

County: MIDDLESEX, ss.

Docket No.: CIVIL ACTION NO. 1681CV01640

Parties: GUSTAVO GERMAN Plaintiff vs. DAVID LOPES CARDOZO and LEE L. RUBIN Defendants

Judge: Elizabeth M. Fahey

Date: August 25, 2016

FINDINGS OF FACT, RULINGS OF LAW ON PLAINTIFF'S VERIFIED COMPLAINT FOR PROTECTION FROM HARASSMENT

The following findings of facts are based on the affidavits of the parties, witnesses and counsel and evidence provided during the hearings.

FINDINGS OF FACT

Plaintiff, Gustavo German ("German"), is a fifth year graduate student in Biological and Biomedical Sciences ("BBS") and approximately four months from finishing his Ph.D. from Harvard Medical School.[1] He has been employed at the Rubin Lab, which Lee Rubin ("Rubin"), directs. Rubin also directs and trains a number of the graduate students employed at the lab.

By an email on March 10, 2016 to Drew Faust ("Faust"), President of Harvard, German raised a complaint of research misconduct, the knowing publication of fabricated data. In his complaint to Faust, German alleged this misconduct was committed by Rubin, Natalia Rodrigues Muela ("Muela") and another Ph.D. candidate, now graduate, whose publication included the allegedly false data.

Harvard has a process to deal with such complaints. On March 24, 2016, German received an email from Gretchen Brodnicki, a Research Integrity Officer ("RIO") for Harvard Medical School ("HMS"), indicating that she and her colleague, Gerald Griffin[2], a RIO for the Faculty of Arts and Science ("FAS"), wanted to meet with German. In that meeting on March 25, 2016, Brodnicki gave German an outline of the investigation process; her estimate was that, after a preliminary investigation, he could be asked to testify before a panel in about three weeks, approximately April 15, 2016. German's Fourth Affidavit, which I credit. His affidavit does not indicate this occurred. I credit that German was advised by Brodnicki "to be very confidential about this information and not report this to others,"[3] (his complaint to Faust about the misconduct by Rubin and others) see page 4 of 11 pages of medical records attached to plaintiff's Second Affidavit as Ex. 17. I also accept German's statement on that page of Ex. 17 that Ms. Brodnicki had to make an inquiry to the Principle Investigator (Rubin) about this investigation which is what caused Rubin to initiate what plaintiff believes is "Rubin's defamation campaign" against him.

Beginning later in March 2016 and continuing through at least June 4, 2016, the evidence reveals numerous instances when Rubin willfully and maliciously engaged in a "knowing pattern of conduct or series of acts over a period of time directed at" German. G. L. c. 258E, § 3(a).

Two serious events for German occurred as a direct result of Rubin's acts. First, a physician, Ayse A. Atasoylu ("Dr. Atasoylu") (who had never spoken to plaintiff or his physician), from Harvard University Health Services ("HUHS"), applied[4] at 11:15 p.m. on June 3, 2016 for an authorization of temporary involuntary hospitalization of German pursuant to G. L. c. 123, § 12.[5] It is undisputed that Rubin was the primary, if not only, source of information on which Dr. Atasoylu relied on his application. As a result of Rubin's and HUHS' actions, the police went to German's home at 1:00 a.m. on June 4, 2016, placed him into custody and transported him to Cambridge Hospital, where he spent three hours. He was found "to be of sound mental health," "not at imminent risk of self-harm or harm to others and to

not require inpatient" mental health services. (Letter of Gabby Noy, DO dated June 4, 2016: To Whom It May Concern and who evaluated German at Cambridge Hospital).

The second event, also with unfortunate consequences for German, is that after he was found to be of sound mental health, David Cardozo ("Cardozo"), Associate Research Dean for Graduate Students at HMS, emailed German on June 6, 2016 informing him that he "cannot return to [Rubin's] lab until the adversarial situation that currently exists is completely cleared up." Claiming that he "only want[ed] the best for" German, Cardozo barred German from the lab or accessing lab data until "we have a resolution." Cardozo took this action after speaking with Rubin. The unfortunate effect for German is that he remains effectively precluded from finishing both his research and his Ph.D., or even accessing his three years of data.

The record also reveals the following:

Rubin claims in his affidavit at ¶24 that in early 2016 German appeared "uncharacteristically disheveled and exhausted," and "his relations with other members of the lab became increasing tense." I do not credit that Rubin took this too seriously as if it occurred and were concerning to him, he would, as German's Principle Investigator ("PI"), have said or done something about it. Other emails and affidavits do not support Rubin's claim. The emails do support that by April 6, 2016, German complained in an email to Rubin of Rubin's "misconduct towards [German]" (Ex. 2 to defendants' counsel's affidavit) and German was looking for Rubin's assistance with regard to other lab members including Tobias Grass ("Grass") and Chen Benkler ("Benkler"). Then on April 21, 2016, Rubin and German met with HMS Ombudsperson Melissa Brodrick about how to correct the problems German faced with three lab members. They later agreed to meet with those lab members, though that never occurred.

On May 4, 2016, [6] RIO Griffin and Professor Peter Ellison ("Ellison"), both on the Committee for Professional Conduct ("CPC"), finally met with Rubin; Rubin claims that "until that meeting, I was entirely unaware of any allegations against me." [7] (44 of Rubin Aff., dated July 4, 2016). On May 10, 2016, Muela and Rubin met Griffin and Ellison and received a redacted copy of German's March 10, 2016 [8] email to Faust with German's identity redacted. Notwithstanding the redactions, Rubin suspected that "German might be behind the allegations of research misconduct against [him]." (II 48 of Rubin's Affidavit). I credit that whenever Rubin first learned of the allegations of misconduct against him, he suspected German was involved.

On May 10, 2016, two lab members (Muela and Grass) [9] contacted Dr. William Lensch ("Lensch"), Executive Director of the Department of Stem Cell and Regenerative Biology, the Department to which the Rubin Lab belongs. Although the identity of those two members is known to Harvard, and likely known by Cardozo and Rubin, they have not identified those lab members to this court. Defendants' counsel provided Lensch's May 11, 2016 email (Ex. 5 to Defendant's Affidavit of Counsel) to Cardozo, Garth McCavana and Allen Aloise, both of FAS, but not Rubin, in which Lensch reports the concerns two lab members had expressed to him. He indicated that "over the past week the members of a lab in SCRB have come to me with serious concerns about the erratic and threatening behavior of another lab member who is a BBS student. The faculty member [Rubin] is among the concerned parties. Yesterday at 5:00 p.m. two lab members [Muela and Grass] came to me abruptly and expressed serious concerns for their personal safety, the self-welfare of the student and fear of sabotage." I accept that the faculty member to whom Lensch refers is Rubin, the Director of the Rubin Lab. I also accept that Muela and Grass, who expressed to Lensch concern about German, did so at Rubin's instigation and direction as Rubin at least suspected German to be the complainant. I accept that Muela and Grass complained on May 10, 2016 to Lensch after Muela had been at the meeting earlier in the day with Rubin, Griffin and Ellison. Clearly that day Muela and Rubin both suspected, if not believed, that German was the source of the claim that they had knowingly allowed false data to be published.

Clearly Lensch's email concerned German. Cardozo's response three hours later on May 11, 2016 (Ex. 6 to Affidavit of Counsel) stated, after speaking with the lab manager, "while there are real concerns about Gustavo, they don't consider him an immediate threat. I'll be speaking with Lee Rubin (PI) tomorrow and then will get together with Gustavo." [10]

Exhibit 10 of Defendants' Counsel's Affidavit includes a long note (unclear if it is an email) dated May 11, 2016 from Grass concerning his work with German at the lab over the past three months. He claimed that about two months prior, i.e., approximately March 11, 2016, German totally changed his behavior towards him. He wrote that German was then telling him that "Rubin was trying to manipulate me to turn me against Gustavo." He added "just for the record, I would like to mention that Prof. Rubin never ever tried to manipulate me to change my behavior toward Gustavo."

I credit Cardozo's testimony that on approximately May 11, 2016, he received an email from Allen Aloise, Dean of Administration and Finance, that stated he had received an email from the administrator, William Lensch, at Rubin's lab, which Aloise oversees, expressing concern by one or two lab members (i.e., Muela and Grass) that plaintiff was "acting strangely" and that there had been an abrupt change in his behavior." Cardozo "forgets" the name of the person he called to get more information but was told plaintiff was "paranoid". Though it may well be Rubin that he called, I decline to draw the inference. This caused Cardozo to call HUHS on May 12, 2016 to see if plaintiff has a doctor/counselor there and if Cardozo should be concerned. Cardozo was informed that plaintiff does see a doctor there for ADHD. Cardozo also called Barbara Lewis ("Lewis") (head of HUHS mental health) who advised him that German is fine, has no "red flags," has a therapist who Cardozo asked to check in with German to see if he is alright. Cardozo also spoke with the Rubin Lab Administrator, Jane LaLonde ("LaLonde"), who said plaintiff is "odd sometimes in his behavior but nothing requiring immediate action, no danger to himself or anyone."

It was after this that Cardozo phoned German to be sure he is okay. German said he was fine; Cardozo was satisfied he was fine and they agreed to meet. When they met on May 13, 2016, Cardozo found German to not be in any distress, though upset at his lab schedules. This meeting went fine and ended with a "group hug."

Cardozo emailed Rubin and the others at Harvard who knew of this issue. Cardozo advised them that plaintiff is "alright, not a threat, and would build bridges with his lab colleagues." Cardozo thought the problem with German "was solved." All but Rubin expressed relief and satisfaction.

By May 11, 2016, Cardozo had "followed up with all the folks involved including HUHS (Harvard University Health Services) and Gustavo and there [did not] appear to be an immediate concern." Cardozo met with German and Susan Dymecki ("Dymecki") on May 13, 2015 which he reported the next day to others including Rubin (Ex. 18 to Defendants' Counsel's Affidavit), Cardozo wrote: "Our meeting with Gustavo was very positive. While Gustavo has clearly been under a great deal of stress, he doesn't present a danger to himself or others. In addition, he has no intention of disrupting other lab members' experiments. He understands that his recent behavior has not been in accordance with good lab working protocols and that it's harming his own development as a scientist . . ." On May 12, 2016, Cardozo and Rubin spoke by phone concerning complaints made by Muela and her boyfriend, Grass, to Lensch about German. [11]

I accept that plaintiffs psychiatrist, Dr. Arash Ansari, M.D., telephoned German on May 13, 2016 at 2:25 p.m. after Dr. Ansari had been contacted about German by Cardozo. Cardozo led Ansari to believe plaintiff "was going through some sort of mental crisis that required urgent intervention." (Plaintiff's Sixth Affidavit, page 8). Dr. Ansari inquired of plaintiff about his mental health. When plaintiff said he was fine, Dr. Ansari expressed that he could "not believe Cardozo could have made such an inquiry about my mental health if it were unsubstantiated." It was this call revealing Cardozo's concern about plaintiffs mental health that caused

German, on May 13, 2016, to believe Cardozo [12] and Rubin "intend[ed] to defame [him] and retaliate against [him] after [he] raised the research misconduct complaint." At all times thereafter, whatever concerns Cardozo had been told by others, including Rubin, about plaintiffs mental health, were allayed by Cardozo's own subsequent personal contact with plaintiff. I accept that German's legitimate fear of Rubin's "defamation campaign" against him is what caused German to stop attending Harvard by May 21, 2016.

I accept that German, prior to June 4, 2014 was already fearful that Grass, a bodybuilder, would cause a physical confrontation with German, a very slight individual, even though German did not then know that Grass had already acted at Rubin's direction, when he complained to Lensch.

In a May 14, 2016 email (Ex. 19), Cardozo reported to Lewis that in his Friday, May 13, 2016 meeting, German "although under a great deal of stress, seemed completely reasonable and aware of his situation,"[13] and was "going to try to work things out with the lab members with whom he's fallen out." Lewis replied that plaintiff's psychiatrist thought German was doing okay and he did not find any paranoia (in German). (Ex.19).

Clearly by May 14, 2016, excluding Rubin, all those at Harvard dealing with German were satisfied that his mental health is not concerning, at least not immediately concerning.

On May 19, 2016, Rubin sent Cardozo the email German sent on May 18, 2016 to Rubin which Rubin thinks was "confrontational" and Cardozo thinks was "unusual in tone" for a grad student. In the email, German sought mice for his research and more (than the two he had) assistants for help with his experiments. When Rubin received German's May 18, 2016 email, he wrote to Cardozo and Dymecki that he "had discussions with several members of my lab."

"I guess my position for now, based on my discussions with several members of my lab, is that I honestly can't risk a situation in which multiple people (at least 6) feel concerned and unsafe in the lab. I also think Gustavo is unhappy and likely to remain that way in that I won't want to provide a solution that's positive for him and negative for everyone else. I still think he believes that I've caused all of his problems and therefore can fix them without any acknowledgement from him that he has at least contributed to them and may change in his behavior towards others in the lab. I can't emphasize enough that none of these problems, or any other problems in the lab, did exist or would have existed in his absence." (See Ex. 25 to Defendants' Counsel's Affidavit.)

Since May 10, 2016, Rubin has known of the misconduct allegations and at least suspects, if not believes, German to be the complainant.

Cardozo reached out to German and Dr. Dymecki, Prof of Genetics, for a second meeting, likely on May 20, 2016, which was very collegial. German had also been working with an ombudsperson who did not propose the same plan Cardoza had suggested. Cardozo then suggested that all four meet together, which was initially agreed upon. German later cancelled that meeting and other meetings. Plaintiff told Dymecki he did not want to communicate with anyone except Faust. On May 25, 2016, Cardozo emailed plaintiff that "I just want to make sure you are alright." German responded, "David, I am alright. Thank you for your concern."

Cardozo left on May 27, 2016 for vacation, having provided names if any "health-related assistance with Gustavo" was needed. (Ex. 37 to defendants' counsel's affidavit.) Cardozo left for vacation, having notified Dean McCavana, Dumecki, Leah Simons, and Jackie Yun, Head of Student Services, but not Rubin.

Cardozo described that the PI for any grad student, including Rubin and his Rubin Lab, has "discretion in all decisions." He denied giving German an example of a Harvard PI being able to back out/dismiss a grad student based on his/her hair color. I accept that at least Rubin, as PI for plaintiff and

a number of grad students and because he is head of the Rubin Lab, brings in a lot of funding and has a lot of authority at Harvard. So much authority that Cardozo would likely be deferential and not interfere with Rubin's choice to dismiss a grad student.

Based on complaints to him made by German and others about conditions at the Rubin Lab, Cardozo has twice consulted with German's Dissertation Advisory Committee ("DAP"), once at the beginning of May and the second, later in May. Cardozo also consulted with Dean McCavana about German as well as about other grad students at other times; in all cases but this one, he has always found a resolution. Cardozo did not know until June 8, 2016, when he was served with German's complaint in this case, that plaintiff had made a claim of Rubin's scientific misconduct; [14] until then Cardozo thought he was only dealing with personality differences between German and Rubin and a few others at the lab.

After he returned from vacation and learned on June 6, 2016 of German's June 4, 2016 hospitalization, Cardozo wrote to him. German responded formally, informing Cardozo that he would "not attend Harvard until these serious matters are resolved." It was in response to this that Cardozo informed German that he "cannot return to [Rubin's] lab until the adversarial situation that currently exists, is cleared up."

Notwithstanding defendants' claims and the affidavits of five lab members, including Muela, Grass and Benkler, that some were concerned regarding whether German was "unpredictable, could manipulate experiments, fear of sabotage or harm to those in the lab," plaintiff provides excerpts in his affidavits of emails from other lab members which do not evidence any such concern. [15] In his Fifth Affidavit dated July 5, 2016, plaintiff also provides excerpts of emails from lab members who had good relations with him and do not appear to have any concerns in working with him.

German also provides in his Fifth Affidavit at p.7 text messages sent to him on June 3, 2016 from freshman Alex Pai ("Pai"), seeking to get together. Plaintiff responded:

Hi Alex, unfortunately, due to personal matters I'm off from school. I don't know when I'm coming back. Meanwhile, you have to find another mentor. I highly recommend you to contact Becca (Rebecca Gibbs) for a mentor since she is a very bright scientist (mentored by me) and she was interested in having an undergraduate. This is the most I can do for you at the moment. I'm very sorry about this. My best, Gustavo.

It is unclear if Rubin actually saw or received plaintiffs actual text to Pai. Rubin's Paragraph 58 in his affidavit does not clarify this. German's first response, "While due to personal matters, I'm off from school. I don't know when I'm coming back," could in some situations indicate the possibility of self-harm. However, the context of German's entire text plus his direct response to Pai's second inquiry, "Are you okay?", "I'm okay, Alex please don't worry about me," would likely leave one relatively unconcerned. Certainly any concern could have been clarified by a phone call, text or even email to German, as Dymecki had suggested that very day to Rubin. Instead, what Rubin did on June 3, 2016, was to contact Brodrick and Dymecki and mention only his concern about plaintiffs absence from the lab and the possibility that plaintiff accessed the lab at night when no one was there. [16] By June 3, 2016, Rubin did not have any real fear that plaintiff would sabotage experiments as Rubin acknowledged that he and Dymecki discussed telling German he should only work in the lab during the hours others are in the lab. They also discussed whether they should temporarily deny plaintiff access to the lab, although Rubin expressed concern that this could cause German additional stress.

Defendants agree on page 14 of Defendants' Response to Plaintiff's Complaint that "(O)n the morning of Friday, June 3, Professor Rubin spoke with Ombudsperson Brodrick and learned that Mr. German had canceled his meeting with her and Dr. Dymecki. He had not been going to the lab for two

weeks. Professor Rubin sent an email to Dr. Dymecki expressing concern."

Dymecki responded that she'd encouraged German to contact Mr. Yun and Dean McCavana and they were "working to insure he has a safety support network." She encouraged Rubin to check with German, which Rubin failed to do. Rubin reiterated his concern "about the problem of Gustavo not coming to the lab at all except when no one is here, [17] which he considered "alarming" and "inappropriate". I do not accept that German ever came into the lab between May 21 and June 4; the access log has not been produced. I reasonably infer that if it showed what Rubin claimed, Rubin would have produced it.

The Program Administrator for plaintiff's program is Kate Hodgins ("Hodgins"); her supervisor is Dymecki. On June 3, 2016 at 3:53 p.m., Hodgins wrote to plaintiff (Plaintiff's Ex. 28):

"Hi Gustavo,

I haven't seen or spoken to you in a very long time. I hear you're currently experience (sic) some challenges in your lab and people are very concerned for you.

We're all extremely worried about you so I need you to contact me asap via email or I'll need to call for a wellness check at your home in Belmont.

I'm always happy to chat if you think it would be helpful but for now, please let me know that you're ok.

Best,
Kate"

Plaintiff responded at 6:40 p.m.:

"Hi Kate,

I am perfectly well—thank you.

At this instance, I am dealing exclusively with the Office of the President. There are my lab issues and other serious interconnected matters that unfortunately I cannot discuss with you.

Regards,
Gustavo"

Kate responded at 6:58 p.m.:

"Hi Gustavo,

I thank you for the quick response.

Be well!
Kate"

Susan Dymecki is Harvard's Head of Ph.D. programs in Biological and Biomedical Sciences. When she discussed German with Rubin on June 3, 2016, she knew German had emailed his "cancellation of yesterday's meeting." She responded to him and then received within 90 minutes plaintiff's response that he is "All right. Thank you for your concern." She would have also known that in response to his June 1, 2016 email to her asking for a meeting, he had replied, again within 90 minutes, "For this and other matters, I am dealing with the Office of the President."

Clearly, all of these contacts between German and Hodgins and German and

Dymecki were known, or at least should have been known, by Dymecki and Rubin; they were known by Dymecki, and should have been known by Rubin well before HUNS signed the application for the c. 123, § 12 application. Notwithstanding German's reply to Hodgins that he is "perfectly well," earlier that day, it was in Rubin's interest to press forward towards getting others to have a basis to discredit German's claims of Rubin's misconduct.

Later on the evening of June 3, Rubin and Dymecki spoke concerning "German's hostile and erratic behavior" [18] and whether German should be told to "only utilize lab when others are present or to temporarily deny access to the lab." (¶59). Rubin suggested at 8:27 p.m. that Dymecki "get[] advice from a mental health professional," which Dymecki agreed to pursue. (¶60). The only possible predicate for this could be the text German sent to Pai. However, Rubin had learned of the text earlier in the day and had not initially expressed any concern. This court accepts that Rubin's later suggestion to Dymecki to seek advice from a mental health professional was motivated by bias and revenge, not by a legitimate interest in keeping German safe. Dymecki, as well as Rubin, should by then have known of German's email/text response earlier on June 3, 2016 to Kate Hodgins that he is "perfectly fine." Rubin knew German had even earlier that day texted Pai that he is fine.

Rubin understands that Dymecki contacted HUHS; later that night Rubin received a call from a clinician at HUHS. According to Rubin, (¶62), he "explained [his] concerns and those of others in the lab regarding German's erratic and hostile behavior, [19] his failure to appear at the lab for the past two weeks, and his refusal to meet or communicate with anyone attempting to improve the situation." The clinician, not a psychiatrist, told Rubin [s]he would speak with a psychiatrist and call him back. (¶63). Later that evening, Rubin spoke again to the clinician. (¶64). Rubin and Dymecki had a text exchange in which Dymecki advised that HUHS Urgent Care will set in motion a Section 12, apparently based only on what Rubin told the clinician in their two conversations, though Jackie Yun was "in on all the decisions." (¶ 64).

German's medical record from Cambridge Hospital, where the police brought him on the Section 12 at 1:00 a.m. on June 4, 2016, is somewhat different than portrayed by Rubin. The DO doing German's Section 12 evaluation on June 4, 2016, was quite thorough. Though he incorrectly indicated on page 3 of Ex. 17 that "the clinician who filed the Section 12" is Wen Hui at HUHS, [20] he did accurately state that the doctor signing the application had never met German. The DO also indicates that (the Section 12) is "based on report of pt's [patient's] primary investigator at his neuroscience laboratory due to reported odd/out-of-character behaviors and paranoid-like displays of behavior by pt." Rubin is German's primary investigator who, since at least May 10, 2016, had a bias against German, and a motive to report, even inaccurately, if it would accomplish his goal of intimidating and discrediting German.

The DO also stated in plaintiff's record at pages 5-6 of plaintiff's Ex. 17:

Per telephone call with Wen Hui – on call Harvard mental health clinician:

Personally never met with student. Today received phone call from professor Rubin, working with student for many years. He provided sequence of change for presentation for past few months. Clinical team felt pt needed more thorough mental health assessment b/c he sent a message to an undergraduate student he supervised that he wouldn't be "around" for a few weeks and advised that student to get another mentor. What triggered this was that professor and lab mates had not seen him for a few weeks. He's had more difficulties with school and increased paranoia around people and ideation around discussion of an idea and he feels he "owns" the ideas. He also feels that if anyone wants to use the words related to his project that he won't allow anyone to use it. He's

been going through lab[21] and things seem to be moved, and they're concerned. People are concerned he's trying to alter his projects. Lab mates somewhat uncomfortable around them, but no direct threats to himself or others. Some irrational thoughts of how professor should change the lab, how they should treat him better and how he deserves things other people should not have. This behavior has lasted for a while. He's also reached out to school in wanting this to be resolved. School attempted to get things resolved and he would cancel appointments. At the end he is telling administrators not to have contact with them, says he'll do it with the office of the president. Appearance seems unbathed, disheveled, not as taken care of compared to prior. Cancelled appointment with doctor on 5/13 and pt agreed to reschedule appointment for following week but cancelled and cancelled next appointment as well. Dx with ADHD in the past. No prior psychosis or manic episodes. Currently seems manic, grandiose.

Professor mentions it's a collaborative team. He noticed a few months ago, post-doc who was there for 8 years finished her paper but it was not accepted. This student finally finished her paper, but it was not accepted. She was request to put in additional work and since then, this is when pt started becoming protected of his own work. Not concerned about physical safety of harm, just no face:face ability to observe how he's doing, all is through email.

I do not accept that Rubin initiated the contact with HUHS on June 3, 2016; I accept that Rubin was called twice by the clinician.[22] I accept that after the DO examined German and found him to not be dangerous or have mental health issues, he called HUHS. I infer the DO called HUHS out of concern as to why the Section 12 issued, given that German told him Harvard and Rubin were retaliating against him for his complaint. There is nothing in what Wen Hui reported on June 4, 2016 to the Cambridge Hospital DO that suggested plaintiff has any mental health issue, let alone was dangerous or had any serious, urgent mental health issue.

However, Rubin knew when he reported that German had been going through the lab that the information of "he's been going through lab" was at least unknown (though knowable to Rubin if he had checked the lab access log). It was also known to Rubin on June 3, 2016 that any suspicion of German's "increased paranoia" had previously been ruled out by those who had personally seen and evaluated German. Rubin's report that German "currently seems manic, grandiose" is false as Rubin's last contact with German was a text/email message on May 18, 2016, the content of which does not suggest any mental health issue. It is unclear when Rubin had last seen or spoken with German, but it was before May 18, 2016.

Because Rubin relayed information to HUHS on June 3, 2016, which information was not based on facts known to Rubin, but facts which Rubin knew had been ruled out by others, and/or was information Rubin knew was false ("increased paranoia"), I reasonably infer that Rubin acted as he did to intimidate German to retract his complaint and to have a basis to argue to others, if German did not retract his complaint, to discredit German's complaint.

Those who personally observed plaintiff's mental health, without knowing that German had made an extremely serious complaint against Rubin, found him not to exhibit any mental health concerns, certainly not of any emergency basis. Cardozo reached this conclusion on all the occasions he personally dealt with German in May. The Lab Manager, LaLonde, who would have seen German daily (until May 21, 2016), described plaintiff as "odd sometimes in his behavior, but nothing requiring immediate action, no danger to himself or anyone." When Cardozo left for vacation on May 27, 2016, no one expressed any current concern regarding German's mental health. No evidence was presented that anyone at Harvard, but for Pai, communicated with German between May 21, 2016 and June 3, 2016.

I accept plaintiff's definition of "fear" in his Sixth Affidavit at page 7:

I argue that the definition of "fear", even in a "narrowly defined" case, must include fear of being committed to a mental institution against your will. The event of losing both your freedom (becoming confined) and your rights to decide what drugs you take or medical treatment you receive, for example the use of potent anti-psychotic drugs with known adverse effects or the application of electroconvulsive therapy, involve substantial fears. Such fears are as severe as the "fear of damage of property" and the "fear of physical harm", at least for a wide range of "physical harm" conceivable. Commitment to a psychiatric institution also implies abuse or physical harm, when an inpatient is fitted with a straitjacket, given injections, administered with potent anti-psychotic drugs, applied electroconvulsive therapy, or provided with other physically harming treatments.

I also accept that once the Section 12 issued on June 3, 2016 and plaintiff was taken into custody by the police at 1:00 a.m. on June 4, 2016, then barred from the lab on June 6, 2016 by Cardozo after consulting with Rubin, that German has been in "fear" that his research and lab work will be damaged and/or lost. I accept that this result, being barred from the lab, is also the direct consequence of Rubin's willful and malicious acts, taken for the purposes of revenge, intimidation and in an effort to discredit German.

When Rubin spoke twice to a HUHS clinician about German's mental health on June 3, 2016, Rubin certainly had a motive and bias against German. Plaintiff thought Rubin had been defaming him since March 2016, after German filed his complaint that Rubin knowingly allowed false research to be published. No evidence was offered that anyone at Harvard had ever heard or seen German make or express any threat to anyone at Harvard. No evidence was offered that, on June 3, 2016, Rubin had any basis of current personal knowledge concerning German's mental health or dangerousness. Rubin relies only on the text Pai received as the source of his knowledge of German's mental health on June 3, 2016, as German stopped attending Harvard on May 21, 2016.

I accept plaintiff's conclusion that Rubin's "absurd and deceitful interpretation of [German's] texts to Pai" demonstrates the willful and malicious intentions of Rubin. (Plaintiff's Fifth Affidavit at page 8). I also accept plaintiff's conclusion on page 20 of his Sixth Affidavit that although Rubin had prior concerns over plaintiff's lab requests, Rubin had expressed no concerns about German's mental health until after May 4, 2010 when Rubin learned of his misconduct complaint to Faust.

This court considers Rubin's suggestion to Dymecki on June 3, 2016 that mental health services become involved for plaintiff as one act; this court considers his two separate phone conversations with HUHS clinician(s) on the evening of June 3, 2016 to be two separate acts. All three of these acts were undertaken by Rubin without any current personal knowledge of German's mental health and were taken due to his motive and bias against plaintiff, taken for retaliation for plaintiff's complaint to Faust in March 2016 and to intimidate and discredit German. In addition, this court considers Rubin's influencing Muela and Grass to make complaints to Lensch to be a fourth act, as well as Rubin's own complaint made to Lensch on May 10, 2010 to be a fifth act of harassment against this plaintiff. At all relevant times, Rubin's five acts were intentionally and willfully done to intimidate German from continuing with his complaint that Rubin had knowingly permitted false scientific research to be published. Those five acts were also done by Rubin to cause others to discredit and disbelieve German's complaint that Rubin knowingly allowed false scientific research to be published.

During the hearing on June 27, 2016, on plaintiff's Request for a

Harassment Order, this court raised the issue of whether plaintiff could be allowed to return and to use the Rubin Lab where he had worked for such a long time. The court offered the hearing to continue from day to day but counsel for the defendants stated that one of the defendants was not available and the hearing was continued to July 5, 2016. Counsel for the defendants raised as their only basis for objecting to this court's proposals that other lab users would be fearful if German was permitted to return. The defendants were then ordered to produce affidavits setting forth the basis of such a claim.

In the cover letter submitted with the affidavits, dated June 29, 2016, the defendants do not mention any "fear" but do cite to such an order being "premature, unwarranted and potentially disruptive to other members of the lab." The affidavits do not state any factual basis for being afraid of plaintiff and none cite to any example of threatening behavior, or actual or threatened violence. One cites to fear that plaintiff "can do anything with anyone's experiments." (§ 9 of Muela's Affidavit). In §10 of her Affidavit, she states: "I don't know what he's capable of doing [with] dangerous chemicals." In §11, she references "his temper, negative reactions and selfish demands created a threatening environment."

Nina Makhortova's Affidavit claims that before plaintiff left the lab, she would "often find the experiment out of focus on Monday mornings," and though she had no direct proof of plaintiff's or anyone's direct involvement, she became more cautious and began locking her computer. § 6. She began to rinse her coffee mug "just in case" as she worried "he might put something in her mug." (§ 7). She worries what he might do to her experiment if he is permitted "back in the lab." (§ 8).

Chen Benkler's Affidavit says plaintiff's behavior began to shift during the December 2015 holiday break with plaintiff becoming more aggressive and "slightly more paranoid." Plaintiff began locking his computer so no one could see his data. He told Benkler he was "deliberately mislabeling his samples" "to fool anyone who might steal them and kept a master code of what was mislabeled so he would know the true nature of his samples." I accept this is not normal behavior in a lab. Benkler also claims that plaintiff became unpredictable. Another lab user, Grass, was confronted by plaintiff, and they could not continue to collaborate. Grass expressed concern in his affidavit about plaintiff's work because plaintiff is unpredictable, and so unreasonable.

Dr. Phaff, Senior Research Manager, says in her affidavit that the Rubin Lab began to see plaintiff "exhibit extremely erratic behavior in February 2016, though she was not a direct witness to many of the encounters." Plaintiff looked "unwell, pale and seemingly lacking sleep and agitated." She claims that "because of plaintiff's irrational actions [which she does not elaborate], many lab members became concerned that his anger could lead to experimental sabotage or harm to people in the lab." § § 5 & 6. To her credit, she believes, and is willing to say publicly, that plaintiff is "a bright and talented researcher" and that she would "like to see a resolution where [plaintiff] is still able to obtain his Ph.D. from Harvard on the body of work he has generated."

The "fear" that three of the lab members expressed concerning German appears, at least to this court, exaggerated. It is well within Cardozo and Rubin's ability to print and review the access log for the Rubin Lab. Doing so would potentially lay to rest any and all concerns regarding plaintiff coming in to the lab at night.

It does not appear to be disputed that at all relevant times the lab members were approximately 35 in number. Defendants submitted affidavits from five of those 35, two of whom included Muela and Grass, one of the three alleged to have knowingly participated with Rubin in the alleged scientific misconduct and her boyfriend. Plaintiff has submitted other affidavits and emails based on personal knowledge of others, all of which support that plaintiff then had no mental health issues or concerns.

I accept Rubin's testimony that he was not concerned about plaintiff

doing harm to anyone or their experiments. Rubin claims to have acted as "Harvard would expect him to act," whatever that means. I do not accept that Harvard would accept or permit retaliation or acts done for the purpose of retaliating against someone who has alleged knowledge of publication of false data; I expect that Harvard expects that Rubin would recuse himself from dealing with German while the investigation is ongoing, and while he suspects German is the complainant.

Turning to plaintiffs claim as to Cardozo, this court does not accept that he acted three or more times "with the intent to cause [to German] fear, intimidation, abuse or damage to property." G. L. c. 258E, § 3. When he learned from Lensch on May 11, 2016 that lab members and the director (Rubin) had concerns about German, Cardozo acted appropriately in contacting and meeting with German and others. Even if Cardozo was premature in contacting HUHS prior to speaking with German, I do not accept that he then acted to cause German "fear, intimidation, abuse or damage" but simply that he likely was just too deferential to Rubin without realizing that Rubin had his own personal agenda to find reasons, even false reasons, to discredit and intimidate German. Even when Rubin continued on May 18, 2016 to make allegations to Cardozo about plaintiff, Cardozo then met personally with German and Dymecki on May 20, 2016, and he and Dymecki were then satisfied that plaintiff did not exhibit any mental health concerns. Even when Cardozo learned that plaintiff had, on and after May 21, 2016 cancelled all his meetings at Harvard, Cardozo continued to reach out to German, always finding plaintiff to be "ok." Cardozo was satisfied when he left for vacation on May 27, 2016 that German was still "ok", though Cardozo did provide direction to others at Harvard for the week he would be away in the event concerns about German arose in his absence. His direction did not include any mention of a Section 12 application.

RULINGS OF LAW

Plaintiff seeks protection through a civil harassment order pursuant to G. L. c. 258E. To obtain such an order, plaintiff must first "show that the defendant engaged in at least three willful and malicious acts, and that for each act the defendant intended to cause fear, intimidation, abuse, or damage to property." *Demayo v. Quinn*, [87 Mass. App. Ct. 115](#), 116 (2015), quoting *O'Brien v. Borowski*, [461 Mass. 415](#), 426 n.8 (2012), abrogated on other grounds by *Seney v. Morhy*, [467 Mass. 58](#) (2014). See G. L. c. 258E, § 1. Second, plaintiff must demonstrate the three or more acts of civil harassment did "in fact cause fear, intimidation, abuse or damage to property . . ." *O'Brien*, 461 Mass. at 420 (emphasis added).

Starting with the first prong of the foregoing analysis, I find that Rubin engaged in five separate willful and malicious acts. G. L. c. 258E, § 1. Section 1 defines a "malicious" act as one "characterized by cruelty, hostility or revenge." G. L. c. 258E, § 1. "In most cases, because it is impossible to look into someone's mind to determine his intent, fact finders are instructed to examine the defendant's actions and all of the surrounding circumstances and then to draw reasonable inferences to determine what was the defendant's intent." *A.T. v. CR.*, [88 Mass. App. Ct. 532](#), 537-538 (2015).

In the present case, all of Rubin's malicious acts, which were carried out by various methods of calling plaintiff's mental health into question, were taken after Rubin learned of German's allegations on May 4, 2016, despite Rubin's contention that he had been concerned about plaintiff's alleged "unkempt," "disheveled" and "tired" appearance since the beginning of 2016. See *Commonwealth v. Roberts*, [442 Mass. 1034](#), 1034 (2004) (inferring intent from "sequence and timing" of acts). Notably, Rubin has not submitted any affirmative evidence that he expressed concerns about plaintiff's mental health prior to May 4, 2016, when his motive to fabricate the allegations arose. See *Commonwealth v. Binieda*, [20 Mass. App. Ct. 756](#), 759 (1985) (evidence of consistent statement made prior to motive to fabricate arose competent to rebut allegation of fabrication).

I find that Rubin fabricated concerns and encouraged others to fabricate

concerns about plaintiff's mental health in response to his belief that German was responsible for the allegations against him, and Rubin thus acted maliciously. G. L. c. 258E, § 1. See *Sklar v. Beth Isr. Deaconess Med. Ctr.*, [59 Mass. App. Ct. 550](#), 555 (2003) ("[M]alice may be shown by the proof of facts from which a reasonable inference of malice may be drawn.") (quotation omitted). Compare *Seney v. Morhy*, [467 Mass. 58](#), 63 (2014) (email describing plaintiff in "unflattering terms" not act of harassment because it "was not motivated by cruelty, hostility, or revenge"). Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964) (knowledge that statement was false or reckless disregard of falsity demonstrative of malice).

In particular, Rubin's first action consisted of his personal complaint to Lensch about the plaintiff's alleged "erratic and threatening behavior." Rubin testified that plaintiff had never made any threats concerning anyone; his claims of "erratic behavior" are fiction. Rubin's second action was his exercise of influence over Muela and Grass, urging them contact Lensch with regard to the same. Indeed, Rubin occupied a distinguished and powerful position at Harvard, was Muela's and Grass' direct supervisor, had broad discretion to remove Muela and Grass from the lab, and was in a position to influence their research careers. See *E.E. O. C v. Morgan Stanley & Co., Inc.*, 206 F.Supp.2d 559, 562 (S.D.N.Y. 2002) (recognizing influences inherent to employer-employee relationship). Though Muela also had a personal stake in the outcome of the investigation of the plaintiff's allegations, the fact that she took the same path as Rubin to discredit German evidences Rubin's influence over the report she made to Lensch.

Rubin committed the final three acts on June 3, 2016, first suggesting to Dymecki that the plaintiff required mental health services for purported "hostile and erratic behavior," and later during two separate phone calls with an HUHS clinician and expressing the same purported concerns about the plaintiff's mental health. See *A. T.*, 88 Mass. App. Ct. at 535-536 (finding two separate statements defendant made to harass plaintiff within the same school day were two separate acts of harassment). Compare *Smith v. Mastalerz*, [467 Mass. 1001](#), 1001 (2014) (finding defendant had engaged in just "one continuous act" as opposed to three separate acts where defendant lived near plaintiff and drove by her home three times "within a very short period of time"). As stated, as of June 3, 2016, Rubin had not been in contact with German for weeks and had no credible reason to believe he was in danger of harming himself or others.

Thus, the sole purpose of Rubin's comments to Dymecki and the clinician on June 3, 2016 was to further his endeavor to intentionally harass the plaintiff. See *Petriello v. Indresano*, 87 Mass. App. Ct. 438, 446 (2015).

I also find that Rubin intended for each of the foregoing acts to cause German to experience "fear, intimidation, [and] abuse . . ." *Demayo*, 87 Mass. App. Ct. at 116. "Fear" in the context of civil harassment is restricted "to fear of physical harm or fear of physical damage to property." See *O'Brien*, 461 Mass. at 427. The Massachusetts Appeals Court has defined "intimidation" in the context of civil harassment as "putting in fear for the purpose of compelling or deterring conduct." *A. T.*, 88 Mass. App. Ct. at 535. Rubin's "repeated[] and escalating harassment of the plaintiff" after learning of the plaintiff's allegations, reasonably supports an inference that he intended to cause German to fear physical harm and intimidate him to deter his continued participation in the investigation into Rubin's alleged misconduct. *Id.* at 538.

The second portion of the analysis requires the court to consider whether Rubin's acts did, in fact, "cause fear, intimidation, abuse or damage to property" and review "the entire course of harassment, rather than each individual act . . ." *A. T.*, 88 Mass. App. Ct. at 535 (quotation omitted). The effect of Rubin's "defamation campaign" against German caused plaintiff to stop attending Harvard on May 21, 2016. Rubin's third, fourth and fifth acts of harassment culminated in German's involuntary hospitalization on June 4, 2016, subsequent to which German formally informed Cardozo that he would not return until his issues with Rubin and

the lab were resolved. I credit plaintiff's assertion that he feared if he returned to Harvard, Rubin would continue his campaign to restrict plaintiff's personal freedom and inflict emotional, physical and psychological damage upon him. Cf. Dziokonski v. Babineau, [375 Mass. 555](#), 556 (1978) (acknowledging correlation between psychological and physical harm). Accordingly, I find that Rubin's entire course of harassment did, in fact, cause German to experience fear and intimidation. See A.T, 88 Mass. App. Ct. at 535. For these reasons, German is entitled to a civil harassment protection order as to Rubin.

As stated, the court does not accept that Cardozo acted three or more times "with the intent to cause (to German) fear, intimidation, abuse or damage to property." G. L. c. 258E, § 3. For the reasons detailed supra, in the court's findings of facts, plaintiff is not entitled to a civil harassment prevention order as to Cardozo.

ORDER

Until further court order, it is ORDERED that:

1. The defendant Lee Rubin is to stay at least 100 feet away from plaintiff and have no contact, direct or indirect, with plaintiff;
2. Plaintiff is to immediately be fully restored to his position and research in the Rubin Lab with all the assistance, equipment, and supplies he had on March 10, 2016.

Elizabeth M. Fahey
Justice of the Superior Court
August 25, 2016

[1] Though he could finish his Ph.D. within four months, it is critical to his future that he graduate with a published thesis which German believes, and I accept, requires that his research be completed.

[2] Plaintiff claims in his affidavit that Griffin told him in their meeting on March 25, 2016 that "he knows Professor Rubin almost as much as (his) own dad". Plaintiff claims (in Plaintiffs Fourth Affidavit) that 42 C.F.R. § 93.310(g) requires the interviews of complainants to be recorded and transcribed, which transcriptions should be provided to interviewees for correction. At least as of July 5, 2016 no such transcript was provided to German. It goes without saying that due process requires that those evaluating misconduct should be fair and impartial. Because the Rubin Lab receives Federal funding, Harvard is required to comply with Federal regulations pertaining to research misconduct, 42 C.F.R. §§ 93; 100 et seq.

[3] [accept German's claim that he followed Brodnicki's instructions and kept confidential his complaint to Faust that Rubin and others had knowingly allowed falsified research to be published.

[4] The only document provided by the parties is the physician's application which is incomplete in that the physician had not checked whether (s)he had "personally examined this person" or "if not, why?"

[5] General Laws c. 123, § 12(a) states in pertinent part:
Any physician who is licensed pursuant to section 2 of chapter 112 . . . who, after examining a person, has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a 3-day period at a public facility or at a private

facility authorized for such purposes by the department. If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician . . . on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore. . . . An application for hospitalization shall state the reasons for the restraint of such person and any other relevant information which may assist the admitting physician or physicians. Whenever practicable, prior to transporting such person, the applicant shall telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person

This is a very rare statute in which no court order by a judge is necessary.

[6] No explanation for the delay between March 25, 2016 and May 4, 2016 has been provided. No information has been provided that Rubin was told of the complaint prior to May 4, 2016. It would not be reasonable to infer that he had any such knowledge prior to May 4, 2014, though it certainly is possible because of: 1) Griffin's statement to plaintiff that he had a close relationship to Rubin, even if I were to credit it; 2) the delay in the commencement of the investigation; 3) that German believes defendant Rubin began a campaign to "defame" him in March 2016; 4) Ellison has already told Rubin that the investigation is likely to be closed though no such decision has yet been made (why that would be disclosed prematurely is unclear).

[7] German had been given resources within the lab but still wanted more. During the hearing, counsel and Cardozo advised that grad students are not automatically entitled to assistance by undergrads or other lab members. For reasons I attribute to the strength and merits of German's research, it is undisputed that he had been assigned two undergrads prior to March 2016, i.e., more assistance than normal.

[8] Rubin's computer was taken by the RIO on May 4, 2016; Muela's computer was taken on May 10, 2016. In German's Fourth Affidavit, on p. 3, which I credit, he says he told the RIOs on March 25, 2016 that Muela keeps a back-up of all of her digital files on a red USB flash drive and that the RIO made no effort to obtain her flash drive, her lab desk PC, or the lab's automatic daily back-up, which may be a violation of C.F.R. § 93, 305(a). Apparently the RIO and Ellison did not obtain these items.

[9] I accept that the two lab members, Muela and her boyfriend Tobias Grass, spoke to Lensch on May 10, 2016 after Muela and Rubin's meeting with the RIO and Ellison concerning the complaint against them of knowing publication of false scientific research.

[10] According to German, Tobias Grass is Muela's boyfriend. German's Affidavit also indicates that beginning in March 2016, Tobias Grass, Muela and Chen Benkler, all lab members, stopped talking to him. German sent an email to Rubin on May 18, 2016 asking him "To request from Tobias to immediately return the equipment and tools that I [German] shared with him and that he has inappropriately taken away from me after March 11." (Plaintiff's Supporting Document No. 8, Ex. 22 to Affidavit of Defendants' Counsel). In his affidavit, Benkler says his friendship with plaintiff came to an end around mid-March 2016 when plaintiff asked Rubin for Benkler's research assistance. They have not spoken since then.

[11] Whether Cardozo understood or was told by Rubin that he had

informed Lensch of his concerns about German is not clear.

[12] I accept that Cardozo did not then know of German's misconduct complaint. After what he had been told, he then had at least some genuine concerns about German's mental health, all of which were allayed before he left on vacation. Cardozo thought then that he was dealing with personality conflicts.

[13] German had reported to Cardozo that he saw a doctor/counselor because of ADHD and didn't have other issues-depression, paranoia, etc. (Ex, 19 to defendants' counsel's affidavit).

[14] I do not credit Cardozo's testimony that he did not know until June 20, 2016 of plaintiff's misconduct allegation against Rubin. Cardozo was served with plaintiff's complaint on June 8, 2016. I accept that he read enough on June 8, 2016 to be aware of plaintiff's complaint to Faust against Rubin.

[15] During the second hearing on June 27, 2016, this court learned that plaintiff's work/research/experiments were still preserved by Harvard as it had agreed to do. This court also suggested at this second hearing that plaintiff be allowed to return to the Rubin Lab. To support their claim that German should not be allowed to return, defendants submitted these five affidavits supportive of their position that this court not order plaintiff be allowed to return to the Rubin Lab.

[16] When it was revealed during the third hearing on July 5, 2016 that access to the lab requires identification, Rubin stated he did not realize a log of such access is maintained. I do not credit his testimony. Any question whether plaintiff, who had not been seen at the lab or anywhere by Rubin since at least May 21, 2016, was accessing the lab at night could have been answered by reviewing the lab's access log. There is no dispute that plaintiff had stopped attending Harvard by May 21, 2016.

[17] Rubin had earlier in the day referred to the "possibility" of German going into the lab at night; now he refers to that "possibility" as a fact, and as an "alarming problem."

[18] Since he had been absent from the lab since at least May 21, it is unclear what "German's hostile and erratic behavior" means. Clearly, Rubin had no personal knowledge on June 3, 2016 of any of German's recent behavior as he had not seen or had any communication with German since May 18, 2016.

[19] Again, the factual basis for this reference to "erratic and hostile behavior" is unclear and appears to be without any factual basis; I accept this evidences Rubin's bias, revenge and motive to intimidate plaintiff.

[20] I accept Wen Hui is the clinician, not an M.D., who spoke twice on June 3, 2016 to Rubin.

[21] Rubin has now described as fact not only German's entry into lab, but moving things; the lab entry conduct which earlier in the day he described at first, as only "a possibility" and then an "alarming problem." Rubin had not previously expressed concern about German "moving things."

[22] The text exchanges between Dymecki and Rubin suggest that Dymecki initiated the contact with HUHS. AU the substantive information

concerning the c. 123, § 12 was provided by Rubin in the two phone contacts he had with Harvard's clinician. Given the medical record, I accept that the clinician Rubin first spoke with in the evening of June 3, 2016 was Wen Hui, the on-call mental health clinician, but not an M.D. That the text messages between Rubin and Dymecki do not appear vindictive/revengeful does not convince me that they reflect Rubin's actual thought process or intent that night.