the issue at hand. Horse Pond Fish and Game Club, Inc. v. Cormier, 133 N.H. 648,653 (1990).

"The paramount role that juries play in Title VII cases, stressing that in evaluating summary judgment evidence, courts must refrain from the making of [c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts, which are jury functions, not those of the judge." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). Applying the totality of the circumstances, there is evidence in the record that demonstrates there are numerous valid material facts in dispute and inferences that can be drawn which should be decided by the trier of fact/jury and not the judge. "If reasonable minds could differ as to the import of the evidence, the jury, not the court, must render judgment." Anderson v. Liberty Lobby, 477 U.S. 255 (1986).

A review of the pleadings, depositions, affidavits and the excerpts from the school board hearing transcripts reveals evidence from which conflicting inferences could be drawn as to whether Plaintiff was

terminated because of her sexual orientation. A fact is material if, under governing law, it could have an effect on the outcome of the lawsuit. Macie v. Helms, 156 N.H. 222, 223 (2007). All inferences must be drawn in favor of the party opposing summary judgment. It requires the court to indulge all reasonable inferences in favor of the nonmovant. If proven, the facts alleged in Plaintiff's pleadings, together with the reasonable inferences therefrom, would constitute a basis for relief under Plaintiff's claim of [discrimination]. Trahan-Laroche v. Lockheed Sanders, Inc., 139 N.H. 483, 485 (1995).

There is evidence in the record to support there are material facts in dispute which create trial worthy issues as to whether Defendant's stated reason for terminating Plaintiff; sexual harassment, is a pretext versus Plaintiff's termination was discriminatory animus based on her sexual orientation. The factors and inferences supporting this include but are not limited to;

(1) Whether Defendant disseminated the confidential report to all witnesses prior to their testimony at the School Board hearings was an attempt to manipulate and influence the testimony of all witnesses to support the findings in the sham investigation affecting the final determination of the Board;

(2) Whether the statements by the witness/accusers after speaking to each other regarding the reason for Plaintiff's termination; sexual harassment, were false, inaccurate and inconsistent and based on Plaintiff's sexual orientation;

(3) Whether the Cat's paw theory of discriminatory animus applied;

(4) Whether the in-application of Defendant's own policy regarding sexual harassment was ignored because it was not

supported by the facts and contrary to the evidence and tailored to a desired outcome based on Plaintiff's sexual orientation;

(5) Whether the discriminatory comments by the investigators based on their own interpretation and bias [we have known them longer and the grooming comment] was based on Plaintiff's sexual orientation;

(6) Whether the fact that all the witnesses had spoken to each other prior to the GAM meeting and prior to being interviewed and knew Canard, Robison, Carrington and Garand had provided sexual harassment claims against Plaintiff and then provided the same sexually charged language at the end of benign statements was an attempt to strengthen/substantiate the claim against Plaintiff because of her sexual orientation;

(7) 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;

(8) Whether the proximity in time in which Principal Lampros spoke with Robison who articulated no complaints about Plaintiff and three days later filed an initial report claiming numerous allegations of sexual harassment was based on Plaintiff's sexual orientation;

(9) Whether the Investigators unfounded claim of retaliation by Plaintiff during her interview using the incorrect policy was an attempt to bolster Defendant's claim of sexual harassment based on Plaintiff's sexual orientation;

(10) Whether the Investigators, by adding in language to the allegations; 2 or 3 ["fingers"] and 2 women hugging and ["kissing"] was based on Plaintiff's sexual orientation;

(11) Whether ignoring the inconsistent testimony of the heterosexual witnesses whereby no one claimed to have been sexually harassed was evidence that the Investigators found Plaintiff guilty because of her sexual orientation;

(12) Whether finding Plaintiff guilty of allegations the Investigators did not ask Plaintiff about was based on Plaintiff's sexual orientation;

(13) Whether Robison's purported allegation against Plaintiff, "I don't do straight" and subsequent explanation that she thought it meant "I don't do neat" was a disingenuous attempt to distance herself from Plaintiff's sexual orientation; and

(14) Whether the fact that the witnesses at the GAM meeting claimed at times the group can be inappropriate, yet no one filed a complaint against a heterosexual female and now they claim Plaintiff made an inappropriate comment which was based on her sexual orientation.

A motion for Summary Judgment is reviewed de novo. A dispute is genuine if a reasonable jury, drawing favorable inferences, could resolve it in favor of the non-moving party Velazquez v. Developers Diversified Realty Corp., 753 F.3d 265, 270 (1st Cir. 2014). In viewing the totality of the circumstances, there are genuine factual issues that can only be properly resolved by a finder of fact because they may reasonably be resolved in favor of either party. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in Plaintiff's favor.

A. UNDER THE CAT'S PAW THEORY OF LIABILITY, A REASONABLE FACT-FINDER COULD DRAW AN INFERENCE OF DISCRIMINATORY ANIMUS AND PRETEXT WHERE DISCRIMINATORY

MOTIVATION AND RETALIATION TAINTED THE OUTCOME.

There is no dispute, the record supports that Katelyn Carrington ("Carrington") and Donna Robison ("Robison") exhibited and harbored outward animus toward Plaintiff. What is in dispute however is whether this animus was the catalyst that led to Plaintiff's termination and whether it was based on her sexual orientation. The jury is free to accept or reject this contention.

The record supports that Plaintiff's secretary Robison [previously was Carrington's secretary] within the first two (2) weeks of school in September 2015 told numerous witnesses that Plaintiff was incompetent. (App. p. 76, Tr. p. 280). Plaintiff tried to utilize Robison but was baffled at her resistance and did not want to make the relationship worse so did not utilize her. (App. p. 122, Tr. pp. 573-575). Carrington, upon return from maternity leave, repeatedly and on numerous occasions exhibited animus toward Plaintiff by making stink faces behind her back in front of employees during meetings undermining Plaintiff's position. (App. p. 79, Tr. pp. 302-304). Principal Lampros was aware of the friction as Plaintiff sought advice on several occasions on how to make the relationship with Carrington and Robison work. (App. p. 90, Tr. pp. 362-364). Resource Officer Rick Campbell ("Campbell") and Truant Officer Sue Garand ("Garand") also had a strained relationship with Plaintiff. (App. p. 122, Tr. pp. 572-575). Robison, Garand and Campbell ate lunch together and were known as the lunch bunch and Plaintiff did not feel safe around them. (App. p. 127, Tr. p. 36) (App. p. 174).

On January 12, 2016 Robison met with Lampros indicating she was looking for another job because she couldn't work for Plaintiff and Lampros tried to pinpoint what exactly concerned her about Plaintiff and didn't find out anything and indicated that she had an opportunity and she should go for it. (App. p. 92, Tr. pp. 384-385). Later that day, Plaintiff was the administrator at an afterschool meeting and the guest was having difficulty connecting to the internet. (App. p. 54, Tr. pp. 75-76), (App. p. 128, Tr. p. 39-43). Kerry Canard ("Canard"), Carrington's secretary was assisting with this computer tele-presentation and was having problems getting it connected. Plaintiff stepped out and indicated to Canard the connection was lost again and Canard turned to her and slipped her middle finger up and down her nose [flipped her off] and then called her a bitch. Id. Plaintiff, sensing Canard was frustrated thought Canard was joking around and responded with "I prefer two or three" indicating it's a joke phrase when people flip her off; if you're really pissed at me and you really want to get mad, you're going to have to do it two or three times, because it's not a big deal to me. Id. Plaintiff did not perceive Canard was upset at all and up until this time Plaintiff had a very friendly relationship with Canard and they interacted with each other daily. Id. Canard indicated the comment embarrassed her, she got annoyed and was irritated. (App. p. 155). Canard did not indicate she felt like she was being sexually harassed.

On January 15, 2016 Robison urged Canard to tell Carrington about the exchange Canard and Plaintiff had on January 12, 2016. (App. p. 46, Tr. pp. 18-20). Carrington indicated there were other people in her office when Canard told her, and Carrington assumed some things got out. (App.

p. 50, Tr. pp. 36-37). The animus culminated in a statement drafted by Carrington one week later, on January 22, 2016 outlining statements against Plaintiff by Canard, Robison, and Garand. (App. p. 136).

Robison, who three (3) days prior met with Lampros now provided two allegations about Plaintiff which were based on hearsay and did not concern her involving an errant comment back in August of 2015 regarding two females hugging and a statement "I Don't do straight" in reference to a sign in the front office that was crooked. (App. p. 136). An inference of a motive could be drawn that Robison, who harbored animus against Plaintiff, who three (3) days prior could not get Lampros to do anything about Plaintiff, and because of Plaintiff's sexual orientation, an allegation of sexual harassment against Plaintiff would harm if not end Plaintiff's career. Canard indicated she only told Carrington about her allegation against Plaintiff and waited a week before she shared it with Robison. (App. p. 56, Tr. pp. 82-83). Robison indicated she had no idea how her alleged statements to Carrington made on the same day as Canard's ended up on the statement sent to Defendant's Superintendent Mosca ("Mosca"). (App. p. 74, Tr. pp. 270-273). Canard also did not initially admit to calling Plaintiff a "bitch." However, Carrington contradicted this and indicated Robison and Canard went to her office together to make the statement against Plaintiff on January 15, 2016. (App. pp. 45-46, Tr. pp. 17-19). By concealing relevant information or feeding false information, Robison and Canard were able to influence the decision. Cariglia v. Hertz Equipment Rental Corp, 363 F.3d 77, 87 (1st Cir. 2004). "An employee's termination could be 'impermissibly tainted' with a subordinate's animus, if the

subordinate concealed relevant information or fed false information to the neutral decisionmakers." Harlow v. Potter, 353 F.Supp.2d 109, 118 (D.Me. 2005).

Carrington who indicated there were other people in her office who heard the allegations of sexual harassment took it upon herself to continue to screen and conducted a further fact-finding investigation for an eight-day period. (App. p. 50, Tr. pp. 36-37). On January 22, 2016, these same employees reported an additional allegation against Plaintiff that took place the previous day just prior to the weekly guidance meeting [GAM] which was described as an informal setting. (App. p. 145). Campbell and Guidance Counselor, Lisa Sloan ("Sloan") engaged in questionable conduct by utilizing handcuffs surrounded by sexual innuendoes in a joking manner, which made Plaintiff uncomfortable which she reported to the Investigators during her interview. (App. p. 11, Tr. p. 579). The staff present at the meeting indicated "the staff were having informal conversations, everyone was kind of in the moment joking around, the team was blowing off steam." (App. p. 145). Additionally, one of the witnesses indicated "A lot of times people say inappropriate stuff," and the impression was that no one was offended. (App. pp. 80-81, Tr. pp. 306-312). At the meeting, Plaintiff indicated to no one in general, "Oh, that's interesting" referring to the handcuff scenario which Plaintiff admitted saying when asked by the investigators and this comment then morphed into numerous allegations of sexual innuendos allegedly made by Plaintiff after everyone had spoken to each other prior to the interviews [i.e., this makes me so hot, I am so hot]. (App. pp. 139-159).

Carrington, who knew of the allegations and harbored outward animus toward Plaintiff did not reduce the four allegations into a writing until January 22, 2016 which was then sent to Superintendent Mosca ("Mosca"). (App. p. 136). Carrington attended the meeting at the District office with Lampros and Mosca which was against district policy. (App. p. 200), (App. p. 88, Tr. pp. 3357-362). Not one of the witnesses/accusers indicated they felt sexually harassed or that the alleged statement was directed at them. (App. p. 98, Tr. pp. 434-435). No one indicated the unwelcome conduct had the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile, or offensive working environment. Id.

The U.S. Supreme Court Opinion, Staub v. Proctor Hospital, 562 U.S. 411 (2011), held, "If a supervisor performs an act motivated by … animus that is intended by a supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable …." The Court further held that an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision. Id. A cat's paw theory, meaning that plaintiff sought to hold the employer liable for the supervisor who was not charged with making the ultimate decision to discharge him, that the non-decision maker exercised such "singular influence" over the decision maker that the decision to terminate was the product of "blind reliance." Staub at 415. The investigators relied on Carrington. "It is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the

earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." Staub at 419. "Proximate cause requires only 'some direct relation between the injury asserted and the injurious conduct alleged,' and excludes only those links that are too remote, purely contingent, or indirect." "The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause and did in fact cause an adverse employment decision." Staub, at 421. "Since a supervisor [or employee] is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a 'motivating factor in the employer's action.'" Staub at 421.

"In a cat's paw situation, the harasser(s) clearly cause(s) the tangible employment action, regardless of which individual(s) actually signs the employee's walking papers." Harlow v. Potter, 353 F.3d 109, 117 (D.Me. 2005). The first Circuit… concluded an employee's termination could be impermissibly tainted with a subordinate's animus, if the subordinate concealed relevant information or fed false information to the neutral decision maker. Id. at 118. When viewing the light most favorable to Plaintiff, Plaintiff has demonstrated a genuine issue of material fact concerning whether there is a causal connection between Robison and Carrington's discriminatory animus and motive, and Defendant's decision to remove Plaintiff from her position of Dean of Students. Discriminatory intent and animus can often be proven through testimonial or circumstantial evidence. In re Hardy, 154 N.H. 805, 807 (2007).

When looking at the totality of the circumstances, there is ample evidence in the record which indicate numerous material facts are in dispute in the record to create trial worthy issues as to whether Defendant's stated reason for terminating Plaintiff is pretext and the real reason for her termination was because of her sexual orientation under the Cat's Paw Theory of liability. The factors supporting this contention require a jury resolution. Cote v. T-Mobile, USA, Inc. 168 F.Supp.3d 313, 328 (D.Me. 2016). The jury is free to accept or reject an inference of discriminatory animus which can be drawn beginning with:

1. Prior to Carrington's report, fueled by Robison, none of those who expressed concerns about Plaintiff's conduct filed any complaints about Plaintiff. (App. pp. 54, 65, 67, 71, 73) Not until the "handcuffs meeting" in January 2016 did anyone report any complaints, and that report went to Carrington, not the principal. (App. p. 68).

2. Robison, Plaintiff's administrative assistant had complained to others that Plaintiff was incompetent as early as two weeks into the 2015-16 school year. (App. pp. 50, 77). Plaintiff tried to utilize Robison but was baffled at her resistance and did not want to make the relationship worse so did not utilize her. (App. p. 122, Tr. pp. 573-575). Robison met with Lampros January 12, 2016 indicating she was looking for another job because she couldn't work for Plaintiff and Lampros tried to pinpoint what exactly concerned her about Plaintiff and didn't find out anything. (App. p. 92, Tr. pp. 384-385). Robison had not worked for Plaintiff for months and Lampros could not pinpoint any work-related concerns. Lampros indicated it was not relevant to the investigation if Robison had conflicts with Plaintiff. Id.

3. Carrington, who filed the initial complaint, was hostile to Plaintiff, among other things having made "stink faces" behind Plaintiff's back. (App. pp. 52, 79).

4. Other witnesses after speaking with each other prior to being interviewed expressed concerns about working with Plaintiff, but none of those witnesses had specifically complained about sexual harassment, unreasonable interference with their work, or intimidating conduct by Plaintiff, all of which might be violations of policy but none of which was the subject of a complaint about Plaintiff. (App. pp. 53, 65, 67, 71, 73, 199).

5. The relationship between witnesses, the lunch bunch, and the social relationship many had with each other combined with the fact the witnesses indicated they had spoken to each other during the week-long investigation by Carrington and prior to being investigated by the investigators and then they each added the same sexually charged language to the end of benign statements.

6. Given the nature and timing of the complaints, Defendant Superintendent should have considered whether the issues were ones of workplace frictions—co-workers and supervisors having conflicts of a generalized or non-specific nature—and not issues of sexual harassment.

7. The investigators admitted bias and application of their own interpretation of what they believed Plaintiff meant without asking Plaintiff and failure to ask Plaintiff about many of the allegations yet found her guilty. (App. pp. 93-110).

8. Robison and Canard told conflicting versions of how their statements about Plaintiff appeared on the initial report and when they had spoken to each other which conflicted with Carrington's version. (App. pp. 56, 74).

9. Carrington testified that the initial statement of January 22, 2016 was for sexual harassment even though Canard did not state she was sexually harassed. A determination had been made prior to the investigation or interview of Plaintiff. (App. p. 48).

10. The final Confidential report found Plaintiff responsible for allegations which Plaintiff was never asked about, ignored evidence of a possible motive, misrepresented evidence of retaliation by Plaintiff and found Plaintiff made sexual advances without asking Plaintiff about the allegations which led to the desired outcome of a finding of sexual harassment. (App. pp. 87, 99-108, 172-183).

11. It would be hard to imagine a heterosexual female would be accused of sexual harassment for the same conduct.

When applying the cat's paw theory under which Defendant is liable for discrimination it is if Defendants discriminatory motivation and retaliation tainted the ultimate outcome. Harlow v. Potter, 353 F.Supp.2d 109, 116 (D. Me. 2005). "Other circuits have also recognized that an employer may be held liable if the decisionmaker who discharged the plaintiff merely acted as the rubber stamp, or the "cat's paw," for a subordinate employee's prejudice, even if the decisionmaker lacked discriminatory intent." Id. at 117.

Plaintiff's termination was based on filtered, embellished and tainted information. Issues of sexual harassment as grounds for her termination were impermissibly tainted by the identified employee's animus and unfounded and undocumented claim of retaliation by the Investigators which contributed significantly to Plaintiff's termination and was a material and important ingredient in causing it to happen. Plaintiff has produced

probative evidence that the final decisionmaker acted as a conduit for Defendants prejudice and an inference of discriminatory animus can be inferred coupled with additional inferences and it is not for the court to decide between competing inferences as it should be left to the jury. A reasonable jury could conclude that Plaintiff's employment was terminated because of her sexual orientation…the issue becomes whether Defendant's stated nondiscriminatory reason is a pretext for discrimination and as such courts must be cautious about granting Defendant/employer's motion for summary judgment. Hodgens v. General Dynamics Corp., 114 F.3d 151, 167 (1998). "Summary judgment is not automatically precluded even in cases where elusive concepts such as motive or intent are at issue." Id. Where the non-moving party has produced more than conclusory allegations, improbable inferences or unsupported allegations, the court should use restraint in granting summary judgment where discriminatory animus is in issue. Id. The record raises triable issue as to whether discriminatory animus was at issue whereby Plaintiff suffered sexual orientation discrimination resulting in termination.

The evidence in this case was provided by biased employees and the school board relied on the biased testimony and report. The employee animus and bias combined with the Investigators retaliation caused Plaintiff's termination …the causal chain, they were acting in the scope of their employment, and displayed open hostility/animus toward Plaintiff and their actions influenced the other witnesses and caused the Board's ultimate employment decision of termination. Staub, at 422. Therefore, there are valid genuine issues of material fact as to whether Canard, Robison, Carrington and the investigators harbored discriminatory animus toward

Plaintiff because of her sexual orientation and acted as the Cat's Paw for Plaintiff's termination. This allegation could lead to a finding that would support recovery if found to be true by a jury.

B. A REASONABLE FACT-FINDER COULD DRAW AN INFERENCE AND DETERMINE THE INVESTIGATION WAS A SHAM AND NOT WORTHY OF BELIEF WHEREBY THE DEFENDANTS DID NOT ADHERE TO ITS OWN POLICY, IGNORED EVIDENCE, WERE BIASED AND DISSEMINATED THE CONFIDENTIAL REPORT TO ALL WITNESSES WHICH SUPPORTED DEFENDANT'S DESIRED OUTCOME.

The record reveals Carrington indicated the statements she sent to Mosca outlined sexual harassment – a determination had already been made before speaking to Plaintiff or conducting an investigation. (App. p. 45, Tr. p. 15). Carrington conducted a further investigation for an additional week knowing others knew about the alleged allegations of sexual harassment. Id. Defendant relied heavily on Carrington's written statement and included her in the meeting at the District office which was against the policy. (App. pp 88-89, Tr. pp. 357-362). Defendant did not bother assessing the credibility of Carrington despite knowing the relationship with Plaintiff was fractured…even after learning Carrington made stink faces behind Plaintiff's back nor did they interview Carrington. Carrington's credibility and Robison's motive should have been assessed. The investigators indicated all the witnesses interviewed, except for Plaintiff were persons they had worked with or known for a long time and they all made what the Investigators described as consistent statements.

(App. p. 107, Tr. pp. 482-483). Lampros indicated it was based on her basic experience and knowledge having worked with many of them for many years, knowing them personally, knowing their strengths and weaknesses. (App. pp. 86-87, Tr. pp. 341-342). Lastly, Lampros indicated, knowing the alleged allegations of sexual harassment had been discussed with others for a week prior to the investigation and that the witnesses had spoken to each other prior to being interviewed made no difference. The witnesses were able to compare notes and align stories prior to their interviews.

The point of a proper investigation is to seek the truth, not to justify a decision or assumption that has already been made and certainly not to justify discrimination or retaliation. The timing of an investigation can suggest ill motive and it is extremely important to conduct an investigation that does not suggest bias and gives an employee suspected of misconduct a chance to tell her side of the story as failure to do so can be evidence of an unlawful intent [losing objectivity and failing to be thorough]. The single most important characteristic for a workplace investigation is to possess neutrality which requires the investigators not to be closely tied to any one party in the investigation. Kramer v. Wasatch County Sheriff's Office, 743 F.3d 726 (10th Cir. 2014). If you know the players well it can be problematic in terms of potential or perceived bias. Id. Investigators should not reach any conclusion until they have gathered all the information and evaluated all the facts. The Essential Guide to Workplace Investigations, at p. 67 (3rd ed. 2013, Guerin). If an employer is shown to be untruthful about the reason for a decision, they may be inferred to have

been covering up actual discrimination. There is a question of fact to be decided by a jury in evaluating the truth of the Defendant's nondiscriminatory explanation.

The findings in the report do not support Defendant's district policies and are contrary to the termination of Plaintiff: [impermissibly tainted] and the reasons offered by Defendant were a pretext for discrimination. The court concluded and 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. The sole inquiry is whether Plaintiff established a genuine issue of material fact that Defendant's justification was pretextual and Defendant's action was, in fact, improperly motivated by discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

A Sham investigation can serve as a pretext for termination if sufficient facts are pleaded to support a claim. Quigley v. Precision Castparts Corp., et al, Opinion No. 2016 DNH 166 (2016). A sham investigation includes the person's conducting the investigation ignore or misrepresent evidence, or the investigation leads to a desired outcome. Id.

The United States Supreme Court has written it "is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Reeves v. Sanderson Plumbing Prod., 530 U.S. 133, 147 (2000). [underlining the implausibility's and inconsistencies in the defendant's justification]. Proof that the defendant's explanation is unworthy of credence is one form of circumstantial evidence that is probative of intentional discrimination and may be quite persuasive.

McCowan v. All Star Maintenance, Inc., 273 F.3d 917, 922 (10th Cir. 2001).

The court in Grivois v. Wentworth-Douglas Hosp., Lexis 10233 (D.N.H. Jan. 28, 2010), held, "A finding that plaintiff did not engage in the behavior that her employer cited in firing her raises a genuine issue of fact as to whether the real reason for her termination was her protected activity … ." "The court also discussed the issue of 'bad faith, malice or retaliation' in this decision and held that 'an inference of bad faith or malice can arise when the record does not support the stated reason for the discharge.'" Id. Presently, the ultimate finding in Defendant's report and subsequent termination of Plaintiff's employment was not supported by the evidence or Defendant's own policy. Absent evidence of asking Plaintiff about numerous allegations and having no evidence that any witness/accuser indicated Plaintiff sexually harassed them, Defendant was unable to prove Plaintiff violated any harassment policy. Therefore, an inference of discrimination can be found. State of N.H. v. Ouahman, 164 N.H. 413, 416 (2012).

"Evidence that an employer's reason is false, combined with evidence presented to establish a prima facie case, in some cases can be sufficient to sustain plaintiff's burden, and plaintiff need not have further evidence of discrimination." Zimmerman v. Assoc. First Capital Corp., 251 F.3d 376, 381-82 (2d Cir. 2001). Plaintiff has demonstrated the proffered reason was false and completely lacks a factual basis and thus has shown pretext. Murray v. Kindred Nursing Centers West, LLC, 789 F.3d 20, 27 (1st Cir. 2015).

Plaintiff must elucidate facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up Defendant's real and unlawful motive of discrimination. Ray v. Ropes, 799 F.3d 99 (1st Cir. 2015). There is evidence Defendant did not follow their policy in deciding to terminate Plaintiff's employment. "A failure to follow established procedures or criteria … [may] support a reasonable inference of intentional discrimination," and "pretext can be shown by demonstrating irregularities in … the procedures for discharge." Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 687 (2016). Defendant's departure from its protocol when terminating Plaintiff is evidence sufficient to create a triable issue of pretext.

The GBAA policy is very clear; upon receipt of the report, Lampros [and in this case Carrington] was to notify Mosca immediately without screening or investigating the report. (App. p. 199). The first allegation by Canard and Robison was on January 15, 2016. The report was not written or submitted to Mosca until January 22, 2016 yet Mosca knew about it on January 19, 2016 and indicated to Carrington to sit on the report until Lampros got back to town. (App. p. 51, Tr. pp. 39-40). During this eight-day period, Carrington took it upon herself to conduct a further investigation. (App. p. 46, Tr. p. 20). Lampros indicated, despite the policy and the friction between Carrington and Plaintiff, because Carrington received the information and they frequently worked on a team, Carrington needed to be at the SAU meeting to further discuss the statements. (App. p. 88, Tr. pp. 357-363).

The findings in Defendant's final report do not meet the test outlined in their Policy GBAA-Sexual Harassment. (App. p. 200).

The report's Finding No. 1 does not meet that test:

> That finding covered the GAM meeting, where school resource officer Campbell and Sloan toyed with the officer's handcuffs and Plaintiff's commented on it. Although Plaintiff's comment may have had sexual overtones, it did not meet any of the other tests of the school district policy. It was not a sexual advance, nor a request for sexual favors, or physical conduct that was a term or condition of employment or a basis for disciplinary action. Nor did it unreasonably interfere with anyone's work performance. Most of those present simply ignored Plaintiff's comment and none of the witness notes suggests that Plaintiff's comments were intimidating, hostile or offensive, or, as the legal standard requires, "extremely serious." (App. pp. 139-169).

The same is true with regard to Finding No. 2, "I don't do straight," but because the school board did not act on that finding, nothing further need be said.

Finding No. 3 also fails to apply the standards stated in the school district policies.

> This is the "two teachers hugging" [which morphed into and added kissing] complaint. Neither teacher complained about the event, which had occurred some five months earlier, and there is no showing of unreasonable interference with work performance or intimidating, hostile or offensive conduct, based on the two teachers' comments. Sloan said she ignored the comment and thought it may have been an effort by Plaintiff to be funny. (App. pp. 143-144). Leslie Unger felt uncomfortable and said she did not feel professionally safe, but she did not report it. (App. pp. 147-148). If the alleged comment Unger complained of in August of 2015 occurred, Unger asked it to stop and it did as there were no other reported instances. All indications are that the alleged unwelcome

conduct stopped. That is what the policies underlying sexual harassment law demand, and that is what happened here.

Finding No. 4 relates to the Superhero day Batman costume.

The interview notes are telling. Canard Interview Notes (App. pp. 155-156) and Plaintiff Interview notes (App. pp. 165-169). According to those notes, Plaintiff allegedly looked Canard "up and down," made a noise like she approved of the costume and left despite the fact Canard was behind a desk that was chest high. (App. p. 60, Tr. pp. 98-100). The report says this created a hostile working environment, notwithstanding the fact that Canard did not file a complaint about the matter and that several months elapsed before anyone raised the concerns and Plaintiff had no memory of this event. (App. p. 102, Tr. pp. 448-450), (App. pp. 181-183, pp. 10-11). The event itself does not have any hallmarks of a hostile environment; it appears to be a single, isolated occurrence with no threatening overtones or statements. And school district policy requires that "context" be a part of any investigation. Plaintiff was never asked about this yet was found guilty of it.

Further, the context does not favor Canard as indicated in a later incident, where Canard gave Plaintiff "the bird." Plaintiff replied by saying "I prefer two or three." Canard responded by calling Plaintiff "a bitch." (App. p. 54, Tr. pp. 76-77). Whatever else this encounter suggests, it does indicate that there are issues between the two employees, and Canard is no fan of Plaintiff at this point. That should be weighed in any consideration of Canard's complaints. The report does not show that the tension between the two was considered in arriving at conclusion and that Plaintiff harassed Canard. Given the facts, a neutral, outside observer could conclude that Canard harassed Plaintiff, not the other way around.

Finding No. 5 is, as discussed above, misapplies the law of sexual harassment in the workplace.

If an employee finds conduct objectionable, then that employee should tell the offending party - whether a co-worker or a supervisor

- that the conduct is unwelcome. That is what happened here. Unger allegedly told Plaintiff she does not want to hear the alleged inappropriate comments: "You're an administrator and you can't say anything like that to anybody at any time." As noted above, Plaintiff stopped making the alleged comments that Unger objected to, and that is consistent with what the law requires. (App. pp. 70-71, Tr. pp. 239-242).

Finding No. 6, the "dumb blonde" comment, should not in any event be considered sexual harassment.

While such comments are not encouraged, they are too common to be a basis for discipline. As EEOC guidance states, "federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not 'extremely serious.' Rather, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment." The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment."

Workplace Harassment - The finding by the investigators that Plaintiff retaliated against them during the second interview was not supported by any documentation or credible evidence. Further, Defendant's, in an attempt to substantiate their findings applied the Complaint Procedure of Policy GBAB-R which is the Anti-Harassment Policy. (App. p. 213).

Plaintiff has demonstrated the proffered reason was not credible and completely lacks a factual basis and thus has shown pretext and the trier of fact can reasonably infer from the falsity of the explanation not supported by the policy that Defendant is dissembling to cover up a discriminatory purpose. A reasonable jury could have found that these proffered reasons were not credible [and the investigation was a sham]. Madeja v. MPB

Corp., 149 N.H. 371, 383 (2003). An inference can be made that the investigators did not actually believe in the investigation and had already pre-judged Plaintiff and found her guilty because of her sexual orientation and falsely assuming because she was a lesbian she must therefore be sexually interested in all females.

At the very least, the decision to terminate Plaintiff was precipitous to raise a factual question as to whether it was a disingenuous overreaction to justify dismissal. Cote v. T-Mobile, USA, Inc. 168 F.Supp.3d 313, 335 (D.Me. 2016). One well-established method of demonstrating pretext is to show discriminatory comments were made by key decisionmakers or those in a position to influence the decisionmaker. Id. at 336. MacDonald indicated she felt as though Plaintiff was grooming the witnesses even though Plaintiff was never asked about this. (App. pp. 112-113, Tr. pp. 502-506). Lampros stated that she was so shocked and stunned by Plaintiff's direct response to the comment "I prefer 2 or 3" that she never asked Plaintiff what she meant by it. (App. p. 87, Tr. p. 343), (App. p. 95, Tr. pp. 394-395). Lampros indicated there were a couple of meanings which were sexual in nature that she chose to apply. Id. There were also other meanings that were not sexual in nature. The investigators applied their personal bias regarding certain allegations because of her sexual orientation without questioning Plaintiff. Id.

Much like the investigation in Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 855 (2006), Defendant's investigation was conducted prior to delivering the findings and lacked the careful, systematic assessment of credibility one would expect in an inquiry on which an employee's

reputation and livelihood depended. Mastro's investigation relied heavily on an employee who had a strained working relationship with Mastro and management did not bother to access the credibility of the employee whose account proved most central to determining Mastro's fate. Another shortcoming of the investigation was … neglecting to determine if collusion or camaraderie may have shaped the stories upon which the findings were based and that such considerations were not an integral part of the investigation. Id. at 856. In conducting the investigation in Mastro "that rested entirely on the question of credibility, the investigator eschewed consideration of any indicia of credibility." Id. The investigator "seems to have based his determination on the sheer weight of the numbers; but sufficient evidence exists for a jury to conclude, alternatively, that discriminatory treatment may have permeated the investigation itself….and turned a blind eye to motive." Id.

Applying the fact pattern in Mastro to the instant case, the investigators knew that all the witnesses had spoken to each other prior to being investigated and indicated it would not make any difference. They neglected to determine if collusion or camaraderie of the close- knit group may have shaped the stories upon which the findings were based. Investigator Lampros indicated the basis for believing all the witnesses and not Plaintiff was because she had known all the witnesses longer. McDonald indicated despite all the witnesses speaking to each other prior to the interviews, because they all testified alike [sheer numbers] they were more credible. Lampros did not bother to assess the credibility of the

employees [Carrington, Robison and Canard) whose account proved most central to determining Plaintiff's fate.

Plaintiff has presented sufficient valid evidence to attack Defendant's proffered explanation for its actions. Plaintiff's claim calls into question whether Defendant's sham investigation was a reasonably objective assessment of the circumstances or, instead, an inquiry colored by sexual orientation discrimination. Had Defendant really believed in its investigation and findings of sexual harassment, Defendant would never have disseminated the confidential report to all the witnesses in an effort to support their position at the hearings. Defendant's justification for Plaintiff's termination which was not supported by the sham investigation was false for two (2) reasons; first, no one claimed they had been sexually harassed or that anything Plaintiff did or said unreasonably interfered with their work environment; and (2) even if Plaintiff did, Plaintiff did not violate any of Defendant's policies.

Plaintiff has demonstrated the proffered reason was a lie and the investigation was a sham which completely lacked a factual basis, and not worthy of belief and thus shows pretext. Murray v. Kindred Nursing Centers West, LLC, 789 F.3d 20, 27 (1st Cir. 2015). A jury could conclude that Defendant failed to provide a fair and impartial investigation and that its claim, to the contrary, is pretextual which is a genuine issue of material fact properly assigned to the jury. Sufficient evidence exists for a jury to conclude, alternatively, that discriminatory treatment may have permeated the investigation itself. Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 856 (2006). A reasonable jury could conclude the Defendant's sham

investigation was central to and culminated in Plaintiff's termination and was not just flawed but inexplicably unfair. Id.

CONCLUSION

Plaintiff elucidated numerous specific factually material allegations that are in dispute and the reasonable inferences therefrom raise a jury issue as to whether Defendant discriminated against Plaintiff based on her sexual orientation. It should be left up to a reasonable juror to conclude whether Plaintiff would not have suffered the adverse action if she was heterosexual and everything else stayed the same. The court improperly usurped the jury's function of weighing the evidence, drawing reasonable inferences, and making the ultimate factual finding whether Plaintiff's termination was motivated by discrimination based on her sexual orientation. For all the forgoing reasons, the Court's grant of Defendant's Partial Motion for Summary Judgement should be reversed.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant, Amy M. Burnap requests 15 minutes for oral argument to be presented by Samantha M. Jewett.

S. CT. RULE 16(3)(i)

A copy of the decision below to be reviewed/reversed.

Respectfully Submitted,

Amy M. Burnap
By Her Attorney

Date: _____

/s/ Samantha M. Jewett
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CERTIFICATION OF SERVICE

I hereby certify that on this date a copy of the foregoing was sent to all counsel of record.

/s/ Samantha M. Jewett

SUPPLEMENT TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
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NOTICE OF DECISION

File Copy

Case Name: **Amy M Burnap v Somersworth School District**
Case Number: **219-2016-CV-00168** ***219-2017-CV-00201***

Enclosed please find a copy of the court's order of September 21, 2018 relative to:

Order on Defendant's Motion for Partial Summary Judgment

September 21, 2018

Kimberly T. Myers
Clerk of Court

(277)

C: Samantha M. Jewett, ESQ; Brian J.S. Cullen, ESQ

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Amy M. Burnap

v.

Somersworth School District

Docket No.: 219-2016-CV-00168

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff, Amy M. Burnap, brought this suit against the defendant, Somersworth School District, seeking damages and attorney's fees arising from the defendant's alleged discriminatory actions. (Court Index #1). The plaintiff originally filed a contract claim under Docket Number 219-2016-CV-00168 while pursuing a charge of discrimination with the New Hampshire Commission for Human Rights and the United States Equal Employment Opportunity Commission ("EEOC"). (See Court Index #30). After receiving a notice of right to sue from EEOC, the defendant filed a discrimination claim as well as a number of tort claims under Docket Number 219-2017-CV-00201. (Id.). The claims were consolidated under Docket Number 219-2017-CV-00168. The defendant now moves for summary judgement on all but the plaintiff's contract claim. (Court Index #13). The plaintiff objects. (Court Index #30). Based on the pleadings and the applicable law, the defendant's motion for partial summary judgment is GRANTED.

FACTUAL BACKGROUND

The following facts are supported by the parties' exhibits and affidavits and provide background for the claims made in this case. Burnap asserts that she is "a member of a protected class of Lesbian, Gay, Bisexual, and Transgender (LGBT) individuals," which the defendant

does not dispute. (Obj., Ex. 10 ¶ 3; Mot. Summ. J. at 12).[1] On June 29, 2015, Burnap and Somersworth School District entered into a contract for Burnap to serve as Dean of Students at Somersworth High School from July 1, 2015 to June 30, 2016. (Compl., Ex. A; Obj., Ex. 10 ¶ 2). Burnap served as the dean of students until January 22, 2016. (Obj., Ex. 10 ¶¶ 5–7). On that day, Burnap was called into a private meeting at the school district office with Superintendent Jeni Mosca ("Mosca") and high school principal Sharon Lampros ("Lampros"). (Id. ¶ 5–6). At the meeting, Mosca read a letter to Burnap and told Burnap that she was being placed on leave due to pending sexual harassment charges. (Id. ¶¶ 6–7).

The sexual harassment charges to which Mosca referred stemmed from a complaint originally made by Secretary Kerry Canard ("Canard") to Katelyn Carrington ("Carrington"), the dean of the school's career technical center, on Friday, January 15, 2016. (Mot. Summ. J., Ex. B ¶ 3–4). Canard informed Carrington that earlier in the week, Burnap had asked her to accomplish a task, and Canard responded by raising her middle finger toward Burnap. (Id. ¶ 4). Burnap's response was something to the effect of, "I prefer two or three." (Id.). When Canard realized the sexual connotation of Burnap's response, she called Burnap a "bitch." (Id.). Sometime after this incident, Burnap brought Canard two gifts, a bottle of maple syrup and a pink monkey toy. (Id.). Canard told Carrington that she felt uncomfortable around Burnap and was considering changing her work hours in order to minimize her interactions with Burnap. (Id.).

Carrington did not report Canard's complaint to Principal Lampros that day because Lampros was in a meeting. (Id. ¶ 5). However, on her way out of the building that day, Carrington spoke to two other staff members, Donna Robinson ("Robinson") and Erich

[1] Throughout this order, "Obj." shall refer to the "Plaintiff's Memorandum of Law in Objection to Defendant's Motion for Partial Summary Judgment," Court Index #30; "Mot. Summ. J." shall refer to the "Memorandum of Law in Support of Defendant's Motion for Partial Summary Judgment," Court Index #13.

Ingelfinger ("Ingelfinger"). (Id. ¶ 6). Ingelfinger told Carrington that at the beginning of the school year, Burnap had seen two female staff members hugging, and she made a physical gesture as she said "that's so hot." (Id.) Robinson told Carrington that, just before Christmas, when a student commented that a wall decoration was off-center, Burnap quipped, "I don't do straight." (Id.). It is unclear what prompted Robinson and Ingelfinger to report these past incidents on the same day that Canard made her complaint. Because Lampros was on vacation the following week, Carrington reported Canard's, Ingelfinger's, and Robinson's allegations to Superintendent Mosca on January 19, 2016. (Id. ¶ 7).

On January 22, 2016, another staff member, Sue Garand ("Garand"), informed Carrington of a recent incident involving Burnap. (Id. ¶ 8). Garand reported that the day before, January 21, during a Guidance Administration Meeting, Burnap had remarked, "I am so turned on right now," as one staff member demonstrated the use of handcuffs upon another staff member. (Id.). Carrington reported the incident to Lampros; she and Lampros then reported the incident to Mosca. (Id. ¶ 9).

The school district's policy on sexual harassment in effect at the time set forth some of the reporting procedures for complaints of sexual harassment. (Obj., Ex. 9). In relevant part, the policy stated:

> The use of formal Reporting Forms provided by the District is voluntary. The District will respect the confidentiality of the complainant and the person(s) against whom the complaint is filed as much as possible, consistent with the School District's legal obligations and the necessity to investigate allegations of sexual harassment and take disciplinary action when the conduct has occurred.

(Id.). The school district's policy on complaint procedures stated, in relevant part:

> By authority of the Somersworth School Board, the Human Rights Officer shall immediately authorize an investigation upon receipt of a report or complaint of harassment. This investigation may be conducted by School District officials or a third party designated by the Superintendent or School Board. The investigator

> shall provide a written report of the investigation to the superintendent within ten (10) working days of the School District's first receipt of the report or complaint. The Superintendent will then report the status of the investigation to the School Board and, if deemed appropriate, to the complainant, accused harasser or other third parties.
>
> . . .
>
> Upon receipt of the investigator's report, the Superintendent shall review the report and determine whether the alleged conduct, together with any additional conduct that may have been discovered during the course of the investigation, constitutes a violation of this policy and what disciplinary or corrective action should be taken as a result. In certain circumstances, the School Board may be involved in making these determinations.
>
> . . .
>
> After the Superintendent and/or School Board has made the required determinations as to whether a violation of this policy has occurred and what disciplinary or corrective action should be taken as a result, the complainant and the accused harasser(s) will be notified in writing of the outcome of the investigation and any disciplinary action that is taken.

(Obj., Ex. 12).

After placing Burnap on leave on January 22, Mosca assigned Lampros and Pamela MacDonald ("MacDonald"), the school's Title IX coordinator, to investigate the allegations of sexual harassment against Burnap. (Mot. Summ. J., Ex. C ¶¶ 7, 8). Neither Lampros nor MacDonald had previously handled a sexual harassment investigation. (Id.). Over the course of the following week, Lampros and MacDonald interviewed each of the witnesses who had made a complaint against Burnap, as well as several other staff members. (Mot. Summ. J., Ex. D ¶ 4). The interviewees generally confirmed the allegations against Burnap; they also provided the interviewers with new information. (See Obj., Ex. 6). Canard told Lampros and MacDonald of an incident in which Burnap had looked her up and down while Canard was dressed as Batman; Burnap then made a noise of approval and walked away. (Mot. Summ. J., Ex. D ¶ 7). Additionally, Lisa Lucier ("Lucier") informed the investigators that Burnap had once commented that a particular office chair "turns [her] on." (Id.). Much of the investigation, however, focused on the January 21 incident. (Mot. Summ. J., Ex. D ¶ 9; Obj., Ex. 4).

Lampros and MacDonald also interviewed Burnap on January 25 and 28 as part of their investigation. (Obj., Ex. 6). Burnap cooperated fully with the investigation and tried to provide her interviewers with as much information as possible. (Obj., Ex. 10 ¶¶ 8–11). She confirmed that she made several of the comments that were the subject of her coworkers' complaints. (Obj., Ex. 7 at 4, 6). She clarified, however, that she intended those comments only as jokes. (Id.). Burnap also confided to Lampros and MacDonald that she would never want to make others feel uncomfortable sexually because she herself had been the victim of sexual abuse. (Obj., Ex. 7 at 7). At the beginning of her interview on January 28, as Burnap entered the interview room, she kicked the door stopper out from under the door and allowed the door to slam shut. (Mot. Summ. J., Ex. D ¶ 13). Lampros and MacDonald felt intimidated by Burnap's actions, and MacDonald later accused Burnap of retaliation for her general demeanor during the second interview. (See id.).

At the conclusion of their investigation, Lampros and MacDonald prepared a report of all their findings. (Obj., Ex. 7). In the report, they concluded that Burnap had violated a number of school policies, including the policy on sexual harassment, and they recommended that Burnap's employment be terminated. (Id. at 9–12). They submitted their report to Mosca on or about January 29, 2016. (Mot. Summ. J., Ex. C ¶ 9). Mosca reviewed the report and recommended that the school board terminate Burnap's employment. (Id. ¶ 9–10).

In response to Mosca's recommendation, the school board held a closed hearing to determine whether it should terminate Burnap's employment. (See Obj., Ex. 1). The hearing spanned three nights in March, 2016, and it included the testimony of thirteen witnesses. Burnap testified at the hearing. (See Obj., Ex. 1; Mot. Summ. J., Ex. C ¶ 11). Burnap, represented by counsel, was given the opportunity to present her own witnesses and to cross-examine all of the

defendant's witnesses against her. (See Mot. Summ. J., Ex. C ¶ 11; Obj., Ex. 1).

Prior to the hearing, copies of the report prepared by Lampros and MacDonald were disseminated to each of the witnesses. (Mot. Summ. J., Ex. C ¶ 11). It is unclear from the written record who published the report to the witnesses, however, defense counsel has represented that the school district's attorney at the time of the hearing was responsible. Nevertheless, Burnap's counsel at the school district hearing was able to cross-examine each of the witnesses about their prior exposure to the report. (Id.).

At the conclusion of the hearing, the school board voted to terminate Burnap's employment with Somersworth High School. (Mot. Summ. J., Ex. C, 3). The school board issued its judgment in a written decision dated April 6, 2016. (Id.). In its written decision, the school board found that: (1) Burnap "engaged in unwelcome conduct, inappropriate behavior and communication of a sexual nature" during the January 21 Guidance Administration Meeting; (2) Burnap "engaged in unwelcome conduct and communication of a sexual nature . . . which had the effect of creating an offensive working environment" when she commented on two female staff members hugging; (3) Burnap "engaged in unwelcome conduct, inappropriate behavior and communication of a sexual nature in her interactions with Kerry Canard which created a hostile and offensive working environment;" and (4) Burnap "engaged in unwelcome conduct, inappropriate behavior and communication of a sexual nature with Lisa Lucier which had the effect of creating an offensive, hostile working environment." (Id.). Each of these offenses violated the School District's sexual harassment policy. (Id.). The members of the school board did not consider Burnap's sexual orientation in reaching their decision. (Mot. Summ. J., Ex. F).

DISCUSSION

Burnap has now filed a number of claims against Somersworth School District, including

breach of contract (titled "Plea of Assumpsit" in the complaint), employment discrimination in violation of RSA 354-A:7, invasion of privacy, intentional invasion of privacy, intentional infliction of emotional distress, defamation, defamation *per se*, and negligent supervision. (Compl. ¶¶ 52–106, June 20, 2017; Compl. ¶¶ 32–43, May 3, 2016). Somersworth School District moves for summary judgment on all but Burnap's breach of contract claim. (Def.'s Mot. Summ. J.).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III; see Super. Ct. Civ. R. 12(g). The moving party has the burden of proving its entitlement to summary judgment. Concord Grp. Ins. Companies v. Sleeper, 135 N.H. 67, 69 (1991). The moving party must submit an affidavit or affidavits based on personal knowledge of admissible facts to which the affiants will be competent to testify. RSA 491:8-a, II. The facts detailed in the attending affidavits are considered admitted "for the purpose of the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits." Id. When a motion for summary judgment is made and accompanied by the supporting documents described above, the opposing party "may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV. A genuine issue of material fact is one that "affects the outcome of the litigation." Weeks v. Co-Operative Ins. Co., 149 N.H. 174, 176 (2003). In evaluating a

motion for summary judgment, the court "must consider the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." Concord Grp. Ins. Co., 135 N.H. at 69. The court must determine "whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavit at trial." Iannelli v. Burger King Corp., 145 N.H. 190, 193 (2000).

I. Tort Claims

Somersworth School District first argues that it is entitled to summary judgment on Burnap's tort claims because they are all barred by RSA 507-B, which governs municipal immunity. RSA 507-B:5 states that "[n]o governmental unit shall be held liable in any action to recover for bodily injury, personal injury or property damage except as provided by this chapter or as is provided or may be provided by other statute." The remainder of the chapter specifically permits certain suits: "A governmental unit may be held liable for damages in an action to recover for bodily injury, personal injury or property damage caused by its fault or by fault attributable to it, arising out of ownership, occupation, maintenance or operation of all motor vehicles, and all premises . . . ." RSA 507-B:2. Because Burnap's alleged injuries do not arise out of the school district's ownership, occupation, maintenance, or operation of motor vehicles or premises, her tort claims are barred by RSA 507-B:5.

Burnap counters that the statute's definition of personal injury "expressly preserves personal injury claims if against public policy and the laws of New Hampshire, or both, and claims of discrimination." (Obj. at 22). The statute states,

> "Personal injury" means . . . [a]ny injury to the feelings or reputation of a natural person, including but not limited to, false arrest, detention or imprisonment, malicious prosecution, libel, slander, or the publication or utterance of other defamatory or disparaging material, invasion of an individual's right of privacy, invasion of the right of private occupancy, wrongful entry or eviction, mental injury, mental anguish, shock, *and, except when against the public policy or the*

laws of New Hampshire, or both, discrimination . . .

RSA 507-B:1, III. (a) (emphasis added). Thus, she argues that, despite RSA 507-B:5's bar against most claims, RSA 507-B:1 permits all personal injury claims when to do otherwise would be against public policy or the laws of New Hampshire.

The court interprets statutes "in the context of the overall statutory scheme and not in isolation." Blackthorne Group, Inc. v. Pines of Newmarket, Inc., 150 N.H. 804, 806 (2004). "By doing so, [the court is] better able to discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." Id. In this case, the court interprets the phrase "except when against the public policy or the law of New Hampshire, or both" as modifying only the word "discrimination." It does not modify the previously-listed causes of action. This interpretation is in keeping with the overall statutory scheme of RSA 507-B, which bars all claims for bodily injury, personal injury, and property damage unless such claims are specifically permitted by the same chapter or another statute. Burnap's interpretation would be contrary to the statute's purpose of barring most claims. The court's interpretation is also in keeping with New Hampshire's Equal Employment Opportunity statute, which specifically permits discrimination suits against "the state and all political subdivisions, boards, departments, and commissions thereof." RSA 354-A:2, VII.; see RSA 354-A:7; RSA 354-A:21-a. Accordingly, the court holds that Burnap's tort claims are barred by RSA 354-A:5.[2]

II. Discrimination Claim

RSA Chapter 354-A prohibits employers from refusing to hire or employ or to bar or to

[2] Although RSA 507-B "must be construed to permit intentional tort claims against municipal actors who do not have a reasonable belief in the lawfulness of their conduct, regardless of whether the claims have a nexus to motor vehicles or premises," McCarthy v. Manchester Police Dep't, 168 N.H. 686, 208 (2015), neither party has raised that issue. Furthermore, the court finds that there is no evidence on the record to suggest that Somersworth School District or its agents did not reasonably believe in the lawfulness of their conduct.

discharge from employment or to discriminate against an individual in compensation or in terms, conditions or privileges of employment on the basis of age, sex, race, color, marital status, physical or mental disability, religious creed, national origin, or sexual orientation. RSA 354-A:7, I. New Hampshire courts rely on federal law Title VII cases to analyze claims under RSA Chapter 354-A. Rolfs v. Home Depot U.S.A., Inc., 971 F. Supp. 2d 197, 208 (D.N.H. 2013).

When a plaintiff does not provide direct evidence of discrimination, his or her case is governed in the first instance by the burden-shifting framework of McDonnell Douglas. Mesnick v. Gen. Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973)); Bates v. Bull HN Info. Sys., Inc., No. CIV. 92-290-SD, 1994 WL 258664, at *2 (D.N.H. Feb. 1, 1994). Under the McDonnell Douglas paradigm, a plaintiff must first prove a *prima facie* case of discrimination by showing, by a preponderance of the evidence, circumstances giving rise to an inference of unlawful discrimination. Burns v. Town of Gorham, 122 N.H. 401, 406 (1982). Once a *prima facie* case is made , the burden then shifts to the defendant, who must articulate a legitimate, nondiscriminatory reason for the adverse employment decision. Id. The defendant's explanation of its legitimate reasons "must be clear and reasonably specific" in order to afford the plaintiff the ability to address those reasons. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981). If the defendant makes the requisite showing, the burden shifts back to the plaintiff, who then must show that the employer's proffered reason is actually a pretext for discrimination of the type alleged. Mesnick, 950 F.2d at 823.

"It is settled that the presumption arising from a discrimination plaintiff's prima facie case vanishes once the employer has articulated a legitimate, nondiscriminatory reason for dismissing the employee." Mesnick v. General Electric Co., 950 F.2d 816, 824 – 25 (1st Cir. 1991). At the

third stage of the McDonnell Douglas framework, "the ultimate burden is on the plaintiff to persuade the trier of fact that she has been treated differently because of her" sexual orientation. Thomas v. Eastman Kodak Co., 183 F.3d 38, 56 (1st Cir. 1999). "This burden is often broken into two separate tasks. The plaintiff must present sufficient evidence to show both that the employer's articulated reason for laying off the plaintiff is a pretext and that the true reason is discriminatory." Id. In other words, the plaintiff must "elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive:" sexual orientation discrimination. Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990). The plaintiff, however, is not required to produce "smoking-gun" evidence before prevailing in a discrimination suit. Mesnick, 950 F.2d at 824. The plaintiff may rely upon circumstantial evidence such as "statistical evidence showing disparate treatment by the employer of members of the protected class . . . , comments by decisionmakers which denigrate those [in the protected class] . . . , [and] the incidence of differential treatment in the workplace." Id.

The court finds that there is no direct evidence of sexual orientation discrimination in this case. As such, the case is governed by the McDonnell Douglas framework. Assuming, without deciding, that Burnap has proved a *prima facie* case of sexual orientation discrimination, Somersworth School District has carried its burden under the second step of the McDonnell Douglas analysis. The school district has provided ample evidence—the school board's written decision and affidavits of the board's members—that its reason for terminating Burnap's employment was sexual harassment. Accordingly, under the third step of McDonnell Douglas, Burnap bears the burden of proving that the school district's professed reason for firing her, sexual harassment, was both (1) a sham, and (2) intended to cover up sexual orientation

discrimination. She has failed, however, to sustain her burden of proving the second element. Specifically, the evidence does not support a finding that Somersworth School district or its employees were motivated by a discriminatory animus.

Burnap relies primarily on a "cat's paw" theory of liability to prove Somersworth School District's discriminatory animus. In support of this theory, she cites to Staub v. Proctor Hosp., 562 U.S. 411 (2011), which was brought under a federal statute that prohibits discrimination based on a worker's military status. In Staub, the United States Supreme Court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." 562 U.S. at 422. Therefore, Burnap argues that because Canard, Carrington, and Robinson were motivated by her sexual orientation, the school district is liable under RSA 354-A. However, even if the court were to accept Staub as controlling law in this case, the evidence does not support a finding that either Canard, Carrington, or Robinson was motivated by Burnap's sexual orientation.

Burnap also argues that she can sustain her burden of proof by showing that Somersworth School District's proffered reason for firing her, sexual harassment, was false. However, the fact "[t]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 524 (1993). Furthermore, the evidence in this case does not suggest that the school district's reason for firing Burnap was anything other than what it professed to be—sexual harassment. Rather than merely relying upon the recommendations of its administrators, the school board held a three-day hearing and heard testimony from thirteen witnesses, including Burnap herself. Only at the end of the hearing did the school board decide that Burnap had

violated the school district's sexual harassment policy. Additionally, there is no evidence that the school board considered Burnap's sexual orientation in any way in reaching its decision to terminate her employment.

Next, Burnap argues that the school district treated her disparately because, although other school employees made inappropriate comments, none of them were fired. "A plaintiff in a disparate treatment case may attempt to show that others similarly situated to [her] in all relevant respects were treated differently by the employer." Ray v. Ropes & Gray LLP, 799 F.3d 99, 114 (1st Cir. 2015) (quotation omitted). "Reasonableness is the touchstone when considering comparators in a disparate treatment case; that is, while the plaintiff's case and the comparison cases that he advances need not be perfect replicas, they must closely resemble one another in respect to relevant facts and circumstances." Id. (quotations omitted). In this case, however, the evidence does not support a finding that other employees were similarly situated. While other employees' behavior may have been inappropriate, none were accused of multiple instances of sexual harassment, as Burnap was. Accordingly, Burnap has not carried her burden of proving disparate treatment.

Finally, Burnap argues that Lampros's and MacDonald's investigation was a sham, thus demonstrating pretext. First, the court does not find any evidence that the investigation was a sham. Simply because the principal investigators were not experienced in sexual harassment investigations does not mean that their efforts were not professional and genuinely motivated by legitimate concerns over the complaints and Burnap's behavior. Perhaps more importantly, while a sham investigation, if proved, might be indicative of a pretext, it does not establish that the school district's reason for terminating Burnap was discriminatory. As such, even if the initial investigation had been a sham, Burnap has not elucidated specific facts that would allow

jurors to conclude that the investigation was intended to cover up sexual orientation discrimination.

CONCLUSION

For the foregoing reasons, the defendant's motion for partial summary judgment is GRANTED. The matter will proceed to trial only on the plaintiff's claim of breach of contract.

So Ordered.

Date: September 21, 2018

Mark E. Howard
Presiding Justice

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

AMY M. BURNAP, Plaintiff, v. SOMERSWORTH SCHOOL DISTRICT, Defendant.	Supreme Court Case No. 2018-0624 Superior Court Case Nos. 219-2016-CV-00168 219-2017-CV-00201 Dover, New Hampshire September 4, 2018 3:27 p.m.

MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE MARK E. HOWARD
JUDGE OF THE SUPERIOR COURT

AMENDED (Cover)

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

(Proceedings commence at 3:27 p.m.)

THE COURT: -- and thank you for your patience. If I can have, beginning with the Plaintiff's counsel, the counsel and parties to introduce themselves for our record, please.

MS. JEWETT: Again, Your Honor, Samantha Jewett, my client Amy Burnap, and William Philpot.

THE COURT: All right. Good afternoon.

MR. PHILPOT: Good afternoon.

MR. CULLEN: Thanks, Your Honor. Brian Cullen here on behalf of Somersworth School District, and with me is Assistant Superintendent Lori Lane.

THE COURT: All right. So we're here on the oral argument on the Defendant's motion for summary judgment, I believe. Are there any other issues that we were going to try to take up today? I think that was it.

MR. CULLEN: I don't believe so, Your Honor.

THE COURT: All right. So why don't I hear first from the Defendant.

MR. CULLEN: Thank you, Your Honor. I'll be somewhat brief, though it is a fairly long, complicated argument because there are a lot of different issues.

I believe Your Honor already knows the facts of the case and I trust you -- I understand from your prior ruling setting up this hearing that you had already addressed the

tort claims and then you were going to issue a separate ruling. I have not seen that yet. And just -- you had indicated you really only wanted to hear argument on the discrimination count.

I just caution -- or ask, rather, that I'm assuming the reason that you don't need argument on the 507-B is that the Court's concluded that it applies. But if that's not the case, I would like the opportunity to address it.

THE COURT: Why don't you go ahead and address it because I don't want anybody to make any assumptiónsˊ here, all right?

MR. CULLEN: Okay. Well, the 507-B is, as Your Honor is aware, sets forth municipal liability and municipal unity in particular for governmental entities. Governmental entities are specifically defined to include school districts, so it's a clearly applicable statute.

And it allows for personal injury claims, which is broadly defined to include intentional infliction of emotional distress, defamation, invasion of privacy, all of which are claims arguably in this case; that those -- that personal injury claims can only be brought if they arise out of the operation or maintenance, et cetera, of motor vehicles or premises.

This case is not that case. It does clearly arise out of an employment dispute, not out of motor vehicles. And

507-B sets forth that unless it's otherwise set forth in statute, or in this statute or some other statute, that those claims -- that the municipality or, in this case, the government entity, is immune from those suits, that applies here.

The Plaintiff raised one objection to the filed application of 507-B arguing that the construction of the statute, particularly a clause that leads into the -- at the very end of it that says this is a series of torts that are excluded, and then it says, and except where against public policy or other laws of the state, discrimination. The Plaintiff has made the argument that that exception actually applies to all personal injury claims and not simply discrimination claims.

I don't think that's a fair reading of the statute. The -- it seems very clear to me, it's been applied a dozen times that I know of in (indiscernible) and Farm Family (phonetic), and in Huckins v. McSweeney (phonetic), I think it was; any number of cases in which this statute has been applied to bar claims. I've never seen this argument before, but it just doesn't -- isn't the way the statute reads.

The statute lists all these different things that are excluded, and then says, all -- essentially, also, unless barred by public policy or other statute, discrimination. Well, here there is a discrimination statute, so the 354-A

claim isn't barred by the immunity under the express terms of the immunity, but every other court claim here is.

So I would encourage you to -- to look -- that's really addressed, I think, primarily in the reply and the sur-reply, Your Honor. But as I say, the 507-B immunity can't be -- just one last thing on that, I guess, is that the courts have also asked that because it's an immunity statute, it should be read broadly and consistent with the intent of the legislature.

And the intent of the legislature, it was not to eviscerate the statute by applying one clause to basically say any public policy, any personal injury claim, because all personal injury claims essentially have a public policy argument. It would take the statute and really gut it, and that's neither the intent of the statute nor the express will of the Supreme Court. Direction of the Supreme Court, I should say.

Turning to the claim that the Court did ask us to address, the 354-A claim in this case is a state law claim. It's brought on the basis of the Plaintiff's sexual orientation.

The Plaintiff's claim is that she was terminated based upon her sexual orientation. There are a couple of different ways that a Plaintiff can bring such a claim, and none of them apply here.

Certainly, if the Plaintiff had had any direct evidence that discrimination, that her sexual orientation was part of the reason that she was fired, if she had direct evidence of that, that would be a basis to go to a jury. But there is no direct evidence of that.

In connection with the summary judgment motion, we've provided affidavits from each and every one of the board members who sat on the hearing, the three-day hearing with 13 witnesses. And each of whom avow that they did not have any discriminatory animus towards the Plaintiff, and she conceded as much in her deposition, that she had no way of knowing or reason to believe that any of them were discriminating directly.

In the objection, Plaintiff has raised a cat's paw theory of direct discrimination, saying that two people in particular, Ms. Lamprose and a secretary by the name of Donna Robison, that they had discriminatory animus, and under the cat's paw theory, that could be imputed to the decision maker; here, the board. That theory really -- that argument falls short for two reasons in this case, Your Honor.

First, there really is no evidence at all that either person acted with any discriminatory bias. There's an argument that Ms. Robison didn't like the Plaintiff, but there's no evidence that that dislike, if it existed, arose out of her sexual orientation. There's simply not one piece

of evidence of that.

With respect to Ms. Lamprose, the only statement out of her testimony that they refer to is Ms. -- the Plaintiff, Ms. Burnap, suggests that she had at one stage suggested that she should consider wearing scarves, and they try to analogize this to the Price Waterhouse case in which a person who was going up for partnership had not become partner, she brought a gender discrimination claim. There, the -- and they suggested this is the same because in that case, the person was suggested dress more femininely.

But that's not what the case says. The case goes much beyond that. The judge, in fact, refers to the sentence as the coup de grace where the partner says, well, you should dress more femininely, act more femininely, wear more jewelry, walk more femininely -- I mean, there was a whole series of things, not an innocuous statement like, oh, you know, would you consider wearing scarves sometimes. This is just not enough.

This Court, as you know, has an obligation to act as a gatekeeper to prevent cases that don't have sufficient evidence to go to a jury from going to a jury. And I'm happy to say over -- you know, the days of everybody gets a trial are long gone in New Hampshire.

We now look at the statute of summary judgment and look at it properly and apply it effectively, and I think

that's been done for the last dozen years now in this court and others. So I'd ask that the Court take on that gatekeeper function in this case.

In the absence of direct evidence of discrimination, courts turn to the Donald Douglass test, and I'm confident that this Court's aware of it, it's applied in a number of different scenarios. And it's essentially a three-part test.

The Plaintiff has to satisfy the initial burden of showing that she's a qualified individual to bring a discrimination claim, which there's no contest here that she meets that hurdle. The hurdle then -- burden then shifts to the District, the Defendant here, to demonstrate that the -- to demonstrate that they had a good faith reason, a nondiscriminatory reason for terminating the Plaintiff.

In this case, they had testimony from 13 different people, the vast majority of whom testified to specific examples of behavior that they felt was inappropriate and improper. A number of them were, you know, of a sexual nature, and most of them were of a sexual nature. And that is against the policy.

And I know the Plaintiff has raised some question about this not being against harassment policy, but the harassment policies are quite clear that they don't have to testify that, I thought this was sexual harassment. That's the conclusion -- conclusion the board came to. They just

need to testify as to what happened and how they felt about it.

Ms. Kenard in particular cried at the hearing; it was clear that she felt very much as though this was harassment, it was an unsafe work environment for her. But the District doesn't have to prove that that's true. It merely has to prove that they had a nondiscriminatory reason, but they don't have to prove that by a preponderance of the evidence; the burden always lays still with the plaintiff.

Whereas here the District satisfies that burden, and where most cases turn, Your Honor, is this question of pretext. Can the Plaintiff prove that although we've raised a legitimate reason for her termination, that that's merely pretextual. And there's simply no evidence here, Your Honor, that this is a pretext.

And just to quote Azini (phonetic), which is in our papers,

> "Plaintiff must elucidate specific facts which would lead a jury to find that the reasons given is not only a sham, but a sham induced to cover up the real and unlawful motive of discrimination."

And again, Your Honor, as we point out in the papers, it's just -- there's no evidence that this is a pretextual determination, that there was a -- there's a lengthy hearing over three nights, the Plaintiff was there

with counsel. She testified herself, there had been an investigation prior to that in which the witnesses had been interviewed.

Each of the witnesses had been interviewed. There's just no indication from any avenue or any evidence in front of this Court that this was pretextual, that this was a sham, and that the sham was intended to cover up discrimination.

The final argument, just going back to the cat's paw theory, even if the Plaintiff had some evidence that Robison or Lamprose or some other person acted with discriminatory intent, and again, I challenged her to come up with anything that would allow to Court to find such a decision, they'd still have to be able to show that the board knew or should have known about this discriminatory animus, and that's in the Velasquez-Perez (phonetic) case, a First Circuit case, 2014, that's in our papers, Your Honor.

And so not only is there no evidence that the supervisors or the underlying complaining persons acted with discriminatory animus, but there's also no evidence that even if they did, that the board knew or should have known of such animus.

And then finally, Plaintiff makes a small -- a brief disparate impact claim as a final foray to try to shoehorn this case into a discrimination case. It's based purely on the fact that two of the witnesses in the case were

disciplined for conduct that they believe should have been disciplined. But it's not comparable conduct.

One of them is Ms. Kenard who, in a moment that she admitted was in exasperation, gave the Plaintiff, who's her supervisor, the finger, one of these things where she sort of rubbed her finger on her nose in a manner that was clearly intended to give her the finger. I think the Court's well-familiar with the term, if not the -- if not the actual manner, as in this case.

And the Plaintiff's response to that was, I prefer two or three. And the Plaintiff was trying to explain that away by saying, well, I meant you have to give me the finger two or three times before I'll take you seriously and believe that you're mad. Ms. Kenard, I think, understandably took it a different way and was quite offended by the matter.

In fact, that was really the first complaint that was brought to the principal's attention, to the dean of CTC's attention, and it triggered other reports. But Ms. Kenard is not -- her giving her supervisor the finger is not a comparable offense to the six different allegations that were made against the Plaintiff, four of which were founded by the board, all of which had strong sexual connotations including statements such as, you know, when I see two women hugging it turns me on, moaning in front of people when they're, you know, playing with handcuffs and the like.

And in addition, the individual is a -- is not a supervisor charged with setting the tone for her underlings. So Ms. Kenard really isn't a proper comparator.

The only other thing that they've suggested is that Ms. Carrington apparently made something called stink faces behind her back. I'm not sure exactly what that is, but I'm fairly sure it means pulling some sort of face, making an expression that means that's you don't believe or you don't credit somebody or you don't value what they're saying.

Again, it may be inappropriate, it certainly would be inappropriate for somebody like Ms. Carrington to do so, but it's not a comparator. It's not, you know, her not being disciplined for that in January when she testifies to it is not the same as being disciplined for a multitude of allegations concerning sexual misconduct.

So each of the potential claims against -- or potential theories of discrimination really falls flat, really, Your Honor, for a lack of evidence. What it really comes down to -- and I say this in the papers -- Ms. Burnap may understandably feel that she shouldn't have been terminated, that the sanction was, she thinks, perhaps harsh, but that's not the same as showing that the sanction was imposed because of her orientation.

There is simply no evidence, none, you know, that ties anything that anyone did, from the first complaining

person to the investigators to the superintendent -- who the Plaintiff herself admits that she believes she's gay -- to the board that suggest any of these people acted on the basis of her orientation.

We are talking about Somersworth, a town with a very progressive public face. The mayor of the town is gay; he's also the principal of the middle school. It's just -- this wasn't a factor in this case, and it shouldn't be a factor that goes in front of a jury without some evidence, and there's just not enough to get there today.

THE COURT: All right. Thank you.

MS. JEWETT: Your Honor, as with most cases of this nature, there's rarely a smoking gun. Defendant's position is that because there's no direct evidence whereby someone overtly made a reference to my client's sexual orientation, that her claim of discrimination must fail. That's not supported by the case law, and I will get to that.

It's -- our burden is to demonstrate there are genuine issues of material fact as to whether the proffered reasons for her termination, sexual harassment, is worthy of belief. There are numerous ways in which pretext for unlawful employment discrimination can be inferred.

The evidence in this case was provided by biased employees, and we'll get to that; and investigators who harbored discriminatory animus did an incomplete

investigation, and they made claims against Plaintiff based on her sexual orientation.

We offer that Defendant's proffered reason is not credible, and here's why. And Your Honor, I know you can read so I'm not going to regurgitate my entire objection. But I think it's important to talk about the material facts in dispute.

The pretext and the discriminatory animus can be shown. Specifically, Investigator Lamprose, the principal, agreed that it was -- that it was possible that because all those witnesses spoke to each other before they were even interviewed, they all use the same kind of language.

Everything -- there's a benign comment like, that chair is really comfortable but it makes me hot. It's great, I love seeing two women hugging, and it turns me on. There's a pattern, Your Honor. We have proven that all the witnesses and accusers all got -- spoke to each other prior to ever being investigated. And it's just troublesome because every single one of them testified a benign statement, but yet they all used the same terminology at the end of each benign comment.

The investigators made a claim of retaliation and intimidation against my client when she came in for her second interview. During her second interview, it was brought up at length during the hearings that Amy, my client, thought she

was working with the investigators. They're her colleagues. She is trying to get this case resolved so she can get back to work.

So she comes in for the second interview, and there's one of those door stops stuck underneath the door; we've all done it, you kick it out. The door closes, she sits down. Well, they turn this to bolster their case that she then slumped down in her chair, we felt very intimidated; and to be honest, the investigator said, I was sitting there shaking. The school board didn't find that to be valid.

Now, these are supposed to be biased (sic), neutral investigators, and during the second interview, knowing that everybody has already spoken to each other, they -- and she's trying to help them out, now they're finding that she's retaliating against them. The investigator further said, we saw a pattern of grooming her victims.

Well, Your Honor, my client is not being targeted as a pedophile. They found that she was grooming her victims when no one else around, except there was no evidence whatsoever produced from any witness from any testimony at any hearing that my client was grooming anybody.

And what's really interesting, they alluded to the claim of, she gave gifts. They never even asked her about the gifts, but yet they found that she was grooming this certain employee by giving her gifts. Well, for a complete

investigation, at a minimum they should have asked her about the gifts.

If they had asked her about the gifts, they would find -- that would have found that the testimony was just totally inconsistent. Again, that was an investigator who took one side of the story and made a complete -- to support her position, again, that my client was grooming. But my client never even had an opportunity to address that issue.

So she was found guilty of making sexual advances, yet she was never even questioned. The questions that they asked her had no context whatsoever. They were as benign as, do you remember giving somebody a gift? That was it, that's the context.

Well, racking her brains, of course, most teachers in schools around the holidays or whatever, you may give somebody a gift. I mean, it was totally -- and because they never even gave her that opportunity by even asking her that, but yet they found her guilty.

They also said she was making sexual advances against Carrie (phonetic) Kenard on this superhero day, so they found her guilty of that. But they never even questioned her about that.

And what was interesting, Your Honor, is during the hearing, when Ms. Kenard was questioned about this Batman, hero day, she has a desk in her classroom that is as tall as

this podium, Your Honor. It's a desk this tall.

Even if Ms. Burnap came in to look at her, you can only see from the head -- from the neck down (sic), and I specifically said to her, did she come around the desk to see you to, you know, make these sexual advances and stuff? And she's like, no. Well, do you have x-ray vision? No. So even that's not credible.

But furthermore, Your Honor, they never even asked my client anything about this superhero day or the alleged, you know, looking her up and down, but yet they found her guilty of this sexual advance.

And it's important to note, Your Honor, this Ms. Kenard actually was a very good professional friend of Ms. Burnap. They had a great comradery and relationship at this school. There's all this talk about this real exotic fish tank with all these exotic fish that Ms. Kenard had to relocate in the school because her section of the school was being renovated.

Well, guess who she's entrusting this treasured fish tank of hers? Ms. Burnap. Do you think that if she felt for a moment that Ms. Burnap was making sexual advances towards her, you know, as far back as October, that in January she would be having Ms. Burnap have her, you know, trusted fish tank? I mean, it's not even believable.

What's also very interesting, in -- on page 5, Your

Honor, just take note, for Defendant's motion for summary judgment, it says, "Amy Burnap frequently looked at Ms. Kenard up and down in what seemed to be a sexual manner." Well, Your Honor, you can look through the transcripts, you can look through every piece of evidence I have. Nowhere in the testimony did anybody ever say that.

That sentence is also in Investigator McDonald's affidavit. Again, they're now adding more insinuating, derogatory comments about my client. They're not even in the evidence. Every time I read something they add something else in that was never part of a transcript, a hearing, anything.

It also said in the affidavit, by January 2016, Kenard relayed she was already extremely uncomfortable with the way Amy interacted with her. Again, Your Honor, you can look through everything. That is not cited anyplace. That was never any information or testimony that came out of any hearing.

We talk about the discriminatory animus. Well, Your Honor, the investigators, the accusers, the witnesses; I mean, they try to belittle it and downplay. This case is so full of discriminatory animus, and Your Honor, it doesn't have to be -- it has to be -- Defendants want you to think that they actually had to be overt about it. That's not really what discriminatory animus is about.

If you look at the testimony of Robison, Carrington,

and Garon (phonetic), which I will get into in just a minute, and Officer Campbell (phonetic), there's no question that there was discriminatory animus, especially with the investigators.

So my client was found guilty of allegations she had no memory or knowledge of, and they presented no context associated with the inquiry. Yet they found her guilty of things they never even questioned her about. How can that be a legitimate investigation? And how can it not be an inference of discriminatory animus, Your Honor?

So the hugging incident. So they asked Amy about this on January 25th. Now, this allegedly happened at the end of August, five to six months prior. She had no idea what they were talking about. And the fact that the investigators -- this is a quote:

> "The investigators conclude that Amy does not recall commenting about women hugging or any reaction she made. She did not deny the comment or claim she would never have said such a thing; therefore, because she didn't deny it, she's guilty of it."

Is she guilty of commenting on two females hugging because she's of her sexual orientation? If a heterosexual female had said the same thing, do you think we would be sitting here today?

And also, Your Honor, the times of this, just at the

end of June or July of that year is when the United States Supreme Court decision came down that same-sex marriage is allowed in all 50 states. Who wouldn't be thrilled to death to see two females hugging, two men hugging? It's a wonderful time in our country.

This is all in the same time frame, but again, they found her guilty of something because she didn't remember it. Also, Your Honor, it's important to know that neither female said they felt violated or sexually harassed because it wasn't aimed at them, and their policy says that it has to be aimed at an employee.

And I'm not going to go into their sexual harassment policy because you've got it as an exhibit, but you will find nothing that happened here fought with their policy. And they have a policy there for a reason, and they totally ignored it.

Carrie Kenard further indicated she wondered if she was giving off a vibe. Would she be saying that if my client was not a lesbian? Would she be saying that? I don't think so. She said Amy must be interested in her.

Your Honor, I suggest this is to support their claim of sexual harassment, because they want you to think that because of her sexual orientation, she is interested in all females and everything she says must be sexually based; therefore, sexual harassment. And I would argue that is just preposterous.

We get to the investigation. Your Honor, that was so faulty and flawed from the get-go that it's a travesty. They didn't follow their own criteria of their policy, or the guidelines of sexual harassment. As the interview notes show, not one person stated they felt sexually harassed in any meeting, or any alleged comment was directed at anybody.

And I'm talking this faulty, flawed report, just prior to the first hearing, they electronically disseminate this report that is just full of all this bogus accusations, not based on anything, to all the witnesses. Well, Your Honor, why would they do that?

They have a policy that only the superintendent is to get that final confidential report and talk and discuss with the school board, so they gave it to every single witness. Every single accuser, prior to the hearing, got not only the final evaluation or report, they got my response, 45-page response, that line by line addressed everything in their investigation.

So now they have two sides --

THE COURT: I'm sorry, when did they give out that report that you had characterized as confidential?

MS. JEWETT: Within one week of the first school board hearing.

THE COURT: Okay.

MS. JEWETT: And I only found out about it, Your

Honor, at the hearing when, I think it was by the second person testifying, they changed their story. Because you have the original interview sheets of all what everybody said, and everybody's story started -- now they're saying they were sexually harassed, and I would question them, well, isn't it true that you didn't say this?

And then somebody said, well, report, and I was like, what report? And that's how we found out that they had given the report to everybody. And nobody should have had that report.

So if you can't draw an inference of trying to now taint the school board hearings, and apply an inference of sexual harassment, Your Honor, it was like a lynch mob at the hearing. Now everybody was sexually harassed, their lives being ruined, their -- I mean, it was -- prior to the dissemination of that report, Your Honor, not one person in any investigative mode ever said they felt sexually harassed or that their work environment was anything but stellar. Not one person until they got that report.

So during the hearing I asked the superintendent, why did you give the report to everybody? She agreed we needed to conduct an investigation with an objective mind, and yes, it's a confidential report. So the response from the District was, because they were all on the witness list, it was important that they, every witness and accuser, had the

information that they needed.

I'll start right there. Isn't the only information they needed their own testimony? She further said,

"We gave them a copy of everything because we felt it was important for them to have the information they needed, and pulling parts and pieces of information out was difficult to do. I trust that they're respected professionals and needed to do what they needed to do with the information and keep it confidential. I stressed with them that this was difficult information, and it would be released to them, and they were to keep it private and confidential."

That was cited on page 532 of the transcript.

She then further agreed that she did not have control over what they did with it. They could just hit send and it's out on the information highway. Again, Your Honor, it was like a lynch mob at the hearing.

So during the initial investigation, again, not one person or witness indicated they had been sexually harassed at all; that anything Amy did interfered or intimidated them. No one, there's no testimony to that.

So now we have inconsistent testimony from all accusers. And inconsistent, Your Honor, can be another word for they all lied.

THE COURT: So how does it translate from they should not have received this report and they were provided information, what other witnesses were saying, maybe what investigators had concluded -- the point you've been focusing on is the witnesses went from not having any incidents of feeling sexually harassed to now they're testifying that they feel sexually harassed.

How does that translate to sexual discrimination based on orientation? Because you're saying that's the reason she's fired, according to you. That's the discriminatory animus. You're talking about sexual harassment, how does that translate to orientation?

MS. JEWETT: Well, they now have all read the report, which is flawed in the entire investigation, Your Honor. So there's a couple of pieces here. It started with the animus from the investigators.

If you were to read the final report, it's not accurate. It's kind of skewed so -- to cover up, first of all, that -- it's to cover up that there really was any sexual harassment, because there wasn't. It's mainly, if you have to lie in a report, Your Honor, case law says you can draw an inference that the real reason they're hiding -- and I'll argue, Your Honor, and I've got more information. The real reason was based on her discrimination -- her sexual orientation.

And it all stems from that core group of employees, because Donna Robison on January 12th, who's the one, the secretary -- Amy's secretary, way back in September said, she's incompetent. So January 12th, she goes to Principal Lamprose, and Amy had been meeting with her on a regular basis, like, what the -- how are we going to make this work? What is wrong with them? What is wrong with her?

So Robison meets with Lamprose, I can't work here anymore, blah, blah, blah. And on January 12th, Lamprose says to her, what is it about Amy? What is it -- give me some information. And the testimony from Lamprose is, I didn't get anything out of her other than she's incompetent, okay?

So it's important here, Your Honor, Robison, Kenard, and Carrington and a few of the others are what are called the "lunch bunch". Now, Donna Robison, throughout the hearing, every single person pretty much that I spoke to said, yeah, she couldn't stand Amy. She couldn't stand Amy.

So she goes in to try to get Amy terminated based on her incompetence; that doesn't work. So it's very suspect that three days later, now all of a sudden, Donna Robison is involved in the main -- the main complaint, and it's not information about Donna Robison.

Donna Robison added, oh, yeah, so-and-so back in August told me that she said something about two women hugging and it makes me so hot. Oh, so-and-so told me -- so Your

Honor, you got to look at the timing of everything that went on.

The other great thing here is Kenard, the finger incident. And I'll call it the finger incident, because my client never used the word "finger", ever. Every piece of information throughout the testimony, Defendants have added the word "finger".

In fact, Defense counsel, in his motion for summary judgment, they add in language. They add in things that you would never add in of an argument if it weren't based on her sexual orientation. None of the complaints from anybody -- Susan Garon, after that (indiscernible) reading, has changed her testimony four times.

Every time you talk to them, Your Honor, they add in sexually charged language at the end of every single comment. If you can't get rid of her for her competence, it's a home run that we can get rid of her by claiming she sexually harassed us. I mean, this whole case is just filled with these inferences. It's just --

THE COURT: And that sort of goes back to my other question. It doesn't mean that they're acting with discriminatory intent due to her sexual orientation, it means that they want to fire her for harassment. Those are two different things, right?

MS. JEWETT: But the evidence doesn't support that

she harassed anybody.

THE COURT: Okay. But that's -- the way I read the pleadings and understood it, that's why the City is conceding that you're entitled to a jury trial on breach of contract. There wasn't a basis to terminate her.

You're taking it one step further and saying that issue of whether she was terminated for sexual harassment and whether there was, you know, inappropriate, improper behavior, whether there was evidence of that, we're going to translate that into, this is all motivated by the fact that we don't like the fact that she's gay.

MS. JEWETT: Yes.

THE COURT: That's a huge leap, isn't it?

MS. JEWETT: Well, our --

THE COURT: How are we getting there?

MS. JEWETT: Well, our whole claim of discrimination. I mean --

THE COURT: Right. What's the evidence that they were motivated by their dislike for her sexual orientation? They clearly were motivated, based on everything you've told me, by the fact that they don't like that she may be sexually harassing people in the workplace. That may be for a jury to decide later; it was for the school board to decide. But that's a different question than, they are manufacturing this sexual harassment claim because they don't like her

orientation.

MS. JEWETT: Well, Your Honor, I think all the evidence supports that in that their claim of sexual harassment doesn't even meet the criteria of what their sexual harassment policy is.

THE COURT: So you have a breach of contract claim. You're trying to push the harassment into it means that they are discriminating against her based on her sexual orientation. Would it be any different to go back to something you had said earlier, if it was a heterosexual male doing these things?

We aren't trying to fire you because we don't like the fact that you're heterosexual, we're trying to fire you because you're harassing our employees. What's -- I don't understand how we're getting to that next level. I'm not seeing the evidence that gets there.

MS. JEWETT: Well, I think the evidence, Your Honor, is -- if you look at their sexual harassment policy and what she has to do to be accused of sexual harassment, it doesn't exist. It doesn't exist. So she can't possibly have been found guilty of sexually harassing.

So what's the underlying -- and you can draw an inference if -- and I've got the case law to support it, Your Honor -- if an investigation, they didn't even ask her about half of the charges of --

THE COURT: Does the law support -- sorry to interrupt. Does the law support the notion that you can infer discriminatory animus by the lack of maybe another explanation? Or does there have to be affirmative evidence of discriminatory animus?

MS. JEWETT: Well, an inference can arise when the record does not support the stated reason for the discharge. That's Grivois v. Wentworth-Douglass Hospital, that's a January 28th, 2010, case, New Hampshire District Court. Hang on.

In the Price Waterhouse, acts in evidence of asking plaintiff about numerous allegations and having no evidence that any of the witnesses or accusers indicated plaintiff sexually harassed them, defendant was unable to prove plaintiff violated any harassment policy. Therefore, the court says an inference of discrimination can be found.

State of New Hampshire v. Uman, again, that's 164 N.H. 413. That's a 2012 case. I think that supports it right there, Your Honor.

Let me see. Defendant's justification for plaintiff's termination was false for two reasons. First, no one claimed they had been sexually harassed or that anything plaintiff did or said unreasonably interfered with their work environment. And two, even if plaintiff did, plaintiff did not violate any of defendant's policies.

The United States Supreme Court has written,

"It's permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Evidence that an employer's reason is false combined with evidence presented to establish a prima facie case in some cases can be sufficient to sustain the plaintiff's burden, and plaintiff need not have further evidence of discrimination."

That's Zimmerman v. Associate First Capital Corporation, 251 F.3d, that's a Second Circuit case. "A disparaged treatment claim arises when an employer treats an employee" -- I haven't gotten to that part yet.

"A sham investigation can serve as a pretext for termination if sufficient facts are pled to support a claim." That's Quigley v. Precision Cathcarts (phonetic). Again, that's a First Circuit case.

"A sham investigation includes the persons conducting the investigation ignore or misrepresent evidence, or the investigation leads to a desired outcome."

Plaintiff has -- in Murray v. Kindred Nursing Center, plaintiff demonstrated the proffered reason was a lie and completely lacks a factual basis and -- unless shown pretext. I mean, Your Honor, this entire investigation, every

single one of these cases I just cited to you supports the pretext for discrimination.

Again, the ill motive, the timing, the pretext can be shown by weaknesses, implausibilities, inconsistencies, incoherencies, or contradiction in an employer's proffered legitimate reason for its action that a reasonable fact-finder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted nondiscriminatory reason.

Your Honor, the record is replete with contested material facts. No one claimed they were harassed but they found her guilty of such harassment. Investigators didn't ask her about three of the charges they found her guilty of.

They credited what their own -- the grooming. They said, even though they didn't ask her about that, they used their own interpretation. How do you use your own interpretation of something and find my client guilty of grooming if you never even asked her about it?

If you never even asked her about sexual advances, how can you find her guilty of that? Isn't it based on the fact of her sexual orientation? It's not based on sexual harassment. There's no evidence she sexually harassed.

The investigators said they credited the accusers and the witnesses' stories because they had known them longer, but yet they never asked her about any of it. They all spoke

to each other prior to ever being investigated initially, and then they all had the same report, so at the hearing everybody changed their testimony. Everybody -- you know, inconsistencies. This entire three nights of hearing were totally inconsistent.

I guess I don't need to go into the quality of the report, Your Honor, because it was a sham. It was an absolute sham.

THE COURT: So I need to interrupt at this point. I only have a few minutes left before I lose my monitor for the day.

MS. JEWETT: Okay.

THE COURT: And I did want to ask just one last question of the other side. Is there another point that you wanted me to make -- wanted to make to me? Excuse me.

MS. JEWETT: Your Honor, I have not just one, I have about 20.

THE COURT: All right. Well, I don't mean to end your presentation and to cut you short on making a record, but I do need to move -- I did want to ask the one question of this, the disclosure of the report.

The way it's been characterized is it's a confidential report that should not have been disclosed, and that it -- there's at least an inference, maybe, that it generated testimony favorable to the City that it did not

otherwise have.

MR. CULLEN: Yeah. I was not the attorney at that hearing. I know the attorney, I believe, was the one who released the report to the witnesses in advance of the hearing. They each, except perhaps the very first person, extensively cross-examined about this in front of the board.

The board didn't make the decision to release it, the attorney prosecuting the case on behalf of the District did. And as I said, and as has been apparent, Attorney Jewett was present throughout, raised that point time and time again with everyone.

So I don't believe that in itself is enough to create an inference that the intent was based on the Plaintiff's orientation. If there is an ill intent or if it was a poorly considered decision, that may be one thing. But again, as Your Honor pointed out, it has to be tied to somehow that this was based on the Plaintiff's orientation.

Just a couple quick points, if I may, Your Honor. The policies are quite clear. Creation of an offensive working environment, I think Carrie Kenard testified extensively that she felt that that was true. It doesn't have to be more than that.

And there are two policies: GBA-B and GBA-A. GBA-B says,

"While not always easy to identify precisely what

conduct constitutes unlawful harassment, prohibited conduct certainly includes slurs, epithets, derogatory comments, unwelcome jokes, teasing, or other similar verbal or physical conduct."

And that's what this is. To suggest that somehow in the three days of testimony that the 12 or 13 witnesses didn't provide sufficient evidence is just not the case. There's been no finding, and it doesn't -- I -- I'm confident that this is not in either the decision by the investigators or recommendation, or in the board decision that she was found guilty of grooming.

My understanding is that Ms. McDonald testified at one point on cross-examination, I think it was, that like, oh, it was almost as if she was grooming. She was eviscerated for that on cross-examination, and -- but there's no finding that she was grooming. There's no finding that she made sexual advances towards people.

There was a finding that her conduct, including making what was termed, like, "When Harry Met Sally" orgasmic noises when she sees people hugging or trying on handcuffs, that those things are the basis. It wasn't grooming or advances, that's just not in there.

There were two different things going on here that I think are getting conflated. There were complaints that were made, and then there's an investigative -- an investigation

done by two members of the staff: Ms. McDonald and Ms. Lamprose.

They made, then, a recommendation; that recommendation went to the superintendent. The superintendent reviewed it, approved it, forwarded it to the board, and then the board makes the decision. So this I think is getting conflated a little bit.

But ultimately, I think as Your Honor pointed out, I think the Plaintiff's best case may be a breach of contract case. I've not certainly conceded that there was a breach of contract. I think at trial we'd be able to establish that this was a proper termination.

But this is not a discrimination case, absent some evidence -- some evidence somewhere that somebody acted on the basis of her orientation, and there's just none. When you review the objection and the surreply, you'll find that there are statements of fact, and then there are conclusions.

And every one that talks about orientation, just like today, has been a conclusion. They had to do this, they had to do that. There's no factual citation to anywhere in the record that even hints at orientation being a factor to anybody.

THE COURT: Thank you. I --

MS. JEWETT: Just 30 seconds?

THE COURT: -- really do have to go. I have --

MS. JEWETT: Just 30 seconds?

THE COURT: -- Ms. Cook does need to go.

MS. JEWETT: Okay.

THE COURT: 30 seconds.

MS. JEWETT: Just, she was found guilty of making sexual advances, so it counts --

THE COURT: Okay.

MS. JEWETT: And also, Your Honor, if you look at the Quigley case, and sham investigation, which this reeks of it, can serve as a pretext for termination. And this was a sham investigation. And nobody ever had any issue until they read the final -- the report was disseminated to them.

THE COURT: All right. Thank you, both. Thank you for your patience this afternoon, and I will get an order out. Thank you.

MR. CULLEN: Thank you, Your Honor.

THE BAILIFF: All rise.

(Proceedings concluded at 4:18 p.m.)

CERTIFICATE

I, Karen Raile, a court-approved transcriptionist/proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

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KAREN RAILE, CDLT-105 February 26, 2019