

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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PAUL NUNGESSER,

Plaintiff,

v.

**COLUMBIA UNIVERSITY, TRUSTEES
OF COLUMBIA UNIVERSITY,
LEE C. BOLLINGER, individually and as
agent of Columbia University, JON
KESSLER, individually and as agent of
Columbia University, THOMAS VU-DANIEL,
individually and as agent of Columbia
University, and MARIANNE HIRSCH,
individually and as agent of Columbia
University,**

Defendants.
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15-cv-3216 (GHW)

**SECOND AMENDED
& SUPPLEMENTED
COMPLAINT**

**JURY TRIAL
DEMANDED**

PLAINTIFF PAUL NUNGESSER, by and through his undersigned attorneys Nesenoff & Miltenberg, LLP, hereby alleges as follows:

PRELIMINARY STATEMENT

1. Plaintiff Paul Nungesser, a male former scholarship student at and now a graduate from Defendant Columbia University, brings this action against Defendants Columbia University, the Trustees of Columbia University, Columbia University's President Lee C. Bollinger, Columbia University's Visual Arts Professor Jon Kessler, the Director of Printmaking and Artistic Director of the LeRoy Neiman Center for Print Studies at Columbia University School of the Arts Thomas Vu-Daniel, and Director of Columbia University's Institute for Research on Women, Gender and Sexuality ("IRWGS") Marianne Hirsch (collectively, "Defendants"). Plaintiff Paul Nungesser asserts claims under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* ("Title IX") and state law for Defendants' knowing indifference to and

participation in gender-based harassment, sexual harassment of and gender-based misconduct¹ targeting Plaintiff Paul Nungesser that was known and participated in by Defendants, that was severe, pervasive and objectively offensive and that deprived Plaintiff Paul Nungesser of educational opportunities. To remedy these claims, Plaintiff Paul Nungesser seeks damages and declaratory relief.

THE PARTIES

2. Plaintiff Paul Nungesser (“Paul”) is a German national who was a scholarship student at Columbia University, graduating in May 2015. During his time in the United States, he was living in the country as a non-resident alien with a valid F1 Visa. After graduation, Paul’s remaining in the United States on this Visa would have required employment, but Paul was unable to secure such employment due to the events at issue in this case. As a result, Paul Nungesser has returned to Germany.

3. Defendant Columbia University (“Columbia” or “Columbia University”) is an elite private Ivy League University located in New York (Manhattan), New York. Upon information and belief, Columbia receives nearly \$645,000,000 in federal funding for research and development.

4. Upon information and belief, Columbia operates under a 1787 charter that places the institution under a Board of Trustees -- Defendant Trustees of Columbia University (“Board of Trustees”). Overall governance of Columbia lies in the hands of its twenty-four-member

¹ “Gender-based misconduct”: this is the term Columbia University uses in its policies to describe all different kinds of behavior ranging from violent rape over intimate partner violence to offensive speech that potentially could result in discrimination. Under Columbia’s policy sexual harassment, gender-based harassment, and intimate partner violence are subcategories of gender-based misconduct, which however are independent terms and also used in documents such as the Department of Education’s Office of Civil Rights “Dear Colleague letters”. This text also uses the term “sex-based harassment” whenever referring to texts which use this term also. “Sex-based harassment” is widely used synonymously with “gender-based harassment” (with the important difference that the latter shifts the focus from biology to cultural and social norms and opens the discussion to genders other than the traditionally male and female gender) and is nowhere found to mean “based on an act of sex.”

Board of Trustees. The Board of Trustees is entrusted to select the President, oversee all faculty and senior administrative appointments, monitor the budget, supervise the endowment, and protect Columbia property.

5. Defendant Lee C. Bollinger (“Defendant Bollinger”) is the President of Columbia.

6. Defendant Jon Kessler (“Defendant Kessler”) is a Professor of Visual Arts at Columbia.

7. Defendant Thomas Vu-Daniel (“Defendant Vu-Daniel”) is Director of printmaking and Artistic Director of the LeRoy Neiman Center for Print Studies at Columbia University School of the Arts.

8. Defendant Marianne Hirsch (“Defendant Hirsch”) is the Director of Columbia’s Institute for Research on Women, Gender and Sexuality (IRWGS).

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction pursuant to federal question jurisdiction under 28 U.S.C. § 1331 and diversity of citizenship jurisdiction under 28 U.S.C. § 1332. For federal question jurisdiction, Paul invokes Title IX; and for diversity of citizenship jurisdiction, the Plaintiff Paul is a German national, the Defendants are New York citizens, and the amount in controversy well exceeds the statutory limit, exclusive of interest and costs.

10. Venue in the Southern District of New York is proper pursuant to 28 U.S.C. § 1391 because all Defendants reside in this Judicial District and because a substantial part of the events or omissions giving rise to the claims occurred in this Judicial District.

FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

A. Columbia University Exonerates Paul But Fails To Stop The Harassment Campaign Against Him.

11. On November 1, 2013, a Columbia University Hearing Panel found Paul “not responsible” for the allegations of sexual assault made by a fellow student, Emma Sulkowicz. The Office of Gender-based Misconduct, led by Assistant Director Rosalie Siler, investigated Sulkowicz’s allegations² for over seven months, including countless interviews, hearings, written statements, meetings and several dozens of e-mails as part of the fact finding process.

² Although Sulkowicz claimed that she was almost strangled to death and subject to a brutal anal rape in her dorm room in Summer 2012, there was not one single piece of evidence that could confirm her severe allegations:

- a. There were no witnesses to Sulkowicz’s alleged screams in the badly soundproofed student dorm.
- b. There was no medical report, even though an attack as massive as described would have caused serious injuries requiring medical attention and would have left visible bruises on Sulkowicz’s body for days.
- c. There was no testimony from Sulkowicz’s friends or family members who could confirm such injuries or changes in her behavior. On the contrary, in the days following the alleged attack, Sulkowicz participated in various social events with friends and with the fencing team. Given the multitude of social contact, any changes in behavior or physical injuries would have likely been noticed by people on campus or those close to Sulkowicz.
- d. There were varying accounts by Sulkowicz as to whether and when she had spoken to anyone about the alleged assault: At times she claimed she hadn’t spoken to anyone, not even her parents; at other times, she claimed that she told a few good friends. Her latest claim was that she spoke to a friend days after the alleged event who had to make clear to her that being nearly strangled to death and being penetrated anally while struggling against it and screaming “NO” constituted rape.
- e. There was also no evidence whatsoever that Sulkowicz’s attitude or behavior regarding Paul had changed after the alleged incident. On the contrary, Paul was able to present numerous love messages that Sulkowicz wrote to him before and after the alleged event with no apparent change in mood. Even though these messages were excluded as exculpatory evidence from the investigation, Columbia was informed about their existence and their content.
- f. Columbia was also informed that Sulkowicz had a history of alleging sexual assault. During the investigation, Paul had provided further messages from Sulkowicz to Columbia, in which she alleged abuse and sexual assault by other students at Columbia University, including her former boyfriend. These messages, too, were excluded from evidence. Nonetheless, Columbia was informed that Sulkowicz had a history of claiming to be a victim of sexual assault and should have included this knowledge in its assessment of Sulkowicz’s harassment campaign in the course of the events.

Evidence, which was not admitted in Columbia’s investigation, such as written conversation also showed that Sulkowicz felt unbroken affection for Paul after the alleged incident:

- Two days after the alleged incident, on August 29, 2012, Paul Facebook messaged Sulkowicz to invite her to a gathering in his room, stating, “small shindig in our room tonight ~ bring cool freshmen.” Sulkowicz messaged back four minutes later, “lol yussss – also i feel like we need to have some real time where we can talk about life and thingz.” Paul immediately agreed, writing “word.” Sulkowicz continued, “because we still haven’t really had a paul-emma chill sesh since summerrrrr.” Paul responded “when are you guys

12. The Hearing Panel in Paul's case consisted of: Robert J. Jenkins, Assistant Dean of Students at the School of General Studies; Sandra Garcia, Assistant Dean at the College of Dental Medicine; and Morgan Murray, Director of Disability Services at Barnard College. The Hearing Panel had to evaluate the allegations under the extremely low preponderance of evidence standard. Their finding was and is clear: even under this low burden of proof, Sulkowicz's allegations lacked credibility; in fact, Paul was innocent.³

13. With Paul's exoneration, a seventh-month long period of fear and uncertainty concluded – rumors were spread around the campus, friends had withdrawn from him, he had to move out of his dorm and his membership in several extra-curricular activities was suspended. However, the shock over what has occurred still remains: During his freshman year Paul developed a close friendship with Sulkowicz. They became "friends with benefits" and had sex on three occasions; however, Paul did not want to pursue a romantic relationship with Sulkowicz.⁴

coming through." Sulkowicz wrote, "I'll probs come at 10:45. Is that cool?0." Paul wrote back "sweet – yeah – you at the fencing thing." Sulkowicz wrote back "Yeah I'm just gonna chill with them for a bit haha is adp a rager?" Paul wrote back "naah – a little too many guys right now haha – so bring some peepz." Sulkowicz wrote back "Okay let them know I'll be der w da females spon." At 11:06 p.m., she messaged Paul "Ack are people still there? Heading over now."

- Paul remained at the ADP party but he and Sulkowicz did not see one another. The next day, he messaged her at 4:55 p.m., "part II tonight – you're coming?" She messaged him back seconds later, "lol i came and left already!!!" Paul responded, "lolcats – when were you here – I dont believe you – its not the truth – to the tune of pretty women."
- Two weeks later, on September 9, 2012, Sulkowicz messaged Paul, "I wanna see yoyououyou." Thereafter, Paul sent Sulkowicz a happy birthday message as follows: "oh hai. happy born day! you better be celebrating muchos, no? also: donde estas tu i mi viva – see i'm so desperate with out you, i even try to speak spanish. – anywho: merry happy days!" Sulkowicz responded, "I love you Paul. Where are you?!?!?!?"

³ The outcome notification letter Paul received on November 1st 2013 states: "After careful consideration and review of the information provided to us through the investigative and hearing processes, the hearing panel found you not responsible for violating the policy based on the preponderance of evidence standard. (...) Therefore, the charge has been dismissed."

⁴ Sulkowicz messaged Paul obsessively throughout the summer of 2012 with messages including: "wuv youuuu," – "i miss and love you btw" – "Paul i really miss you" – "i really mis you" – "Paul I wuv you so much. Please stay w me foevah" – "paul I miss you so much" – "like u know when you tell people you miss them and you don't really mean it? - i actually mean it – i miss you so much – ahhh" – "pookie – i miss you" – "I LOVE YOU – SO MUCH" – "I MISS YOU MORE THAN ANYTHING" – "I love youuuu" – "and I would LOVE to have you here – omg –

14. Paul was a highly talented student with a wide range of interests: he wanted to produce films, create set designs and take part in the countless curricular and extra-curricular opportunities at Columbia and in New York – a dream come true after winning a prestigious scholarship to attend the university. Sulkowicz however, unable to accept his rejection, spent the next three years to destroy Paul’s dream.

15. In April 2013, Sulkowicz falsely accused Paul of sexual assault and instigated others to do the same.⁵ Her goal, which she stated repeatedly during the investigation, was to have Paul expelled from Columbia, knowing that it would also force Paul to leave New York and the United States.

16. As soon as Sulkowicz had filed her false allegations with the Office of Gender Based Misconduct, she started spreading rumors in order to motivate others to join her campaign against Paul.⁶

17. At the end of the process that would eventually lead to Paul’s exoneration in November 2013 and the rejection of Sulkowicz’s appeal, Sulkowicz sought other means to force Paul out of Columbia. She sought counsel from Stanley Arkin, one of New York’s most expensive attorneys and PR consultants.

18. What followed was an unprecedented harassment campaign: Sulkowicz enabled reporters to stalk Paul, she defamed him as a “serial rapist,” and her campaign resulted in Paul’s

we could snuggle” – “PAUL I MISS YOU PAUL I MISS YOU PAUL I MISS YOU PAULLL” – “DUDE I MISS YOU SO MUCH” – “I love you Paul!!!!!!”

⁵ Accusations against Paul were made by four different individuals. During the investigation process, Sulkowicz, Jane Doe#1 and Jane Doe#2 admitted collusion. John Doe, the fourth accuser, was also a friend of Sulkowicz and like Sulkowicz a student at Columbia’s visual arts department. Paul was fully exonerated from all accusations.

⁶ In April 2013, days after she filed her report, Sulkowicz encouraged the President of ADP to notify its alumni board and several members that an alleged rapist was living at ADP. She also tried to convince other women to join her with false allegations against Paul, in order “to support her as a woman”, as a fellow student, Jane Doe#3 told Paul in spring 2013. While Jane Doe#3 declined to file a false allegation she also declined to testify in front of the OGBM-Investigator, citing fear of retaliation by Sulkowicz’s friends and other activists if she testified in Paul’s favor.

public intimidation, isolation on campus and receipt of threats against him. Sulkowicz successfully initiated a media campaign against Paul leading to media outlets in over 35 countries reporting, encouraging complete strangers to demand Paul's murder, imprisonment and rape,⁷ and almost completely destroying Paul's reputation and name.

19. Throughout this ordeal, the Columbia University administration was fully aware of the lack of credibility of Sulkowicz's allegations, having conducted an investigation, held a hearing and exonerated Paul. They were also acutely aware of the harassment and witch-hunt unfolding on-campus against Paul, a then 21-year old international student with no friends or family in the United States outside of Columbia. But fearful of the media campaign unleashed by Sulkowicz,⁸ Columbia administrators refused not only to support Paul as one of their students, but also they failed to dispel even the most obvious fabrications. Sulkowicz claimed that her allegations were swept under the rug, when in truth, far from it, they were investigated at length over a seven-month period and, after a hearing, were found without merit.

20. Sulkowicz's harassment campaign could not possibly have been as widespread and as pervasive without Columbia University's actions and inaction. The escalation of Sulkowicz's harassment campaign into a global media spectacle was contingent upon the university's public silence coupled with university administrators discouraging Paul to speak out publicly as well as their failure to investigate Sulkowicz's violations of university policy⁹. Columbia's confidentiality policy was silencing Paul, but was being ignored by Sulkowicz without any action by Columbia. Even worse: after refusing to protect Paul and becoming a

⁷ Compare also ¶¶ 137-155 of this document.

⁸ A media campaign she had announced to start in her eventually unsuccessful attempt to appeal Paul's exoneration for the case the university would not grant her the appeal.

⁹ In the letter that notified Paul of Sulkowicz's allegations he was, under the threat of disciplinary action, explicitly advised to "not discuss the incident with others."

silent bystander in a deliberately indifferent manner, Columbia University turned into an active supporter of Sulkowicz's harassment campaign by institutionalizing it and heralding it.

B. Columbia University Fails to Adhere To Its Own Policy and Encourages Sulkowicz's Gradual Escalation.

21. According to its policy effective in 2013, Columbia University is bound to investigate when a university official gains knowledge of an allegation of gender-based misconduct.¹⁰

22. Columbia University policy recognizes "intimate partner violence"¹¹ as a form of gender-based misconduct, which it defines as "*The use of physical violence, coercion, threats, intimidation, isolation, stalking, or other forms of emotional, sexual or economic abuse directed towards a partner in an intimate relationship (...). This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone. Intimate partner violence can be a single act or a pattern of behavior in relationships.*" The policy explicitly includes sexual relationships that have already ended and those that only existed briefly.¹²

23. Despite the language around gender-based violence becoming increasingly gender-neutral, women are still commonly only considered as potential victims of sexual

¹⁰ "Any University official (e.g. Student Affairs staff, Advising and Residential Programs staff, Officers of Administration, Full-time and Adjunct Faculty, Teaching Assistants, etc.) informed of an allegation of gender-based misconduct against a student is expected to file a report with Student Services for Gender-Based and Sexual Misconduct." *Gender-Based Misconduct Policies for Students, January 2013* (the "2013-1 Policy"), p. 4; *Gender-Based Misconduct Policies for Students, August 2013* (the "2013-8 Policy"), p. 2.

¹¹ "Gender-based misconduct comprises a broad range of behaviors focused on sex and/or gender discrimination that may or may not be sexual in nature. Sexual harassment, sexual assault, gender-based harassment, stalking, and intimate partner violence are forms of gender-based misconduct under this policy. (...) Gender-based misconduct can be committed by anyone regardless of gender identity, and it can occur between people of the same or different sex or gender." (2013-1 Policy, p. 4; 2013-8 Policy, p. 2, emphasis added)

¹² "Intimate partner relationships are defined as short or long-term relationships (current or former) between persons intended to provide some emotional/romantic and/or physical intimacy." (2013-1 Policy, p. 4; 2013-8 Policy, p. 2, emphasis added)

discrimination, intimate partner violence / dating violence and gender-based harassment. That they can also act as perpetrators in the same realm towards male victims, is largely disregarded.¹³

24. Sulkowicz's behavior towards Paul fully fit the definition of intimate partner violence¹⁴ as provided in Columbia's policy: They engaged in a brief, sexual relationship in 2012. Unable to accept the end of that relationship, Sulkowicz felt rejected and sought revenge.¹⁵ Her attempt to get Paul expelled by filing a false accusation against him, failed and instead she experienced a second defeat when, as part of the university's investigation, Paul highlighted major discrepancies in her narrative, revealing a complete lack of credibility on Sulkowicz's part, and the university exonerated Paul. This outcome, however, only strengthened Sulkowicz's resolve to have Paul removed from campus.¹⁶

¹³ The American literature scholar and feminist Sharon Marcus calls this "the gendered grammar of violence". She writes: "The gendered grammar of violence predicates men as the objects of violence and the operators of its tools, and predicates women as the objects of violence and the subjects of fear." Marcus, Sharon (1992): *Fighting Bodies, Fighting Words. A Theory and Politics of Rape Prevention*. In: Judith Butler, Joan W. Scott (ed.): *Feminists Theorize the Political*. New York, London Routledge, 1992, pp. 385-403, p. 393.

¹⁴ Recent studies show the magnitude of the underestimated phenomenon of male victims of intimate partner violence: According to the *National Intimate Partner and Sexual Violence Survey (NISVS)* more than 1 in 3 women (35.6%) and more than 1 in 4 men (28.5%) in the United States have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime. (Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R. (2011): *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, p. 2. http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf, last accessed April 24, 2016.)

In analogy to Columbia's Policies, the CDC's definition of intimate partner violence includes "psychological aggression", which is defined as follows: "Use of verbal and non-verbal communication with the intent to: a) harm another person mentally or emotionally, and/or b) exert control over another person. (...) Psychological aggression can include, but is not limited to: Expressive aggression (e.g., name-calling, humiliating, degrading, acting angry in a way that seems dangerous) and "exploitation of victim's vulnerability (e.g., immigration status, disability, undisclosed sexual orientation)". (Breiding MJ, Basile KC, Smith SG, Black MC, Mahendra RR. *Intimate Partner Violence Surveillance: Uniform Definitions and Recommended Data Elements, Version 2.0*. Atlanta (GA): National Center for Injury Prevention and Control, Centers for Disease Control and Prevention; 2015, p. 15, <http://www.cdc.gov/violenceprevention/pdf/intimatepartnerviolence.pdf>. Accessed April 24, 2016)

¹⁵ Intimate partner violence after the end of a relationship is so far spread that there are a specific terms for it: "post-separation violence" or "post-separation abuse".

¹⁶ As late as December 2014, during a conversation with art critic Roberta Smith Sulkowicz says about Paul: "The longer he stays the angrier I get with him. So ... I am angrier with him than I've ever been with him in my life." (YouTube/Brooklyn Museum (December 17, 2014): "Carry That Weight" <https://www.youtube.com/watch?v=OMXp3RLOVNg>, 1:03:28. Accessed April 24, 2016)

25. Only days after Sulkowicz appeal was rejected and Paul's exoneration upheld, Sulkowicz reached out to Tara Palmieri,¹⁷ a reporter from the *New York Post*, and identified Paul by providing Paul's name, his dorm address and e-mail.¹⁸ On December 4, 2013, a reporter and a photographer ambushed Paul at the entrance to his dorm and confront him with Sulkowicz' false accusations. As a result, Paul's parents immediately informed President Bollinger, Provost Coatsworth and Title IX Coordinator Melissa Rooker.¹⁹

26. Following the notice given to Columbia by Paul's parents, Columbia failed to initiate an investigation, despite its own policy requiring it to do so. Sulkowicz's actions constitute harassment against a previous sexual partner²⁰, which clearly meets the definition of

¹⁷ The article is published December 11, 2013, in the *New York Post* (Palmeri, Tara: *Columbia drops ball on jock 'rapist' probe: students*. <http://nypost.com/2013/12/11/co-eds-rip-columbia-over-athlete-rape-probes/>. Accessed April 24, 2016). Even though the content suggests that all three students that are part of the campaign initiated by Sulkowicz have spoken with Tara Palmeri and even though the policy (see footnote 20) explicitly bans retaliation, their public denunciation of Paul, who Columbia rightfully exonerated, stays without consequences for the students.

¹⁸ December 9, 2013, Tara Palmeri from the *New York Post* contacted Paul via e-mail, giving him a deadline till 5pm the same day to respond.

¹⁹ From an e-mail sent December 4, 2013, 10.55am: "Dear President Bollinger, dear Provost Coatsworth, dear Melissa Rooker, with utter bewilderment we have just learned that our son was ambushed outside his residence by two reporters from the New York Post who were informed about the accusations against our son. (...) This retaliatory action represents a blatant violation of the Confidentiality Agreement according to Columbia policy. (...) We feel that Columbia shares a significant responsibility for the escalation which now takes place: There was clear evidence from early on during the investigation that the complainant was defaming our son. Her repeated violations of the Confidentiality Agreement remained without consequences. Given the fact that our son - though innocent - has endured almost seven months of severe so called 'interim measures', it is now high time that sanctions against those responsible for this public defamation be imposed. (...) Let us also know what actions are taken by Columbia to restore the good name of our son, especially, but not only, if an article should appear in the *New York Post*. Sincerely, Andreas Probosch and Karin Nungesser"

²⁰ In the Department of Education's Office of Civil Rights "Dear Colleague Letter" from October 2010, a strikingly similar case - with reversed gender roles - serves as the paradigmatic example for sexual harassment under Title IX:

"Title IX: Sexual Harassment

Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other male and female students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and emails. One of the student's teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as "hazing" that new students often experience. They also noticed the new student's anxiety and declining class participation. The school attempted to resolve the situation by requiring the student to work the problem out directly with her harassers.

Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors;