UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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STACY BLAIN, PH.D.,

Plaintiff,

-against-

STATE UNIVERSITY OF NEW YORK DOWNSTATE MEDICAL CENTER, VITALY CITOVSKY, RICHARD GRONOSTAJSKI, FRANK MIDDLETON, and DAVID CHRISTINI,

Defendants.
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OPINION AND ORDER
Case No. 22-CV-3022-FB-MMH

Appearances:
For the Plaintiff:
JIM WALDEN
Walden Macht & Haran LLP
250 Vesey Street, 27th Floor
New York, New York 10281

FAITH GAY
Selendy Gay Elsberg PLLC
1290 Avenue of the Americas
New York, New York 10104

For the Defendants:
CLEMENT J. COLUCCI
Assistant Attorney General
State of New York
28 Liberty Street
New York, New York 10005

BLOCK, Senior District Judge:

Stacy Blain, Ph.D. ("Dr. Blain" or "plaintiff"), is a tenured professor of pediatrics and cell biology at the State University of New York's Downstate Medical Center ("SUNY Downstate" or "defendant"). In 2019 SUNY Downstate issued an

investigation report substantiating allegations that Dr. Blain falsified or fabricated research data. On May 12, 2022, it notified her that it was initiating disciplinary proceedings based on the report.

Ten days later, Dr. Blain filed the present action alleging sex discrimination and retaliation in violation of federal, state, and local law, as well as defamation. She simultaneously moved for a preliminary injunction forbidding SUNY Downstate from pursuing the disciplinary proceedings and taking other related actions during the pendency of her lawsuit.

The Court held an evidentiary hearing on June 29, June 30, and July 1, 2022. Having considered the evidence adduced at the hearing and the parties' post-hearing submissions, the Court denies the application for failure by Dr. Blain to satisfy the Court, based solely on the evidence presented at the hearing, that there is a likelihood of success that she will prevail on the merits.

While the Court will thoroughly explain in this opinion why the plaintiff has failed to satisfy her burden, there are troubling aspects of this case that bear on serious public health concerns, which the Court feels compelled to address first. Indeed, most of the evidence adduced at the hearing—although irrelevant in respect to gender discrimination and retaliation claims—centered on these concerns.

I

A. Dr. Koff's Testimony

The plaintiff's first witness, Dr. Andrew Koff—one of the world's leading molecular biologists—explained that Dr. Blain invented an experimental drug "that would actually activate the body's own mechanisms in order to . . . stop cancer growth." Hg. Tr. at 50. He estimated that "within two years it could be in clinical trials." *Id.* at 51. The drug was originally developed for breast cancer but, thanks to a research grant funded by the National Institutes of Health ("NIH"), its effectiveness is now also being tested on pancreatic cancer.

Dr. Koff testified that he had read SUNY's investigation report and disagreed with its conclusion that the falsification would be obvious to any cell biologist. He explained that the authors of the report "went about trying to identify anomalies based on a forensic computer software program," *id.* at 59, but that it was "[not] possible to make a scientific conclusion of falsification of data based on this software." *Id*. at 60. Dr. Koff testified that SUNY Downstate's actions against Dr. Blain, including "asking for retractions of her seminal work," would "end the program." *Id.* at 65.

Dr. Koff is eminently qualified to take issue with the investigation report. He is a full professor at the Memorial Sloan-Kettering Cancer Center, where he has worked for about three decades as a cancer researcher and made "an important

discovery that advanced cancer research." *Id*. at 45. He is also the chair of the biochemistry cell molecular graduate program at Weill Cornell Medical College.

B. The Whistleblower Complaint

The events that led to the investigation report are a convoluted web resulting from the implementation of rigid institutional policies. It all started in June of 2019, when SUNY's Compliance Office received an allegation from "Clare Francis"—a pseudonym for a well-known whistleblower in the scientific community—that Dr. Blain had published articles containing manipulated images. Associate Vice President Shoshana Milstein referred the allegation for an "Assessment" by Dr. James Knowles, Chair of the Department of Cell Biology. Dr. Knowles found eight of twenty-four images "suspicious" and an additional three "possibly suspicious." Under SUNY Downstate's research integrity policy, Dr. Knowles's findings triggered an "Inquiry."

On July 17, 2019, the Compliance Office received a letter from the Office of Research Integrity ("ORI") at the U.S. Department of Health and Human Services. ORI had apparently received the same "Clare Francis" allegations as SUNY Downstate because Dr. Blain's research was supported by grants from NIH and other federal agencies. ORI had "examined the matter and determined that the allegations represent possible falsification and/or fabrication of data." Defs'. Hg. Ex. 5. It therefore directed SUNY Downstate to "initiate a formal inquiry into the

matter to determine whether an investigation of possible research misconduct is warranted" under federal regulations. *Id*. It further directed SUNY Downstate to send a report of any findings if it "has already conducted an inquiry or review of this matter." *Id.*

C. The Inquiry Process

To comply with ORI's instructions, SUNY Downstate continued the Inquiry it had already begun. Its president, Dr. Wayne Riley, authorized the Inquiry on July 18, 2019. Dr. Blain was informed orally shortly thereafter and in writing on August 6, 2019.

SUNY Downstate began the inquiry by sequestering Dr. Blain's electronic and paper data. Because the data was not centrally stored on SUNY Downstate's servers, it took several weeks to compile from individual computers and other sources. All told, 25 binders of paper data and 40 gigabytes of electronic data were sequestered.

SUNY Downstate then assembled an Inquiry Committee of three members with the requisite scientific expertise and without any conflicts of interest. It consisted of Dr. Frank Middleton from SUNY Update Medical Center in Syracuse, Dr. Richard Gronostajski from SUNY-Buffalo, and Dr. Vitaly Citovsky from SUNY-Stony Brook. Dr. Blain initially raised no objection to the committee's composition. After its first meeting, however, her attorney sent Milstein and

SUNY Downstate's in-house counsel a letter expressing "concerns about how the Inquiry has been—and continues to be—conducted." Pl.'s Hg. Ex. 9. The letter summarized Dr. Blain's view that SUNY Downstate "has illegally discriminated against [her] and treated her unfairly for over a decade," *id.*, and suggested that the "Inquiry is being used as a pretext by [SUNY Downstate] to terminate the information-sharing agreement with [Dr. Blain's research company]." *Id.* SUNY Downstate's counsel forwarded the letter to the university's Office of Diversity and Inclusion. Milstein had no further involvement with the complaint or its investigation and did not mention it to the Inquiry Committee.

After reviewing records and conducting interviews with Dr. Blain and others, the Inquiry Committee prepared its report. Dr. Blain received a copy of the draft report and submitted comments on it.

In its final report, the Inquiry Committee found several instances of identical-looking images purporting to show the results of different experiments. It noted that Dr. Blain either did not acknowledge the discrepancies or was unable to explain them, and that a prior investigation into the allegations that a graduate student had falsified the same data was incomplete. In sum, the committee recommended a full investigation. Its final report was forwarded to ORI on December 16, 2019. ORI informed SUNY Downstate that it would review the report and send a "formal communication . . . following that review." Defs.' Hg.

Ex. 13.

D. The Investigation Process

In the meantime, SUNY Downstate implemented the Inquiry Committee's recommendation. With input from Dr. Blain, it formed an Investigation Committee consisting of the three members of the Inquiry Committee, plus Dr. Patricia Kane from SUNY Update and Dr. Laurie Read from SUNY-Buffalo.

By design, an Investigation is more thorough than an Inquiry. Thus, the Investigation Committee interviewed more witnesses—again including Dr. Blain—and examined the challenged data in greater detail. After considering Dr. Blain's extensive comments to its draft report, the committee issued its 46-page Final Investigation Report on December 2, 2021. It found twelve instances of falsified or fabricated data. In only one of those instances did the committee conclude that there was not "sufficient evidence as to the elements of research misconduct to assign culpability to Dr. Blain." Defs.' Hg. Ex. 16, at 26. In all other cases, it found by a preponderance of the evidence either that the misconduct was intentional or that Dr. Blain showed such "indifference to the risk that the materials were false, fabricated or plagiarized" that it amounted to recklessness. *Id.* at 14 (internal quotation marks omitted).

The Investigation Committee recommended "serious action" based on what it found to be "repeated, sustained reckless research misconduct on the part of Dr.

Blain." *Id.* at 42-43. In particular, it recommended contacting the scientific journals in which papers containing falsified or fabricated data had appeared, informing them of the Investigation, and recommending that they retract the papers or "at a minimum" publish "significant corrections . . . listing the altered figures." *Id.* at 43. It further recommended that SUNY Downstate confer with its Research Foundation to discuss the impact on licensing agreements (such as patent applications) it had with Dr. Blain's research company.

The Final Investigation Report is somewhat compromised in a number of respects. In addition to the issues raised by Dr. Koff, the report "did not mention . . . positive comments" about Dr. Blain." Hg. Tr. at 427. For example, Dr. Katrina Nguyen, a co-author on one of the challenged articles, told the committee that she and the graduate student she supervised never "cut and pasted" data while working in Dr. Blain's lab. Pl.'s Hg. Ex. 3, at 4. Presented with one allegedly manipulated image, Dr. Cindy Gomez, another co-author working in Dr. Blain's lab, said: "I didn't see that and I certainly didn't do it." Pl.'s Hg. Ex 4, at 19. She also found it "farfetched" that Dr. Blain would have done so because "she could have just repeated the experiment." *Id.* The transcribed interviews of Drs. Nguyen and Gomez were attached as exhibits to the Final Investigation but not addressed in the body.

In addition, the Investigation Committee did not interview other potentially

relevant witnesses. Dr. Susan Gottesman worked with Dr. Blain as a co-investigator for over ten years. She would have told the committee that Dr. Blain's research ethics were "superb" and "of the highest quality." Hg. Tr. at 110. Dr. Jonathan Somma worked with Dr. Blain since 2014 and, though not interviewed by the committee, told the Court that she would not "ever publish bad data." *Id*. at 189. Both Dr. Gottesman and Dr. Somma quit the lab after Dr. Blain was, as explained below, removed from the grants they were working on together. Her replacement on the grants, Dr. Janice Brissette, wrote to the committee that she "never noticed anything that suggested misconduct on the part of Priyank [Patel] or Stacy [Blain]." Hg. Tr. at 456. The committee did not follow-up with an interview.

The Court was greatly troubled by the exclusion of exculpatory evidence from the body of the report:

> THE COURT: It deals with the integrity—now we're not even talking about the integrity of Dr. Blain, we're talking about the integrity of this unbiased committee—and I can make findings that there was a problem here. I may or may not do that, but I am inclined to do that because it bothers me.

Hg. Tr. at 430.

Moreover, one of the defendant's own witness, Dr. David Christini—the Senior Vice President for Research—testified that although he felt obliged to ask various journals to consider retracting some of Dr. Blain's articles, he described

the reason as "irregularities" in, or "fabricat[ion]" or "falsifi[cation]" of, the data, Hg. Tr. at 490; he never told the journals that Dr. Blain was responsible for the misconduct. *See id.* ("Research misconduct is not anywhere in any of these conversations."). In fact, Dr. Christini "never had a problem or issue with Dr. Blain" and, but for the accusations of research misconduct, "had no reason to want any of this to happen." *Id.* at 487.

E. Implementation of the Final Investigation Report

The Final Investigation Report was sent to SUNY Downstate's President and ORI, which had also received a copy of the Inquiry Committee's report. ORI's investigation is ongoing. There is no deadline, and the parties agree that the process is often lengthy. ORI may well conclude that—contrary to the investigation report—Dr. Blain is not guilty of research misconduct.

SUNY Downstate's implementation of the Final Investigation Report did not await a final determination by ORI. *See* Hg. Tr. at 489 ("[T]he institutional report . . . is not some interim step that we need to wait for ORI for."). The university notified the relevant department chairs of the report and its findings. It also has conferred with its Research Foundation, which has obtained an extension on a pending patent application that may rely on the data at issue.

SUNY Downstate has also notified the relevant journals. It has requested retraction of two papers based on "irregularities" in the data underlying them but

did not, as noted by Dr. Christini, mention research misconduct by Dr. Blain. Dr. Blain has, however, submitted defenses of the papers to the journals, which are conducting their own review.

F. The NIH Grant

Critically, at NIH's insistence, SUNY Downstate removed Dr. Blain as Principal Investigator ("PI") of two federally funded grants. The first grant expired prior to the hearing, leaving only the second grant—which expires in 2026—at issue.

ORI had directed SUNY Downstate to inform NIH of the Investigation Committee's finding. In response, SUNY Downstate sent NIH's research integrity officer an "extract" of the Final Investigation Report and "several relevant exhibits." Defs.' Hg. Ex. 19. After reviewing the documents, NIH directed SUNY Downstate "to either find a new PI to replace Dr. Blain on the grant, or to unilaterally terminate the grant." Hr. Tr. at 353.

Significantly, NIH's sole reason for taking this action, as stated in an explanatory letter, was the Investigation Committee's comment that Dr. Blain had failed to cooperate with its investigation:

> You have informed us that Dr. Stacy Blain is in violation of your institution's policies. You stated that in the course of a misconduct investigation, "she declined multiple requests to review the notebooks and identify the data that she asserts supports the figures in the manuscript and was, therefore, in violation of SUNY Downstate's policy."

Pl.'s Hg. Ex. 26.

As Dr. Christini acknowledged, NIH "made no findings themselves as to Dr. Blain," Hg. Tr. at 522:

> THE COURT: Why did NIH put the kibosh on everything and you told me it's because they said she failed to cooperate and that violated a very important policy and that was really the basic reason why NIH told you, you got to stop all this. You testified to that.
>
> * * *
>
> THE WITNESS: That was their reasoning in their entirety they gave us.
>
> THE COURT: That was the reasoning?
>
> THE WITNESS: Yes, your Honor.
>
> THE COURT: Nothing else? That was it?
>
> THE WITNESS: That was it, sure.

Id. at 520. In fact, NIH did not mention any research misconduct. *See id.* at 480 ("THE COURT: Nothing about the quality of her research or anything of that matter? THE WITNESS: Nothing about any research misconduct violations.").

SUNY Downstate responded that it would not itself consider removing Dr. Blain as discipline for her conduct and urged NIH not to do so. As Dr. Christini explained: "[F]or these types of—this type of violation, in the absence of any other violation, we—this would not be our typical—this would not be our typical penalty that we would expect to give to one of our faculty members." *Id*. at 525. In other

words, he "tried to explain to NIH that noncooperation by itself would not be enough to disqualify a person from holding a grant or being the principal investigator in a grant." *Id*. at 526. He also acknowledged that he and NIH "did not talk granularly about any of the specific statements in the committee report that led to the conclusion of lack of cooperation." *Id.*

In truth, the "multiple requests" for cooperation all centered on one isolated episode concerning a 2008 paper when Dr. Blain exhorted the committee to locate the material because she believed she had already done so once before:

> THE COURT: The committee said, please help us, can you identify the underlying data. She said I already did and you can find it yourself.
>
> THE WITNESS: That's correct.
>
> THE COURT: Maybe she should have been a little more political about it, maybe she [should have] said, okay, I'll try to help you find it. Let me see what I can do. But she said no. Right?
>
> THE WITNESS: That is correct….
>
> THE COURT: Maybe they got a little annoyed because of that, I guess.
>
> THE WITNESS: I think they got more than a little annoyed but that's the crux of the problem.
>
> THE COURT: As a practical matter, that['s] the essence of the problem she faced thereafter because she had the temerity or the nerve to say it's there, don't bother me anymore, find it yourself.
>
> THE WITNESS: That's the essence of why the NIH chose to do this.

Hg. Tr. at 528-29.

In any event, SUNY Downstate told NIH that it would comply with its directive unless it heard otherwise. Receiving no such response, it removed Dr. Blain and proposed, as previously noted, Dr. Brissette as the new Principal Investigator on the grants. NIH approved the proposal.

Dr. Brissette was candid in testifying about the negative impact of removing Dr. Blain from the grants. She acknowledged that the focus of her own work is not breast cancer and that Mount Sinai stopped providing tissue samples for a study after the grant was transferred to her. She further agreed that Dr. Blain's work was of tremendous value:

> THE COURT: Would it not be of value if Dr. Blain was still there doing the great work? There's really no question that she's an outstanding scientist, I assume.
>
> THE WITNESS: I agree.
>
> THE COURT: And the work she was doing was so important, right? So critical to continue, right?
>
> THE WITNESS: Mm-hmm.
>
> THE COURT: Do you think that she is of value—I'm sure you're doing a great job? Do you think that she could be of great value in picking up the pieces?
>
> THE WITNESS: I think she's an outstanding scientist.
>
> THE COURT: So she got caught up in some things, which sometimes happens, especially in terms of bureaucratic organizations like schools and universities and maybe even the courts; and my main concern is

to really make sure that the people are going to have a good chance of benefitting from her outstanding research, which obviously can save lives. How can we make that happen more so now?

THE WITNESS: Well, I think NIH and Downstate know the work is very important—

THE COURT: They do.

THE WITNESS: —and that's why it was transferred to me.

THE COURT: Let me ask you this. NIH for years, knows Dr. Blain, and I assume that they all agree that she has an outstanding reputation as an outstanding scientist. I don't have them here as part of this lawsuit. I just don't get it. Why would they want to really not have Dr. Blain continue to do her outstanding work? I'm sure you're doing fine also, but I don't get it.

THE WITNESS: So I was—I think I was as shocked as you when I was first contacted—because I had NIH funding since 1998, and I've never heard of an instance where they have pulled a grant like this, but I thought it must be something very serious, so—and I don't know what it was.

THE COURT: We don't know what it is either. It doesn't sound terribly serious to me. I've heard outstanding people testify that she's done nothing wrong. . . .

Hg. Tr. at 451-52.

G. The Pending Disciplinary Proceeding

The disciplinary proceeding that SUNY Downstate has initiated is pursuant to its collective bargaining agreement with Dr. Blain's union. The process will unfold in several steps. So far, the matter has been assigned by the Assistant Vice President for Employee and Labor Relations to a staff member, who will

eventually gather information, interview Dr. Blain and other witnesses, and report back to the Vice President, who will decide whether to pursue disciplinary action. If so, she will prepare proposed findings and a proposed penalty. If Dr. Blain challenges the proposed findings or penalty, the matter would proceed to binding arbitration. SUNY Downstate estimates the remaining process will take at least several months.

II

The tangled circumstances that flowed from the anonymous whistleblower's complaint back in 2019 has embroiled Dr. Blain in a Kafkaesque nightmare. She stands accused by SUNY Downstate of research misconduct, but she might very well be exonerated at her disciplinary hearing. Only time will tell.

On the federal level, ORI is reviewing the finding of research misconduct. Its decision will not be rendered for some indeterminate period of time and there is no certainty that it will agree that Dr. Blain is culpable. Milstein acknowledged that ORI "may or may not" agree that Dr. Blain is liable for research misconduct, which prompted the Court to comment:

> THE COURT: In the meantime, her career is over, okay, while we're waiting for all this wonderful, you know, institutional process to work its way out, okay? Okay. Terrible, isn't it?
>
> THE WITNESS: (Nodding)
>
> THE COURT: If she is ultimately exonerated. Terrible, right.

> THE WITNESS: Certainly.
>
> THE COURT: It's like somebody being found not guilty after they've been executed.

Hg. Tr. at 359-60.

Separate from the issue of research misconduct is the loss of Dr. Blain's NIH grant for failing to cooperate with the Investigation Committee pursuant to "multiple requests." But this rationale is undermined by the record before the Court, which suggests that NIH's reaction was one of pure pique; Dr. Blain resisted cooperating only concerning the data supporting one isolated paper published in 2008 because she believed that she had honored the request on a prior occasion.

Because ORI and NIH were not parties to the lawsuit, they were not subject to the Court's jurisdiction. *See* Hg. Tr. at 91 ("THE COURT: See, I have no jurisdiction over them."). It suggested, however, that it would be willing to speak with NIH to ascertain if there was a path that could lead to reinstating Dr. Blain as PI on the grant. It was suggested that a Mr. Lockhart from NIH would be amenable to such a meeting. However, permission from NIH's upper echelons never materialized.

The Court repeatedly acknowledged during the hearing that it had no jurisdiction to rule on the merits of the research misconduct finding or NIH's decision to remove Dr. Blain. It explained that the only issues it could pass upon

were her claims of gender discrimination and retaliation. *Cf., e.g.*, *Shafii v. British Airways, PLC*, 83 F.3d 566, 569 (2d Cir.1996) (explaining that an action for wrongful discharge is not a federal claim supporting removal to federal court).[1]

Nonetheless, the Court has put judicial pen to paper on the issues that are beyond its jurisdiction for two reasons: First, the propriety of the actions of SUNY Downstate, ORI and NIH regarding Dr. Blain's grant was the mainstay of plaintiff's evidence and arguments at the hearing. Second, as a result, the Court became concerned about NIH's wisdom in jettisoning Dr. Blain. Her discovery of the drug that holds out the promise of reducing cancerous growths suggests that it was in the public's best interest for NIH to have allowed her to continue her quest to rid the world of cancer.

It is the Court's hope that Dr. Blain can be returned as the PI on the grant. Although the Court has acknowledged that it has no jurisdiction to adjudicate the decisions and actions of SUNY Downstate, ORI and NIH, it believes that this is a rare occasion when a court should stray from the strictures of its jurisdiction and speak to the public in *dicta* because of the profound public interests at stake.

In the meantime, the Court now turns to the issues that *are* ripe for adjudication.

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[1] Although Dr. Blain's complaint includes a state-law claim for defamation, that claim was not mentioned during the hearing or in the parties' post-hearing submissions. Therefore, the Court need not address it.

III

A preliminary injunction "is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.,* 555 U.S. 7, 24 (2008). On the contrary, it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22. To make such a showing, the plaintiff must establish: (1) that she is likely to succeed on the merits; (2) that she is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of the equities tip in her favor; and (4) that an injunction is in the public interest. *Pharaohs GC, Inc. v. U.S. Small Business Admin.* 990 F.3d 217, 225 (2d Cir. 2021). Where, as here, the government is a party to the suit, the final two factors merge. *Nken v. Holder*, 56 U.S. 418, 435 (2009).[2]

The plaintiff's failure to establish a likelihood of success on the merits at this stage of the litigation is, as explained below, dispositive.

Again, the Court's role is not to second-guess the merits of the Final Investigation Report. The Court has expressed its views on the shortcomings of the report, but the laws prohibiting discrimination and retaliation "do[] not make

[2] Discrimination and retaliation claims are normally remedied with an award of monetary damages. In addition, SUNY Downstate's disciplinary proceeding has not yet resulted in any concrete adverse action and, as explained, the Court cannot enjoin NIH to restore Dr. Blain as PI. Nevertheless, the Final Investigation Report's finding of research misconduct causes harm different from a typical discrimination/retaliation claim.

employers liable for doing stupid or even wicked things." *Norton v. Sam's Club*, 145 F.3d 114, 120 (2d Cir. 1998). The Court's sole concern is whether the evidence adduced at the hearing makes a "clear showing" that the investigation was motivated by discriminatory or retaliatory animus.

A. Discrimination

Under the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff in a discrimination case must first show "(1) that she is a member of a protected class; (2) that she was qualified for employment in the position; (3) that she suffered an adverse employment action; and . . . (4) some minimal evidence suggesting an inference that the employer acted with discriminatory motivation." *Littlejohn v. City of New York*, 795 F.3d 297, 307 (2d Cir. 2015) (discussing *McDonnell Douglas*). The burden then shifts to the employer to present a legitimate, nondiscriminatory reason for its action. *See id.* If it does, the burden shifts back to the plaintiff to show that the employer's reason was pretextual and that she has "satisf[ied] her ultimate burden of showing that the defendant intentionally discriminated against her." *Id.*[3]

Dr. Blain relies principally on a 2016 investigation into allegations that the

[3] Dr. Blain has described her discrimination claim as a claim under Title VII. However, no such claim appears in her complaint because she has not yet received a right-to-sue letter. No matter; the burden of showing discriminatory animus is the same under state and local antidiscrimination laws. *See Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 107 n.10 (2d Cir. 2011).

same data were fabricated by then-graduate student Priyank Patel, a man. Dr. Mark Stewart, the Dean of SUNY Downstate's Graduate School, investigated and found that Patel had not engaged in any research misconduct.

Dr. Blain refers to the 2019 investigation into her conduct as a "reopening" of the 2016 investigation. That is not quite correct. The allegations against Patel were made by another graduate student working in Dr. Blain's lab. Dr. Stewart did not have any supervisory authority over Dr. Blain and, therefore, did not look into her involvement or possible responsibility. Rather, Dr. Stewart considered it a "student-to-student allegation of academic misconduct" and, accordingly, did not refer the matter to the university's Compliance Office. Hg. Tr. at 330. It remained unaware of his investigation until 2019, when it received a letter from the graduate student's lawyer. *Id.* at 328, 330.

Dr. Blain asks the Court to infer discrimination because SUNY Downstate absolved Patel yet found her liable for the same manipulated images. But the allegations against Patel did not mention Dr. Blain and Dr. Stewart did not investigate her conduct. *See* Hg. Tr. at 330 ("There was nothing that involved Dr. Blain."). Rather, the investigation into Dr. Blain's conduct was triggered by allegations from a different source and pursued at ORI's insistence. *See* Defs.' Hg. Ex. 5. SUNY Downstate's decision to investigate was clearly not motivated by Dr. Blain's sex.

Nor does the Court infer discrimination from the conduct or result of the investigation, which was conducted, not by SUNY Downstate, but by a committee comprised of professors drawn from outside the institution. All five members were chosen because they lacked any conflict of interest and two were women. Yet the Final Investigation Report speaks with one voice, with no dissenting view from the distaff members. That the Investigation Committee found Dr. Blain liable for research misconduct while Dr. Stewart had exonerated Patel is the unremarkable product of different decisionmakers conducting different investigations of different individuals. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355-56 (2011) ("In such a [large] company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's.").

Dr. Blain argues that SUNY Downstate withheld the 2016 investigation report from ORI so that ORI would not consider the matter closed. If this was SUNY Downstate's strategy, it was poorly executed because ORI was sent a copy of the 2019 Final Inquiry Report, which referred to, and included "[c]orrespondence and recommendations" from, the 2016 investigation. Defs.' Ex. 11. More importantly, there is no evidence that the strategy—if, indeed, there was one—was motivated by Dr. Blain's sex.

Finally, Dr. Blain refers to a "long history of discrimination" she allegedly suffered at SUNY Downstate, including underpayment compared to her male

colleagues, delayed tenure eligibility, obstacles to her research, decreased opportunities for professional development, erosion of her reputation among her peers and students, and the creation of a generally hostile work environment.[4] As with the 2016 investigation, the Court finds that this history, even if true, was too attenuated from the conduct of the Investigation Committee to support an inference that its report was based, even in part, on gender discrimination.

In sum, the Court concludes that the finding that Dr. Blain was responsible for research misconduct was not tainted by any discriminatory animus. There is no evidence that SUNY Downstate took any action that it would not have taken against a similarly situated male professor.

B. Retaliation

Retaliation claims are subject to the same burden-shifting framework as discrimination claims. *See Littlejohn*, 795 F.3d at 315 (citing *Hicks v. Baines*, 593 F.3d 159, 164 (2d Cir. 2010)). However, the elements of a prima facie case differ. The plaintiff must show "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." *Id*. (quoting *Hicks,* 593 F.3d at 164)).

[4] These alleged instances of prior discrimination do not themselves form the basis of Dr. Blain's request for a preliminary injunction.

It is undisputed that Dr. Blain's October 23, 2019 letter complaining of gender discrimination is protected activity. She offers evidence that SUNY Downstate was, as an institution, generally aware of the complaint, which satisfies the second element. *See Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000) (holding that "general corporate knowledge" will suffice). And she has pointed to a litany of actions that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

But Dr. Blain's retaliation claim falters at the fourth element. Many of the adverse actions she relies on involve the conduct of the Inquiry Committee and Investigation Committee; in addition to the eventual finding of research misconduct, she accuses them of suppressing exculpatory evidence, lying to witnesses, being hostile towards her, describing her unwillingness to provide raw data as "noncooperation," and generally conducting their investigations in ways that demonstrated that they had prejudged culpability. However, the Court credits Milstein's testimony that she did not inform the committee of Dr. Blain's letter and, despite Dr. Blain's speculation to the contrary, there is no evidence that committee members heard about it from some other source. While general institutional knowledge is sufficient for the second element, "the lack of knowledge on the part of particular *individual agents* is admissible as some

evidence of a lack of a causal connection, countering plaintiff's circumstantial evidence of [temporal] proximity or disparate treatment." *Gordon*, 232 F.3d at 117.[5]

Dr. Blain argues that some actions were taken by SUNY Downstate agents with the requisite knowledge of her complaint. She argues, for example, that Dr. Christini "chose a more punitive consequence than what the committee and SUNY had recommended" when he asked that Dr. Blain's published articles be retracted instead of corrected. Pl.'s Mem. of Law at 22. That is simply incorrect. The Investigation Committee recommended "these papers be *retracted or at a minimum that significant corrections be published listing the altered figures*, depending on the standards of the journal." Defs.' Hg. Ex. 16, at 43 (emphasis added).

Dr. Blain further argues that SUNY Downstate *chose* to remove her from grants "on the basis of the spurious 'non-cooperation' allegation." Pl.'s Mem. of Law at 36. The record is clear that SUNY Downstate's decision was not the product of a free choice, but of NIH's demand. Even if the Investigation Committee's description of Dr. Blain's "non-cooperation" was unfair, the Court

[5] In addition to circumstantial evidence of knowledge, evidence "that an agent is acting explicitly or implicitly upon the orders of a superior who has the requisite knowledge" can satisfy the fourth element. *See Gordon*, 232 F.3d at 117. The evidence satisfies the Court that the Inquiry and Investigation Committees had no "superiors" and acted independently.

has explained that it could not have been motivated by retaliatory animus if, as the Court has found, its members were not aware of Dr. Blain's discrimination complaint.

Finally, Dr. Blain argues that SUNY Downstate violated its collective bargaining agreement with her union by pursuing disciplinary charges beyond the agreement's statute of limitations. *See* Defs.' Hg. Ex. 25, at 21 (setting a one-year limitation period on most charges). However, by her own description, the charges are a "mystery." Pl.'s Mem. of Law at 36. They may well call into question her conduct during the investigation. In any event, the Court declines to infer that allowing an arbitrator to determine the timeliness of the charges conceals a retaliatory motive. *See* Defs.' Hg. Ex. 25, at 19 (giving arbitrator "exclusive jurisdiction over issues of timeliness arising under this Article").

Overall, the evidence does not satisfy the Court that the investigations or their consequences were intended to retaliate against Dr. Blain for complaining about gender discrimination. In particular, the Court credits Dr. Christini's testimony that "We don't want research misconduct cases. We don't want findings against our investigators. We don't want to have to sanction people [in] any way." Hg. Tr. at 487. In other words, the investigation of Dr. Blain was not in SUNY Downstate's reputational or financial interest. *See id.* ("[N]one of this is in the institutional interest or especially in the research interest."). The Court is

convinced that only the most serious and legitimate reasons would lead SUNY Downstate to act against those interests.

IV

The foregoing discussion is limited to Dr. Blain's request for a preliminary injunction. It does not in any way bar her from pursuing her claims of sex discrimination and retaliation. This is true even insofar as those claims relate to adverse actions taken as a result of the allegations and investigation of research misconduct because discovery may reveal additional evidence on that issue. For now, the Court holds only that the record does not currently establish a likelihood of success on the merits sufficient to warrant a preliminary injunction. Dr. Blain's application for that relief is, therefore, denied.

SO ORDERED.

_/S/ Frederic Block_____
FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
January 24, 2023