No. 23-ICA-345

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Megan McKnight and Luke McKnight,
Plaintiffs Below,
Petitioners

v.

Board of Governors of Glenville State University, Gary Z. Morris and Jason P. Barr
Defendants Below,
Respondents

On Appeal From the
Circuit Court of Gilmer County, West Virginia
The Honorable Richard Facemire
(Civil Action No. 22-C-17)

PETITIONERS' BRIEF

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D. The Circuit Court committed error in concluding M. McKnight failed to allege facts sufficient to constitute a discrimination claim against Morris and Barr and in dismissing the same.

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F. Petitioner, Luke McKnight's loss of consortium claim should be remanded along with M. McKnight's substantive claims.

STATEMENT OF THE CASE

Petitioners filed their Complaint in this matter on December 16, 2022. *J.A. 0001.* In their Complaint, Megan McKnight (hereinafter "M. McKnight") and Luke McKnight (hereinafter "L. McKnight") have asserted the following claims: 1) constructive discharge; 2) discrimination based on sex/gender; 3) discrimination against Respondent, Gary Z. Morris (hereinafter "Morris") and Respondent, Jason P. Barr (hereinafter "Barr"); 4) hostile environment; and, 5) loss of consortium. *J.A. 0008-0019.*

M. McKnight received a Bluegrass Music Certificate from Glenville State College in 2007

(*J.A. 0009,* ¶ 21) and her B.A. in Elementary/Early Education in 2011, both from Respondent, Glenville State University (hereinafter "Respondent"). *J.A. 0010,* ¶ 25. It was during the 2006-2007 school year that M. McKnight began working for Respondent under the supervision of Buddy Griffin in the school's Bluegrass Program, a position she maintained through the 2009-2010 school year. *J.A. 0009,* ¶ 21. On June 7, 2010, M. McKnight was employed to serve as the part-time Bluegrass Program Assistant. *J.A. 0010,* ¶ 22. Respondent advised M. McKnight that she was selected for the position to assure that the bluegrass program at GSU had the type of leadership and skill-endowed faculty that would keep the program strong and viable for many years *J.A. 0010,* ¶ 23.

M. McKnight continued working for Respondent in various positions until December 2021 as discussed and described below. Following her graduation, Respondent employed M. McKnight for the 2011-1012 school year in the position of Artist in Residence and Director of Bluegrass Programs. *J.A. 0010,* ¶ 26. M. McKnight was employed by Respondent for the 2012–2013 school year as the Director of Bluegrass Programs. *J.A. 0010,* ¶ 28. M. McKnight received her M.Ed. Degree from Marshall University in May 2013. *J.A. 0010,* ¶ 30, and her Doctor of Education degree from Walden University in April 2018. *J.A. 0011, ¶ 37.*

After receiving her M.Ed. Degree, M. McKnight was employed by Respondent for the 2013–2014, 2014–2015 and 2015–2016 school years in the position of Visiting Assistant Professor of Music and Director of Bluegrass Programs, *J.A. 0010,* ¶ 32, and as Assistant Professor of Music and Director of Bluegrass Programs during the 2016–2017, 2017–2018, 2018–2019 and 2019-2020 academic years. *J.A. 0011,* ¶ 35. In or around the 2016-2017 academic year, Respondent promised M. McKnight that she would be offered expedited promotion and tenure upon completion of her Doctor of Education degree based on her length of employment, her

commitment to GSU and her extra efforts and service to the university and community. *J.A. 0011,* ¶ 36. M. McKnight was not offered expedited promotion and tenure after receiving her Doctorate degree. *J.A. 0011, ¶ 38.*

Morris became the interim Vice-President of Academic Affairs for Respondent during the 2017–2018 school year and its Provost and Vice-President of Academic Affairs on February 4, 2020. *J.A. 0009,* ¶ *9.* Morris selected and appointed Barr to be GSU's Chair of the Fine Arts Department on or about June 22, 2019. *J.A. 0009,* ¶ 12. In appointing Barr as Chair of the Fine Arts Department, Morris violated Respondent's policies and procedures governing the selection of department Chairs. *J.A. 0009,* ¶ 13. After Barr became the Fine Arts Chair and Respondent Morris became Provost and Vice-President of Academic Affairs, M. McKnight's work environment dramatically changed.

Prior to Morris becoming Provost and Vice-President of Academic Affairs, M. McKnight had consistently received stellar evaluations from Respondent. Following completion of the 2011-2012 academic year M. McKnight was given an overall evaluation of "Excellent" by Respondent. Respondent noted that McKnight "has been a blessing and a fantastic addition to the department!" *J.A. 0010,* ¶ 27. Following completion of the 2012–2013 academic year, M. McKnight again received an overall evaluation of "Excellent" from Respondent and Respondent noted that McKnight "is a major asset to GSC, the Fine Arts and our community. Her incredibly hard work, dedication, care, passion, excitement, creativity, knowledge and love for her students is awesome. She has truly taken the GSC Bluegrass Program to new heights and she is poised to do even more." *J.A. 0010,* ¶ 29. Following completion of the 2013–2014 academic year, M. McKnight received an overall evaluation of "Excellent" from Respondent. Respondent noted in this evaluation that McKnight "is absolutely top notch! Her tireless efforts and love for the program is most

appreciated. She has done incredible work recruiting, improving the program, representing GSC, organizing great concerts & internships and making our department better. She is a God send!" *J.A. 0011,* ¶ 33. Following completion of the 2015–2016 academic year, Respondent again evaluated M. McKnight and found her to be proficient in all categories that were the subject of the evaluation. Teaching effectiveness comprised sixty percent (60%) of this evaluation[1]. *J.A. 0010,* ¶ 34.

Respondent next evaluated M. McKnight during the 2018–2019 academic year and again found her to be proficient in all categories that were the subject of the evaluation. *J.A. 0011,* ¶ 39. In completing the evaluation, Respondent noted in the section of the evaluation titled "Instructional Activities – Course Development and Teaching Evaluation" the following: "Course adjustments have been made very successfully by implementing more technology. Dr. Darby continues to excel in course development, especially in the development of the online BA in Music program. Dr. Darby has also done a great job finding appropriate internship placements. Dr. Darby also kept students engaged throughout summer with various activities at the Pioneer Stage, which was a major goal of the venue. Dr. Darby also worked with Professor Amanda Chapman on an Appalachian Studies course in the fall of 2018." *J.A. 0010,* ¶ 40.

Regarding the 2018 – 2019 school year, the section of the evaluation titled "Service to College" included the following comments: "Dr. Darby is a great ambassador for GSC through local, state, regional, and international performances with GSC Bluegrass. Her involvement with the honorary doctorates bestowed to Bluegrass artists in Nashville and its incorporation of the Glenville community in this project brought great PR to the college. Megan also does great

[1] The 2015-2016 evaluation was based on McKnight's tenure track status and, therefore, was set up differently. McKnight received the highest ratings possible during the 2015-2016 evaluation.

committee service." *J.A. 0012,* ¶ 42. Regarding the section of 2018–2019 evaluation titled "Professional Development and Scholarship" Respondent noted the following: "Megan has attended a great many Bluegrass festivals and professional workshops in her field. Megan has also been branching out beyond Bluegrass to workshops involving Appalachian studies. Megan also publishes to various Bluegrass periodicals promoting GSC and the Bluegrass program." *J.A. 0012,* ¶ 43. Teaching effectiveness comprised sixty percent (60%) of the 2018–2019 evaluation. *J.A. 0012,* ¶ 44. M. McKnight created the Pioneer State Music Education Center and developed and saw the implementation of Respondent's online B.A. in Music program. *J.A. 0011,* ¶¶ 40–41).

In her Complaint, M. McKnight has alleged that Respondents subjected her to the following adverse employment actions:

1. Denial of opportunity to seek tenure on an expedited bases following receipt of Doctorate. *J.A. 0010,* ¶¶ 35, 37;

2. Denial of the opportunity to serve on committees is one of the specific factors GSU considers in its consideration of promotion and tenure. *J.A. 0014,* ¶ 67;

3. Denial of the opportunity to have a full slate of student advisees which is one of Respondent's specific requirements for assistant professors, associate professors and professors and that advisees were often reassigned by Respondent Barr to himself *J.A. 0014,* ¶ 68;

4. Denial of the opportunity to provide instruction to students in GSU's Bluegrass Program which she was hand-selected to lead. *J.A. 0014,* ¶ 70;

5. Denial of the opportunity to teach core classes in Appalachian Studies. *J.A. 0014,* ¶ 72;

6. Denial of the opportunity to teach a Recording and Engineering course that she had taught for the previous ten years. Respondents assigned a male instructor to assume responsibilities for this course *J.A. 0015,* ¶ 75;

7. Denial of the opportunity to run the Pioneer Stage Music and Education Center which she had established. *J.A. 0015,* ¶ 77;

8. Denial of the stipend she was to receive for running the Pioneer Stage which

Respondent had agreed to provide through 2023. *J.A. 0015,* ¶ 78;

9. Denial of the opportunity to teach a full course load as required by Respondent. *J.A. 0013 - 0014,* ¶¶ 63 – 64;

10. Denial of an offer to teach GSC 101 Orientation which she had taught. *J.A. 0015,* ¶ 79;

11. Denial of opportunity to teach courses in Education or Music which she had historically taught. *J.A. 0015,* ¶ 79;

12. Denial of the opportunity to teach dual credit courses in high schools. *J.A. 0015,* ¶ 79;

13. Denial of the opportunity to teach in prisons so that she would have a full course load. *J.A. 0015,* ¶ 79;

14. That she was compensated at a rate less than similarly situated male employees. *J.A. 0016,* ¶ 88;

15. Respondent, on more than one occasion, improperly withheld from M. McKnight the compensation to which she was entitled. *J.A. 0016,* ¶ 88.

In addition to the aforesaid specific allegations that constitute adverse employment decisions taken by Respondents against M. McKnight, additional allegations have been alleged that support the fact that the adverse decisions were made based on M. McKnight's gender and/or constitute allegations from which an inference of discrimination is raised:

1. While denying McKnight the opportunity to advise students in the Appalachian Studies program, Respondent and Morris hired a new male instructor to teach the Appalachian Studies courses and advise students in the Appalachian Studies program. *J.A. 0015,* ¶ 73;

2. While denying McKnight a full course load to teach, Respondent and Morris hired a new male instructor to teach history courses that she was qualified to teach. *J.A. 0015,* ¶ 74;

3. While denying McKnight the opportunity to teach a full course load, Respondent assigned a male instructor to teach the Recording and Engineering course that she had taught for the previous ten (10) years. *J.A. 0015,* ¶ 75;

4. After becoming Chair of the Fine Arts Department, McKnight attended a meeting in which Respondent Barr was discussing the promotion of a female colleague and made a comment suggesting that the female colleague must have been sleeping with

someone to get the promotion. McKnight was the only female present at this meeting. *J.A. 0018,* ¶ 104;

5. Upon information and belief, Morris has been reprimanded by Respondent for actions and conduct of a harassing nature directed to females. *J.A. 0018,* ¶ 107;

6. Morris attended an emergency meeting of the Board of Governors and in referring to McKnight commented that "this girl" should not be on the faculty, she should only be staff. *J.A. 0018,* ¶ 108;

7. Respondent Morris actively lobbied the promotion and tenure committee to deny McKnight promotion and tenure. *J.A. 0012,* ¶ 47;

8. In preparing the documentation she was required to submit to the Promotion and Tenure Committee, McKnight was instructed by Morris to have no contact with Dr. Lloyd Bone, the former Chair of the Fine Arts Department, and to only communicate with Respondent Barr regarding her submissions. *J.A. 0012,* ¶ 48;

9. Respondent Barr gave McKnight a negative evaluation when she was up for promotion and tenure, the only negative evaluation throughout her years of employment with Respondent, and it was done for the purpose of preventing her from obtaining promotion. and tenure. *J.A. 0012,* ¶ 49;

10. Respondent Morris permitted Barr to submit his negative evaluation to the Promotion and Tenure Committee well past the deadline for submission of such information in violation of GSU's policies and procedures. *J.A. 0012,* ¶ 50;

11. Respondent Morris misrepresented to Dr. Manchin, Respondent's President, that McKnight did not have the academic credentials to teach either Music or Appalachian Studies even though she was currently serving as an Assistant Professor of Music and had served in that capacity since 2013. *J.A. 0013,* ¶¶ 55-56; and,

12. At no time prior to Respondent Morris becoming Provost and Vice-President of Academic Affairs had McKnight's credentials to teach Music been raised with her by anyone at GSU. *J.A. 0013,* ¶ 57.

On February 13, 2023, Respondents filed their motion to dismiss and memorandum of law in support of their motion to dismiss. *J.A. 0001,* Line 20. By Order entered on February 14, 2023, the Circuit Court set a briefing schedule. *J.A. 0001,* Line 21. On February 17, 2023, the Court set the motion to dismiss for hearing. *J.A. 0002,* Line 24. Petitioners filed their response to the motion to dismiss on February 28, 2023. *J.A. 0002,* Line 28. On April 14, 2023, Respondents filed their

Reply in support of the motion to dismiss. Respondents' motion to dismiss was heard on May 22, 2023. *J.A. 0002,* Line 34. The Court ordered the parties to submit proposed orders "no later than July 7, 2023." *J.A. 0186.* Respondents filed their proposed Order granting their motion to dismiss at 11:05 a.m. on July 5, 2023. *J.A. 0190.* The Court entered Respondents' *Order Granting Motion to Dismiss* at 5:14 p.m. on July 5, 2023. *J.A. 0218.* The Circuit Court entered the Respondents' order without affording Petitioners an opportunity to file its own proposed order or to object to the proposed order submitted by Respondents. Petitioners timely filed their Notice of Appeal on August 4, 2023.

SUMMARY OF ARGUMENT

The trial court erroneously granted Respondent's *Motion to Dismiss* based upon Rule 12(b)(6) of the West Virginia Rules of Civil Procedure by failing properly apply the well-settled law governing such motions. Petitioner asserts that the trial court erred in failing to properly evaluate Petitioners' C*omplaint* for the limited purpose of determining whether the allegations constituted any claim under Rule 8(a) pursuant to *John W. Lodge Distrib. Co., v. Texaco*, 161 W. Va. 603, 604-605, 245 S.E.2d 157, 158 (1978) and further, by failing to "liberally construe" the allegations so as to do "substantial justice" as required. *See, Cantley v. Lincoln County Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007). Moreover, the Circuit Court failed to address all of Petitioners' allegations and further failed to construe those facts and the inferences arising therefrom in the light most favorable to the Petitioners/Plaintiffs. *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 520, 854 S.E.2d 870, 882 (2020).

Petitioners further maintain, as discussed more fully herein, that the Circuit Court impermissibly applied the wrong standards when evaluating the sufficiency of the allegations in the *Complaint* that supported Petitioners' claims. In part, the Circuit Court failed to recognize or

acknowledge that a "heightened pleading" standard is not appropriate when qualified immunity is not implicated. For all of the aforesaid reasons, as discussed more fully below, this Court should reverse the Circuit Court's *Order Granting Motion to Dismiss* and remand the same back to Circuit Court for further proceedings.

STATEMENT REGARSDING ORAL ARGUMENT

Petitioners believe that oral argument pursuant to Rule 19 of the Rules of Appellate Procedure is appropriate as this appeal involves assignments of error in the application of settled law.

STANDARD OF REVIEW

Petitioners appeal from an order granting a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*" Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). Because this Intermediate Court of Appeal's review is *de novo,* it must apply the same standards applicable to the circuit court in considering the motion.

The West Virginia Supreme Court instructs that "motions to dismiss are viewed with disfavor," and it has "counsel[ed] lower courts to rarely grant such motions." *Forshey v. Jackson*, 222 W. Va. 743, 749, 671 S.E.2d 748, 754 (2008). "[T]he purpose of a motion to dismiss . . .is to test the legal sufficiency of the complaint to determine whether the allegations constitute a claim under Rule 8(a). *John W. Lodge Distrib. Co., v. Texaco*, 161 W. Va. 603, 604-605, 245 S.E.2d 157, 158 (1978). A "trial court . . . should not dismiss the complaint unless it appears beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl., *John W. Lodge, supra,* (internal citations omitted).

The "court reviewing the sufficiency of a complaint . . . should presume all of the plaintiff's factual allegations are true, and should construe those facts, and inferences arising from those facts, in the light most favorable to the plaintiff." *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 520, 854 S.E.2d 870, 882 (2020). A plaintiff "is not required to establish a *prima facie* case at the pleading stage." *Id.* at 522, 854 S.E.2d at 884. "[T]o survive a motion under Rule 12(b)(6), a pleading need only outline the alleged occurrence which (if later proven to be a recognized legal or equitable claim), would justify some form of relief." *Id.* At 521, 854 S.E.2d at 883. "[A] motion to dismiss should be granted only where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Ewing v. Board of Educ. of County of Summers,* 202 W. Va. 228, 235, 503 S.E.2d 541, 548 (1998) (citations omitted).

"A court should not dismiss a case simply because it believes it is unlikely that the plaintiff will prevail." *McGinnis v. Cayton*, 173 W. Va. 102, 104, 312 S.E.2d 765, 768 (1984). The question is not whether a plaintiff has "a strong case, but rather whether [he or she] ha[s] *any* case." *Id.* at 105, 312 S.E.2d at 768 (emphasis added). West Virginia law reflects a "preference . . . to decide cases on their merits[.]" *Yurish v. Sinclair Broad. Grp., Inc.*, 866 S.E.2d 156, 161, 2021 W. Va. LEXIS 649, **6 (2021) (quoting *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008). Therefore, we require "[a] trial court considering a motion to dismiss under Rule 12(b)(6) [to] *liberally construe* the complaint so as to *do substantial justice.*" *Cantley v. Lincoln County Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007) (emphasis added).

ARGUMENT

A. The Circuit Court erred in evaluating M. McKnight's substantive claims on a "heightened pleading" standard[2].

The Circuit Court evaluated M. McKnight's claims utilizing a "heightened pleading" standard instead of the "short and plain statement" standard when qualified immunity is not implicated. *J.A. 0279,* ¶ 18; *J.A. 0280,* ¶¶ 19-21; *J.A. 0286,* ¶ 31; *J.A. 0298,* ¶ 65. "[W]hile heightened pleading may be necessary in actions where immunities are implicated, we reiterate that '[a] plaintiff is not required to anticipate the defense of immunity in his complaint.'" *Judy v. E. W. Va. Cmty. & Tech. Coll.,* 286 W. Va. 483, 874 S.E.2d 285, 290 (2022), quoting in part, *Hutchison v. City of Huntington,* 198 W. Va. 139, 150, 479 S.E.2d, 649, 660 (citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980)).

Pursuant to *Hutchinson*, when the Complaint clearly demonstrates that the movant is not entitled to a shield of immunity because the allegations arise from apparent violations of clearly established statutory law heightened pleading would not be necessary and the analysis of the adequacy of Petitioner's Complaint need only satisfy the "short and plaint statement" standard utilized when immunities are not implicated. *Judy, supra,* at 874 S.E.2d 285, 290 – 291. "A government entity has no qualified immunity where the plaintiff can demonstrate that the government entity's discretionary 'acts or omission are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known[.]" *Judy, supra*, at 874 S.E.2d at 290, quoting in part, Syl. Pt. 3, *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 783 S.E.2d 75 (2015). The West Virginia Human Rights Act constitutes a clearly established statutory law of which public institutions like GSU should be aware. *Id.* When a plaintiff pleads facts

[2] This argument applies equally the dismissal of each of McKnight's claims, but will not be discussed separately regarding each claim.

"demonstrating a violation of this clearly established law" a public institution such as Respondents are not entitled to qualified immunity and the heightened pleading standard does not apply. *Id.*

Pursuant to *Judy*, "heightened pleading" was not required by M. McKnight and it was error for the Circuit Court to evaluate the sufficiency of her Complaint on this heightened standard. Instead, the Court was required to apply the "short and plain statement" standard to determine whether she had sufficiently pled her claims herein. While M. McKnight asserts that her Complaint is sufficient to satisfy the "heightened pleading" standard, it was, nonetheless, error for the Circuit Court to dismiss her claims based on this erroneous standard. For this reason, the Circuit Court's order should be reversed, and the case remanded for further proceedings.

B. The Circuit Court committed error in concluding that M. McKnight failed to allege facts sufficient to constitute a constructive discharge claim and in dismissing the same.

The Circuit Court determined that M. McKnight's "working conditions were not intolerable as a matter of law" as the sole basis for dismissing her constructive discharge claim. *J.A. 0286,* ¶ 32. In addressing the "intolerability" element of her claim, the Circuit Court placed reliance on four cases.[3] Of the four cases relied on by the Circuit Court, only the *Cox* case was resolved on a motion to dismiss. *Slack* was resolved after a jury verdict and *Matvia* and *Mveng-Whitted* were resolved on summary judgment. These three cases clearly establish the need for discovery prior to summarily dismissing discrimination claims.

While *Cox* was resolved on a motion to dismiss, the facts alleged are not nearly as egregious as those alleged by M. McKnight, nor was the conduct at issue ongoing for a like amount

[3] *Slack v. Kanawha Cty. Hous. & Redevelopment Auth.,* 188 W. Va. 144, 423 S.E.2d 547 (1992); *Cox v. Huntington Museum of Art,, Inc.,* No. CV 3:20-0142, 2020 WL 1958635 (S.D.W. Va. (April 23, 2020); *Matvia v. Bald Head Island Mngt., Inc.,* 259 F.3d 261 (4th Cir. 2001); and, *Mveng-Whitted v. Larose,* No. 3:11-CV-00842-JAG, 2013 WL 4880364 (E.D. Va. Sept. 12, 2013).

of time. In *Cox*, the plaintiff's allegations of intolerable conduct were limited to the failure of a subordinate to communicate with her and fulfill his responsibilities and for being reprimanded for inappropriately touching the subordinate. Moreover, unlike the Plaintiff in *Cox*, M. McKnight was not alleged to have engaged in any inappropriate conduct.

M. McKnight's allegations, and the inferences drawn therefrom, are much more than "mere dissatisfaction with work assignments, a feeling of being unfairly criticized or difficult or unpleasant working conditions" as indicated by Defendants. *J.A. 0285,* ¶ 28. The actions and conduct as alleged by M. McKnight, including the reasonable inferences raised by the allegations, support her constructive discharge claim. In considering the allegations contained in the Complaint, the Court can conclude that Defendants engaged in a pattern of discriminatory conduct, occurring over a number of years, which created a toxic environment unbearable and intolerable to her and which would be unbearable and intolerable to others in the same or similar position.

It is also worth noting that in addition to erroneously applying the "heightened pleading" standard, the Circuit Court committed further error in reviewing the sufficiency of McKnight's Complaint based in part in requiring proof and evidence not relevant to the evaluation of Petitioners' Complaint on a motion to dismiss. *J.A. 0281,* ¶¶ 22-23. This is evident from the fact that the Circuit Court relied almost exclusively on cases that were resolved at the summary judgment stage, applying the law applicable to summary judgment motions. In discussing *Slack*, the Circuit Court suggests that for McKnight "[t]o succeed on a constructive discharge claim, a 'plaintiff must establish'" intolerability and that "[p]roof of this element may be determinative of the case." *J.A. 0281,* ¶ 22. The Circuit Court's order suggests that for McKnight to survive Respondents' motion to dismiss, she is required to "prove" each element of her claim at the initial

pleading stage. This is not the appropriate standard for the Court to apply when evaluating the sufficiency of M. McKnight's Complaint.

The Circuit Court goes on to conclude that "she will never be able to make the requisite showing at summary judgment or at trial. This deficiency exists regarding of whether the notice pleading standard of the heightened pleading standard is applied . . .." *J.A. 0286,* ¶ 31. The Circuit Court also concludes that "Plaintiff's allegations of fact demonstrate that she cannot succeed on a constructive discharge claim . . ." *J.A. 0283,* ¶ 27. The Circuit Court's order consistently confuses the various review standards he was required to follow when considering whether Petitioner sufficiently set forth a "short and plain statement" which set forth her constructive discharge claim.

Consistent with *Mountaineer, supra,* M. McKnight was not required to establish a *prima facie* case at the initial pleading stage. All she was required to do to avoid a motion to dismiss was allege sufficient information to outline the elements of her claim or to permit inferences to be drawn that these elements exist. *John W. Lodge, supra.* M. McKnight met the "short and plain statement" standard and the Circuit Court committed error in dismissing her constructive discharge claim. This Court should reverse the Circuit Court ruling and remand this case for further proceedings.

C. The Circuit Court committed error in concluding that M. McKnight failed to allege facts sufficient to constitute a sex/gender discrimination claim and in dismissing the same[4].

To avoid dismissal under Rule 12(b)(6), M. McKnight was only required to "outline the alleged occurrence which if later proven to be recognized as a legal or equitable claim would justify some form of relief. *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*,

[4] Every case the Court cited and/or relied on in dismissing McKnight's gender/sex discrimination claim was resolved at the summary judgment stage of the litigation other than *Brown v. City of Montgomery*, wherein a motion to dismiss was granted and the West Virginia Supreme Court of Appeals reversed and remanded the case.

244 W. Va. 508, 521, 854 S.E.2d 870, 883 (2020). M. McKnight was "not required to establish a *prima facie* case at the pleading stage." *Id.* 244 W. Va. at 520, 854 S.E.2d at 884. A "trial court . . . should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl., *John W. Lodge Distrib. Co., v. Texaco*, 161 W. Va. 603, 604-605, 245 S.E.2d 157, 158 (1978). The trial court in considering a motion to dismiss is required to "presume all of the plaintiff's factual allegations are true, and should construe those facts, and inferences arising from those facts, in the light most favorable to the plaintiff." *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 520, 854 S.E.2d 870, 882 (2020).

The Circuit Court cited *Mveng-Witted* as support for dismissing M. McKnight's sex/gender discrimination claim. The *Mveng-Witted* case was decided at the summary judgment stage, not on a motion to dismiss. M. McKnight should be afforded the same opportunity to further develop her claim as the plaintiff in the *Mveng-Witted* case. As noted in *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986). "[b]ecause discrimination is essentially an element of the mind, there will probably be very little direct proof available. Direct proof, however, is not required. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others." 178 W. Va. at 170-71, 358 S.E.2d at 429-30.

As with the Circuit Court's conclusions regarding her constructive discharge claim, the Circuit Court's conclusions appear to apply the erroneous standard in evaluating the sufficiency of M. McKnight's Complaint. Again, it appears the Circuit Court created an order that weaved in and out of various standards, created confusion as to whether it evaluated Petitioners' Complaint on a "heightened pleading" standard, a notice pleading standard or whether it required Petitioners to satisfy a summary judgment standard.

By way of example, the Circuit Court's order concludes that M. McKnight failed to state a claim under the notice pleading standard, much less the heightened pleading standard. The order goes on to state that "[p]laintiff 's allegations merely recite the elements of her claim, but she has brought no allegations of fact to support them, and therefore they are nothing more than legal conclusions which the Court properly ignores. (*See* Compl., ¶¶ 86-91.)" *J.A. 0287,* ¶ 36. Not only does the Circuit Court fail to state the standard it is applying in evaluating the sufficiency of M. McKnight's Complaint, but it entirely overlooks the fact that paragraphs 1-85 of Petitioners' Complaint set forth the factual predicates upon which paragraphs ¶¶ 86-91 were based,

Finally, the Circuit Court erroneously concludes that M. McKnight failed to relate any adverse employment actions to her gender/sex. *J.A. 0288,* ¶¶ 38, 39; *J.A. 0289,* ¶¶ 40, 41; *J.A. 0291,* ¶ 45. This conclusion is in error as M. McKnight specifically alleged in her Complaint that "[t]he actions and conduct alleged herein would not have occurred but for Dr. McKnight's gender. *J.A. 0016,* ¶ 90, and that "[t]he actions and conduct as alleged herein constitutes unlawful gender/sex discrimination in violation of the West Virginia Human Rights Act. *J.A. 0016,* ¶ 91. For all of the aforesaid reasons, this Court should reverse the Circuit Court decision and remand the case for further proceedings.

D. The Circuit Court committed error in concluding M. McKnight failed to allege facts sufficient to constitute a discrimination claim against Morris and Barr and in dismissing the same .

1. M. McKnight sufficiently pled discrimination claims against Respondents Morris and Barr.

The Circuit Court dismissed Count II of Petitioner's Complaint for two stated reasons: 1) McKnight's allegations are insufficient to state a claim against either Respondent Morris or Respondent Barr, and 2) because Respondents Morris and Barr acts were within the scope of their employment and not their individual capacities. The Circuit Court erred in each of these conclusions.

The Circuit Court correctly acknowledges that West Virginia Code § 5-11-9 permits discrimination claims against individuals who violate the West Virginia Human Rights Act. *J.A. 0292,* ¶ 46, but erred in concluding that M. McKnight's allegations "do not constitute any violation of the WVHRA. W. Va. Code § 5-11-9(7)(A) – (C)." *J.A. 0292,* ¶ 46. The Circuit Court does address a handful of allegations it attributes to M. McKnight's claims against Morris and Barr. As to the claims against Morris, the Circuit Court addresses the following allegations: lobbying the promotion and tenure committee to deny tenure, *J.A. 0292,* ¶ 48; denying her the opportunity to serve on committees and have student advisees, *J.A. 0293,* ¶ 49; instructing colleagues to have no contact with M. McKnight, *J.A. 0293,* ¶ 50. As to Barr, the Circuit Court attributes the following allegations: negative evaluation to promotion and tenure committee, denial of opportunity to teach in the Bluegrass Program and, reassigning student advisees from M. McKnight to himself, *J.A. 0293,* ¶ 52.

The Circuit Court ignored additional allegations that that are sufficient to satisfy the "short and plain statement" requirement supporting the claims against Morris and Barr. M. McKnight incorporated into her cause of action against Morris and Barr all of the actions and conduct

attributed to them within her Complaint. Among those allegations as to Morris and Barr are the following:

1. Morris attended a Board of Governors meeting wherein he referred to McKnight as "this girl" and went on to say that McKnight should not be a member of the faculty, but should only be staff. *J.A. 0018,* ¶ 108;

2. Morris instructed McKnight to have no contact with Dr. Lloyd Bone, the former Chair of the Fine Arts Department, in preparing the documentation associated with her application form promotion and tenure. *J.A. 0012,* ¶ 48;

3. Morris instructed McKnight to communicate only with Morris regarding the documentation she was required to submit in support of her application for promotion and tenure. *J.A. 0012,* ¶ 48;

4. After becoming Chair of the Fine Arts Department, McKnight attended a meeting wherein Defendant Barr was discussing the promotion of a female colleague and made a comment suggesting that the female colleague must have been sleeping with someone to get the promotion. *J.A. 0018,* ¶ 104;

5. Morris permitted Barr to submit this evaluation well past GSU's deadline in violation of GSU's policies and procedures. *J.A. 0012,* ¶ 50;

6. Morris misrepresented to Dr. Manchin in 2021 that McKnight did not have the academic credentials to teach either Music or Appalachian Studies despite serving as Assistant Professor of Music since 2013. *J.A. 0013,* ¶ 55;

7. McKnight offered, but Defendants denied her the opportunity, to perform other services so that she would have permitted her to have more than 12 instructional hours in Fall 2021, including: (a) teaching GSC 101 Orientation which she had taught in the past; (b) teaching courses in Education or Music; (c) teaching dual credit courses in high schools; (d) teaching in prisons. *J.A. 0015,* ¶ 79;

8. Defendants denied McKnight the opportunity to teach any core classes in Appalachian Studies with the exception of a single class that she had previously taught through the Department of Fine Arts which was renamed and moved to the Appalachian Studies Program. *J.A. 0014,* ¶ 72;

9. Defendants denied McKnight the opportunity to teach a Recording and Engineering course despite having taught the course for the previous ten years. *J.A. 0015,* ¶ 75;

10. Defendants denied McKnight the opportunity to continue running the Pioneer Stage which she had established. *J.A. 0014,* ¶ 71;

11. Defendants denied McKnight a monetary stipend associated with running the Pioneer

Stage which GSU had agreed to provide through 2023. *J.A. 0015,* ¶ 78; and,

12. That she was retaliated against by Respondents in violation of the West Virginia Human Rights Act. *J.A. 0019,* ¶ 114.

The aforesaid allegations, and inferences arising therefrom, constitute evidence of discrimination sufficient to satisfy the requirements of Rule 8 of the West Virginia Rules of Civil Procedure. However, in reviewing the sufficiency of M. McKnight's claims against Morris and Barr, the Circuit Court failed to acknowledge or address the aforesaid allegations.

M. McKnight alleged that the aforesaid allegations attributable to Morris and Barr, as set forth in her Complaint, were for the purpose of (1) harassing, degrading and embarrassing M. McKnight, *J.A. 0017,* ¶ 97; (2) in retaliation for M. McKnight's complaints about their discriminatory actions and conduct, *J.A. 0017,* ¶ 97; (3) by aiding and abetting one another in the commission of the discriminatory and unlawful conduct, *J.A. 0017,* ¶ 97; and, (4) by failing to prevent and prohibit such conduct (*Complaint* ¶ 97), all of which is violative of *West Virginia Code* § 5-11-9(7). *J.A. 0017,* ¶ 97. M. McKnight has further alleged that Morris and Barr colluded and conspired with one another in the participation of their discriminatory and unlawful conduct. *J.A. 0017,* ¶ 98, in further violation of *West Virginia Code* § 5-11-9(7). The Circuit Court failed to address any of the aforesaid allegations.

This Court should remain mindful that since "discrimination is essentially an element of the mind, there will probably be very little direct proof available. Direct proof, however, is not required. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the

apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others." *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 170-171, 358 S.E.2d 423, 429-430 (1986).

M. McKnight's allegations are sufficient to meet the "short and plain statement" standard sufficient to defeat a motion to dismiss as to the claims asserted against Morris and Barr. The Circuit Court failed to consider relevant factual allegations set forth in the complaint as referenced herein and, further, failed to properly apply the well-established law in grating Respondents' motion to dismiss.

2. The Circuit Court erred in concluding that the claims against Morris and Barr were based on actions and conduct beyond the scope of their employment.

The Circuit Court erred in concluding that M. McKnight's claims against Respondents Morris and Barr were predicated on actions and conduct beyond the scope of their employment. *J.A. 0294,* ¶¶ 54, 55. In reviewing the allegations set forth in M. McKnight's *Complaint*, the Court failed to recognize that her claims were based on actions and conduct in their individual roles as employees, agents and/or servants of Respondent. Specifically, M. McKnight alleged as follows regarding the actions and conduct of Respondents Morris and Barr:

1. At all times relevant hereto, GSU acted through its agents, servants and employees including, but not limited to, Defendant's Morris and Barr. *J.A. 0009,* ¶ 17;

2. GSU is liable for the discriminatory actions and conduct as alleged and described herein. *J.A. 0009,* ¶ 18;

3. Additionally, Defendants Morris and Barr are responsible for the violations of the West Virginia Human Rights Act individually. *J.A. 0009,* ¶ 19;

4. GSU is vicariously liable for the said discriminatory actions and conduct as alleged and described herein. *J.A. 0017,* ¶ 95; and,

5. The actions and comments of Defendants Barr and Morris occurred in the course and scope of their employment such that GSU is vicariously liable for such conduct. *J.A. 0018,* ¶ 113.

M. McKnight's aforesaid allegations as set forth in her Complaint make clear that she was not asserting any claims against Morris and Barr based on actions and conduct outside the course and scope of their employment, but for their individual responsibility in engaging in the alleged discriminatory conduct as set forth in *W. Va. Code* § 5-11-9(7).

In reaching its conclusion, the Court failed to address *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 730, 461 S.E.2d 473, 476 (1995). In *Holstein*, the West Virginia Supreme Court of Appeals addressed a situation wherein an employee asserted discrimination claims against an employer and an employee. In addressing this issue, the *Holstein* Court noted that "person" as defined in *W. Va. Code* § 5-11-3(a) specifically refers to "one or more individuals." *Id.* at 461 S.E.2d 473, 476. The *Holstein* court further noted the fact that this statute is to be "liberally construed to accomplish its objectives and purposes." *Id.* at 461 S.E.2d 473, 476-477. Consistent with *W. Va. Code* § 5-11-9(7), the *Holstein* Court found that "[a]n agent or employee can be held personally liable for his own torts against third parties and this personal liability is independent of his agency or employee relationship. Of course, if he is acting within the scope of his employment, then his principle or employer may also be held liable.' Syl. Pt. 2, *Id.*

Pursuant to *Holstein,* it is abundantly clear that M. McKnight's claims against Morris and Barr are based on the conduct they engaged in as agents, servants and employees of Respondent. As alleged herein, Morris and Barr are responsible for their own discriminatory actions and conduct. However, Respondent, likewise, is also vicariously liable for the actions and conduct of Morris and Barr since their actions were within the course and scope of their employment.

Pursuant to *W. Va. Code* § 5-11-9(7) and *Holstein*, it is clear that M. McKnight has sufficiently pled a discrimination claim against Morris and Barr based on the discriminatory actions and conduct as alleged in the Compliant. Limiting M. McKnight's claim as the Circuit

Court has done constitutes a failure on the part of the Circuit Court to consider M. McKnight's factual allegations and the inferences arising therefrom in the light most favorable to her and, further, a failure to liberally construe the West Virginia Human Rights Act to accomplish its objectives and purposes. For all of the aforesaid reasons, the Circuit Court erred in dismissing M. McKnight's claims against Morris and Barr and this Court should reverse and remand the case for further proceedings.

E. The Circuit Court committed error in concluding that M. McKnight failed to allege facts sufficient to constitute a hostile environment claim and in dismissing the same[5].

The Court's cites *E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4th Cir. 2008) in evaluating the "sufficiently severe or pervasive" element of a hostile environment claim[6]. In evaluating this element, the 4th Circuit held that "[a]ny of the above incidents, viewed in isolation, would not have been enough to have transformed the workplace into a hostile or abusive one. No employer can lightly be held liable for single or scattered incidents. We cannot ignore, however, the habitual use of epithets here **or view the conduct without an eye for its cumulative effect.** Our precedent has made this point repeatedly. *Id.* at 319 (emphasis added) (internal citations omitted). The Circuit Court acknowledged and discussed only a handful of M. McKnight's allegations in reaching its conclusion that M. McKnight did not assert a viable claim, it failed to recognize the fact that individual allegations of discrimination cannot be viewed in isolation, but are to be viewed with an eye for its cumulative effect, which the Circuit Court failed to do in the present case.

[5] The Circuit Court does not cite to or rely on a single case that was resolved on a motion to dismiss.
[6] It is noteworthy that *Sunbelt Rentals* involved a case wherein summary judgment was reversed and the case was remanded with instructions to proceed to trial.

On review, it should be relevant that the Circuit Court failed to rely on a single case that was resolved on a motion to dismiss. The cases relied on by the Circuit Court were either resolved at the summary judgment level or proceeded to trial which is an indication of the fact sensitive nature or discrimination claims, the fact that discrimination is often an element to the mind, and that motions to dismiss are viewed with disfavor and are to be rarely granted.

It appears that the Circuit Court chose to ignore the well-established legal standards when reviewing the sufficiency of M. McKnight's Complaint and dismissing the same. First, the Circuit Court based its rulings in this case on the "heightened pleading" standard, not the "short and plain statement" standard. Recognizing that "heightened pleading" was not the proper standard, the Circuit Court engages in a pattern of logic wherein it weaves in and out of the "heightened pleading" standard, the "short and plain statement" standard and the summary judgment standard when evaluating the sufficiency of Petitioners' Complaint.

By way of example, the Circuit Court concludes that M. McKnight "has failed to bring allegations of fact, that if true, could permit her to succeed on her hostile environment claim." *J.A. 0298,* ¶ 65. The Circuit Court's conclusion is erroneous as M. McKnight does not have to alleged facts sufficient to "succeed" on her hostile environment claim, she only has to allege a short and plain statement of her claim, which she has done in her Complaint. On a motion to dismiss, the Circuit Court should not be concerned with whether M. McKnight has pled sufficient facts to "succeed" on her claim, but only whether her allegations constitute a claim under Rule 8(a). M. McKnight clearly satisfied this requirement.

The Court also concluded that "going through discovery would be futile." *J.A. 0297,* ¶ 63. Despite the Circuit Court's conclusion, every case it relied on in dismissing M. McKnight's hostile environment claim was resolved only after the parties were permitted to engage in discovery.

Consistent with *Conaway, supra,* discovery could lead to additional evidence which would support M. McKnight's hostile environment claim.

M. McKnight's Complaint set forth sufficient facts to allege a hostile environment claim that was in compliance with Rule 8 of the West Virginia Rules of Civil Procedure. For all of the aforesaid reasons, the Circuit Court erred in dismissing M. McKnight's hostile environment claim and the Circuit Court's decision should be reversed and remanded to Circuit Court for further development.

F. Petitioner, Luke McKnight's loss of consortium should be remanded along with M. McKnight's substantive claims.

The Court dismissed Luke McKnight's loss of consortium claim as it was derivative of M. McKnight's discrimination claims. Luke McKnight does not challenge the Circuit Court's decision as to this claim, but wants to assert his right to have his claim reinstated if this Court reverses and remand M. McKnight's discrimination claims.

CONCLUSION

Based on the foregoing, Petitioners pray that this Honorable Court enter an Order reversing the ruling of the Circuit Court and remanding the same for further proceedings.

Respectfully submitted this 6th day of November, 2023.

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No. 23-ICA-345

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Megan McKnight and Luke McKnight,
Plaintiffs Below,
Petitioners

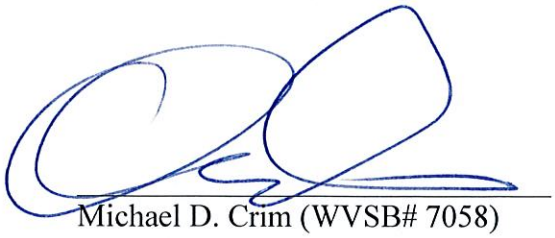
v.

Board of Governors of Glenville State University, Gary Z. Morris and Jason P. Barr
Defendants Below,
Respondents

On Appeal From the
Circuit Court of Gilmer County, West Virginia
The Honorable Richard Facemire
(Civil Action No. 22-C-17)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of November, 2023, a true and correct copy of the foregoing ***PETITIONERS' BRIEF*** was served upon counsel of record via the WV E-File system and/or via facsimile



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