DOCKET NO. NNH-CV-21-60111766 S	:	SUPERIOR COURT
	:	
CHRISTOPHER DUKES	:	JUDICIAL DISTRICT OF NEW HAVEN
Plaintiff	:	
v.	:	
	:	
CENTRAL CONNECTICUT	:	
STATE UNIVERSITY	:	
Defendant	:	MARCH 2, 2023

DEFENDANT'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

I. INTRODUCTION

Pursuant to Practice Book § 17-49, the defendant, Central Connecticut State University ("Defendant" or "CCSU"), hereby submits this Memorandum of Law in Support of its Motion for Summary Judgment. In his one-count Complaint, the plaintiff, Christopher Dukes, alleges that his termination from his position as Director of Student Conduct at CCSU was in retaliation for his exercise of free speech rights under the Connecticut Constitution in violation of Connecticut General Statutes § 31-51q. The plaintiff's § 31-51q claim fails because he cannot establish that he engaged in constitutionally protected speech and, more significantly, that his speech was the reason for his termination rather than his off-duty conduct that had a direct nexus to his position as Director of Student Conduct. The defendant, CCSU, is therefore entitled to summary judgment.

II. STATEMENT OF UNDISPUTED FACTS

The plaintiff, Christopher Dukes, was employed as the Director of Student Conduct at CCSU from 2003 until his termination in 2018. (Complaint, ¶ 2; Ex. 1, Excerpts from the Deposition of Christopher Dukes, dated November 7, 2022, ("Dukes Dep."), pp. 32:25-33:2).

As Director of Student Conduct, Dukes administered the Student Code of Conduct under the direction of the President and Vice President for Student Affairs. He managed the

investigation of student conduct cases, determined disciplinary consequences and facilitated resolution by way of mutual administrative agreements and hearings. (Ex. 1, Dukes Dep., pp. 39:4-41:22 and Deposition Exhibit G, Job Description). In his role, Dukes investigated student conduct cases involving allegations of serious misconduct, including criminal conduct and allegations of serious physical violence, sexual assault and dating and intimate partner violence. He made disciplinary determinations consistent with Board of Regents and CCSU policies and state and federal laws. (Ex. 1, Dukes Dep., p. 43:6-25 and Deposition Exhibit G). In performing his duties, Dukes met with the students involved as well as their family members and it was necessary that he act impartially and exercise sound judgment. (Ex. 1, Dukes Dep., pp. 46:14-48:12). Additionally, Dukes served as the designee of the Title IX Officer with respect to student conduct cases and as a liaison with campus police, members of the community and law enforcement generally regarding off-campus student behavior. He also was a member of CCSU's Threat Assessment Team, Chair of the Student Behavioral Review Team and a mandated reporter. (Ex. 1, Dukes Dep., pp. 48:15-50:21 and Deposition Exhibit G).

On April 20, 2018, Dukes met privately with CCSU President, Dr. Zulma Toro. (Ex. 1, Dukes Dep., p. 64:14-21; Ex. 4, Affidavit of Dr. Zulma R. Toro, dated March 1, 2023, ("Toro Aff.," ¶ 9). He discussed with her two cases previously handled by CCSU's Office of Student Conduct ("Student Conduct") that he believed had been mismanaged, involving [redacted] and [redacted]. (Ex. 1, Dukes Dep., pp. 83:11-84:3; Ex. 4, Toro Aff., ¶ 9). He testified in his deposition that President Toro thanked him for bringing these matters to her attention. (Ex. 1, Dukes Dep., pp. 90:1-6, 146:6-13). After meeting with Dukes, President Toro promptly met with CCSU University Counsel, Carolyn Magnan, and asked her to review the handling of both cases. (Ex. 2, Affidavit of Carolyn Magnan, dated March 1, 2023, ("Magnan Aff."), ¶ 7; Ex. 4,

Toro Aff., ¶ 10). Upon her review, Magnan concluded that both cases had been handled appropriately. (Ex. 2, Magnan Aff., ¶ 8).

As to [redacted], he had been a former CCSU graduate student and adjunct math professor who was found responsible by Student Conduct for making an unsolicited and unwelcome sexual advance on a student in May 2011. The student complaint against [redacted] was made at the end of the 2011 Spring semester. By the time the complaint had been investigated by Student Conduct, [redacted] was no longer employed by CCSU. [redacted] was disciplined in his capacity as a graduate student through Student Conduct and entered into an administrative agreement pursuant to which he received a five-year suspension from the Connecticut State University ("CSU") system and was banned from all CSU property and events from May 24, 2011 to May 24, 2016. [redacted] had not been employed by CCSU since the Spring of 2011, was not currently employed by the State of Connecticut and had a last known address in Florida. (Ex. 2, Magnan Aff., ¶¶ 9-11; Ex. 4, Toro Aff., ¶ 11).

As to [redacted], in September 2013, a student reported that [redacted] had assaulted her in 2011. At the time of the alleged misconduct in 2011, [redacted] was an undergraduate student at CCSU. In 2013, when the incident was reported, [redacted] had since graduated and was enrolled as a graduate student and employed as [redacted] at CCSU. [redacted] was disciplined in his capacity as a student through Student Conduct and entered into an administrative agreement pursuant to which he received a one-semester suspension from his graduate studies from January 9, 2014 to May 9, 2014. Other than the report made in 2013, there had been no other accusations against [redacted] and no accusations in his capacity as an employee at CCSU. (Ex. 2, Magnan Aff., ¶¶ 15-17; Ex. 4, Toro Aff., ¶ 12).

Several days after meeting with President Toro, in the early morning of April 25, 2018, police responded to Dukes's home. (Ex. 1, Dukes Dep., p. 148:20-23). Dukes was subsequently arrested and charged with three felonies, including for kidnapping and strangulation, and three misdemeanors for assault, breach of peace and threatening. More than eighteen (18) months later, all of the charges were dismissed in November 2019. (Ex. 1, Dukes Dep., p. 152:19-25 and Deposition Exhibit M, pp. 1-2, ¶¶ 4, 6).

On the morning of April 25, 2018, upon receiving information as to what had transpired at Dukes's home, CCSU held an emergency Threat Assessment Team meeting. (Ex. 3, Affidavit of Anna E. Suski-Lenczewski, dated March 1, 2023, ("Suski-Lenczewski Aff."), ¶ 8). CCSU, thereafter, issued a letter, dated April 25, 2018, notifying Dukes that, upon his release from incarceration, he would be placed on administrative leave with pay pending investigation into matters regarding his recent arrest. His administrative leave became effective April 27, 2018 upon his release. (Ex. 1, Dukes Dep., p. 154:1-19 and Deposition Exhibit N; Ex. 3, Suski-Lenczewski Aff., ¶¶ 9, 11 and Ex. A, Letter to plaintiff, dated April 25, 2018; Ex. 4, Toro Aff., ¶¶ 14-15).

CCSU's Chief Human Resources Officer, Anna E. Suski-Lenczewski, investigated the events that occurred on April 24-25, 2018. Her investigation included a review of the pending charges, the police incident report, a statement of the then-CCSU Police Chief regarding his communications with Dukes and his involvement at the scene on April 25, 2018, a transcript of court testimony by the plaintiff's wife related to her subsequent application for a restraining order, media coverage as to the incident, requests by several students and parents to review student conduct cases previously handled by Dukes and the 911 calls with Hartford Police

Department Dispatch. (Ex. 3, Suski-Lenczewski Aff., ¶ 12 and Ex. B, Letter to plaintiff, dated October 26, 2018 with enclosures).

CCSU's investigation found that, on the night of April 24 and early morning of April 25, 2018, Dukes confronted his wife about having an extramarital affair and, during the confrontation, Dukes threatened, restrained, choked and hit her. Dukes's wife escaped from the home and called 911. Hartford Police Department responded along with its Emergency Response Team. Dukes refused to exit the home or allow police into the home for approximately two hours and told police that he had a loaded gun on his person. While refusing to leave his home, Dukes stated in a conversation with Hartford Police Dispatch that many people would be hurt. He also contacted CCSU's Police Chief, stating "It's bad, I'm in trouble" or words to that effect. (Ex. 3, Suski-Lenczewski Aff., ¶ 13 and Ex. B, Letter to plaintiff, dated October 26, 2018 with enclosures; Ex. 4, Toro Aff., ¶ 16).

By letter, dated October 26, 2018, CCSU notified Dukes as to the conclusions of its investigation and potential discipline, including termination. The letter stated:

> "Because of the seriousness of your conduct, the investigation supports a finding that you are unsuitable to discharge your professional responsibilities as Director of Student Conduct at Central Connecticut State University. In your position as Director of Student Conduct, you must adjudicate matters and determine disciplinary consequences in matters involving students who have been alleged to have engaged in serious misconduct, including conduct of a criminal nature. Your behavior . . . undermined your ability to carry out the duties and functions of your position."

(Ex. 1, Dukes Dep., pp. 154:20-155:12 and Deposition Exhibit O; Ex. 3, Suski Lenczewksi Aff., ¶ 15 and Ex. B, Letter to plaintiff, dated October 26, 2018 with enclosures).

CCSU determined that there was a direct nexus between Duke's off-duty conduct on April 24-25, 2018 and his position as Director of Student Conduct and terminated Dukes, effective December 26, 2018. (Ex. 3, Suski-Lenczewski Aff., ¶¶ 18-22; Ex. 4, Toro Aff., ¶¶ 17-

21).

The termination letter, dated December 12, 2018, stated:

> "Your dismissal is for off-duty behavior on the night and early morning of April 24-25, 2018, which resulted in a response from the Hartford Police Department and its Emergency Response Team. This behavior created a hazardous situation, placing your spouse, children, police personnel, and yourself at risk for grave harm. The seriousness of the misconduct renders you unsuitable to discharge your professional responsibilities as Director of Student Conduct."

(Ex. 1, Dukes Dep., pp. 157:25-158:18 and Deposition Exhibit Q; Ex. 3, Suski-Lenczewski Aff., ¶ 22 and Ex. D, Letter to plaintiff, dated December 12, 2018).

The union grieved Dukes's termination and the matter proceeded to arbitration. The arbitrator found that the termination was not for just cause pursuant to the collective bargaining agreement and restored Dukes to his position as Director of Student Conduct. (Ex. 5, Arbitration Award, dated November 30, 2020, p. 37). The State of Connecticut, acting through the Board of Regents for Higher Education ("BOR") and CCSU, filed an application to vacate the arbitration award on the ground that the award violated public policy. The Superior Court granted the application to vacate, finding that enforcement of the award "would violate explicit, well-defined and dominant public policies" and that Dukes's "actions had a direct nexus to his responsibilities as the Director of Student Conduct." *State v. Connecticut State University Organization of Administrative Faculty*, Docket No. HHDCV206136501, 2021 Conn. Super. LEXIS 1080 (Conn. Super. Ct. June 16, 2021), attached hereto as Ex. 6, p. 19). The union has appealed the Superior Court's decision vacating the arbitration award on public policy grounds and the appeal is pending before the Connecticut Supreme Court.

Additional facts will be set forth as necessary.

III. <u>SUMMARY JUDGMENT LEGAL STANDARD</u>

Practice Book § 17-49 provides that summary judgment "shall be rendered forthwith if

the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

"The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . ." *Romprey v. Safeco Ins. Co. of America*, 310 Conn. 304, 312 (2013) (internal quotation marks omitted).

"It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . ." *State Farm Fire & Casualty Co. v. Tully*, 322 Conn. 566, 573 (2016) (internal quotation marks omitted). The opposing party must demonstrate that "he possesses *sufficient counterevidence* to raise a genuine issue of material fact as to any, or even all, of the essential elements of his cause of action." *Stuart v. Freiberg*, 316 Conn. 809, 823-24 (2015) (emphasis added). "*The existence of genuine issues of material fact must be demonstrated by counteraffidavits and concrete evidence.*" *Gianetti v. Health Net of Connecticut*, *Inc.*, 116 Conn. App. 459, 464-65 (Conn. App. Ct. 2009) (emphasis in original; internal quotation marks omitted). "Only evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment." *Nash v. Stevens*, 144 Conn. App. 1, 15, cert. denied, 310 Conn. 915 (2013) (internal quotation marks omitted). The trial court's function is not to decide issues of material fact, but rather to determine whether any such issues exist. *Buehler v. Town of Newtown*, 206 Conn. App. 472, 481 (2021) (internal quotation marks omitted). "[S]ummary

judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." *Wilson v. New Haven*, 213 Conn. 277, 279 (1989) (citation omitted).

In this case, the pleadings, affidavits and other admissible evidence clearly demonstrate that there is no genuine issue of material fact in dispute as to whether the plaintiff's termination was the result of retaliation for his disclosures and the defendant is entitled to judgment in its favor.

IV. ARGUMENT

A. CCSU Is Entitled to Judgment on the Plaintiff's § 31-51q Retaliation Claim

Connecticut General Statutes § 31-51q provides in relevant part: "Any employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge . . . ." The plaintiff asserts his § 31-51 q claim under the Connecticut Constitution. (Complaint, ¶ 4).

The plaintiff's § 31-51q claim is analyzed using the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Perez-Dickson v. Bridgeport Board of Education*, Docket No. FBTCV136033116, 2016 Conn. Super. LEXIS 3233, at *7-8 (Conn. Super. Ct. Dec. 5, 2016) (applying *McDonnell Douglas* framework to "free speech retaliation claims made pursuant to . . . [§] 31-51q"); *Fasoli v. Stamford*, 64 F. Supp. 3d 285, 296 (D. Conn. 2014) (explaining that the analysis of § 31-51q claims is essentially the same as the *McDonnell Douglas* framework). Connecticut courts look to federal law for guidance in

interpreting the state's antidiscrimination and antiretaliation statutes. *See e.g.*, *Eagen v. Comm'n on Human Rights & Opportunities*, 135 Conn. App. 563, 579-80 (Conn. App. Ct. 2012) (citing cases).

The plaintiff must first establish a prima facie case of retaliation. To establish a prima facie case, the plaintiff must produce evidence showing: (1) he engaged in constitutionally protected speech; (2) he suffered an adverse employment action; (3) there was a causal connection between his speech and the adverse action; and, (4) the exercise of his free speech rights did not substantially or materially interfere with his bona fide job performance or with his working relationship with his employer. *See e.g.*, *Kordick v. Town of Greenwich*, Docket No. FST C V20--6047359S, 2022 Conn. Super. LEXIS 2630, at *11 (Conn. Super. Ct. Nov. 29, 2022) (citation omitted). Once a prima facie case of retaliation is established, "the burden then shifts to the defendant to offer evidence of a legitimate, nonretaliatory reason for its employment action . . . . If the defendant succeeds in doing so, the *McDonnell Douglass* presumption of unlawful retaliation falls away, and the burden shifts back to the plaintiff to produce evidence from which a reasonable jury [or trier of fact] could find that the employer's stated reason is merely pretext for illegal retaliation." *Perez-Dickson*, 2016 Conn. Super. LEXIS 3233, at *8, citing *Fasoli*, 64 F. Supp. 3d at 297-97 (emphasis in original). "Although intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the employer intentionally retaliated against the plaintiff remains at all times with the plaintiff." *Smith v. State Judicial Branch*, Docket No. NNHCV116018712, 2014 Conn. Super. LEXIS 2096, at *7 (Conn. Super. Aug. 25, 2014) (citation omitted). "The ultimate burden of proving all elements of C.G.S. § 31-51q remains with plaintiff." *Kordick v. Town of Greenwich*, Docket No. FST CV20-6047359S, 2022 Conn. Super. LEXIS 2630, at *18 (Conn.

Super. Ct. Nov. 29, 2022); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (the plaintiff bears the ultimate burden of persuasion under *McDonnell Douglas* framework).

The plaintiff's § 31-51q retaliation claim against CCSU fails because he cannot establish that his discussion with President Toro on April 20, 2018 constituted constitutionally protected speech under the Connecticut Constitution or that his speech in that meeting was a substantial or motivating factor in his termination, both necessary elements of a prima facie case. Moreover, the undisputed evidence establishes that CCSU terminated the plaintiff for legitimate, non-retaliatory reasons related to his off-duty conduct on April 24-25, 2018 and the plaintiff cannot establish that these reasons were a pretext for unlawful retaliation. There are no genuine issues of material fact in dispute as to any of the elements of the plaintiff's § 31-51q claim. The defendant, CCSU, is therefore entitled to summary judgment.

B. <u>The Plaintiff Cannot Establish a Prima Facie Case of Retaliation under § 31-51q</u>

The plaintiff cannot establish a prima facie case of retaliation because 1) his disclosures to President Toro did not constitute constitutionally protected speech under the Connecticut Constitution and 2) there was not a causal connection between his disclosures and his termination.

1. The Plaintiff Did Not Engage in Protected Speech Under the Connecticut Constitution

As a threshold matter, the plaintiff's speech must have been constitutionally protected in order for him to prevail on his § 31-51q claim. "A clear prerequisite to the application of § 31-51q . . . is that the speech at issue must be constitutionally protected . . . ." *Schumann v. Dianon Systems*, 304 Conn. 585, 600 (2012).

Under the Connecticut Constitution, speech made pursuant to an employee's official duties is protected if it addresses (1) official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety, ***and*** (2) a matter of public concern. *See Trusz v. UBS Realty Investors, LLC*, 319 Conn. 175, 212, 216-17 (2015) (adopting the modified form of the *Pickering/Connick* balancing test set forth in Justice Souter's dissenting opinion in *Garcetti v. Ceballos*, 547 U.S. 435 (2005)).

A matter of public concern is one that has "significant public interest," i.e., is a matter of "unusual importance" to the public. *Trusz,* 319 Conn. at 179, 204. "An employee's speech addresses a matter of public concern when the speech can be fairly considered as relating to any matter of political, social, or other concern the community." *DiMartino v. Richens*, 263 Conn. 639, 667 (2003) (quotation marks omitted). "[S]peech deals with matters of public concern . . . when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Gleason v. Smolinski*, 319 Conn. 394, 412 (2015).

"[I]t is within the province of the trial court to determine, as a matter of law, which topics are considered to be of public concern." *Daley v. Aetna Life & Casualty Co.,* 249 Conn. 766, 777 (1999). "[W]hether the subject matter addressed by a particular statement is of public concern involves a question of law for the court." *Id.* at 777. In determining whether speech is on a matter of public concern, a court must consider "the content, form, and context of [the speech], as revealed by the whole record. . . ." *Schumann*, 304 Conn. at 602.

The plaintiff asserts that he engaged in protected speech in his meeting with President Toro on April 20, 2018. (Complaint, ¶¶ 3, 4). He claims that he raised in that meeting his perceived mismanagement of the [redacted] and [redacted] cases insofar as they were handled through Student Conduct and not CCSU Human Resources and, as a result, received protection from

disclosure under the Family Educational Rights and Privacy Act ("FERPA") and a 2019 Freedom of Information Act ("FOI") disclosure. (Ex. 1, Dukes Dep., pp. 90:18-91:2, 127:17-128:25; 134:15-135:1). The plaintiff relies entirely on his own conclusory assertions and understanding; he lacks any specific concrete evidence to establish that these cases were mishandled. This is insufficient to raise a genuine issue of material fact. *See Stuart*, 316 Conn. at 823-24 (the party opposing summary judgment must demonstrate that "he possesses sufficient counterevidence to raise a genuine issue of material fact as to any, or even all, of the essential elements of his cause of action."). In fact, the evidence demonstrates the contrary—that the two cases were appropriately handled and, therefore, the plaintiff did not comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing or threats to health and safety.

With respect to [redacted], as an adjunct professor, he had a non-permanent appointment with CCSU on a semester-by-semester basis. His non-permanent appointment ended effective May 20, 2011 and Human Resources did not renew his appointment. Human Resources could not take any action as to the misconduct reported at the end of the Spring semester in May 2011 in terms of disciplining or terminating [redacted] as an employee given that his non-permanent appointment ended in May 2011 and was not thereafter renewed. Investigating and disciplining [redacted] in his capacity as a graduate student through Student Conduct ensured that he could not return to CCSU for the five-year period in a non-employee capacity. (Ex. 2, Magnan Aff., ¶¶ 12-14).

As to [redacted], he was an undergraduate student at the time of the alleged misconduct. Under the Student Code of Conduct, once a student has graduated, there is no jurisdiction to address misconduct unless there is a continuing relationship. In [redacted] case, Student Conduct

retained jurisdiction because he was a graduate student and employee at the time the alleged misconduct was reported in 2013; however, his case was handled through Student Conduct and not Human Resources because he was an undergraduate student at the time of the alleged misconduct in 2011. Human Resources had no authority or grounds to discipline [redacted] as an employee because he was an undergraduate student at the time of the alleged misconduct in 2011. (Ex. 2, Magnan Aff., ¶¶ 18-19).

Moreover, the evidence makes clear that the plaintiff's disclosures concerning these cases did not raise a matter of public concern, i.e., a matter of "significant public interest" or "unusual importance" to the public. *Trusz*, 319 Conn. at 179, 204. Under *Trusz*, an employee's speech is only protected "when it is on a matter of public concern *and* implicates an employer's official dishonesty . . . other serious wrongdoing, or threats to health and safety." *Id.* at 212 (internal quotation marks omitted; emphasis added). These cases involved incidents occurring in 2011 and 2013, respectively—five to seven years earlier. Both cases were investigated and discipline was issued. [redacted] had not been employed by CCSU since the Spring of 2011, was not currently employed in the State in 2018 and had a last known address in Florida. (Ex. 2, Magnan Aff., ¶ 11). There were no other accusations against [redacted]r and none in his capacity as an employee. (Ex. 2, Magnan Aff., ¶ 17). At his deposition, the plaintiff admitted that he is not aware of any other complaints against [redacted] and has no knowledge as to when [redacted] employment ended. (Ex. 1, Dukes Dep., pp. 99:16-19, 115:23-116:1).

As evidence of mismanagement, the plaintiff asserts that the two cases were omitted from a 2019 FOI request unlike other professors and employees. (Ex. 1, Dukes Dep., pp. 127:17-25, 128:14-25). On its face, this assertion as to a 2019 FOI request does not support that the plaintiff engaged in protected speech in his **prior** meeting with President Toro in April 2018. Moreover,

in his deposition, the plaintiff admitted that he had no involvement in and no personal knowledge as to this subsequent FOI request. (Ex. 1, Dukes Dep., pp. 134:15-135:1). The 2019 FOI request was limited to reports by CCSU's Office of Diversity and Equity ("ODE") with findings of sexual misconduct involving CCSU employees over a ten-year period. All reports within the scope of the request were disclosed. The [redacted] and [redacted] cases were not within the scope of the request. (Ex. 2, Magnan Aff., ¶¶ 21-22).

The evidence clearly demonstrates that the two cases were appropriately handled and that the plaintiff's concerns regarding their handling did not raise matters of broader concern to the community at large. The plaintiff's discussion with President Toro regarding the two cases did not constitute protected speech under the Connecticut Constitution as it did not address official dishonesty, deliberately unconstitutional action, other serious wrongdoing or threats to health and safety or a matter of public concern. *Trusz*, 319 Conn. at 212, 216-17. Because the plaintiff cannot establish that he engaged in protected speech under the Connecticut Constitution, his § 31-51q claim fails and the defendant is entitled to judgment.

2. The Plaintiff Cannot Establish a Causal Connection Between His Alleged Protected Speech and His Termination

Even assuming that the plaintiff engaged in constitutionally protected speech in meeting with President Toro, his § 31-51q claim fails at the prima facie stage for the additional reason that the plaintiff cannot establish a causal connection between his disclosures to President Toro on April 20, 2018 and his termination given his subsequent off-duty conduct on April 24-25, 2018 in relation to the police response to his home that had a direct nexus to his position as Director of Student Conduct.

"Courts in Connecticut have consistently held that the causation element of a section 31-51q claim requires that plaintiff prove that his speech was at least a substantial or motivating

factor in the adverse employment action." *Cubilla v. Town of Montville*, KNLCV116010874S, 2014 Conn. Super. LEXIS 669, at *22 (Conn. Super. Ct. Mar 18, 2014) (quotation marks omitted). "A plaintiff may establish causation either directly through a showing of retaliatory animus, or indirectly through a showing that the protected activity was followed closely by the adverse action." *Matthews v. Dept. of Public Safety*, Docket No. HHDCV116019959S, 2019 Conn. Super. LEXIS 366, at *76 (Conn. Super. Ct. Feb. 7, 2019) (citation and internal quotation marks omitted); *see also Ayantola v. Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 539 (2009) (explaining that retaliatory causation can be established indirectly by evidence of temporal proximity or directly by evidence of retaliatory animus).

However, a causal connection based on close temporal proximity "**may be broken where an intervening event post-dating the protected conduct provides an independent basis for the adverse action**." *Mauze v. CBS Corp.*, Docket No. 15-CV-4905 (RJD) (SLT), 2019 U.S. Dist. LEXIS 228561, at *7-8 (E.D.N.Y. Jan. 23, 2019) (citing cases) (emphasis added). "[A] causal inference may be negated—or, put differently, the causal chain broken—where an intervening event post-dating the protected conduct provides an independent basis for the adverse action, **or where the uncontroverted evidence otherwise renders the inference unreasonable in the case at hand**." *Mendez-Nouel v. Gucci America, Inc.*, 2012 U.S. Dist. LEXIS 160530, at *43 (S.D.N.Y. Nov. 8, 2012) (citing cases) (emphasis added).

The plaintiff relies entirely on the temporal proximity between his meeting with President Toro on April 20, 2018 and his placement on administrative leave on April 25, 2018 and

subsequent termination in December 2018. (Complaint, ¶¶ 3, 5-6).[1] His Complaint is devoid of any other allegations to establish a causal connection. Any causal connection based on the timing between the plaintiff's disclosures to President Toro and his placement on administrative leave and subsequent termination, however, is clearly negated by the significant intervening events on April 24-25, 2018 related to the police response to the plaintiff's home and his off-duty conduct.

The evidence establishes that, upon receiving information as to what had transpired, CCSU acted immediately and issued a letter the same day placing the plaintiff on paid administrative leave pending an investigation into the events leading to his arrest. (Ex. 3, Suski-Lenczewski Aff., ¶¶ 8-9, 11 and Ex. A, Letter to plaintiff, dated April 25, 2018; Ex. 4, Toro Aff., ¶¶ 14-15). This is standard practice that would be applied to any employee involved in the type of situation as the plaintiff in order to assess the situation and determine whether the employee could safely return to campus. (Ex. 3, Suski-Lenczewski Aff., ¶ 10).

Suski-Lenczewski, CCSU's Chief Human Resources Officer, investigated the events of April 24-25, 2018. (Ex. 3, Suski-Lenczewski Aff., ¶ 12). Her investigation determined that the Hartford Police Department, including its Emergency Response Team, responded to the plaintiff's home after his wife called 911. After the police arrived, the plaintiff refused to exit the home or allow police into the home for approximately two hours, told police that he had a loaded gun on his person and stated that many people would be hurt. After the incident, the

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[1] Administrative leave with pay pending an investigation is not considered an adverse employment action. *See Brayboy v. O'Dwyer*, 633 F. App'x 557, 558 (2d Cir. 2016) (addressing retaliation claim under Title VII and stating "we have held that 'administrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action.' *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006)").

plaintiff's conduct received significant media attention, leading several students and parents to contest his decisions in student conduct cases that he previously handled. (Ex. 3, Suski-Lenczewski Aff., ¶¶ 13-14 and Ex. B, Letter to plaintiff, dated October 26, 2018 with enclosures; Ex. 4, Toro Aff., ¶ 16).

Suski-Lenczewski determined that the plaintiff's off-duty conduct had a direct nexus to his position as Director of Student Conduct insofar as his position required that he investigate and determine disciplinary consequences in cases involving allegations of serious student misconduct, including allegations of criminal conduct, sexual assault and physical violence. In investigating such cases, the plaintiff worked directly with campus police and outside law enforcement. Additionally, the serious nature of the plaintiff's off-duty conduct, including but not limited to his refusal to surrender, unload his firearm and cooperate with police, created a hazardous situation and placed all involved at risk of grave harm. The incident further received media attention and resulted in inquiries from students and parents. As a result, Suski-Lenczewski determined that the plaintiff's off-duty conduct rendered him unsuitable to carry out his professional duties and responsibilities. (Ex. 3, Suski-Lenczewski Aff., ¶¶ 13-14, 18-20). Indeed, the plaintiff admits that, in performing his duties, he interacted with campus police and law enforcement generally as well as students and their families and it was necessary that he act impartially and with sound judgment. (Ex. 1, Dukes Dep., pp. 46:14-23, 47:14-22, 48:10-49:11).

Based on her investigation, Suski-Lenczewski made a verbal recommendation to President Toro that the plaintiff be terminated because of his off-duty conduct and its nexus to his position. (Ex. 3, Suski-Lenczewski Aff., ¶¶ 18-20; Ex. 4, Toro Aff., ¶ 17). Critically, with respect to the plaintiff's retaliation claim, Suski-Lenczewski had **no knowledge** that the plaintiff had met with President Toro or of his disclosures regarding the [redacted] and [redacted] cases. (Ex. 3,

Suski-Lenczewski Aff., ¶¶ 26, 28). President Toro determined that the plaintiff's off-duty behavior on April 24-25, 2018 directly and negatively impacted his capacity to head Student Conduct and made the final decision to terminate him. (Ex. 4, Toro Aff., ¶¶ 18-20, 22).

The facts as found by the arbitrator support CCSU's investigation findings and its actions. The Court can take judicial notice of both the arbitration decision and the Superior Court decision vacating the award. (Exs. 5 and 6 attached hereto). *See e.g., Cohen v. Cohen*, 327 Conn. 485, 501 (2018) (citation omitted) ("[t]he trial court has the power to take judicial notice of court files of other actions between the same parties."); *Plaza-Williams v. Williams*, Docket No. HHDFA166068756S, 2017 Conn. Super. LEXIS 4025, at *5 n.3 (Conn. Super. Ct. July 20, 2017), *citing Ferraro v. Ferraro*, 168 Conn. App. 723, 731-32 (Conn. App. Ct. 2016) ("At any time during a proceeding, a court at its discretion may, but is not required to, take judicial notice of any fact that is not subject to reasonable dispute.").

These facts are not in dispute and include that, in the early morning of April 25, 2018, after the Hartford Police Department and its Emergency Response Team responded to the plaintiff's home, the plaintiff refused to open the door and unload his firearms when asked to do so by police. The armed standoff lasted more than two hours, during which time the plaintiff refused to surrender and told police not to breach the house. His children were in the home asleep upstairs. He told police that he was "in a bad place" and "many people will be hurt." A perimeter was set up around the house and neighbors were evacuated from the area. (Ex. 5, Award, pp. 4-5, 12-13, 35; Ex. 6, *State v. Connecticut State University Organization of Administrative Faculty*, 2021 Conn. Super. LEXIS 1080, pp. 3-5).

Nor can the plaintiff dispute the reaction that his conduct generated in the media and the resulting inquiries from students and parents regarding his actions in misconduct cases, including

one parent expressing concern about him having any further contact with his daughter. (Ex. 3, Suski-Lenczewski Aff., ¶ 14 and Ex. B, Letter to plaintiff, dated October 26, 2018 and enclosures Media Coverage and Appeals of Student Conduct Cases).

Based on these undisputed facts, a reasonable trier of fact could only conclude that the plaintiff was terminated due to the serious nature of his off-duty conduct and its direct nexus to his position as Director of Student Conduct and not because of his disclosures to President Toro. Because the plaintiff cannot establish a causal connection in support of a prima facie case of retaliation, i.e., that his disclosures to President Toro were a substantial or motivating factor in his termination, in light of the significant and serious intervening events after the police responded to his home, his § 31-51q claim fails and the defendant is entitled to judgment.

C. <u>The Defendant Acted with Legitimate Non-Retaliatory Reasons and the Plaintiff Cannot Demonstrate Pretext or Establish Retaliation</u>

Even assuming that the plaintiff can establish a prima facie case of retaliation under § 31-51q, his claim against CCSU fails because the evidence establishes that CCSU terminated the plaintiff based on legitimate, non-retaliatory reasons and the plaintiff cannot establish that these reasons are pretextual or, ultimately, that retaliation for his exercise of free speech rights was the cause of his termination. The defendant's burden is one of production only, and virtually "[a]ny legitimate nondiscriminatory reason [for the claimed adverse action] will rebut the presumption triggered by the prima facie case." *Fisher v. Vassar College*, 114 F.3d 1332, 1335-36 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998). An employer can meet the burden of proffering a legitimate non-discriminatory justification by introducing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Burdine*, 450 U.S. at 257.

As set forth above, CCSU terminated the plaintiff based on its investigation that substantiated that the plaintiff engaged in off-duty conduct of a serious nature that created a hazardous situation and risk of grave harm for all involved in relation to the police response to his home and that had a direct nexus to the duties and responsibilities of his position as Director of Student Conduct, rendering him unsuitable to carry out the functions of the position. (Ex. 3, Suski-Lenczewski Aff., ¶¶ 12-14, 18-22, 28 and Ex. B, Letter to plaintiff, dated October 26, 2018 with enclosures, Ex. D, Letter to plaintiff, dated December 12, 2018; Ex. 4, Toro Aff., ¶¶ 16-22). As addressed below, the plaintiff lacks any evidence to establish that CCSU's reasons are a pretext for unlawful retaliation.

1. The arbitration decision did not address retaliation under § 31-51q and does not establish a genuine issue of material fact in light of the plaintiff's total lack of evidence to establish any retaliatory intent

In his Complaint, the plaintiff relies on the arbitration decision, asserting that the defendant is bound under the rules of res judicata and collateral estoppel by the arbitrator's determination that the defendant's legitimate, non-retaliatory reasons for terminating the plaintiff are "false and unjustified." (Complaint, ¶ 8). The arbitration decision has been vacated and that decision is pending appeal. (Ex. 6, *Connecticut State University Organization of Administrative Faculty*, 2021 Conn. Super. LEXIS 1080). Notwithstanding, the plaintiff's reliance on the arbitration decision fails.

As an initial matter, res judicata and collateral estoppel do not apply to the arbitration decision. "Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum. [C]laim preclusion prevents a litigant from reasserting a claim that has already been decided on the merits. . . . [I]ssue preclusion . . . prevents a party from relitigating an issue that has been determined in a prior suit. . . ." *Pollansky v. Pollansky*, 162 Conn. App. 635, 645 (2016). Res judicata and collateral estoppel,

however, do not apply in this case because the arbitration decision did not address retaliation. The arbitration decision did not determine, as the plaintiff asserts, that the defendant's legitimate, non-retaliatory reasons for terminating the plaintiff were "false and unjustified." The arbitration decision addressed whether there was "just cause" under the collective bargaining agreement to terminate the plaintiff, not whether the plaintiff's termination was in retaliation for his exercise of free speech rights in violation of § 31-51q. *See Siddiqua v. New York State Dept. of Health*, 642 F. App'x 68, 71 (2d Cir. 2016) ("[r]es judicata and collateral estoppel have no application where plaintiff sought only to vindicate contractual rights under the terms of a collective bargaining agreement in submitting grievance to arbitration and not a statutory claim"); *Miller v. City of Ithaca*, Docket No. 3:10-CV-597 (BKS/ML), 2019 U.S. Dist. LEXIS 195707, at *12, 16 (N.D.N.Y. Nov. 12, 2019) ("*contractual* arbitration is distinct from the *statutory* claim now at issue. . . . Because the Plaintiff did not agree to arbitrate his retaliation claim, the conclusions and findings by [the arbitrator] . . . have no preclusive effect here.").

For the same reasons, the arbitration decision does not raise a factual issue as to the plaintiff's retaliation claim. The arbitrator determined whether there was "just cause" to support the plaintiff's termination under the collective bargaining agreement; there was no claim of retaliation before the arbitrator. The arbitrator **did not** address retaliation or make any determinations as to whether the plaintiff was terminated in retaliation for his disclosures to President Toro. The issue in this case is not whether CCSU's decision to terminate the plaintiff was supported by "just cause," but whether it was because the plaintiff engaged in protected speech. It is not the place of the Court to question [the defendant's] business decision . . . ., so long as retaliation for Plaintiff's protected activity was not one of the reasons." *Bowen-Hooks v. City of New York*, 13 F. Supp. 3d 179, 231–32 (E.D.N.Y. 2014). "Whether [the defendant's]

actions were unreasonable, unfair or even untrue, . . . without any showing of retaliatory motive, they [cannot] support [a] retaliation claim." *Id*. at 232 (citing cases).

Additionally, even if the Court were to consider the arbitration decision finding a lack of just cause, the arbitration decision by itself is insufficient to establish retaliation. *See Martinez v. Connecticut*, No. 3:13-CV-00457 (JAM), 2016 WL 730690, at *3 (D. Conn. Feb. 23, 2016) (granting summary judgment and finding that plaintiff did not present sufficient evidence to establish a discriminatory motive despite arbitration decision that termination was not for just cause); *Morgan v. DMV*, Docket No. 3:17-cv-2091 (MPS), 2020 U.S. Dist. LEXIS 48458, at *32 (D. Conn. Mar. 20, 2020) ("[b]ecause [the plaintiff] has not pointed to any other facts suggesting retaliatory intent, the arbitrator's ruling by itself does not raise any inference of such intent).

> Absent some evidence—direct or indirect—of discrimination, the fact that an employer may wrongfully terminate an employee on the basis of facts that are later determined not to be true does not by itself suffice to create a genuine issue of fact of discrimination. . . . **[Without more, a lack of 'just cause' is legally insufficient to show that the [defendant's] legitimate reasons for disciplining [plaintiff] and ultimately terminating her employment were pretexts for unlawful discrimination**."
>
> *Martinez*, 2016 U.S. Dist. LEXIS 21453, at *7 (internal citations and quotation marks omitted; emphasis added).

Here, as set forth further below, the plaintiff has not presented any evidence to establish pretext or retaliatory intent and, the arbitration decision, standing alone, is insufficient to do so.

2. The plaintiff lacks any evidence to establish pretext

As evidence to support his retaliation claim, the plaintiff relies on comparators and temporal proximity. For the reasons stated below, the plaintiff's evidence is insufficient to establish pretext.

As to comparators, the plaintiff raises three white males who he asserts were charged with crimes and not terminated—[redacted].

(Ex. 1, Dukes Dep., p. 167:5-9). The plaintiff lacks any personal knowledge as to the circumstances involving these comparators or the actions that CCSU took with respect to them; his knowledge is based entirely on inadmissible hearsay. (Ex. 1, Dukes Dep., pp. 167:16-168:17, 170:13-171:7, 172:3-8). "[O]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." *Jackson v. City of Bridgeport*, Docket No. UWYCV176036577S, 2021 Conn. Super. LEXIS 298, at *27-28 (Conn. Super. Ct. Mar. 11, 2021).

In addition, the comparators raised are not similarly situated to the plaintiff as they involved different decisionmakers and the events occurred over fifteen (15) years earlier. A plaintiff may present circumstantial evidence from which an inference may be drawn that similarly situated individuals were treated more favorably than he was. *See Perez-Dickson v. Bridgeport*, 304 Conn. 483, 513 (2012). To be probative, however, this evidence must establish that the plaintiff and the individuals to whom he seeks to compare himself were "similarly situated in all *material* respects." *Id.* at 514 (citation omitted; emphasis in original; internal quotation marks omitted). Whether comparators are similarly situated "requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases." *Goncalves v. Department of Public Safety, Division of State Police*, No. 3:10-CV-01602, 2015 WL 521382, at *5 (D. Conn. Feb. 9, 2015) (citation omitted). "[A] court may properly grant summary judgment where it is clear that no reasonable [trier of fact] could find the similarly situated prong met." *Jackson*, 2021 Conn. Super. LEXIS 298, at *25-26 (citation and internal quotation marks omitted).

[redacted] was President of CCSU from 1996-2004. Because he was President, any disciplinary matter would have been handled by the Board of Trustees, not CCSU. [redacted], a

former CCSU music professor, was suspended without pay after pleading guilty to criminal charges and, thereafter, retired in 1992 pending dismissal proceedings. [redacted], also a former CCSU music professor, was placed on administrative leave with pay after his arrest and, thereafter, resigned in 1995. (Ex. 1, Dukes Dep., pp. 167:10-15, 168:23-169:4, 170:3-12, 171:1-172:2; Ex. 3, Suski-Lenczewski Aff., ¶¶ 23-25). The plaintiff also raises two professors at Southern Connecticut State University, not CCSU, as to whom he has no personal knowledge. (Ex. 1, Dukes Dep., pp. 172:25-174:4).

Given the plaintiff's lack of personal knowledge as well as the evidence demonstrating that the comparators raised are not similarly situated to the plaintiff in all material respects, the plaintiff's evidence as to comparators is insufficient to defeat summary judgment.

Lacking any other evidence to establish pretext, the plaintiff relies entirely on the temporal proximity between when he met with President Toro and his termination. Notwithstanding that the intervening events related to the plaintiff's interaction with police eliminates the significance of any temporal proximity, mere temporal proximity between any protected activity and the plaintiff's termination on its own is insufficient to establish pretext and defeat summary judgment. *See El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010) ("The temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a prima facie case of retaliation under Title VII, but without more, such temporal proximity is insufficient to satisfy [the plaintiff's] burden to bring forward some evidence of pretext. Indeed, a plaintiff must come forward with **some evidence of pretext** in order to raise a triable issue of fact.") (citation omitted; emphasis added); *see also Santucci v. Belimo Customization USA, Inc.*, Docket No. DBD-CV17-6022811-S, 2018 Conn.

Super. LEXIS 9863, at *13-14 (Conn. Super. Ct. Sep. 5, 2018) (mere temporal proximity between protected activity and adverse action is not sufficient to show pretext) (citing cases).

The plaintiff has not put forth any admissible evidence to establish that CCSU's legitimate non-retaliatory reasons for terminating him are a pretext for unlawful retaliation. His § 31-51q claim, therefore, fails and CCSU is entitled to summary judgment.

3. The Plaintiff Cannot Meet His Ultimate Burden of Establishing Unlawful Retaliation on the Basis of Any Protected Speech

The plaintiff cannot meet his ultimate burden of establishing that his termination was due to unlawful retaliation for his having raised concerns with President Toro regarding the prior handling of the two sexual misconduct cases. *See Burdine*, 450 U.S. at 253 (the plaintiff bears the ultimate burden of persuasion); *Smith*, 2014 Conn. Super. LEXIS 2096, at *7 (ultimate burden of persuading the trier of fact that the employer intentionally retaliated against the plaintiff remains at all times with the plaintiff.").

Suski-Lenczewski, CCSU's Chief Human Resources Officer, who investigated the events that occurred on April 24-25, 2018 after the police responded to the plaintiff's home and made a recommendation to the President based on her investigation to terminate the plaintiff, had **no knowledge** that the plaintiff met with the President on April 20, 2018 or of his disclosures regarding the two student conduct cases. (Ex. 3, Suski-Lenczewski Aff., ¶¶ 12-14, 18-20, 26).

President Toro made the final decision to terminate the plaintiff based on the direct nexus between his off-duty conduct and his position as Director of Student Conduct. (Ex. 4, Toro Aff., ¶¶ 18-20, 22). Any retaliatory animus on her part for the plaintiff having disclosed to her concerns regarding the handling of prior sexual misconduct cases is seriously undermined given the extensive efforts she took to address the handling of sexual misconduct complaints, establish

better practices and promote transparency after becoming President of CCSU in 2017. (Ex. 4, Toro Aff., ¶¶ 7-8, 24-27).

Specifically, on April 10, 2018, in response to an article in the student newspaper regarding alleged sexual misconduct by a faculty member and **prior to** meeting with Dukes, President Toro announced a CCSU zero-tolerance policy regarding sexual misconduct and bullying. She further announced that CCSU had retained the law firm of Shipman & Goodwin to conduct a full investigation into the allegations against the faculty member and that she had also instructed her Executive Committee to conduct a comprehensive investigation in order to determine how reports of sexual misconduct were handled in the past and to set a new standard going forward. She, thereafter, established a Task Force on Sexual Misconduct, Bullying and Campus Climate to assess processes and procedures for the reporting and handling of sexual misconduct complaints and identify best practices. (Ex. 4, Toro Aff., ¶¶ 7-8).

In 2019, President Toro announced the development of an Action Plan to Change CCSU Campus Culture that included hiring a nationally recognized expert as Interim Vice President for Equity and Inclusion, hiring a consulting firm to assess and re-engineer the offices of Diversity & Equity, Human Resources and Ombudsperson, implementing new software to track complaints and hiring additional investigators within the Office of Equity and Inclusion. In October 2019, in response to an FOI request related to faculty and staff sexual misconduct, President Toro released the ODE reports both with and without findings to meet the terms of the request and promote transparency. Additionally, under President Toro's leadership, CCSU has continued its efforts to facilitate the reporting of any misconduct and expeditiously process complaints. (Ex. 4, Toro Aff., ¶¶ 24-27).

Based on this evidence, the plaintiff cannot meet his ultimate burden of establishing unlawful retaliation on the part of CCSU. His § 31-51q claim, therefore, fails and CCSU is entitled to summary judgment.

D. The Evidence Establishes That the Defendant Would Have Taken the Same Action Regardless of Any Protected Activity

Should the Court reach the issue, the defendant is entitled to the *Mount Healthy* defense. *Even assuming* that the plaintiff could establish that he engaged in constitutionally protected speech that was a substantial or motivating factor in his termination in support of a prima facie case of retaliation, he cannot ultimately prevail because the record evidence uncontrovertibly demonstrates that the defendant would have taken the same employment action even absent his disclosures to the President. *See Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977) (if the plaintiff carries his prima facie burden, the defendant can then show "that it would have reached the same decision as to [termination] even in the absence of the protected conduct."); *Anemone v. Metropolitan Transportation Authority*, 629 F.3d 97, 114-15, 117 (2d Cir. 2011). *Konspore v. Friends of Animals, Inc.*, Docket No. 3:10cv613 (MRK), 2012 U.S. Dist. LEXIS 38334, at *60 (D. Conn. Mar. 20, 2012) (applying *Mt. Healthy* defense to § 31-51q claim).

Here, should the Court determine that the plaintiff has established a prima facie case and reach this issue, the defendant is entitled to summary judgment because the record evidence makes clear that the plaintiff would have been terminated even had he not made the disclosures to President Toro because of his off-duty conduct in relation to the police response to his home that had a direct nexus to his duties and responsibilities as Director of Student Conduct.

V. CONCLUSION

For the foregoing reasons, the defendant, CCSU, moves that the Court grant its Motion for Summary Judgment.

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CERTIFICATION

The undersigned hereby certifies that on March 2, 2023, a true and accurate copy of the foregoing was sent by electronic mail to the following:

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