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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

TO: THE HONORABLE JUSTICES OF THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGNIA

INTRODUCTION

The trial court failed to adequately and independently assess Respondents' self-serving, proposed order granting their motion to dismiss, which the trial court entered without making a single revision.[1] Moreover, the proposed order, which was filed by Respondents shortly after 11:00 a.m. on July 5, 2023, (*J. A. 189*) was entered by the trial court at approximately 5:14 p.m. on the same day. *J.A. 217-218.*[2] Relevant to this appeal is this Honorable Court's guidance in the recent case of *Jonpaul C. v. Heather C.*, 2023 W. Va. App. LEXIS 175, 889 S.E.2d 769 (2023), wherein it was provided that:

> this Court would be remiss if we failed to caution lower courts from automatically adopting and entering orders outright as prepared by counsel. In this case the family court entered an eighty-nine page order that was entirely prepared by respondent's counsel, without any corrections or revision of any kind. While it is the common practice of family courts' and other courts to request and rely on counsel to prepare an initial draft of a proposed order, **it remains incumbent upon lower court's to carefully review such an order and "determine if the submitted order accurately reflects the court ruling** given that it is well-established that a '[a] court of record speaks through its orders[.]'" . . .**[C]ourts must caution themselves from adopting wholesale orders without determining that the order adequately and accurately reflects the court's findings, analysis and rulings.**

Id., quoting in part, *Taylor v. Dept. of Health and Human Res.*, 237 W. Va. 549, 558, 788 S.E.2d 295, 304 (2016) (emphasis added).

The suggestion herein that the trial court failed to adequately and independently assess the

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[1] The circumstances surrounding the trial court's Order is addressed briefly in *Petitioners' Brief* at p. 13.

[2] Petitioners' counsel contacted the Circuit Clerk's office prior to the entry of the July 6, 2023, order and was advised that the trial court had entered the order on July 5, 2023, at 5:14 p.m., but that it would be re-entered on July 6, 2023, as the judge's signature was not functional at the time of its intended entry on July 5, 2023. The subsequent Order was entered on July 6, 2023. *J. A. 272.*

record is not made lightly. Unfortunately, it is painfully apparent that the trial court entered Respondents' proposed order without making a meaningful assessment of whether the proposed order was accurate and whether it reflected its findings, analysis and rulings. Examples of the trial court's lack of attention to the proposed order include the following:

1. the trial court entered the twenty-six (26) page *Order Granting Defendants' Motion to Dismiss* on Juily 5, 2023, within hours of its filing.

2. the trial court's entry of the *Order Granting Defendants' Motion to Dismiss* was prior to the deadline the trial court set for the submission of proposed orders. In its *Order Following Motion to Dismiss Hearing*, the trial court set July 7, 2023, as the deadline for submission of proposed orders. *J.A. 186;*

3. the trial court entered the *Order Granting Defendants' Motion to Dismiss* without removing Respondents' *Certificate of Service. J.A. 300;*

4. the *Order Granting Defendants' Motion to Dismiss* provides that "**the Court has thoroughly reviewed the parties' arguments and proposed findings of fact and conclusions of law,** the Complaint, and applicable law. . .." *J.A. 274 (emphasis added).*

Had the trial court taken the time to adequately and independently assess Respondents' proposed order, it more than likely would have removed the Respondents' *Certificate of Service;* would have realized that proposed orders were not yet due and would likely have awaited receipt of Petitioners' proposed order, or the expiration of the time for submitting the same, before entering Respondents' proposed order; and, would have likely corrected its statement about having "**thoroughly reviewed**" the parties' submissions.

It is clear from reviewing the relevant pleadings that the proposed *Order Granting Defendants' Motion to Dismiss* does little more than regurgitate the arguments set forth in

Respondents' *Memorandum of Law in Support of Defendants' Motion to Dismiss* (*J.A. 24*) and *Reply* (*J.A. 165*) without any real consideration of the allegations set forth in Petitioners' *Complaint, Response to Motion to Dismiss (J.A. 141)* or counsel's arguments, as will be discussed more fully below.

Respondents' arguments and the *Order Granting Defendants' Motion to Dismiss,* generally assert that Petitioners' factual allegations were insufficient to state a claim, whether under a "heightened pleading" or "notice pleading" standard. The *Complaint* includes 119 paragraphs and was more than sufficient to withstand a motion to dismiss, if properly evaluated consistent with the well-established law, under either standard. Petitioners maintain that the trial court committed reversible error when it dismissed Petitioners' claims.

For all of the reasons set forth herein, as well as in *Petitioners' Brief,* this Honorable Court should reverse the trial court's ruling as to each of Petitioners' claims and remand the case back to the trial court for further proceedings.

ARGUMENTS

A. Standard of Review.

Petitioners disagree with Respondents, and with the trial court, to the extent either suggests that the "heightened pleading" standard was required in this case where Petitioners plead facts that demonstrate a violation of the West Virginia Human Rights Act as such standard would be inconsistent with the West Virginia Supreme Court's holding in *Judy v. E. W. Va. Cmty. & Tech. Coll.,* 286 W. Va. 483, 874 S.E.2d 285, 290 (2022) (internal citations omitted).

B. The Circuit Court did not apply the correct legal standard in dismissing Petitioners' *Complaint.*

The trial court's *Order Granting Defendants' Motion to Dismiss* is a muddled mess when it comes to the legal standard applied to Petitioners' claims. Regarding Petitioners' constructive discharge claim, Respondents generally argue that the trial court applied the appropriate legal standard in dismissing the *Complaint. Resp. Brief*, pp. 13-14. However, a more careful study of the *Order Granting Defendants' Motion to Dismiss* shows that to be untrue.

Regarding the dismissal of Petitioners' constructive discharge claim, the trial court finds as follows: (1) "Plaintiff's allegations of fact demonstrate that she cannot succeed on a constructive discharge claim". *J. A.* 283, ¶ 27; (2) "Plaintiff's allegations of fact do not permit her to succeed on a constructive discharge claim as a matter of law". *J. A.* 285, ¶ 28; (3) "she cannot prove her claim". *J. A.* 286, ¶ 30; (4) "she will never be able to make the requisite showing at summary judgment or at trial". *J. A.* 286, ¶ 31. The trial court's conclusions necessarily implicate a standard more stringent in nature than the standard applicable to a motion to dismiss. The conclusions expressed by the trial court represent the standard that would apply on a motion for summary judgment or on a motion for judgment as a matter of law. "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 application of such a heightened standard at the initial pleading stage is erroneous and subject to reversal.

Regarding Petitioners' hostile work environment claim, the trial court is silent as to the legal standard it applied in dismissing the claim. The trial court does, however, conclude that "[p]laintiff has failed to bring allegations of fact that, if true, could permit her to succeed on her hostile work environment claims". *J. A.* 298, ¶ 65. As with the constructive discharge claim, this

conclusion smells of a standard that would be applied on consideration of a motion for summary judgment or a motion for judgment as a matter of law. The application of such a heightened standard at the initial pleading stage is erroneous and subject to reversal.

C. The Circuit Court erred in concluding that McKnight did not allege a viable constructive discharge claim and in dismissing the same on that basis.[3]

In dismissing their *Complaint*, the trial court failed to consider relevant factual issues alleged by Petitioners. In their *Brief*, Respondents regurgitate the findings and conclusions set forth in the proposed *Order Granting Defendants' Motion to Dismiss* which they prepared and which the trial court entered. In both the *Order Granting Defendants' Motion to Dismiss* and in Respondents' *Brief*, it is clear that the Court did not consider the totality of Petitioners' factual allegations. Instead, the trial court relied on a limited number of hand-picked factual allegations provided by Respondents in the proposed order, and disregarded numerous others, so that it would be in a position to conclude that Petitioners' allegations "demonstrate that Plaintiff was merely dissatisfied with her work assignments, felt unfairly criticized, and found some of her working conditions to be unpleasant." *J.A. 285, ¶ 28.* Characterizing the limited factual allegations relied on by the trial court in this manner permitted the trial court to reach a conclusion that came withing the holding in *Cox.*[4] *J.A. 285, ¶ 28.*

Petitioners also take exception to the trial court's findings that "she failed to bring any such allegations of fact in her Complaint. Similarly, she made no such allegations of fact in her response brief or during oral argument on the present motion." *J.A. 285, ¶ 30.* Contrary to the trial court's findings and conclusions, Petitioner McKnight's *Complaint*[5] includes 119 paragraphs, most of

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[3] Petitioners incorporate herein their arguments set forth in paragraph B regarding the trial court's failure to apply the appropriate legal standard when evaluating the motion to dismiss applicable to the constructive discharge claim.
[4] The *Cox* case was the only case cited by the Court that was resolved on a motion to dismiss.
[5] The second J.A. cite sets forth the location in the record where the numbered allegations from the Complaint are referred to in Petitioner's *Response to Motion to Dismiss.*

which set forth factual allegations regarding the discriminatory treatment she was subject to at GSU. Additionally, the trial court failed to address or consider in any manner the following factual allegations in evaluating the constructive discharge claim:

1. Denial of opportunity to seek tenure following receipt of Doctorate degree during the 2017-2018 academic year (*J. A. 11,* ¶¶ 36-38) (*J. A. 143*);

2. Denial of the opportunity to provide instruction to students in GSU's Bluegrass Program which she was hand-selected to lead after sending a rebuttal letter to Academic Affairs in response to Defendant Barr's evaluation (*J. A. 14,* ¶ 70) (*J. A. 150,* ¶ (xiii));

3. Denial of the opportunity to teach core classes in Appalachian Studies (*J. A. 14,* ¶ 72) (*J. A. 150,* ¶ (xiv));

4. In preparing the documentation she was required to submit to the Promotion and Tenure Committee, McKnight was instructed by Respondent 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.* 12, ¶ 48) (*J. A. 149,* ¶ (iii));

5. 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 Respondent GSU's policies and procedures (*J. A. 12,* ¶ 50) (*J. A. 144*);

6. 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 (*Complaint* ¶ 57) (*J. A. 145).*

Additionally, the trial court failed to address, let alone consider, the allegations related to Petitioner M. McKnight's stellar evaluations and performance prior to the current administration. Among the factual allegations set forth in the *Complaint* are the following:

1. Following completion of the 2011 – 2012 academic year, Dr. McKnight was given an overall evaluation of "Excellent" by GSU. GSU noted in its evaluation of Dr. McKnight that "she has been a blessing and a fantastic addition to the department!" (*J. A.* 10, ¶ 27) (*J. A. 142*).

2. Following completion of the 2012 – 2013 academic year, Dr. McKnight again received an overall evaluation of "Excellent" by GSU. GSU noted in her evaluation that Dr. 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.* 10, ¶ 29) (*J. A. 142).*

3. Following completion of the 2013 – 2014 academic year, Dr. McKnight again received an overall evaluation of "Excellent" by GSU. GSU noted in her evaluation that Dr. 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.* 11, ¶ 33) (*J. A. 142-143).*

4. Following completion of the 2015 – 2016 academic year, Dr. McKnight's evaluation found her to be proficient in all categories that were the subject of the evaluation. Teaching effectiveness comprised sixty percent (60%) of this evaluation. (*J. A.* 11, ¶ 34) (*J. A. 143).*

5. Regarding the 2018 – 2019 school year, the section of the evaluation titled "Instructional Activities – Course Development and Teaching Evaluation" included the following comments: "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.* 11, ¶ 40) (*J. A. 143-144).*

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). Moreover, 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.

Here, the trial court failed to identify, let alone consider, numerous factual allegations[6] as set forth in Petitioners' *Complaint* and/or in Petitioners' *Response to Motion to Dismiss,* each of which supports M. McKnight's constructive discharge claim.[7] Had the trial court considered all of Petitioner McKnight's factual allegations, it could not have reasonably concluded that the "Plaintiff was merely dissatisfied with her work assignments, felt unfairly criticized, and found some of her working conditions to be unpleasant" and, therefore, did not give rise to a viable claim pursuant to *Cox. J. A. 285, ¶ 30.* Moreover, the trial court could not have found that Petitioner McKnight failed to bring any such allegations of fact in her Complaint, her response to the motion to dismiss or in oral argument on the said motion. *J.A. 285, ¶ 30*[8].

The trial court's failure to consider these additional factual allegations, and the inferences arising therefrom, establishes the trial court's misapplication of the long, and well-established legal standard[9] which requires that all factual allegations be considered and presumed true. Moreover, Petitioner M. McKnight's allegations are more than sufficient to outline her constructive discharge claim, which is all she was required to do at the initial pleading stage. For these reasons, this Honorable Court should reverse the trial court's order granting Respondents' motion to dismiss her constructive discharge claim and remand the same to the trial court for further proceedings.

D. The Circuit Court erred in concluding that McKnight did not allege a viable sex/gender discrimination claim and in dismissing the same on that basis.

Respondents generally assert that the trial court's *Order Granting Defendants' Motion to Dismiss* was correct because "her Complaint demonstrates that she did not suffer any adverse

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[6] These factual allegations were omitted from the proposed *Order Granting Defendants' Motion to Dismiss* by Respondents and is further evidence that the trial court failed adequately and independently review the same to determine whether it was accurate and supported the trial court's ruling.

[7] Likewise, Respondents fail to reference these additional factual allegations in their *Brief.*

[8] This is yet another example of the trial court adopting without assessing Respondents' proposed order.

action/decision." *J. A. 288, ¶¶ 38, 39.* (*Resp. Brief* p. 21). The trial court's finding in this regard failed to consider all of Petitioners' factual allegations and construe them in accordance with the appropriate legal standard as will be discussed below.

Regarding these allegations, the trial court found that Petitioner McKnight "appears" to allege that her promotion/tenure process was delayed and that, as a result, she may have had lower earnings in the 2018-2019 and 2019-2020 academic years. However, again, Plaintiff brings no allegations of fact that that permit the inference that the timing of her tenure application and tenure review process had anything to do with her sex . . .." *J. A. 289,* ¶ 40. Contrary to the trial courts' findings, Petitioner McKnight specifically alleged that she was denied tenure and promotion upon receipt of her Doctor of Education Degree as promised by Respondent GSU (*J. A. 11,* ¶¶ 36-38) and that she would not have been so denied but for her gender. *J. A. 16,* ¶ 90. Clearly, the trial court did not accept Petitioner McKnight's factual allegations as true, which evidences the trial court's application of an erroneous legal standard.

In evaluating Respondents' motion to dismiss, the trial court was duty bound to accept all of Petitioner McKnight's factual allegations as true and give her the benefit of all reasonable inferences to be derived from the factual allegations. Had the trial court construed as true all of Petitioner McKnight's factual allegations and the reasonable inferences derived therefrom, it would have found that she was the subject of an adverse employment decision. Instead, the trial court concluded that Petitioner McKnight was not subjected to any adverse employment action or decision resulting from her denial of tenure and promotion.

The trial court further found that Petitioner McKnight's receipt of tenure and promotion following receipt of her Appalachian Studies certificate was on an expedited basis. *J. A. 289,* ¶ 40. However, there is no evidence in the record that supports the trial court's finding. Respondents

briefly refer to Petitioner M. McKnight's receipt of her Doctor of Education Degree in April 2018, but make no further comment. *Respondents' Brief* p. 24. Petitioner M. McKnight's allegations regarding the denial of tenure and promotion following receipt of her Doctor of Education Degree in April 2018 constitutes an adverse employment that alone was sufficient to defeat Respondents' motion to dismiss.

Petitioner M. McKnight has also alleged that she was the subject of adverse employment actions by Respondents in denying her the opportunity to serve on committees and to serve as a student advisor, both of which are requirements for promotion from associate professor to professor. *J. A. 14,* ¶¶ 66-69. The trial court found no adverse employment action resulting from Respondents' decisions, presumably because she was awarded tenure and promotion in the Fall of 2021. *J. A. 290,* ¶ 42. The trial court did not consider, however, that Petitioner McKnight's exclusion from these activities would be considered in her advancement from Associate Professor to Professor. Again, such factual allegations are sufficient, when construed in accordance with the appropriate legal standards, to establish that Petitioner McKnight was subjected to adverse employment decisions.

The trial court found that Petitioner, M. McKnight's, "only allegation approaching a claim of an adverse employment action is her allegation that GSU refused to provide Dr. McKnight with a contract or stipend to operate the Pioneer Stage during the 2021-2022 academic year despite the fact that GSU had agreed to provide the same through 2023." *J. A. 288,* ¶ *39.* The trial court then found that "Plaintiff brings no allegations of fact that create an inference that the alleged refusal had anything to do with her sex or that similarly situated male received more favorable treatment. Instead, she alleges only that GSU did not follow through with a promise." *J. A. 288,* ¶ *39.* Contrary to the trial court's findings, Petitioner McKnight specifically alleged that Respondents'

actions would not have occurred but for her gender (*J. A. 16,* ¶ 90) and that she was compensated at a rate less than similarly situated male employees *J. A. 16,* ¶ *88.* Again, had the court construed the allegations utilizing the appropriate legal standard, the trial court would have concluded that Respondents' refusal to provide Petitioner McKnight the stipend she was promised to operate the Pioneer Stage constituted an adverse employment action.

It is instructive that each and every case on which the trial court relied to support the entry of the *Order Granting Defendants' Motion to Dismiss* Petitioner McKnight's sex/gender discrimination claim all survived a motion to dismiss. Of the cases cited by the trial court, it leaned most heavily, if not exclusively, on the *Mveng-Whitted* case which had some similarities to the present case. *Mveng-Whitted* survived dismissal despite the fact that there were no allegations regarding the denial of tenure and promotion or the reduction in wages, as are present in this case.

For all of the aforesaid reasons, the trial court erred in dismissing Petitioner M. McKnight's sex/gender discrimination claim and this Honorable Court should reverse the same and remand the case back to the trial court for further development and trial.

E. **The Circuit Court erred in concluding as a matter of law that Petitioner, Megan McKnight, did not sufficiently allege claims against Defendants Morris and Barr, and, thus, in dismissing her claims.**

In their *Brief,* Respondents generally argue in Section 1 that the allegations against Respondents Morris and Barr were properly dismissed because Petitioners' allegations do not implicate unlawful conduct (*Resp. Brief pp.* 26-29) and in Section 2 they argue that Petitioners' claims against Respondents' Morris and Barr were properly dismissed because they were only sued in their individual capacity. (*Resp. Brief pp. 30-31*). Regarding Respondents' Section 1 argument, Petitioners state that their allegations are more than sufficient to implicate discriminatory conduct.

Petitioners assert that even if the trial court only considered the limited allegations referred to in its *Order Granting Defendants' Motion to Dismiss* as to this claim, the allegations were sufficient to set forth a viable cause of action against Morris and Barr which should have overcome a motion to dismiss. However, as with other claims, the trial court failed to consider or address all of the factual allegations relevant to Petitioner M. McKnight's claims against Morris and Barr.

One important factual allegation that the trial court failed to consider or even reference in the *Order Granting Defendants' Motion to Dismiss* is Petitioner McKnight's allegation that she was retaliated against by Morris and Barr for reporting discriminatory actions and conduct during her employment at GSU. *J. A. 17, ¶ 97.* This factual allegation alone, if considered by the trial court and presumed to be true, was sufficient to defeat Respondents' motion to dismiss as to these claims against Morris and Barr.

Respondents' Section 2 argument is misplaced and must fail as Petitioners' claims against Morris and Barr fall squarely within Syl. Pts. 2, *Holstein v. Norandex, Inc.,* 194 W. Va. 727, 461 S.E.2d 473 (1995). Syl. Pt. 2 specifically provides that:

> An 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, this his principle or employer may also be held liable.

Id., (internal citations omitted). Similar to this case, the Plaintiff alleged discrimination claims against both his employer and his employer's manager. The claims against the manager were in his individual capacity. The manager was dismissed as a party, but on appeal, the West Virginia Supreme Court found dismissal improper and reversed and remanded the case to the trial court for further proceedings. In this case, Petitioners have alleged a viable claim against Respondents

Morris and Barr and dismissal was not only improper, but was contrary to established West Virginia precedent.[10]

For all of the aforesaid reasons, the trial court erred in dismissing Petitioner McKnight's claims against Respondents' Morris and Barr and this Honorable Court should reverse the same and remand the case back to the trial court for further proceedings.

F. The Circuit Court erred in concluding as a matter of law that Petitioner, Megan McKnight, did not sufficiently allege a viable hostile work environment claim and in dismissing the same on that basis.[11]

The trial court properly notes in the *Order Granting Defendants' Motion to Dismiss* in "determining whether the harassing conduct was objectively severe or pervasive, [the court] must look to all the circumstances . . .." *J. A.* 295, ¶ 58. It is clear that the trial court failed to independently assess the proposed order submitted by Respondents prior to adopting it in its entirety because it failed to consider all of the circumstances upon which the hostile work environment claim was based.

In the *Order Granting Defendants' Motion to Dismiss* the trial court found that Petitioner McKnight's claim was based on "her dissatisfaction with her work assignments as well as just two alleged incidents: one, while Plaintiff was present, in which Barr suggested that another female (not Plaintiff) must have slept with someone to get a promotion; and another where Morris referred to Plaintiff as "this girl" and commented that she should be staff, not faculty. (Comp., ¶¶ 104, 108). Plaintiff's only other allegation in Count III is that "[u]pon information and belief" Barr and Morris' actions and comments "were not isolated occurrences and said defendants were known to

[10] In its *Order Granting Defendants' Motion to Dismiss*, the trial court fails to acknowledge or address *Holstein*. Another example of the trial court failing to independently address and consider the proposed order submitted by Respondents or the arguments of Petitioners.

[11] Petitioners incorporate herein their arguments set forth in paragraph B regarding the trial court's failure to apply the appropriate legal standard when evaluating the motion to dismiss applicable to the hostile work environment claim.

make such comments to and/or about females with whom they worked." (Comp., ¶ 110). *J. A. 297* ¶ 61. Relying on these limited allegations, Respondents generally argue that Petitioner McKnight's hostile work environment claim was properly dismissed by the trial court.

The trial court failed to consider any of Petitioner McKnight's other factual allegations as set forth herein and/or within the *Complaint.* Importantly, one of the factual allegations that the trial court failed to acknowledge or consider was Petitioner McKnight's allegation of retaliation by Respondents for her reporting of discriminatory conduct. *J. A. 17, ¶ 97.* The trial court recognized that it was required to consider all of the circumstances alleged by Petitioner McKnight in evaluating whether the conduct was severe and pervasive, yet failed to do so. Moreover, the trial court failed to accept all of Petitioner McKnight's factual allegations, and the reasonable inferences raised therefrom, as true. The trial court failed to comply with these well-established legal obligations in adopting Respondents proposed order.

Finally, Respondents raise as an issue in their *Brief* regarding the fact that the trial court's order relied on cases decided at the summary judgment stage or following trial. *Resp. Brief* at p. 34. The purpose behind raising this issue is to the amplify the infrequency on which motions to dismiss are granted in discrimination cases, particularly when a trial court applies the appropriate legal standard.

Regarding this case, the trial court adopted in its entirety the one-sided findings and conclusions as presented in Respondents' proposed order granting their motion to dismiss. The trial court did not follow and apply the well-established law in considering the motion to dismiss and committed reversible error in granting the said motion. For all of the aforesaid reasons, this Honorable Court should reverse the trial court's ruling and remand the case back to the trial court for further proceedings.

G. Conclusion.

The trial court did not follow and apply the well-established law in considering the motion to dismiss and committed reversible error in granting the said motion. Accordingly, this Honorable Court should reverse the trial court's ruling and remand the case back to the trial court for further proceedings.

Respectfully submitted this 10th day of January, 2024.

/s/ Michael D. Crim

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2024, a true and correct copy of *Petitioners' Reply Brief* was filed and served electronically via File & ServeXpress on counsel of record:

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