

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT**

JOHN DOE,	:	
Plaintiff,	:	
	:	
v.	:	File No. 1:15-cv-192-jgm
	:	
MIDDLEBURY COLLEGE,	:	
Defendant.	:	

AFFIDAVIT OF KAREN GUTTENTAG

NOW COMES Karen Guttentag, Ed.M., and being duly sworn, deposes and says:

1. I am employed as Associate Dean for Judicial Affairs and Student Life at Middlebury College (“Middlebury”). My duties in that position include serving as a Judicial Affairs Officer (“JAO”) for Middlebury. I have served in this position since the fall of 2008. Between 2004 and 2008, I served in various roles in the judicial system as needed. These included acting as the secretary to the Community Judicial Board when this position was distinct from the associate dean for judicial affairs, and serving as both a designated and a back-up chair for the Community Judicial Board.

2. Since my arrival at Middlebury in June 2001, my title has progressed, as a result of promotion and restructuring, from assistant dean of students to associate dean of students, to associate dean of the college, to my current title. In addition to my responsibilities related to Middlebury’s judicial system, I have also held responsibilities that include directing Middlebury’s Orientation program for new students, serving as the liaison for various academic scholarships, co-founding and co-directing Middlebury’s Spring Student Symposium, and co-chairing the Administration Committee.

3. My duties as JAO include administering Middlebury's academic (that is, honor code-related) and non-academic disciplinary processes. When reports of misconduct may implicate Middlebury's Policy Against Sexual Misconduct, Domestic Violence, Dating Violence and Stalking ("SMDVS Policy"), my duties include facilitating the investigation and adjudication of sexual misconduct, domestic violence, dating violence, stalking and related retaliation complaints, and any other possible policy violations the initial allegations suggest may have been implicated.

4. During November 2014, I became aware that the Plaintiff in this case, who was at the time a Middlebury student studying abroad in a program administered by the School for International Training, which is headquartered in Brattleboro, Vermont, ("SIT"), had withdrawn from the study abroad program after another student in the program reported to SIT that she had been sexually assaulted by the Plaintiff.

5. On December 8, 2014, I sent an e-mail to Stacey Thebodo, Assistant Director, International Programs and Off Campus Study at Middlebury, in which I inquired whether she had any more information about the outcome of Plaintiff's hearing at SIT. Ms. Thebodo responded that she had heard from SIT that they held the hearing, were reviewing the case and expected to have a decision early that same week.

6. On December 11, 2014, I received an e-mail from Ms. Thebodo, in which she informed me that SIT found Plaintiff "not responsible" for the alleged misconduct, and that this meant that he would receive credit for the work completed in the SIT program.

7. On December 16, 2014, I received a phone call from the Title IX Coordinator for a university (which I will call "University X"), who indicated that a student at University X had reported to University X's Title IX Coordinator that she had been sexually assaulted by a

Middlebury student. In that conversation, University X's Title IX Coordinator identified the University X student by name ("Jane Doe" in this litigation), and also identified the Plaintiff in this case as the Middlebury student whom Jane Doe named. University X's Title IX Coordinator also shared that the alleged assault occurred in November 2014, while Jane Doe and Plaintiff were both students in a study abroad program administered by SIT.

8. University X's Title IX Coordinator also told me in that December 16th conversation that Jane Doe had filed a complaint with SIT that was recently adjudicated in Brattleboro, that SIT found Plaintiff not responsible for sexual assault, that Jane Doe had many complaints about SIT's process and felt that it was very flawed, and that she wanted to engage Middlebury's process because she wanted to make sure that others were not hurt by Plaintiff. University X's Title IX Coordinator also told me that the next step he would take would be to send an e-mail to me that would connect me with the University X student.

9. University X's Title IX Coordinator followed up this phone conversation by sending an e-mail to me on December 23, 2014, on which Jane Doe was copied. The email stated that University X was notifying me, at the request of Jane Doe, that she reported that she was sexually assaulted by Plaintiff in his room on the campus of the SIT-administered study abroad program on the night of November 7, 2014, that she cooperated fully in an internal SIT investigation, and that she was also willing to cooperate fully with an investigation by Middlebury. University X's Title IX Coordinator passed along Jane Doe's request that I initiate contact with her via e-mail to set up a time to talk or meet.

10. On the evening of December 23, 2014, I sent an e-mail to Jane Doe in which I let her know that I would be out of town from December 24th until Middlebury reopened on January 5, 2015, asked whether she wanted to set up a time to speak by phone with me the week of

January 5th, and asked her to forward any materials she would like to send to help me understand the situation. *See* EXHIBIT S-4 to PLAINTIFF'S PI MOTION, p. 3 (12/23/14 e-mail from Karen Guttentag to Jane Doe).

11. On January 2, 2015, I received an e-mail from Jane Doe in which she indicated that she had a large file of evidence and a statement she had submitted to SIT for its investigation. She stated that SIT's investigation was "not in depth nor did they interview other students or my academic director," that her "attempts to work through their judicial process in the hope of seeking justice were difficult and [she] was met with many challenges as Title IX procedure was not followed and [she] was further victimized by a process aimed at protecting the individual who attacked [her]." She also stated: "As a result, I am pursuing a complaint with the office of civil rights." She further stated that she was "hoping to work with Middlebury to ensure a proper investigation and to protect other students who remain at risk." She also indicated that she would forward evidence to me through her personal e-mail account. *See* EXHIBIT S-4 to PLAINTIFF'S PI MOTION, pp. 2-3 (1/2/15 e-mail from Jane Doe to Karen Guttentag).

12. I read Jane Doe's reference to "the office of civil rights" as indicating that she planned to pursue a complaint against SIT, not that she planned to pursue a complaint against Middlebury.

13. On January 5, 2015, I replied to Jane Doe's January 2nd e-mail by requesting that she send the evidentiary materials referenced in that message so that I could review them before we met or talked. *See* EXHIBIT S-4 to PLAINTIFF'S PI MOTION, p. 2 (1/5/15 e-mail from Karen Guttentag to Jane Doe).

14. Jane Doe replied on January 5th by sending me several documents and photographic images as attachments to two e-mails. The materials sent included: 1) Jane Doe's statement as given to SIT on November 10, 2014, three days after the alleged incident; 2) a record of Jane Doe's medical evaluation from a hospital visit and internal exam in the country where the study abroad program was based; 3) a record of a medical examination by Jane Doe's primary care physician in the United States; 4) four images of what Jane Doe stated were her "blood stained sleep shorts as a result of the attack"; and 5) four images of what Jane Doe stated were "text messages sent by my attacker referencing the incident as a 'cruel joke.'" Jane Doe claimed in that message that she had "contacted SIT on numerous occasions" to request a recording of the SIT disciplinary hearing that she stated was "sent immediately to the other individual [i.e., Plaintiff] in preparation for an appeal," but that at that time she had "still not received that recording or some of the additional documentation [she] had asked for." *See* EXHIBIT S-4 to PLAINTIFF'S PI MOTION, pp. 5-6 (1/5/15 e-mails from Jane Doe to Karen Guttentag).

15. A copy of what is labeled a "summary" of the statement given by Jane Doe to SIT on November 10, 2014 and the two medical records referenced in the previous paragraph, are attached to Plaintiff's PI Motion as Exhibits S-14, pp. 4-5; S-14, pp. 18-19; and S-14, p. 21, respectively.

16. On January 13, 2015, Jane Doe sent an e-mail to me in which she asked whether there was any additional information I needed from her at that time. I replied by e-mail a few minutes later that I had not yet been able to complete my review of the materials she provided,

and that I was very hopeful that I would be able to be back in touch with her by the end of that week.

17. During the fall of 2014 and presently, Middlebury's SMDVS Policy included the following language:

11. Scope of Oversight (Students)

Students will be held accountable for policy violations that take place between the time they first arrive on campus to begin their Middlebury program and their graduation or completion of their program, or Middlebury's confirmation of their resignation or expulsion. Conduct that takes place on or near Middlebury premises or property; occurs at or in connection with a Middlebury-related event; or occurs off-campus but may represent a threat to the safety of the Middlebury community or any of its members, the pursuit of its objectives, and/or the educational environment of others, may be subject to Middlebury's disciplinary process.

Nearly identical language (the only difference being the deletion of the words "any of" from the second sentence) appeared during the fall of 2014 and appears now in the Community Standards and Policy Overview section of Middlebury's Student Handbook. This Scope of Oversight language therefore applies to all forms of misconduct by Middlebury students.

18. I was aware of precedent under Middlebury's Scope of Oversight language for Middlebury to investigate a report that a Middlebury student had committed sexual misconduct against a non-Middlebury student outside the context of a Middlebury program. I remembered specifically a matter we began investigating during 2012, but discontinued when it emerged that the Middlebury student had been misidentified.

19. Later during the week of January 12th, I completed my review of the materials, and conferred with Middlebury's (at that time) Interim Human Relations Officer and Title IX Coordinator, Susan P. Ritter, about whether Middlebury should or should not conduct an investigation into Jane Doe's allegations. Based upon the information and materials Jane Doe

provided to me about the incident, Jane Doe's perceptions of SIT's investigation and hearing process, and precedent as outlined in the previous paragraph, it was decided that Middlebury would, pursuant to the authority outlined in Middlebury's Scope of Oversight policy language, initiate an investigation of Jane Doe's allegations in accordance with the SMDVS policy. That is, although the actions at issue allegedly occurred off campus, they could, if substantiated, "represent a threat to the safety of the Middlebury community or any of its members, the pursuit of its objectives, and/or the educational environment of others," and could therefore be subject to Middlebury's disciplinary process, as provided in the Scope of Oversight section of the SMDVS policy.

20. On January 16, 2015, I sent an e-mail to Jane Doe advising her that Middlebury would initiate an investigation, that the investigation would proceed under Middlebury's SMDVS Policy, that she would have the status of a witness/affected party rather than a complainant, that certain complainant rights would be extended to her pursuant to discretion reserved by Middlebury in the SMDVS Policy (e.g., the rights to have an advisor of choice present at meetings and interviews, to review evidentiary materials and submit a response, to submit a character reference, and to meet with Middlebury's Human Relations Officer before a final determination was made), but that other complainant rights would not be extended to her (e.g., the right to submit a Sanction Statement and the right to appeal). I also invited Jane Doe to meet with me so that I could inform her of what to expect during the investigation and adjudication process.

21. I contacted the Plaintiff on January 20, 2015 and asked him to meet with me on January 21st. After initially scheduling our meeting for the 22nd, Plaintiff asked that our meeting occur on January 23rd. In my January 23rd meeting with the Plaintiff and by letter to him on that

date, I informed him that Middlebury was going to initiate an investigation because it had determined that the conduct alleged by Jane Doe could, if determined to be true, constitute sexual misconduct, as defined in Middlebury's SMDVS Policy. I also advised him that Middlebury had the authority under the Scope of Oversight language quoted above to pursue an investigation because, while the actions at issue allegedly occurred off campus, they could if substantiated present a threat to the safety of the Middlebury community, its members, and/or the educational environment of others.

22. Under Middlebury's SMDVS Policy, Middlebury's investigation and adjudication process entails a thorough investigation by an investigator, who provides a written report to a Human Relations Officer ("HRO"). The investigator's report includes among other things the evidentiary materials submitted by the parties and otherwise gathered in the case, written responses to the investigation materials and character references (if submitted by the parties or affected parties), and a recommended finding as to whether there is a preponderance of evidence that Middlebury policies were violated. The HRO meets with parties and affected parties if they desire, reviews the investigation report and evidentiary materials, and makes a determination as to whether the respondent is responsible for policy violations based on the preponderance of the evidence. If a student respondent is found responsible, a sanction is determined by a Middlebury official with jurisdiction over that student. Both the complainant (where there is an individual complainant) and the respondent have the right to appeal the finding and/or sanction based on designated grounds. In the 2014-15 version of the policies, students had a right to appeal the sanction (but not the finding of responsibility) to the President if the sanction was expulsion and was upheld by the normal appeals process. The investigation and adjudication procedures are set

forth in more detail in the SMDVS policy. *See generally* EXHIBIT P-4 to PLAINTIFF'S PI MOTION, pp. 19-26 (SMDVS Policy).

23. I appointed Ellen ("Nell") Coogan, Esq., an independent contractor who has substantial experience investigating alleged violations of Middlebury's sexual misconduct-related policies, to conduct the investigation of Jane Doe's allegations. As outlined in more detail in her July 2, 2015, investigation report, *see* EXHIBIT S-6 to PLAINTIFF'S PI MOTION (Investigation Report), Ms. Coogan interviewed 16 individuals and collected a number of documents and other materials. Based on her investigation, Ms. Coogan recommended that a finding be made based upon a preponderance of the evidence that Plaintiff's conduct toward Jane Doe constituted sexual misconduct as defined in the SMDVS Policy. *See id.*

24. Middlebury's SMDVS Policy provides that the general 45-day timeframe for investigation may be extended as necessary due to extenuating circumstances such as the complexity of the case or the availability of witnesses. *See* EXHIBIT P-4 to PLAINTIFF'S PI MOTION, pp. 24-25 (SMDVS Policy). In this case, extenuating circumstances such as the complexity of the case and the availability of witnesses (some of whom were outside the United States) were present, and the timeframe for the investigation was extended accordingly. I informed the Plaintiff by e-mail on March 25, 2015 of the extension. In the course of the investigation, Plaintiff requested that Middlebury delay the provision of the evidentiary materials to the parties for their written responses so this would not interfere with the completion of his final Middlebury course work; an extension of the deadline for the submission of his written response to the evidentiary materials; and an extension of the deadline for his submission of a sanction statement, all of which were granted.

25. On July 10, 2015, Middlebury Human Relations Officer Steven C. Collier issued his decision. Mr. Collier's decision outlined his reasons for concluding, by a preponderance of the evidence, that Plaintiff's conduct toward Jane Doe constituted sexual assault as defined in the SMDVS Policy. *See* EXHIBIT S-7 to PLAINTIFF'S PI MOTION (HRO Decision).

26. Vice President for Student Affairs and Dean of the College Katy Smith Abbott imposed a sanction of expulsion from Middlebury based on the finding of sexual assault. *See* EXHIBIT S-8 to PLAINTIFF'S PI MOTION (July 24, 2015 Notice of Sanction Decision). The Notice of Sanction Decision informed Plaintiff that the sanction of expulsion would go into effect immediately, but would be stayed pending the outcome of an appeal and/or be subject to change, if Plaintiff appealed and his appeal was successful. *See id.*

27. Plaintiff appealed the finding of responsibility and the sanction. His appeal was denied by Vice President of Academic Affairs and Dean of the Faculty Andrea Lloyd, for the reasons outlined in her August 4, 2015 decision. *See* EXHIBIT S-10 to PLAINTIFF'S PI MOTION (VPAA's Decision).

28. Plaintiff appealed the sanction of expulsion to Middlebury President Laurie L. Patton. By decision of August 26, 2015, President Patton decided not to change the sanction related to the finding of sexual misconduct. *See* EXHIBIT S-12 to PLAINTIFF'S PI MOTION (President's Decision).

29. Plaintiff's expulsion from Middlebury, which is defined as being "permanently dismissed from the College," *see* EXHIBIT S-8 to PLAINTIFF'S PI MOTION (July 24, 2015 Notice of Sanction Decision), was therefore effective August 26, 2015.

30. My responsibilities as JAO include keeping records of disciplinary proceedings initiated against Middlebury students.

31. Since 2011-12, Middlebury has not received a report that a female respondent violated Middlebury's sexual misconduct and/or SMDVS policies. The only sexual misconduct-related investigation initiated during that year was the one referenced above, in which the investigation was discontinued when it emerged that the Middlebury student had been misidentified.

32. During 2012-13, Middlebury adjudicated four cases that involved reports that male students had violated Middlebury's Sexual Misconduct policy through their conduct toward female Middlebury students. At that time, Middlebury employed a process that entailed a detailed investigation that resulted in an investigation report, which was considered by a Sexual Misconduct Review Panel ("SMRP") or Human Relations Officer ("HRO"), either of which was responsible for determining the finding. The parties could meet briefly and separately with the SMRP or HRO if they chose to do so before the determination was made.

33. The investigator in Plaintiff's case, Nell Coogan, Esq., investigated three 2012-13 cases. She recommended a finding that the respondents in two of those cases were responsible for some form of sexual misconduct. Middlebury found the respondents in those cases responsible for some form of sexual misconduct. Ms. Coogan recommended in the other case that the respondent was not responsible for sexual misconduct. Middlebury found the respondent in that case not responsible for sexual misconduct.


34. During 2013-14, Middlebury adjudicated three cases that involved reports that male Middlebury students had violated Middlebury's Sexual Misconduct Policy through their conduct toward female Middlebury students. Ms. Coogan conducted the investigation in each case. Ms. Coogan recommended a finding in one case that the respondent was responsible for some form of sexual misconduct, and Middlebury found the respondent in that case responsible

for some form of sexual misconduct. Ms. Coogan recommended findings in the other two that the respondents were not responsible for sexual misconduct, and Middlebury found in those cases that the respondents were not responsible for sexual misconduct.

35. Ms. Coogan did not investigate any SMDVS cases for Middlebury during 2014-15, other than the one involving the Plaintiff in this case. Of those other 2014-15 cases that involved allegations of sexual misconduct in the form of sexual assault (as opposed to, e.g., inappropriate sexual conduct such as distributing nude photographs without permission), one case resulted in a conclusion that the male respondent had committed sexual assault, and four cases (one of which involved allegations of two sexual assaults involving the same parties) resulted in conclusions that the male respondents had not committed sexual assault.

36. I have attended many training programs, on Middlebury's campus and in public settings, on topics related to sexual harassment, sexual assault, domestic/dating violence, stalking, and the investigation and adjudication of cases involving allegations that such misconduct has occurred on college and university campuses. Sometimes, presenters will offer research findings and statistics regarding the incidence of these types of misconduct in the general population and at institutions of higher education. I am not aware of any research findings or statistics that I would view as persuasively establishing or suggesting that a particular student was or was not likely to have committed such misconduct in a particular case. Therefore, I have never relied on such information in deciding whether to initiate an investigation into alleged misconduct. Instead, I have always relied upon whether the allegations of a report may, if found by a preponderance of the evidence to be true, constitute a violation of applicable Middlebury policies.

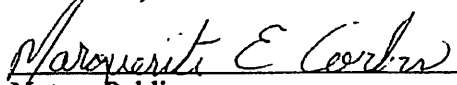
Dated at Middlebury, Vermont, this 8th day of September, 2015.


Karen Guttentag

STATE OF VERMONT
ADDISON COUNTY, SS.

At Middlebury, in said County, on this _____ day of September, 2015, before me personally appeared Karen Guttentag, to me known to be the person described in, and who executed the foregoing, and she acknowledged that she executed the same as her free act and deed.

Before me,


Margaret E. Corbin
Notary Public
Commission expires 02/10/19