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*Via Email (sprpositionstmts@state.ma.us)
and Overnight Delivery*

Patty Woods
Assistant Clerk to the Commission
The Commonwealth of Massachusetts
Commission Against Discrimination
The Springfield State Office Building
436 Dwight Street, Rm. 220
Springfield, MA 01103

Re: ***Jodi Shaw v. Smith College***
MCAD No. 21SEM00375 / EEOC No. 16C-2021-00616

Dear Ms. Woods:

Please accept the following as the position statement of the Respondent, Smith College (“Smith” or the “College”), in response to the above-referenced Charge of Discrimination (the “Charge”) filed by the Complainant, Jodi Shaw (“Ms. Shaw” or “Complainant”). While employed as a Student Support Coordinator in the College’s Residence Life Department, Ms. Shaw began leading a national media campaign to disparage the College’s efforts at preventing discrimination and creating a more equitable and inclusive environment. When her campaign raised several hundreds of thousands of dollars -- enough to fund her litigation, cover her "living expenses" and hire a personal assistant -- Ms. Shaw voluntarily resigned from her employment with Smith.

In her Charge, Ms. Shaw alleges that the College discriminated against her because she is white and subjected her to a hostile work environment because the College offered faculty and staff opportunities to learn more about race discrimination and other social justice issues. Ms. Shaw objects to some of the content in that programming, particularly content involving ideas she claims are derived from critical race theory, anti-racism and white privilege perspectives. She claims that by offering trainings and educational opportunities that encouraged staff to consider the social identities of colleagues and students, the College was somehow forcing her to discriminate against others based on race. Nothing could be further from the truth, as shown below.

Ms. Shaw's claims are based on her *perception* that she suffered disparate treatment and a hostile work environment based on her race. The law, however, requires more than *subjective*

belief. Ms. Shaw fails to establish probable cause of discrimination because her claims are not supported by material facts viewed *objectively*. When viewed in accordance with state and federal law, the material facts establish that the College acted properly and commendably, in fulfillment of its non-discrimination policies, by encouraging Ms. Shaw and all employees to reflect upon and actively engage with educational content intended to advance the College's commitment towards greater equity, inclusion and social justice on campus and in the community. There was no discrimination.

Lacking evidence of discrimination, Ms. Shaw claims further that the College retaliated against her after she submitted an internal grievance alleging race discrimination. She attempts to link her grievance to various personnel actions, including her selection for a partial furlough, the reassignment of one of her job duties, and a written warning resulting from an internal investigation of her unauthorized disclosure of College emails. Her attempt to establish a nexus between these actions and her internal grievance fails, as a matter of law, because the record evidence establishes in each instance that the College acted with legitimate business reasons, consistent with its employment policies, and there is no evidence the reasons were a pretext for retaliation.

To the contrary, the record establishes that Smith acted fairly, reasonably and responsibly when addressing Ms. Shaw's concerns. At its own expense, Smith engaged an external professional to investigate Ms. Shaw's allegations of workplace discrimination and retaliation. After a comprehensive review, the investigator determined that Ms. Shaw's claims were unfounded. The MCAD should reach the same conclusion and dismiss her Charge for lack of probable cause.

I. FACTS

A. Smith College

Smith is a top-ranked, private liberal arts college, located in Northampton, Massachusetts. Smith is among the oldest and largest women's colleges in the United States, with students from 48 states and 68 countries. As an independent, nondenominational college, Smith remains strongly committed to the education of women from all backgrounds.

Smith strives to preserve an educational, working, and living environment that is respectful of differences and free from harassing behavior. See *Smith's Affirmative Action/Equal Employment Opportunity Policy*, <https://www.smith.edu/about-smith/hr/employee-handbook/eo>, attached as Exhibit A. In furtherance of this goal, Smith maintains strict policies that are designed to promote non-discriminatory, non-retaliatory practices and protect its employees. These policies are contained in Smith's Employee Handbook, which is issued to all Smith employees, and maintained publicly on Smith's website. See <https://www.smith.edu/about-smith/hr/employee-handbook>.

Smith is committed to maintaining an environment that is open to all individuals without discrimination on the basis of age, race, color, national origin, ancestry, religion, sex or gender, gender identity, sexual orientation, mental or physical disability, genetic information, or active military or veteran status. *See Smith's Affirmative Action/Equal Employment Opportunity Policy*, attached as Exhibit A. Smith strictly prohibits retaliation against employees for filing a complaint or participating in an investigation. *Id.*

B. Complainant's Employment at Smith

1. Complainant's Employment as a Temporary Librarian.

In September 2017, Ms. Shaw began her employment at Smith as a temporary Teaching, Reference and Outreach Librarian in the Teaching, Learning, and Research ("TLR") Department. In this role, Ms. Shaw worked with faculty to develop research skills curricula, increase student engagement with Smith's libraries, and assist students with research projects. Ms. Shaw reported to the former Head of TLR ("Former Head of TLR") until the summer of 2018 when the Former Head of TLR retired. In June 2018, the Interim Head of TLR ("Head of TLR") became Ms. Shaw's supervisor.

In the summer of 2018, Ms. Shaw was responsible for helping to plan the First Year Library Orientation for incoming Smith students. She proposed to the Head of TLR that she prepare a musical performance as a way to increase student engagement. She did not explain at that time the type or content of the music she had in mind. The Head of TLR first learned about those specifics on August 29, 2018, when Ms. Shaw provided him with a recording of a song she had written and performed, a copy of the lyrics, and slides she intended to use during the performance. The Head of TLR reviewed the materials with the Associate Director of TLR and determined that "incorporating rap into [the libraries'] orientation presentation to an audience of first-year students is not advisable." *See August 30, 2018 email from Head of TLR to Ms. Shaw*, attached as Exhibit B. He explained that "[t]he use of rap as a medium by a white staff member and student could easily be perceived as insensitive or cultural appropriation by incoming Smith students and could create a perception with students that the library is not racially sensitive and reinforce the fact that our organization is not very racially diverse."¹ *Id.* While acknowledging that Ms. Shaw did not intend such an outcome, the Head of TLR noted that "this summer's incident has already resulted in students of color feeling unwelcome on the Smith campus, and especially right now, we don't want the Libraries to be seen as contributing in any way to that sentiment." *Id.*

By way of background, the incident to which the Head of TLR was referring took place on Smith's campus just a month earlier, on July 31, 2018. An employee had called campus safety after observing a student in the common area of a dorm that was closed to residents during

¹ Notably, the Head of TLR did not tell Ms. Shaw that "performing rap music was problematic "because you are white." *Charge*, at ¶ 20.

the summer. The student, who is black, alleged that the white employee's decision to call campus safety constituted racial profiling. The College engaged an external investigator who conducted a comprehensive investigation and concluded independently that the evidence did not support a finding of race discrimination against any employee involved in the incident. Smith published the investigator's complete report for public viewing. See *Investigative Report of July 31, 2018 Incident*, available at:

<https://www.smith.edu/sites/default/files/media/Documents/President/investigative-report.pdf>.

Ms. Shaw's rhetoric notwithstanding, she had *no involvement* in the July 31 incident, nor was she a participant in the investigation or referenced in the report.

With respect to Ms. Shaw's proposed rap, the Dean of Libraries, to whom the Head of TLR reported, reviewed the proposed song and determined that Ms. Shaw could not perform the song to introduce the libraries to the incoming first year students without some modifications to address the legitimate concerns raised by the Head of TLR about how students new to Smith would likely react. The Head of TLR then met with Ms. Shaw to discuss whether she wanted to modify or cancel the performance. The Head of TLR offered to help Ms. Shaw modify the performance and discussed several ideas to improve the presentation materials, such as making the slideshow more inclusive by replacing generic pictures with images of current Smith students and employees, including people of color and students with disabilities.

Ms. Shaw determined that she did not have time to modify the performance and canceled the event entirely. On August 31, 2018, Ms. Shaw emailed the Head of TLR and the Dean of Libraries to communicate her decision. Importantly, no adverse employment actions resulted from Ms. Shaw's proposal, the critical response to her proposal, or her decision to cancel the event. There was no adverse or discriminatory treatment of Ms. Shaw based on her race. Rather, her supervisors raised legitimate concerns about her proposed performance and whether that performance would advance or potentially undermine the Library's student orientation goals.

2. Complainant Applies for a Full-Time Librarian Position, But Withdraws Her Application Before The Second Round of Interviews.

In the summer of 2018, Ms. Shaw applied for a newly-created position, the First Year Experience and Engagement ("FYEE") Librarian. Ms. Shaw was a strong candidate for the position. After her first-round interview in August 2018, and contrary to her unfounded suspicions of discrimination, the hiring committee, which included the Head of TLR, decided unanimously to advance her to the second and final round of interviews. Nevertheless, Ms. Shaw voluntarily withdrew her application in September 2018, before the second round of interviews. As such, this matter cannot support any inference of discrimination.

3. Complainant Resigns from TLR and Is Hired as a Student Support Coordinator in the Student Affairs Department of Residence Life.

Ms. Shaw voluntarily resigned her temporary librarian position on October 29, 2018, and accepted an open position with Residence Life as a Student Support Coordinator in the Student Affairs Department. While the position was administrative, it had many student-facing responsibilities, including managing housing assignments and housing-related disability accommodations. In this role Ms. Shaw reported to the Assistant Director of Residence Life. Ms. Shaw initially reported to the former Assistant Director of Residence Life ("Former Assistant Director of Residence Life"), who left the College in Spring of 2019. On May 4, 2019, Ms. Shaw began reporting to the new Assistant Director of Residence Life ("Assistant Director of Residence Life"). At all times relevant, the Director of Residence Life supervised both Ms. Shaw and the Assistant Director of Residence Life. Notably, both the Assistant Director of Residence Life and the Director of Residence Life served on Ms. Shaw's hiring committee and recommended that she be hired for this position.

Residence Life is committed to promoting four core values: social justice, connection, learning, and balance. These values are essential in guiding interactions among staff and students, and seek to ensure that Residence Life members understand how facets of individual identity, including power, position, and bias, impact their work. Notably, the College focuses on understanding the many different factors that inform an individual's identity - not only race, but also religion, gender, abilities, and others.

To advance those core values, Residence Life staff regularly discuss and address issues involving equity and social justice. Improving awareness and understanding of these issues, and how they impact students and employees at Smith, is not equivalent to imposing any kind of discriminatory treatment, as Ms. Shaw mistakenly asserts.² There is no evidence that Smith compelled Ms. Shaw or any Smith employee to treat people of color better than others, or to treat white people worse. To the contrary, the record evidence demonstrates unequivocally that Smith and its Residence Life team foster fair and equitable treatment of all members of its community.

In the Spring of 2019, there were student demonstrations on campus advocating for greater equity and inclusion at Smith. Ms. Shaw alleges that the students taped a list of demands on her office door (*Charge*, at ¶¶ 37-39), but what she neglects to explain is that during this time Smith students posted lists of demands all over campus to get the attention of the College's

² In her *Charge*, Ms. Shaw alleges that in January 2019, a former colleague once made a derogatory statement about wealthy white alumnae during a professional development meeting and that the College took no corrective action. None of Ms. Shaw's colleagues recall this incident taking place, and Ms. Shaw did not complain about the incident to her supervisors or Human Resources. Thus, even if the event occurred as Ms. Shaw describes it, a single, isolated and unreported incident of derogatory speech provides no support for her allegations of discrimination and retaliation by others a year or more later. Further, these allegations fall outside the statute of limitations. See *Section II(A)*, *infra*.

administration. Ms. Shaw was not individually targeted; the demands were not addressed to her. One of the student demands requested that the College increase affinity housing options on campus. Like many colleges, Smith offers affinity housing options to students who wish to live together in a residential community that cultivates and fosters a sense of belonging for students of color. Applications for affinity housing neither request nor are judged by a student's racial or ethnic identity. *See Smith's Special-Interest Housing, Affinity Houses: Park Annex & Parsons Annex*, available at: <https://www.smith.edu/student-life/residence-life/houses/special-interest>. Ms. Shaw alleges erroneously that the College expanded affinity housing as a concession to the student protests in 2019 (*Charge*, at ¶¶ 32-33), but in fact expanding affinity housing was an initiative the College had started exploring years earlier, and a working group was already in the process of making plans and recommendations when the students began their protests in 2019. Ms. Shaw may disagree with affinity housing and the ideals for which the students were protesting, but she has not shown in any way that such activities discriminated against her.

In a similarly illogical manner, Ms. Shaw attempts to support her discrimination claims by referencing her criticism of Smith's racially-neutral policy decision not to call Campus Safety in response to every report of students smoking marijuana in the residence halls. *Charge* at ¶ 29. Smith prohibits the use and sale of marijuana on campus; however, after marijuana was decriminalized in Massachusetts, Smith sought to ensure that reports of students smoking marijuana in the residence halls are addressed in the same way as reports of alcohol violations. Accordingly, the policy changes provided that in the ordinary course, Campus Safety should be called only if there is an immediate health or safety concern. Once again, Ms. Shaw may disagree with the College's policy decision, or the state's decision to decriminalize marijuana, but she has not shown how this policy change discriminated against her.

Ms. Shaw mistakes education for indoctrination. In January 2020, the Residence Life staff attended a three-day retreat. The first day of the retreat focused on *discussing* social identities, and the second and third days focused on developing a curriculum for residential students. In advance of the retreat, Ms. Shaw met with the Director of Residence Life and expressed her discomfort with discussing her race with others in the workplace. *See Investigator's Report*, attached as Exhibit C, at 20, 22. The Director of Residence Life confirmed that Ms. Shaw could participate as much or as little as she liked in those conversations during the retreat. There was no requirement that Ms. Shaw express any particular viewpoint, nor was she obligated to agree with what others professed.

On the first day of the retreat, external facilitators from Romney Associates, Inc., who specialize in providing diversity, inclusion and leadership training to higher educational institutions and companies nationwide, held a social identities workshop and discussed social identity, culture, cultural affirmation, and Residence Life scenarios. *See January 13, 2020 Residence Life Retreat Presentation by Romney Associates, Inc.*, attached as Exhibit D. The facilitators did not "requir[e] anyone to confess [to] 'racial privilege,'" and none of Ms. Shaw's

colleagues recall the facilitators asking white participants to acknowledge their privilege. *Investigator's Report*, attached as Exhibit C; *but see Charge*, at ¶¶ 46-47.

Ms. Shaw was free to disagree with the facilitators, and she took advantage of that freedom. During the social identities workshop, Ms. Shaw aggressively questioned the facilitators about their approach as opposed to the issues they were attempting to address. The frequency of her interruptions were disruptive to the group and made it difficult for the facilitators to move through their presentation. Several staff members reported to the Director of Residence Life that they felt Ms. Shaw's behavior during the workshop was inappropriate and made them uncomfortable. After the retreat, Ms. Shaw solicited feedback from the Director of Residence Life, who explained that several of her colleagues were offended by how she had treated the facilitators.

There were no adverse employment actions taken against Ms. Shaw based on her conduct during the retreat or at any training or educational programming. Contrary to her unsupported assertions, there were no changes to her job or job description at that time. Before Ms. Shaw was hired, Residence Life had been considering whether to separate the administrative and student-facing responsibilities of the Student Support Coordinator, but made no such changes, in writing or in practice, at that time.

4. Ms. Shaw Submits an Internal Grievance, and External Investigator Finds that Ms. Shaw's Claims Are Not Substantiated.

On March 2, 2020, Ms. Shaw submitted the first of a two-part grievance through the College's Equal Employment Opportunity ("EEO") process for employees ("EEO Complaint"). The first part of her EEO Complaint focused on the January 2020 Residence Life retreat. The second part, submitted on May 12, 2020, recited allegations of a racially-hostile work environment, dating back to her employment in the Libraries Department.

The EEO policy expressly permits the College to designate an investigator to assess a grievance. See <https://www.smith.edu/about-smith/hr/employee-handbook/eo>. In instances involving allegations of race discrimination, sexual assault, and/or other matters with potentially far-reaching policy implications, Smith has often engaged external consultants with certain experience or expertise relevant to the grievance at issue. The goal is to provide a fair process by ensuring independent fact-finding and objective, unbiased evaluation of the evidence. Because Ms. Shaw was alleging so-called "reverse discrimination" as a white employee, an exceptionally rare charge with potentially broad implications, the College decided in its discretion to avoid any appearance of partiality or unfairness by engaging an experienced external investigator (the "Investigator") to collect and assess the evidence and to make factual findings independent of the College.

By any measure, the Investigator conducted a thorough and comprehensive investigation of Ms. Shaw's EEOC Complaint. *See Investigator's Report, attached as Exhibit C.*³ Specifically, the Investigator assessed the following allegations raised by Ms. Shaw:

- i. Did the Head of TLR or the Dean of Libraries prevent Ms. Shaw from performing a rap on the basis of her race, or did the Head of TLR require Ms. Shaw to revise an orientation slideshow to make it more racially inclusive, in violation of the College's Equal Employment Opportunity policy, which prohibits discrimination and harassment?
- ii. Were the Head of TLR and the Dean of Libraries determined not to hire Ms. Shaw for the FYEE Librarian position because they sought to hire a person of color, in violation of the College's Equal Employment Opportunity policy, which prohibits discrimination?
- iii. Did the Dean of Libraries intimidate Ms. Shaw into withdrawing her candidacy for the FYEE position because Ms. Shaw objected to the Dean of Libraries and the Head of TLR's decision about the rap, in violation of the College's Equal Employment Opportunity policy, which prohibits retaliation?
- iv. Did the Director of Residence Life require Ms. Shaw and others in the Residence Life department to discuss and make assumptions about race in a manner that violates the College's Equal Employment Opportunity policy, which prohibits discrimination and harassment?
- v. Did the Director of Residence Life contemplate changing Ms. Shaw's job description and duties because Ms. Shaw refused to discuss and make assumptions about race, or because Ms. Shaw filed a complaint about discrimination and harassment, in violation of the College's Equal Employment Opportunity policy, which prohibits retaliation?

Id., at 2. To answer these questions, the Investigator interviewed 15 individuals, including Complainant, and reviewed relevant documents and communications. *Id.* On October 29, 2020, at the conclusion of the investigation, the Investigator submitted a final investigation report summarizing her findings and conclusions ("Investigator's Report") in 29 single-spaced pages and almost 200 pages of exhibits. *Id.*

As to Ms. Shaw's first allegation, the Investigator found that the Head of TLR and the Dean of Libraries did not discriminate against Ms. Shaw, or subject her to a hostile work

³ For purposes of the position statement, the College has attached a copy of Investigator's Report without the 24 exhibits referenced therein (Investigator's Report with the exhibits is 224 pages).

environment, by prohibiting her from performing the rap she had prepared for the student orientation, or by asking her to include more images of people of color in her presentation. *Id.*, at 11. The supervisors had raised legitimate concerns about whether Ms. Shaw's proposal would advance or hinder the goals of the student orientation. *Id.*, at 11-12. Moreover, there was no adverse employment action taken against Ms. Shaw, and although she subjectively viewed the response to her proposed orientation rap as distressing, "[a] reasonable person in Jodi's position, considering all the circumstances, would not find [the Head of TLR] and [the Dean of Libraries]'s conduct objectively offensive." *Id.*, at 11, 13.

Regarding Ms. Shaw's second allegation, the Investigator found that the Head of TLR and the Dean of Libraries did not exclude her from consideration for the FYEE Librarian position because she was white. *Id.*, at 16. To the contrary, the Head of TLR and the other members of the hiring committee had unanimously approved Ms. Shaw for a second interview and consideration in the final round of candidates, before Ms. Shaw voluntarily withdrew her candidacy. *Id.*, at 16-17. There was no evidence to support Ms. Shaw's speculation that the Dean of Libraries planned to retaliate against her for proposing the rap at student orientation. *Id.*, at 18. Indeed, the Investigator confirmed that the Dean of Libraries was not even a member of the hiring committee. *Id.*, at 16. Further vitiating any inference of discrimination, the Investigator found that the Head of TLR was not privy to the candidates' races, and there was no evidence that the race of the candidates was a factor in who was hired. *Id.*, at 17.

Regarding Ms. Shaw's claims of discrimination and harassment in Residence Life, the Investigator found no evidence supporting those claims. *Id.*, at 22-29. Discussions of race and other social justice issues were in furtherance of Residence Life's legitimate learning and working objectives. *Id.*, at 23-24. Once again, Ms. Shaw's subjective viewpoint did not align with an objective view of the facts. The Investigator explained:

It is worth noting that all of Jodi's white colleagues, and colleagues of color, reject her allegation that the conduct about which she (Jodi) complains was severe and pervasive, or that the conduct interfered with their ability to fulfill their job responsibilities. In fact, they all expressed the opposite: that taking social identity into account in interacting with a diverse group of students and employees is an essential part of their work. They stated that considering race enhances, rather than detracts from, their ability to serve students and understand their peers within the department. Said another way, Jodi is the only person in the department who is uncomfortable talking about and considering race.

Id. the Investigator concluded that while the equity and inclusion trainings and educational opportunities in the Residence Life department clearly had a negative effect on Ms. Shaw, "information provided by Jodi's colleagues demonstrates that a reasonable person in Jodi's position would not perceive that she was working in a hostile work environment. Six white staff members . . . informed me that they feel comfortable with the way that race is addressed in the

department . . . Said another way, *Jodi is the only person in the department, white or a person of color, who objects to the way the department discusses or considers issues of race or identity.*” *Id.*, at 25-26 (emphasis added).

Finally, the Investigator concluded that the Assistant Director of Residence Life and the Director of Residence Life did not contemplate making changes to Ms. Shaw’s job description because she refused to make assumptions based on race or in retaliation for her complaint about race discrimination. *Id.*, at 26-27. As a primary matter, *contemplated* changes to a job description do not constitute an adverse action. *Id.*, at 27. Even so, there was no evidence these contemplated changes were related to Ms. Shaw’s complaint; the Department had been considering whether to separate the administrative and student-facing responsibilities of the Student Support Coordinator role since before Ms. Shaw was hired into the position. *Id.*

On November 2, 2020, the College informed Ms. Shaw in writing that there was insufficient evidence to support a violation of the College's EEO policy and closed the investigation.

5. Complainant's 2019-2020 Performance

Smith typically conducts annual performance evaluations for staff members in May, based on the employees’ performance from April to March of the preceding year (the annual performance review period”). Due to the workload of the Residence Life Department, and its role in facilitating student housing, performance evaluations of Residence Life staff typically take place in June. Because the Former Assistant Director of Residence Life left in May 2019, and the Assistant Director of Residence Life had not supervised Ms. Shaw in the annual performance review period, Ms. Shaw did not receive a performance evaluation for the 2018-2019 year.

The annual performance evaluation cycle for 2019-2020 ended on March 31, 2020, when the College was in the process of transitioning to a remote work and learning environment due to the COVID-19 pandemic. As a result of the pandemic, most performance evaluations, including Ms. Shaw’s, were delayed by several months.

In response to Ms. Shaw’s request for feedback, and recognizing that she did not previously have a performance review, the Assistant Director of Residence Life met with Ms. Shaw in June 2020 to discuss her performance. The Assistant Director of Residence Life recognized certain strengths in Ms. Shaw’s performance, including her ability to provide good customer service to students and others in different departments. She also raised certain concerns regarding Ms. Shaw’s performance, including her inability to work independently without regular, lengthy meetings with the Assistant Director of Residence Life regarding her performance. Indeed, Ms. Shaw’s need for direct supervision and instruction was increasing rather than decreasing. The Assistant Director of Residence Life initially met with Ms. Shaw one-on-one for an hour a week, but later had to increase those meetings to ninety minutes and

eventually two and a half hours a week of scheduled instruction and feedback, on top of additional unscheduled instruction and feedback. Ms. Shaw was not receptive to the Assistant Director of Residence Life's candid assessment. After their meeting, Ms. Shaw challenged the Assistant Director of Residence Life's assessment of her performance and told her she believed that she was being discriminated against or harassed based on her race.

On September 30, 2020, the Assistant Director of Residence Life delivered Ms. Shaw's 2019-2020 Performance Evaluation. *See Ms. Shaw's 2019-2020 Performance Evaluation, dated September 30, 2020*, attached as Exhibit E. The Director of Residence Life also attended the performance evaluation meeting. In her Charge, Ms. Shaw claims her performance evaluation process was different because it was not customary for the Director of Residence Life to attend performance evaluation meetings, but that allegation is inaccurate. In fact, the Director of Residence Life attended the performance evaluation meetings of every member of the Residence Life Department to ensure uniformity in light of the number of personnel changes that year.

At Smith, performance evaluations are designed to review the staff member's performance based on the core competencies required for their position. Accordingly, the Assistant Director of Residence Life reviewed Ms. Shaw's performance based on the core competencies required for the Student Support Coordinator position in the Residence Life/Student Affairs Department: (1) Service Excellence; (2) Communication and Interpersonal Skills; (3) Professional Conduct; (4) Problem Solving and Decision Making; and (5) Technical Skills. *Id.* A sixth area – Cultural Competency – was not included in Ms. Shaw's performance review out of fairness to Ms. Shaw because it was a subject being reviewed in her pending EEO Complaint.

In reviewing Ms. Shaw's overall performance, the Assistant Director of Residence Life rated her "Inconsistently Meets Expectations," although she remained hopeful Ms. Shaw's performance would improve and noted her belief that Ms. Shaw was "progressing in a positive direction." *Id.* The Assistant Director of Residence Life commended Ms. Shaw for being a "rock star in customer service" and "present[ing] a real strength in communicating and working with our students, especially our special student populations, and campus partners." *Id.* However, in reviewing her Service Excellence competency, the Assistant Director of Residence Life identified "concerns regarding the accuracy of Ms. Shaw's work product and communications with others." Regarding Ms. Shaw's Communication and Interpersonal Skills, the Assistant Director of Residence Life noted that Ms. Shaw "does not perform well during times when she does not feel she has all of her questions answered or when the answers are not definitive, which can be difficult to manage in a fast paced, ever changing work environment that the COVID pandemic has fostered." The Assistant Director of Residence Life also "challenge[d] Jodi to continually consider how her work responsibilities may (or may not) intersect with other members of our departmental team as well as other members of our division to work more effectively and efficiently both on a personal and professional level." *Id.* The Assistant Director of Residence Life acknowledged that "working with Jodi has been challenging this year in

developing a communication and working style between us that focuses on accuracy and efficiency in a work environment that has been consistently changing.” *Id.* Nothing in this evaluation evidences discrimination based on Ms. Shaw’s race.

On October 14, 2020, Ms. Shaw emailed the Assistant Director of Residence Life regarding some questions she had regarding her performance review. *See Emails Regarding Ms. Shaw’s Performance Evaluation*, attached as Exhibit F. Ms. Shaw asked the Assistant Director of Residence Life to clarify the review period for the performance evaluation because the Assistant Director of Residence Life included recent examples to provide context to certain feedback, which appeared to fall outside the scope of the review period. Ms. Shaw also asked why the review was so delayed, why the Director of Residence Life attended the performance review meeting, and why the “Cultural Competency” criterion was omitted from her review.

On October 15, 2020, the Assistant Director of Residence Life responded to Ms. Shaw’s email and addressed her concerns. The Assistant Director of Residence Life explained that Ms. Shaw’s performance evaluation was delayed in part because of the COVID-19 pandemic, and also because of “sudden changes in college descisions[sic] and [Ms. Shaw’s] planned vacation time.” *Id.* The Assistant Director of Residence Life clarified that all feedback communicated in Ms. Shaw’s performance evaluation “encompasses behaviors initially noted during the performance review period from April 2019 - March 2020,” but that she included recent examples of these behaviors “for ease of recall and to exemplify reoccurring instances of the behaviors stated.” *Id.* The Assistant Director of Residence Life confirmed that the Director of Residence Life attended the performance evaluation meeting of Ms. Shaw and the rest of the Residence Life department to ensure a uniform procedure was followed because the “department ha[d] undergone a restructure and [there were] so many new hires.” *Id.* Finally, the Assistant Director of Residence Life explained that “Cultural Competency” was omitted from Ms. Shaw’s performance evaluation because it related to Ms. Shaw’s pending EEO Complaint, and “any topics related to [her] pending complaint [were] not [] discussed in this evaluation in fairness to [Ms. Shaw].” *Id.*

Choosing not to credit the Assistant Director of Residence Life’s answers, Ms. Shaw submitted a rebuttal to her 2019-2020 Performance Evaluation on November 19, 2020. *See Ms. Shaw’s Response to Performance Evaluation*, attached as Exhibit G. The rebuttal merely repeats, in an elongated form, Ms. Shaw’s earlier questions which the Assistant Director of Residence Life had answered.

6. Ms. Shaw’s Partial Furlough and Housekeeping Notifications

As a result of the COVID-19 pandemic, and the financial exigencies experienced by the College as a result, the College implemented a partial furlough. To minimize layoffs, the partial furlough reduced by half the worktime and corresponding compensation of effected employees. In selecting employees for furlough from Student Affairs, where Ms. Shaw worked, the

Associate Dean of the College met with the Student Affairs directors and team leaders and reviewed each staff position under consideration,⁴ and assessed the impact of the campus closing on the position's functions. A recommendation was then made to the Dean of the College.

The first furlough took place in the summer of 2020. Two employees from Student Affairs were selected, but not Ms. Shaw. In the fall, four employees were selected, including Ms. Shaw. She was treated no differently than other employees in the furlough selection process.

During the summer of 2020, Ms. Shaw took vacation time, and the Assistant Director of Residence Life covered some of her job duties while she was away. One of those duties was to inform the College's Housekeeping Department when rooms in residence halls needed to be cleaned after a vacancy. Contrary to Ms. Shaw's allegations, providing housekeeping notifications was neither time consuming nor a core task of her position. In fact, Ms. Shaw used to provide these notifications in bulk on a weekly basis. While the Assistant Director of Residence Life was covering this task, she decided to change the process and send more frequent notifications to the Housekeeping Department, to address more time-sensitive vacancies in light of the COVID-19 pandemic. This responsibility was not returned to Ms. Shaw because the Assistant Director of Residence Life did not have time to train Ms. Shaw on the new process before the partial furlough was implemented.

The College ended the partial furlough on January 4, 2021, but Ms. Shaw never returned to work. The College provided her with paid administrative leave pending an internal investigation of her unauthorized disclosure of College emails, *see Section II(B)(7), infra*. After that investigation, she refused to return to work and report to the same supervisors. The College then continued her paid administrative leave, at its discretion, while discussing with her potential reassignment options. *See Section II(B)(8), infra*.

7. Ms. Shaw Opposes Smith's Diversity Efforts

During the course of her employment, Ms. Shaw took issue with Smith's equity and inclusion initiatives, including specifically its diversity, equity and inclusion programming and training among students and employees. She opposed Smith's efforts to provide the Smith community with trainings and workshops on social justice issues, and other various initiatives, including the College's decision to provide affinity housing options to students who wish to live together in an intentional community that cultivates a sense of belonging for students of color.⁵

⁴ Most Residence Life employees work on a 10-month contract (unlike Ms. Shaw) and are effectively furloughed every summer; for this reason, employees subject to a 10-month contract were not eligible for the partial furlough.

⁵ Notably, Smith provides students with the option to select a variety of special interest housing, including substance-free housing, affinity housing, and food cooperatives.

Ms. Shaw published her personal beliefs internally, to her colleagues, supervisors, and other administrators. She also made her concerns public by posting on her personal Twitter account,⁶ publishing videos on a YouTube channel she created titled “Jodi Shaw Smith College Big Dig,” and appearing on the Tucker Carlson - Tonight show on Fox News, as set forth in more detail below.

On October 27, 2020, Ms. Shaw posted a video on YouTube, alleging that Smith’s policies and initiatives “promote a divisive, racially hostile work environment.”

See *Dear Smith College: I Have a Few Requests*, available at: <https://www.youtube.com/watch?v=blqpCMChBpI> (Oct. 27, 2020). In the video, Ms. Shaw identified herself as a Student Support Coordinator in Smith’s Residence Life Department. She expressed her disagreement with Smith’s equity and inclusion initiatives, and asked Smith to “stop demanding that I admit to ‘white privilege’ and work on my so-called ‘implicit bias’ as a condition of my continued employment. Stop telling me that as a white person I am ‘especially responsible’ for dismantling racism.” *Id.* Ms. Shaw purported to speak “for all staff.” *Id.*

Ms. Shaw’s video was viewed by thousands, including Smith employees, students, alumni, media outlets, and members of the general public. Smith began receiving numerous complaints about Ms. Shaw’s video, and her position concerning Smith’s equity and inclusion initiatives, particularly as an employee of Smith’s Residence Life Department.

Tellingly, Smith did not terminate Ms. Shaw’s employment in response to her public attempts at disparaging the College. Although Ms. Shaw’s conduct violated common law duties of loyalty, and defamed the College and certain individuals by publishing false statements, Smith and its leaders transformed the conflict into a learning moment.

In response to the feedback Smith received from students and employees, Smith’s President, Kathleen McCartney (“President McCartney”) published a message to the community, responding to Ms. Shaw’s video. See *A Message from President Kathleen McCartney, October 29, 2020*, available at: <https://www.smith.edu/president-kathleen-mccartney/letters-community/2020-21/a-message-from-president-kathleen-mccartney-october-29-2020> (Oct. 29, 2020). In President McCartney’s message, she clarified that Smith encourages and protects voices of dissent in the workplace but will speak out to correct false statements. In particular, she noted that “the video mischaracterizes the college’s important, ongoing efforts to build a more equitable and inclusive living, learning and working environment.” *Id.* President McCartney affirmed the College’s belief that “we have a moral responsibility to promote racial justice, equity and inclusion at Smith College.” *Id.*

Unwilling to accept Smith’s legitimate reasons for its equity and inclusion initiatives, Ms. Shaw, using her position at Smith as a platform, expanded her public campaign to criticize

⁶ Ms. Shaw’s Twitter handle is @Smith_Surge and was created in June 2020. After resigning from her position at Smith, Ms. Shaw changed her Twitter name to “Jodi Shaw - Former Smith College Employee.”

not only Smith, but also more broadly anti-racism efforts throughout the country. In a four month period, Ms. Shaw posted over two dozen videos concerning her opposition to equity and inclusion initiatives at Smith and elsewhere, recounting many of the same factual allegations at issue in her EEO Complaint, and detailing Smith's internal investigation of Ms. Shaw's misconduct (discussed at Section II(B)(6), *infra*). See, e.g., *Racial Discrimination in the Smith College Library*, available at: <https://www.youtube.com/watch?v=hoeXmnLKuqI> (Nov. 2, 2020); *Shame & Conformity in Smith College Department of Res Life*, available at: <https://www.youtube.com/watch?v=MgeB-c0FevM> (Nov. 4, 2020); *A Letter from the Provost: Ideological Conformity at Smith College*, available at: <https://www.youtube.com/watch?v=fPgy4D7XnPg> (Nov. 22, 2020); *Do you believe in white privilege?*, available at: <https://www.youtube.com/watch?v=B4wTVaRItYo> (Dec. 13, 2020); *"Under Investigation" by Smith College*, available at: <https://www.youtube.com/watch?v=FI28v3mkKN4> (Jan. 22, 2021); *Compare and Contrast: A Tale of Two Investigations*, available at: <https://www.youtube.com/watch?v=KzSZYQGQqsg> (Jan. 26, 2021); *"You're Not Supposed to Tweet That."*, available at: <https://www.youtube.com/watch?v=Y09a8jWOQYg> (Feb. 16, 2021).

On November 9, 2020, Ms. Shaw appeared as a guest on Tucker Carlson - Tonight, a televised segment of Fox News, and publicly discussed her opposition to equity and inclusion initiatives, particularly those designed to promote racial inclusion, based on her experience as a white employee. See *Tucker Carlson - Colleges Push Radical Agenda (White Fragility) on Student and Staff - 11-9-20*, available at: https://www.youtube.com/watch?v=yBZMzvV_38U (Nov. 9, 2020).

After generating public attention through her videos and television appearance, Ms. Shaw capitalized on the opportunity to raise money for herself. On January 23, 2021, she started a "GoFundMe" fundraising website to raise money to "Help Jodi Shaw with Legal and Living Expenses." See *Ms. Shaw's GoFundMe*, available at: https://www.gofundme.com/f/help-jodi-stand-up-to-smith-college?utm_campaign=p_cp_url&utm_medium=os&utm_source=customer.

Still, Smith took no action to terminate Ms. Shaw's employment or discipline her for voicing her dissenting views, despite her repeated mischaracterizations of the facts. Many of Ms. Shaw's statements were direct and unfounded attacks on Smith's care for and relationship with its students, statements not protected by federal or state laws, including the following Tweets:

- This sums up my thoughts about the @SmithResLife curriculum for @smithcollege students.<https://t.co/FXhv2fxAnG>[Responding to tweet: "In particular, my gut sense is this interrupts identity development, makes it impossible to build healthy boundaries, and creates mental illness. Am I correct?"]

- @TheRedQuest @smithcollege I believe this is from recent @smithalumnae -it is the real-world outcome of @smithcollege actively inculcating a destructive and divisive ideology in students (and hopes to instill in faculty and staff).
- Interesting branding choices. “Global” was perhaps the most accurate term to describe @smithcollege. Of the 3, I would say “Audacity” is most accurate, b/c it takes real audacity for Smith to claim it nurtures “agency” or “authenticity” in students (let alone in faculty or staff) <https://t.co/bhr7HtPIJm>

See *Examples of Ms. Shaw’s Tweets*, attached as Exhibit H.

Ms. Shaw’s public crusade against Smith and the Residence Life Department also caused disruptions in operations and negatively impacted the workplace for Ms. Shaw and other employees. Ms. Shaw, her Residence Life colleagues, and other Smith employees, began to receive unsolicited, divisive and sometimes threatening e-mail messages, at times from anonymous senders, concerning Ms. Shaw’s public statements criticizing anti-racism, equity and inclusion efforts, their impact on the community, and Ms. Shaw’s continued employment with the College. Some of the messages were so troubling that Ms. Shaw’s colleagues asked the College to remove their directory photos from the Residence Life website.

The College would have been justified in terminating Ms. Shaw for the safety concerns and disruption she caused herself and others at Smith, and for engaging in a public smear campaign against the College, in violation of laws against employee disloyalty, defamation, and intentional interference with the contractual or advantageous business relations. Instead, the College afforded Ms. Shaw leniency, continued its efforts at education, and took no disciplinary action.

8. Ms. Shaw Violates Employee and Student Records Security

On or around November 12, 2020, Ms. Shaw reported receiving threatening emails to her departmental email account (reslife@smith.edu). The College immediately started investigating the disturbing emails and notified Campus Safety. In the process of monitoring the College’s email accounts and investigating the concerning email messages, the College discovered outgoing messages from the Residence Life departmental email account that were sent to Ms. Shaw’s personal account.

On November 30, 2020, Ms. Shaw met with the Assistant Director of Human Resources, and the Associate Dean of the College and Dean of Students, to discuss the status of the email investigation and the College’s concerns regarding the emails sent to Ms. Shaw’s personal email account. During the meeting, Ms. Shaw admitted that she had been selectively forwarding emails received by the Residence Life email account to her personal account since February 2020. She also admitted that she had deleted at least one email from the sent folder of the Residence Life email account, in an attempt to conceal her actions. Ms. Shaw did not request

permission from anyone in Residence Life to forward department emails to her personal account. Following the meeting, the College placed Ms. Shaw on paid administrative leave, pending an investigation by Human Resources to determine whether her actions violated College policy.

During the Human Resources investigation, the College found that Ms. Shaw forwarded herself at least 13 emails from the Residence Life departmental email account.⁷ At least one of the email communications contained highly sensitive and confidential health information about a Smith student, a record protected from disclosure by the Family Educational Rights and Privacy Act ("FERPA").

Based on the investigation, the College concluded that Ms. Shaw violated the College's Policy on Acceptable Use of Computer Resources, which prohibits the unauthorized "access or disclosure of confidential information or invasion of personal privacy" and the Smith Code of Conduct, which prohibits employees from "releas[ing] confidential information without clearance from her or his department head." See *Outcome of Investigation Letter from Human Resources, dated January 31, 2021*, attached as Exhibit I. Tellingly, Smith did not use these policy violations to justify terminating or suspending Ms. Shaw's employment. Yet again, Smith afforded her leniency and created a learning opportunity by issuing only a written warning, reminding her not to forward confidential College or student information without prior authorization. *Id.*

9. Ms. Shaw Declines Reassignment Options and Resigns her Employment After Raising Over \$185,000 Through GoFundMe.

Ms. Shaw's paid administrative leave concluded after the Human Resources investigation closed, and she was scheduled to return to work on February 15, 2021. See *Letter to Ms. Shaw Regarding Return to Work, dated February 5, 2021*, attached as Exhibit J. Ms. Shaw refused to return to work. She wanted a new job or to report to different supervisors. Through her legal counsel, Ms. Shaw attempted to negotiate changes to her position or a transfer to a new position to avoid working again with the supervisors whom she had publicly denigrated. The College considered her requests in good faith, and identified one position and created a wholly new position to which Ms. Shaw could be reassigned. Both positions were nonexempt roles for which she was qualified and would have continued her compensation and benefits at the same level. Importantly, neither position reported to the supervisors whom Ms. Shaw was then seeking to avoid. *Id.* The College asked Ms. Shaw to respond by February 12, 2021, and then at Ms. Shaw's request, gave her additional time to consider the reassignment options.

⁷ Because of the College's email retention policy, the College could only review the most recent emails sent that Ms. Shaw forwarded to her personal email account. Ms. Shaw admitted that she had engaged in this practice starting in February 2020 and that she had forwarded hundreds of earlier emails. Ms. Shaw deleted those emails in response to a request from the College.

By that time, Ms. Shaw had raised through GoFundMe over \$185,000 – *more than four times her annual salary*. Having reached a position of short-term financial independence, Ms. Shaw declined reassignment and by letter dated February 19, 2021 opted voluntarily to resign. *See Ms. Shaw's Resignation Letter, dated February 19, 2021*, attached as Exhibit K. The College accepted Ms. Shaw's resignation effective February 19, 2021, and kept her on payroll through March 5, 2021, the College's next payroll date.

Ms. Shaw publicly announced her resignation and declared that she chose “freedom” over “comfort” and resigned from her job at Smith College, with the help of the financial support she received from the public. *See Comfort v Freedom*, available at: <https://www.youtube.com/watch?v=mHx60Sz7fuA> (Feb. 20, 2021) (expressing Ms. Shaw's “appreciat[ion] of the outpouring of support that I've received from [the public] . . . On Friday afternoon, I stepped off a cliff and you came together and you caught me . . . “); *see also Ms. Shaw's Tweets Re: Resignation and Public Support*, attached as Exhibit L (tweeting “People are good” and retweeting “People are so good. In just a single day, Jodi Shaw (@Smith_Surge) has raised via GoFundMe almost the entire amount she needs to live on as she fights Smith College over its abusive neoracist policies.”).

Since her termination, Ms. Shaw has continued to post online inflammatory and defamatory statements about the College and the services it provides students on her Twitter account, including:

- Look who made #2 on the @HorowitzCenter list of top ten racist universities toptenracistuniversities.org [sharing screenshot of Smith College listed as #2]
- We have zero evidence that blind devotion to so-called anti-racism ideology is making things better. We only have evidence it makes things worse. [retweeting “Well done, Jodi. They're cowards, and they're making things worse. Especially for Students of Color.”]
- [Retweeting] “Smith College is a racially abusive environment. It is not a safe place for young people leaving home for the first time.”

See Sample of Ms. Shaw's Recent Tweets, attached as Exhibit M.

To maintain public interest in her personal fundraising efforts, Ms. Shaw has also created a website detailing her legal pursuits against the College, where she has published her MCAD Charge. *See Ms. Shaw's Tweet Regarding the MCAD Complaint*, attached as Exhibit N; *see also the "Documents" Page of Ms. Shaw's Website*, available at: <https://jodishaw.net/documents-2/>, attached as Exhibit O. The website asks readers to financially support Ms. Shaw, and states that “contributions will help pay [her] legal fees and living expenses, . . . as well as cover the administrative costs of maintaining this website (including the salary of an assistant), and other costs associated with furthering this cause.” *Id.* To date, Ms. Shaw has raised over \$300,000 through GoFundMe.

II. ARGUMENT

The facts and the law do not support Ms. Shaw's claims that Smith discriminated against her based on her race, nor do they support her claim that Smith retaliated against her for submitting an internal EEO Complaint.

A. Allegedly Discriminatory Acts Before May 1, 2020 Are Time-Barred.

A charge must be filed within 300 days of the alleged unlawful, discriminatory conduct. Mass. Gen. Laws ch. 151B, § 5; 804 C.M.R. § 1:10(2). This relatively short statute of limitations serves an important interest: "The limitations period, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protects employers from the burden of defending claims arising from employment decisions that are long past." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 47 (1st Cir. 1999) (internal citations omitted). Ms. Shaw filed her Charge on February 25, 2021. Consequently, any allegedly discriminatory conduct that occurred before May 1, 2020 is time-barred.

The continuing violation doctrine cannot save Ms. Shaw's time-barred claims. The doctrine is a limited exception that requires the Complainant to prove: (1) at least one discriminatory act occurred within the limitations period; (2) the alleged timely discrimination act has a substantial relationship to the alleged untimely discriminatory acts; and (3) earlier violations outside the limitations period did not trigger the Complainant's "awareness and duty to assert [her] rights, *i.e.*, that [the Complainant] could not have formed a reasonable belief at the time the employment actions occurred that they were discriminatory." *See Ocean Spray Cranberries, Inc. v. MCAD*, 441 Mass. 632, 642-43 (2004); *see also Silvestris v. Tantasqua Reg'l Sch. Dist.*, 446 Mass. 756, 766-67 (2006) (burden on plaintiff/complainant to demonstrate continuing violation doctrine applies); *Cuddyer v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 532 (2001); *Lazzara v. Wyle Elecs., Inc.*, No. 99-P-1837, 2002 WL 31694843, at *3 (Mass. App. Ct. Nov. 29, 2002); *Goguen v. Quality Plan Adm'rs*, No. 975874, 2000 WL 282485, at *3-4 (Mass. Super. Feb. 11, 2000). Ms. Shaw's claims fail this three-part test.

First, Ms. Shaw cannot anchor her claims within the statutory safe harbor because she cannot "show not only that the timely behavior contributed to a hostile work environment, but also that the timely harassment was driven by some impermissible motivation" and itself "amounted to harassment on the basis of" race. *See Brader v. Biogen Inc.*, 983 F.3d 39, 65 (1st Cir. 2020). There are no timely acts of harassment, or any conduct contributing to her hostile-work-environment claim within the 300 days preceding her complaint. Within that statutory period Ms. Shaw alleges claims of a wholly different nature: claims of retaliation. Absent discrete and timely acts of race-based harassment within the statutory period that are substantially related to earlier acts of racial harassment, the continuing violation doctrine does not apply. *See Dias v. Verizon New England, Inc.*, No. C.A. 10-10496-NMG, 2012 WL 13054500, at *14 (D. Mass. Aug. 3, 2012) (continuing-violation doctrine does not apply where

alleged racial discrimination in performance review lacked substantial relationship to alleged earlier acts); *Martin-Kirkland v. United Parcel Service, Inc.*, No. 034520H, 2006 WL 1110371, at *2 (Mass. Super. Apr. 11, 2006) (“mere effects or consequences of past discrimination, as opposed to independently actionable violations . . . are insufficient to serve as the trigger of the limitations period”) (internal citations omitted).

Further, Ms. Shaw concedes that she experienced acts she believed were discriminatory well before the May 1, 2020 cut-off. For example, she asserts in her Charge that she was discriminated against because of her race as early as the summer of 2018. *See Charge* ¶¶ 16-24 (alleging that she was unlawfully prohibited from performing a rap at orientation because of her race). Indeed, she alleges facing racially hostile conditions *throughout* her tenure at Smith, both in her positions in the Libraries and Residence Life Departments. *See Charge*, at ¶¶ 16-23 (detailing Ms. Shaw’s experience in Library position) and ¶¶ 25-56 (detailing Ms. Shaw’s experience in Residence Life position). Having perceived the College’s actions as discriminatory and unlawful, Ms. Shaw was obligated to assert her legal claims in a timely manner. Her failure to do so means that her race discrimination claims are time-barred and cannot be considered by the Commission. *See, e.g., Gardina v. B.J.’s Wholesale Club, Inc.*, No. 02-BEM-01300, 2008 WL 552891, *9 (MCAD Feb. 20, 2008) (dismissing gender discrimination claim as untimely because complainant “clearly believed” she had been unfairly discriminated against more than 300 days before she filed the complaint); *Pascuccio v. Single Source Solutions*, No. 10 BEM 02954, 2015 WL 1153800, *4 (MCAD Mar. 2, 2015) (finding claims outside statutory period were untimely because complainant’s allegations demonstrated that she was on sufficient notice of her hostile work environment claim more than 300 days before the date of filing).

B. There Was No Racially Hostile Work Environment at Smith.

To state a hostile work environment claim, Ms. Shaw must establish that: (1) she is a member of a protected class, (2) she was subject to unwelcome verbal or physical conduct based on her race or color; (3) the unwelcome conduct was subjectively and objectively offensive; (4) the unwelcome conduct was sufficiently severe or pervasive that it altered the conditions of her employment and created an abusive work environment; and (5) the harassment was carried out by a College employee with a supervisory relationship to her or the College knew, or should have known, of the harassment and failed to take prompt remedial action. *MCAD and Connors v. Luther and Luther Enterprises, Inc.*, 2010 WL 2020835, at *12 (MCAD 2010) (citing *Muzzy v. Cahillane Motors, Inc.*, 434 Mass. 409 (2001); *Cuddy v. Stop & Shop Supermarket Co.* 434 Mass. 521 (2001)); *see also Brisette v. Franklin County Sheriff’s Office*, 235 F. Supp. 2d 63, 85 (1st Cir. 2003). “A hostile work environment is one that is ‘pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization [and that] poses a formidable barrier to the full participation of an individual in the workplace.’” *MCAD and Connors*, 2010 WL 2020835, at *12 (quoting *College-Town, Division of Interco, Inc. v. MCAD*, 400 Mass. 156, 162 (1987)).

In evaluating whether alleged discriminatory conduct rises to the level of creating a hostile work environment, the Commission considers the “frequency of the [alleged] discriminatory conduct, its severity, and whether it is physically threatening or humiliating, or merely an offensive utterance.” *Candeliere v. Vanson Leathers, Inc.*, No. 97-BEM-3321, 2002 WL 32079472, at *5 (MCAD July 31, 2002). The Commission has consistently held that accidental or sporadic conduct is insufficient to establish a *prima facie* claim of discrimination based on hostile work environment. *Id.*, at *5. Ms. Shaw cannot demonstrate that any objectionable conduct was based on her race, that it was sufficiently severe or pervasive, or that the College did not take action to address it.

First, as a threshold matter, the allegedly discriminatory conduct about which Ms. Shaw complains was not based on how others treated her because of her race or color. Rather, she builds her claims on her subjective view of Smith’s equity and inclusion initiatives, particularly those efforts at providing all employees and students with trainings and educational opportunities regarding the concepts of social justice, “anti-racism,” and “white privilege.” Ms. Shaw asserts that the message of these trainings and educational opportunities is racist against white individuals by assigning responsibility to the non-minority race to address systemic racism that has permeated our society. Again, Ms. Shaw mistakes education for indoctrination. Wholly absent from her Charge is any evidence that Smith actually imposed racist demands on her or punished her for rejecting them. There are no documents referencing her race in connection with adverse employment actions; there are no allegations of racial epithets and stereotyping directed at her, nor are there any allegations of disparate treatment of employees of color similarly situated to Ms. Shaw.⁸ The only evidence she provides is her own vociferous opposition to certain approaches to racism, which she believes are harmful, and her own subjective reaction to those approaches. Such evidence is insufficient as a matter of law to establish objectively a hostile work environment claim. Absent evidence that her race was the cause of any mistreatment to her in the workplace, Ms. Shaw cannot maintain a hostile work environment claim.

Second, the alleged misconduct was not sufficiently severe or pervasive to create a hostile work environment.⁹ “A hostile work environment is one that is ‘pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, [and that] poses a formidable barrier to the full participation of an individual in the workplace.’” *Cuddy v. Stop & Shop Supermarket Co.* 434 Mass. 521, 532 (2001). Whether any harassing conduct rises to a

⁸ Ms. Shaw identifies several employees connected to an incident that occurred in August 2018 - nearly two years outside the statutory period - in an attempt to paint them as similarly situated (Charge, at ¶¶ 6-15); however, Ms. Shaw herself was not involved in that incident, did not work in the same department as those employees, and they are otherwise entirely unrelated to the allegations in the Charge. *Id.*

⁹ Smith maintains, as detailed in Section II(A) above, that the Commission should not consider any allegations of discriminatory conduct before May 1, 2020, as such conduct is outside the statutory period.

level sufficient to constitute a hostile work environment “is to be considered from the view of a reasonable person in the plaintiff’s position.” *Muzzy v. Cahillane Motors, Inc.*, 434 Mass. 409, 411-12 (2001). Ms. Shaw provides no evidence connecting the alleged harassing activity - the trainings and educational opportunities - to how she performed her job. Indeed, Ms. Shaw was placed on half furlough in September 2020, followed by paid administrative leave in November 2020, while the College investigated her unauthorized disclosure of emails, so the period of time Ms. Shaw worked during the statutory period is extremely limited. Ms. Shaw cannot demonstrate how the trainings and educational opportunities provided by Smith interfered with her ability to perform her job duties during that time.

With regard to severity, there are no allegations that Ms. Shaw suffered any racial harassment that a reasonable person in her position would view as severe. No Smith employee ever publicly disparaged her because of her race, nor did any Smith employee assault her or threaten violence against her because of her race.¹⁰ With regard to pervasiveness, even if the Commission could consider time-barred events, none of the allegations evidence a pattern of mistreatment by any supervisor or official based on Ms. Shaw’s race. At most, Ms. Shaw has described a few isolated incidents by different supervisors and co-workers, spread out over a period of years. Such sporadic conduct, even if related to her race, does not constitute pervasive mistreatment sufficient to create a hostile work environment. *See MCAD and Fintonis v. City of Lynn Public Schools*, No. 99-13-0912, 2006 WL 3423161, at *9 (MCAD 2006) (dismissing “vague, general” comments as a “stray remarks” that were unrelated to Respondent’s decision not to hire complainant); *MCAD & Washington v. Lawyers Stationary*, No. 97-BEM-2880, 2003 WL 21146138, *3-*4 (MCAD 2003) (dismissing complainant’s claim that he was subject to a hostile environment on the basis of his race where the coworker did not intend comment to be racially insensitive or offensive).

Finally, as soon as the College learned of Ms. Shaw's claims of alleged discrimination (which are time-barred), it took prompt remedial action by fully investigating Ms. Shaw’s EEO Complaint. Where the employer has taken appropriate action in response to a report of harassment by coworkers, the employee’s claim must be dismissed. *See Trinh v. Gentle Commc’ns, LLC*, 71 Mass. App. Ct. 368, 376-78 (2008) (granting summary judgment in favor of employer where employer investigated complaint by interviewing individuals allegedly involved, even despite not disciplining any employees following investigation); *see also Modern Continental/Obayashi v. MCAD*, 445 Mass. 96, 111-12 (2005) (“as a matter of law” employer

¹⁰ Any hate mail from members of the general public cannot be considered acts of the College, or any College employee. In any event, the College responded promptly and reasonably when Ms. Shaw reported receiving emails that upset her. *See Modern Continental/Obayashi v. MCAD*, 445 Mass. 96, 111-112 (2005) (holding that employer “as a matter of law” took “prompt action that was reasonably calculated to end” alleged harassment of plaintiff where it investigated plaintiff’s complaints, took corrective action, and there was no evidence that any further harassment took place).

took reasonable action to end coworker's alleged harassment where employer investigated complaints, took corrective action, and there was no evidence of further harassment).

Here, Smith hired an outside investigator to complete a comprehensive investigation into Ms. Shaw's complaints of race discrimination, hostile work environment and retaliation. The Investigator concluded "that a reasonable person in Jodi's position would not perceive that she was working in a hostile work environment. *Jodi is the only person in the department, white or a person of color, who objects to the way the department discusses or considers issues of race or identity.*" *Investigator's Report, Exhibit C*, at 26 (emphasis added). Ms. Shaw's subjective belief is insufficient as a matter of law to support a claim for a hostile work environment. *See Cuddyer*, 434 Mass. at 532.

Finally, Ms. Shaw cannot demonstrate that she suffered an adverse employment action or was terminated under circumstances that give rise to an inference of discrimination. Ms. Shaw voluntarily resigned her position when she determined that she could make more money from her social media campaign. Further undermining any inference of discrimination is the fact that the Assistant Director of Residence Life served on Ms. Shaw hiring committee; it makes no sense that the Assistant Director of Residence Life would recommend hiring Ms. Shaw, knowing she is white, and then seek to have her fired because she is white. *See MCAD and Besinger v. Primary Care Associates and Punyamurtula S. Kishore*, 2005 WL 3465687, at *22 (MCAD 2005) (acknowledging any discriminatory animus based on complainant's gender and/or age is belied by the fact that complainant was hired only a few months before the adverse action) (*citing Landry v. Dana-Farber Cancer Institute, Inc.*, 24 MDLR 214 (2002)); *see also Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 747 (1st Cir. 2002) ("When the same person hires and later fires the employee who claims the firing was discriminatory, judges are skeptical, because why would someone who disliked whites, or Germans, or members of some other group to be working for him have hired such a person in the first place"); *Gillie Harp v. Cardinal Health, Inc. d/b/a Cardinal Distribution*, 249 F. Supp. 2d 1113, 1119 (2003) ("the so-called 'same-actor inference' is grounded in the psychological assumption that employers are unlikely to hire individuals from a group the employer dislikes and then fire them once they are on the job").

C. Ms. Shaw Was Not Constructively Discharged.

Constructive discharge requires proof from Ms. Shaw that her working conditions became so intolerable that a reasonable person in her position would have felt compelled to resign. *Consentini v. Peter Pan Bus Lines, Inc.*, No. 94-SEM-0403, 2000 WL 33665444, at *8 (MCAD 2000) (citing *Said v. Northeast Security*, 18 MDLR 255, 259 (1996); *Magane v. Corcoran Management Company*, 18 MDLR 103, 105 (1996)). As shown above, Ms. Shaw has presented no such evidence. While *subjectively* she may have felt dissatisfied with her employment at Smith, there is no evidence from which to conclude that her employment had become *objectively* intolerable. To the contrary, an external investigator found no basis for her claims of discriminatory treatment; there is no evidence that Ms. Shaw suffered severe or

pervasive harassment because of her race, and Smith had offered Ms. Shaw the option of two reassignments at the same pay and benefit levels, but Ms. Shaw never tried either one. These circumstances fall far below the threshold for constructive discharge. *Compare MCAD and Armijos*, 2010 WL 4633295, at *8 (holding “[a] claim of constructive discharge under chapter 151B does not arise out of general dissatisfaction with the workplace”) (citing *Robinson v. Hafner's Service Stations, Inc.*, 23 MDLR 283 (MCAD 2001); *Pio v. Kinney Shoe Corp.*, 19 MDLR 127, 131 (MCAD 1997) (finding that an employee is expected to make a reasonable attempt to straighten out any misunderstandings before claiming constructive discharge)).

D. Smith Did Not Retaliate Against Ms. Shaw For Her EEO Complaint.

To establish a claim of retaliation under Mass. Gen. Laws ch. 151B, the Complainant must show that (1) she engaged in protected activity; (2) the College was aware of the protected activity; (3) she subsequently was subjected to an adverse employment action; and (4) a causal connection existed between the protected conduct and the adverse action sufficient to establish a retaliatory motive or inference. *See Malchodi and MCAD v. Northeastern Univ.*, No. 00131708, 2008 WL 5192600, *15 (MCAD Dec. 4, 2008) (dismissing retaliation claim because there was no connection between adverse action and protected activity); *Jagielski and MCAD v. Bristol County Sheriff's Office*, No. 03BEM02736, 2009 WL 87509, at *14 (MCAD Jan. 7, 2009) (dismissing claim for retaliation based on events before filing MCAD complaint because complainant failed to establish that she had challenged practices she reasonably believed unlawful under c. 151B); *Mole v. Univ. of Mass.*, 442 Mass. 582, 591-92 (2004) (concluding that sequence and timing of events did not support the requisite causal connection for retaliation claim).

If Complainant succeeds in establishing a *prima facie* case, the burden shifts to the College to articulate a legitimate, nondiscriminatory reason for its employment decision. *See Wright v. CompUSA, Inc.*, 352 F.3d 472, 478 (1st Cir. 2003). If the College provides a legitimate reason for its actions, the ultimate burden falls on the Complainant to show that the employer's proffered reason is a pretext masking retaliation. *Mole v. Univ. of Mass.*, 442 Mass. 582, 591-92 (2004) (holding the party bringing claim bears ultimate burden “of proving that the articulated non-retaliatory reasons were pretext”); *MCAD and Brookins*, No. 05-BEM-03009, 2012 WL 1132412, at 23-24 (MCAD 2012) (complainant must establish that employer's proffered justification was pretext for actual discrimination); *Malchodi and MCAD v. Northeastern Univ.*, No. 00131708, 2008 WL 5192600, *16 (MCAD 2008). Thus, to be successful on a retaliation claim, the Complainant must establish that she was subjected to an adverse employment action *because* she engaged in protected activity. There is no such evidence here.

Ms. Shaw alleges that the College furloughed her, reassigned her job duties, and made her the target of an internal investigation, in retaliation for her submitting a EEO Complaint alleging race discrimination and retaliation. *See Charge ¶¶ 68* (noting Ms. Shaw was placed on

partial furlough), 69 (stating Ms. Shaw's belief that Smith reassigned one of her job duties in retaliation for her complaints), and 81 (alleging Smith investigated Shaw for speaking out against the hostile environment that Smith had created). The College has articulated legitimate, non-discriminatory reasons for each of these actions.

Ms. Shaw was not singled out for partial furlough in the fall of 2020. Rather than resort to layoffs, the College placed many employees on a partial furlough as a result of the COVID-19 pandemic, and some employees were impacted by both furloughs in the summer and fall of 2020. There is no evidence that Ms. Shaw's EEO Complaint was a factor in her selection for a partial furlough. *See Psy-Ed Corp. v. Klein*, 459 Mass. 697, 707 (2011) ("the employer's desire to retaliate against the employee must be shown to be a determinative factor in its decision to take adverse action"). As the record demonstrates, although Ms. Shaw was the only Residence Life staff member impacted by the fall 2020 furlough, many of her Residence Life colleagues work on 10-month contracts, and are effectively furloughed every summer, including the summer of 2020, while Ms. Shaw remained employed. Further belying any inference of retaliation is the termination of Ms. Shaw's partial furlough on January 4, 2021, while she was on paid administrative leave pending the College's investigation of her forwarding emails to her personal email account without authorization. If the College had intended to retaliate against Ms. Shaw, there is no reason it would have ended her furlough while disciplinary charges were pending.

There is no evidence that the Assistant Director of Residence Life retaliated against Ms. Shaw for bringing the EEO Complaint by reassigning the task of issuing notifications to the housekeeping department. As a primary matter, redistributing this job duty is not an adverse action. Providing housekeeping notifications was not "one of Shaw's core tasks" and the reassignment did not substantially change the nature of Ms. Shaw's position. *But see Charge*, at ¶ 69. Further, the Assistant Director of Residence Life only *temporarily* assumed this task while she changed the Housekeeping notification process to better meet student housing needs and address time-sensitive vacancy requests due to the COVID-19 pandemic. There is no evidence that Ms. Shaw's EEO Complaint was a factor in the Assistant Director of Residence Life's decision to reassign this task.

Moreover, Ms. Shaw cannot demonstrate a causal connection between her EEO Complaint and the internal Human Resources investigation of the emails she forwarded to her personal account without authorization, which resulted in a written warning. The College discovered Ms. Shaw's email violations because of Ms. Shaw's own conduct. Ms. Shaw's choice to lead a public campaign against Smith's equity and inclusion efforts had resulted in considerable notoriety for her and, unwillingly, the College. Consequently, Ms. Shaw and other employees began receiving angry and disturbing communications from anonymous sources and people outside the College. After Ms. Shaw and others complained, the College began monitoring the Residence Life departmental email account and discovered that Ms. Shaw had forwarded College emails to her personal email account without authorization, conduct which

she admitted. The College placed her on paid administrative leave - and did not take adverse action - while it investigated the nature and extent of the breach. At the conclusion of the investigation, the College found that Ms. Shaw violated FERPA, and College policy, by forwarding an email containing sensitive and confidential student information to her personal email account. Instead of taking more serious disciplinary action, the College issued Ms. Shaw a written warning and reminded her to follow College policy in the future. Thus, even if the warning could constitute an adverse employment action, the warning issued as a result of Ms. Shaw's own misconduct. There is no evidence linking that personnel action to Ms. Shaw's EEO Complaint months earlier.

Ms. Shaw has submitted no evidence that the reasons for the College's decisions are pretextual. At best, she offers conclusory and inaccurate statements, grounded in her own speculation, which are unsupported by the facts in this case. Ms. Shaw's subjective belief that the College's legitimate reasons for its actions are pretextual is insufficient as a matter of law. See *McBride v. MCAD*, 677 F. Supp. 2d 357, 362 (D. Mass. 2009) ("Mere personal beliefs, conjecture and speculation are insufficient to support an inference of . . . discrimination.") (citations omitted); *Dorman v. Norton Co.*, 64 Mass. App. Ct. 1, 10 (2005) (plaintiff cannot avoid dismissal "merely by speculating that his treatment by the employer came about not because of the merits of his performance as the employer observed it, but rather because of impermissible consideration of his [protected status]"); *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 441 (1st Cir. 1997) ("[m]erely because a supervisor is overbearing or fellow employees unsociable and hard to get along with, does not suffice").

Smith articulated legitimate, nondiscriminatory reasons for the adverse actions alleged by Ms. Shaw. These reasons are supported by substantial evidence, and there is no evidence of pretext. Consequently, Complainant's retaliation claim must be dismissed.

III. Affirmative Defenses

Smith asserts the following defenses in response to the Charge: (1) Complainant's claims are barred, in whole or in part, by the applicable statute of limitations; (2) Complainant has failed to state a claim upon which relief can be granted and has failed to establish a *prima facie* case of race discrimination or retaliation; (3) Smith had legitimate nondiscriminatory and non-retaliatory reasons for its actions, which were not a pretext for discrimination or retaliation; (4) Smith did not have any discriminatory animus; (5) Complainant has failed to identify any protected activity and has failed to prove that there was a causal connection between any protected activity and an adverse action; (6) Complainant has failed to establish any adverse action; (7) Complainant has not suffered any injury or damages as a result of any alleged conduct by Smith; (8) some or all of Complainant's claims for relief may be barred or limited by Mass. Gen. Laws ch. 231, § 85K; and (9) Complainant has failed, and continues to fail, to mitigate any alleged injury or damages he may have suffered.

Patty Woods

Jodi Shaw v. Smith College, MCAD Docket No. 21SEM00375

May 13, 2021

Page 27

IV. Conclusion

For all of the foregoing reasons, Smith did not discriminate or retaliate against Ms. Shaw. Therefore, the College respectfully requests that the Commission dismiss her Charge for lack of probable cause.

Please do not hesitate to contact me if there is any additional information that Smith may provide to assist the Commission in its review and determination on this matter.

Sincerely yours,

HOLLAND & KNIGHT LLP



Stephanie M. Merabet

Enclosures

cc: Joe Greenhalgh, Investigator, MCAD (via E-Mail at joseph.greenhalgh@mass.gov)
Michael Thad Allen, Esq., Counsel for Complainant (via First-Class Mail)

Patty Woods

Jodi Shaw v. Smith College, MCAD Docket No. 21SEM00375

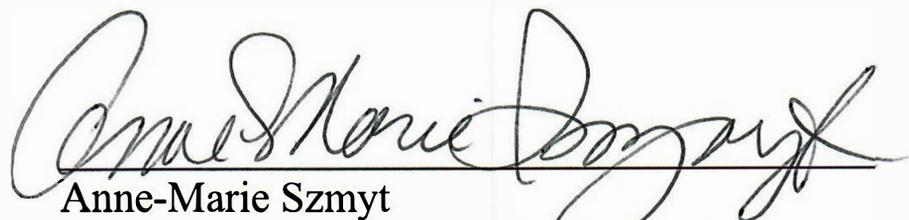
May 13, 2021

Page 26

Verification

On behalf of Smith College, I declare under the penalty of perjury that, to the extent I have personal knowledge of the contents of this response, the contents are true and accurate to the best of my personal knowledge, information, and belief, and, to the extent that I do not have personal knowledge of the contents of this response, I believe such contents to be true and accurate based on the business records and information available to me.

Dated: May 13, 2021



Anne-Marie Szmyt
Associate Vice President for Human Resources
Smith College

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD Docket No.: 20BEM02297

JODI SHAW, Complainant, v. SMITH COLLEGE, Respondent.

EXHIBITS ATTACHED TO POSITION STATEMENT

Smith's Affirmative Action/Equal Employment Opportunity Policy	A
August 30, 2018 email from Head of TLR to Ms. Shaw	B
Investigator's Report	C
January 13, 2020 Residence Life Retreat Presentation by Romney Associates, Inc.	D
Ms. Shaw's 2019-2020 Performance Evaluation, dated September 30, 2020	E
Emails Regarding Ms. Shaw's Performance Evaluation, dated October 14-15, 2020	F
Ms. Shaw's Response to Performance Evaluation, dated November 19, 2020	G
Examples of Ms. Shaw's Tweets	H
Outcome of Investigation Letter from Human Resources, dated January 31, 2021	I

Patty Woods

Jodi Shaw v. Smith College, MCAD Docket No. 21SEM00375

May 13, 2021

Page 30

Letter to Ms. Shaw Regarding Return to Work, dated February 5, 2021	J
Ms. Shaw's Resignation Letter, dated February 19, 2021	K
Ms. Shaw's Tweets Re: Resignation and Public Support	L
Sample of Ms. Shaw's Recent Tweets	M
Ms. Shaw's Tweet Regarding the MCAD Complaint	N
"Documents" Page of Ms. Shaw's Website	O