IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Megan McKnight and Luke McKnight,
Plaintiffs Below, Petitioners

v. **No. 23-ICA-345**

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
Honorable Richard Facemire
Civil Action No. 22-C-17

BRIEF OF RESPONDENTS, THE BOARD OF GOVERNORS OF GLENVILLE STATE UNIVERSITY, GARY Z. MORRIS, AND JASON P. BARR

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STATEMENT OF THE CASE

Plaintiff Megan McKnight ("Dr. McKnight") was a tenured professor working at Glenville State University pursuant to a contract at the time of her resignation on November 9, 2021. (*See* JA 0013, 00016 ¶¶ 60-62, 82.)[1] Plaintiff Luke McKnight ("Mr. McKnight") is her husband. (JA 0008, ¶ 4.) On December 16, 2022, Dr. and Mr. McKnight filed suit, naming Glenville State University, the Board of Governors of Glenville State University ("GSU"), Gary Z. Morris, and Jason P. Barr as defendants. (JA 0008.) On about February 4, 2020, Morris became the Provost and Vice President of Academic Affairs at GSU, a position he held at all relevant times, and Barr became the Chair of the Fine Arts Department at GSU on about June 22, 2019. (JA 0009, ¶¶ 9, 12.) Dr. McKnight's claims in this civil action stem from her employment at Glenville State University, and Mr. McKnight's loss of consortium claim is derivative of Dr. McKnight's claims.

On May 30, 2023, the circuit court entered the parties' Agreed Dismissal Order as to Glenville State University, with prejudice, on the basis that the University is not the employer; rather, GSU (i.e., the Board of Governors of Glenville State University) is the employer of all personnel at Glenville State University. (JA 0182-84.) The dismissal of Glenville State University is not at issue in this appeal; rather, Dr. and Mr. McKnight challenge the dismissal of the claims against the other defendants below (respondents here), GSU, Barr, and Morris. Unless otherwise indicated, the following is a statement of the factual allegations in the Complaint.

"On March 23, 2021, Defendant Morris advised GSU's President, Dr. Mark Manchin, that the 2020-2021 Promotion and Tenure Committee recommended that Dr. McKnight be awarded both a promotion and tenure." (JA 0012, ¶ 46.) Dr. McKnight alleges on information and belief that Morris "actively lobbied the Promotion and Tenure Committee to deny Dr. McKnight tenure

[1] References to "JA" are references to the Joint Appendix.

which she believes was due to her gender." (JA 0012, ¶ 47.) However, Dr. McKnight also alleges that, "[i]n forwarding the recommendation of the Promotion and Tenure Committee to the President of GSU, Defendant Morris said that he agreed with the recommendation, but still wanted to deny Dr. McKnight promotion and tenure until she completed a graduate certificate in Appalachian Studies" and also allegedly "misrepresented" that Dr. McKnight did not have the academic credentials to teach music or Appalachian Studies. (JA 0013, ¶¶ 54, 55.)

Dr. McKnight also alleges on information and belief that Barr "gave a negative evaluation of Dr. McKnight to the Promotion and Tenure Committee . . ., which Dr. McKnight believes was due to her gender." (JA 0012, ¶ 49.) Dr. McKnight prepared and submitted to Academic Affairs a rebuttal addressing Barr's evaluation. (JA0013, ¶ 53.)

On or about March 30, 2021, Dr. McKnight was advised "that she would be promoted to the rank of Associate Professor . . . and awarded tenure effective with the start of the academic year following completion of her graduate certificate in Appalachian Studies," which she completed in the spring of 2021. (JA 0013, ¶¶ 59-60.)

Dr. McKnight's contracts with GSU covering the 2021-2022 academic year are central to her claims and are undisputed, and therefore GSU, Morris, and Barr attached them to their motion to dismiss.[2] (JA 0026, 0045, 0046.) A review of Dr. McKnight's contract for the 2021-2022

[2] "The mere fact that documents are attached to a Rule 12(b)(6) motion to dismiss does not require converting the motion to a Rule 56 motion for summary judgment. Under the doctrine of 'incorporation by reference[,]' a document attached to a motion to dismiss may be considered by the trial court, without converting the motion into one for summary judgment, only if the attached document is (1) central to the plaintiff's claim, and (2) undisputed." Cleckley, Davis, and Palmer, Litigation Handbook on West Virginia Rules of Civil Procedure, 4th ed., §12(b)(6)[3], p. 394 (hereinafter "Cleckley"); *see also Forshey v. Jackson*, 222 W. Va. 743, 747–48, 671 S.E.2d 748, 752–53 (2008). Documents that may be considered on a motion to dismiss include documents annexed to the pleadings "'and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it.'" *Forshey*, 222 W. Va. at 748, 671 S.E.2d at 752 (quoting Cleckley, § 12(b)(6)[2], at 348). Here, the contracts that were attached to GSU, Barr, and Morris's motion to dismiss are central to Dr. McKnight's claims and are undisputed, and they were fairly incorporated within the Complaint. (*See* Complaint, JA 0013, ¶¶ 61-63.) Therefore, the circuit court properly considered them, and this Court may consider them in reviewing the

academic year, which is dated April 22, 2021, demonstrates that it provided that Dr. McKnight was an Assistant Professor of Appalachian Studies (in the Department of Social Sciences) and that Dr. McKnight would be awarded tenure and a promotion on receipt of her official transcript, so long as it was provided by December 1, 2021, showing she had completed the certificate in Appalachian Studies. (Contract, JA 0045; *see also* JA 0013, ¶¶ 61-62.) In August 2021, Dr. McKnight and GSU entered into a revised employment contract reflecting her tenure, promotion to Associate Professor of Appalachian Studies, and 10% raise. (JA 0046; *see* JA 0045.)

In her Complaint, Dr. McKnight alleges that her 2021-22 contract to teach at GSU required her to teach 12 credit hours, but she was offered only 11 credit hours to teach. (JA 0013, ¶ 63.) One course she had taught for a decade was assigned to a male instructor. (JA 0015, ¶¶ 75.) Allegedly concerned that GSU had not assigned "her enough instructional hours to meet her contractual obligations, Dr. McKnight offered to teach" additional courses, but those requests were denied. (JA 0015, ¶¶ 75, 79.) Both her initial and her revised contracts for the 2021-2022 academic year reveal, however, that Dr. McKnight was expected to teach 24 credit hours over the course of the academic *year*; she was not required to teach 12 credit hours in the fall semester. (JA 0045; JA 0046.)

According to the Complaint, Dr. McKnight was told "that she would no longer be paid for any services she provided to the Bluegrass program," which she had directed until the 2019-2020 academic year. (JA 0011, ¶ 35; JA 0015, ¶ 77.) Her contract for the 2021-2022 academic year – which Dr. McKnight executed – also did not provide that Dr. McKnight would operate the Pioneer Stage, which she had established between 2016 and 2020.[3] (JA 0011, ¶ 35; JA 0015, ¶ 78; *see* JA

appropriateness of the dismissal of this civil action. Moreover, in their appeal, the McKnights do not challenge the circuit court's reliance on the contracts.

[3] Dr. McKnight claims GSU had agreed to provide her with a contract or stipend to operate the Pioneer Stage through 2023 (JA 0015, ¶ 78), but she did not bring a breach of contract claim on that (or any) basis.

0045; JA 0046.) Dr. McKnight alleges that she "was not presented with opportunities to serve on committees" (a factor considered in promotion and tenure reviews) or assigned "a full slate of student advisees" (although student advising is required) after Morris became Provost and Vice President of Academic Affairs. (JA 0014, ¶¶ 66-69.)

She further alleges that after she completed her Appalachian Studies "degree" in the spring of 2021, she was denied "the opportunity to teach any core classes within the Appalachian Studies program," with the exception of one course. (JA 0013-15, ¶¶ 60, 72.) Meanwhile, GSU and Morris allegedly hired two male instructors, one to teach and advise all Appalachian Studies courses, and another "to teach history courses that Dr. McKnight was qualified to teach." (JA 0015, ¶¶ 73-74.) Dr. McKnight also alleges that after she completed "her terminal degree in Appalachian Studies," her office was relocated from the Pioneer Stage Bluegrass Music Education Center, where she used to work, to an office her colleagues allegedly referred to as the "broom closet" in the Department of Social Sciences, the department in which she was an Associate Professor. (JA 0015, ¶ 76.)

Dr. McKnight filed a grievance with the Public Employees Grievance Board regarding allegedly discriminatory conduct, but her grievance was dismissed after she resigned from her employment. (JA 0015-16, ¶¶ 80, 82-83.) She alleges that Morris instructed one or more of Dr. McKnight's colleagues not to have contact with her after she filed her grievance. (JA 0015, ¶ 81.)

Stemming from her allegations, Dr. McKnight has brought three causes of action. Count I is brought against GSU only and alleges a violation of the West Virginia Human Rights Act ("WVHRA"). (JA 0016-17.) Dr. McKnight claims, on information and belief, that due to her gender, she was paid at a lower rate and denied the same terms and conditions of employment than similarly situated male employees and that her compensation was improperly withheld on more

than one occasion. (JA 0016, ¶¶ 88-90.) Count II is brought against Morris and Barr in their individual capacities, and in it, Dr. McKnight alleges that they violated the WVHRA (W. Va. Code § 5-11-9(7)). (JA 0017, ¶¶ 97-102.) In Count III, Dr. McKnight alleges that she was subjected to a gender-based hostile work environment in violation of the WVHRA. (JA 0018-19.)

Dr. McKnight does not claim in Count I (or in any other count) that she was constructively discharged. However, in the "facts" portion of her Complaint, she alleges that she "was constructively discharged and/or resigned her employment at GSU on November 9, 2021, due to the unlawful and discriminatory conduct directed at her by GSU and the individual defendants as set forth herein." (JA 0016, ¶ 82.) In Counts I, II, and III, when listing her alleged damages, she includes alleged "loss of wages and benefits and a loss of her career." (JA 0016-17, 0019, ¶¶ 93, 101, 117.)

In Count IV, Mr. McKnight brings a claim for loss of consortium. (JA 0019, ¶¶ 118-19.)

The McKnights filed their Complaint on December 16, 2022. (JA 0008.) GSU, Barr, and Morris filed their Motion to Dismiss, along with a supporting memorandum of law, on February 13, 2023. (JA 0021, JA 0024.) The following day, on February 14, 2023, the circuit court entered an Order giving Dr. and Mr. McKnight ten days to file a written reply to the Motion to Dismiss and giving the parties the option to schedule a hearing for oral argument on the motion. (JA 0138.) Dr. and Mr. McKnight filed a brief opposing the Motion to Dismiss on February 28, 2023. (JA 0141.) On April 14, 2023, GSU, Barr, and Morris moved the circuit court for leave to file a reply brief in support of their Motion to Dismiss, and they attached their reply brief to that motion. (JA 0161, JA 0164-77.) On April 25, 2023, the circuit court granted that motion and directed that the reply brief that GSU, Barr, and Morris filed as an exhibit "shall be filed and made a part of the record." (JA 0179.) The circuit court also ordered that a hearing on the Motion to Dismiss would

"remain on the Court's docket for a hearing on the Motion to Dismiss on May 22, 2023, at 10:00 a.m." (JA 0179 (emphasis omitted).)

The hearing on the Motion to Dismiss took place as scheduled, with all parties represented by counsel and Dr. and Mr. McKnight also appearing in person. (JA 0301-02.) After the hearing, the circuit court entered its Order Following Motion to Dismiss Hearing, in which it noted that it had heard oral argument and was taking the motion under advisement. (JA 0186.) The circuit court also noted that it had "directed the parties to submit proposed findings of fact and conclusions of law pertaining to Defendants' Motion to Dismiss no later than July 7, 2023." (JA 0186 (footnote omitted).) In the morning of July 5, 2023, GSU, Morris, and Barr filed their proposed "Order Granting Defendants' Motion to Dismiss." (JA 0190-216.) In the evening of July 5, 2023, and then again on the morning of July 6, 2023, the circuit court entered its "Order Granting Defendants' Motion to Dismiss." (JA 0218.) In that order, based on comprehensive findings of fact and conclusions of law, the circuit court dismissed the entire civil action. (JA 0218-43; JA 0274-99.)

SUMMARY OF ARGUMENT

The circuit court did not err when it dismissed the McKnights' Complaint, and its decision should be affirmed. This Court applies a *de novo* standard of review in this appeal.

Issue No. 1: The McKnights claim that the circuit court erred by holding them to a heightened pleading standard although it should have applied the notice pleading standard. Application of the heightened pleading standard would have been appropriate because GSU is a State agency, and thus it and its employees are entitled to qualified immunity under certain circumstances. Nevertheless, the circuit court explicitly noted that the notice pleading standard was not met with regard to Dr. McKnight's constructive discharge claim, sex discrimination claim (Count I), and hostile work environment claim (Count III). It implicitly applied the notice pleading

standard in Count II, which was brought against two individuals in their individual (not official) capacities. The circuit court applied the correct pleading standard and found that, even under that standard, Dr. McKnight had failed to state a claim upon which relief can be granted. The circuit court's decision should be affirmed.

Issue No. 2: Dr. McKnight argues that the circuit court erred in dismissing her constructive discharge claim. She claims that she should be permitted to engage in discovery so that she may uncover facts that support her claim. The fatal flaw with her argument is that her claim must be based on her own working environment – her own past experience – not anything that she could discover in the future. The crux of a constructive discharge claim is that the *plaintiff's* work environment must have been intolerable. If Dr. McKnight's work environment had truly been intolerable, she would already be able to articulate facts demonstrating the intolerable nature of her working conditions; such facts are not something she can discover. The fact that Dr. McKnight's allegations of fact are not actionable demonstrates that there are no facts she could prove (or discover) that would permit her to recover on her claim. Accordingly, the circuit court did not err when it dismissed the constructive discharge claim, and its decision should be affirmed.

Issue No. 3: Dr. McKnight also argues on appeal that the circuit court erred when it dismissed her sex discrimination claim in Count I. She argues that the circuit court applied the wrong standard when considering her allegations of fact. However, the circuit court noted that the notice pleading standard was not met, which is the standard Dr. McKnight thinks should have been applied. Moreover, a necessary element of Dr. McKnight's claim is that she must have suffered some adverse employment action or decision due to her sex. Here, however, Dr. McKnight's Complaint, as well as her employment contracts with GSU for the academic year in which she resigned, demonstrate that Dr. McKnight did not suffer an adverse employment action or decision.

To the contrary, just before she resigned, she was granted tenure and a promotion, with a ten percent raise. Thus, the terms and conditions of her employment improved significantly. Case law demonstrates that under these circumstances, Dr. McKnight cannot succeed on her claim, and the circuit court's decision to dismiss Count I should be affirmed.

Issue No. 4: The circuit court also did not err when it dismissed Dr. McKnight's sex discrimination claims against Morris and Barr in Count II. Dr. McKnight alleges that the circuit court ignored some of her allegations of fact when it dismissed the claim. However, even considering all of Dr. McKnight's allegations of fact, she still has failed to state a viable claim against Morris or Barr. Her claim is brought under the West Virginia Human Rights Act ("WVHRA"), which prohibits individuals from engaging in threats, reprisal, and/or harassment; from aiding, abetting, inciting, compelling, or coercing another to engage in an unlawful discriminatory practice; from willfully obstructing or preventing someone from complying with the WVHRA; and from engaging in reprisal or discrimination against a person due to that person's opposition to practices or acts prohibited by the WVHRA. W. Va. Code § 5-11-9(7)(A) – (C). Dr. McKnight's allegations of fact do not show that Morris or Barr engaged in any of these prohibited acts; they did not threaten or harass her, and they did not engage in reprisal, aiding, abetting, or any other unlawful conduct, particularly considering McKnight's allegation that Morris ultimately supported her tenure application and that she was granted tenure, a promotion, and a raise just before she resigned. The circuit court's conclusion that Dr. McKnight failed to bring factual allegations that support her claim against Morris and Barr should be affirmed.

Furthermore, Morris and Barr were sued only in their individual capacities, which affects the application of immunity and whether GSU may be liable for their conduct. The distinction between suing a person individually or in their official capacity has real legal ramifications, and

the circuit court properly recognized that, although Morris and Barr were sued only in their individual capacities, all claims about them implicated only acts undertaken in their official capacities. The circuit court thus did not err when it dismissed Count II for this additional reason.

Issue No. 5: The circuit court also did not err when it dismissed Dr. McKnight's hostile work environment claim in Count III. Aside from challenging the standard of review applied by the circuit court, Dr. McKnight argues that she should be permitted to engage in discovery so she can attempt to find facts in support of her claim. But Count III suffers from the same infirmity as Dr. McKnight's constructive discharge claim. That is, to prove her claim, Dr. McKnight will eventually have to prove that her own working environment was abusive, but she has not brought even allegations of fact that, if true, would satisfy that necessary element of her claim. Again, information about what Dr. McKnight's work environment was like is not something she can discover; she already knows what her work environment was like. Thus, the fact that even her allegations about it do not satisfy her claim necessarily means that discovery would be futile. At best, Dr. McKnight could attempt to prove her allegations through discovery, but even if she could, she still could not prove her claim. Therefore, the circuit court did not err when it concluded that, even under the notice pleading standard, Dr. McKnight has failed to state a hostile work environment claim.

Issue No. 6: Finally, Mr. McKnight's derivative loss of consortium claim was properly dismissed because all of Dr. McKnight's claims were dismissed.

For these reasons, explained in greater detail below, the circuit court's decision dismissing the Complaint should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is not necessary in this case because the dispositive issues have been authoritatively decided, and the decisional process would not be significantly aided by oral argument. This case would be appropriate for a memorandum decision because just cause exists for summary affirmance of the circuit court. *See* W. Va. R. App. P. 21(c).

ARGUMENT

A. Standard of Review

In this appeal, Dr. and Mr. McKnight appeal the dismissal of their claims pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "In actions resulting in an appeal from a Rule 12(b)(6) dismissal, review by this Court is *de novo.*" *Highmark W. Va., Inc. v. Jamie*, 655 S.E.2d 509, 513 (W. Va. 2007).

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure provides that a defendant may move to dismiss an action when the plaintiff's complaint fails to state a claim upon which relief can be granted. "'A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.'" *Williamson v. Harden*, 585 S.E.2d 369, 371 (W. Va. 2003) (citations omitted). Generally, "'[o]n a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff. However, a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations.'" *Brown v. City of Montgomery*, 755 S.E.2d 653, 661 (W. Va. 2014) (citation omitted).

"The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist." *Fass v. Nowsco Well Serv., Ltd.*, 350 S.E.2d 562, 563 (W. Va. 1986) (citations omitted). "[E]ssential material facts must appear on the

face of the complaint." *Id.* A "plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint.'" *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 522 (W. Va. 1995) (citation omitted).

GSU is a State agency. *See* W. Va. Code § 18B-2A-1(b) (listing Glenville State College as one of the State's institutions of higher learning); W. Va. Code § 18B-2A-6(d) (designating Glenville State College as a university); *Beichler v. W. Va. Univ. at Parkersburg*, 700 S.E.2d 532, 534 (W. Va. 2010) (finding that West Virginia University at Parkersburg is a State agency because it is listed as one of the State's institutions of higher learning in W. Va. Code § 18B–2A–1(b)). As such, GSU and its employees are entitled to application of qualified immunity in certain situations: "'Qualified immunity preserves the freedom of the State, its agencies, and its employees to deliberate, act, and carry out their legal responsibilities within the limits of the law and constitution.'" *W. Va. Dep't of Educ. v. McGraw*, 800 S.E.2d 230, 235 (W. Va. 2017) (footnote omitted). Unless a statute imposes an express limit, "the sweep of" qualified immunity "is necessarily broad"; it protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Hutchison v. City of Huntington*, 479 S.E.2d 649, 658 (W. Va. 1996) (citation omitted).

The "need for early resolution" of a case is "particularly acute" when qualified immunity is at issue. *Id.*, 479 S.E.2d at 657. Immunities "grant governmental bodies and public officials the right not to be subject to the burden of trial," which includes being spared from going "forward with an inquiry into the merits of the case." *Id.*, 479 S.E.2d at 658. "Public officials and local government units should be entitled to qualified immunity . . . unless it is shown by specific allegations that the immunity does not apply." *Id.*, 479 S.E.2d at 657–58.

Accordingly, "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Id.*, 479 S.E.2d at 659. A circuit court errs if it applies the

notice pleading standard, rather than the heightened pleading standard, in cases involving qualified immunity. *W. Va. Reg'l Jail & Corr. Facility Auth. v. Est. of Grove*, 852 S.E.2d 773, 782 (W. Va. 2020). When qualified immunity is involved, "plaintiffs 'should supply in their complaints or other supporting materials greater factual specificity and particularity than is usually required.'" *Id.*

The heightened pleading standard does not apply if a plaintiff pleads facts that demonstrate a violation of the WVHRA, and a plaintiff need not anticipate an immunity defense in her complaint. *Judy v. E. W. Va. Cmty. & Tech. Coll.*, 874 S.E.2d 285, 290 (W. Va. 2022) (citation omitted). However, where a complaint does not contain "sufficient detail to survive a motion to dismiss" but qualified immunity is implicated, heightened pleading is necessary. *C.f. id.*, 874 S.E.2d at 290–91 ("under the plain language of *Hutchison*, 'heightened pleading' would not have been necessary in this case because Petitioner's Amended Complaint already contained sufficient detail to survive a motion to dismiss").

B. The Circuit Court Applied the Correct Standard When Dismissing the Complaint

Here, it would have been appropriate for the circuit court to have applied the heightened pleading standard because, as shown above, GSU is a State agency. As such, it is entitled to qualified immunity under some circumstances. Indeed, while her other claims were brought under the West Virginia Human Rights Act ("WVHRA"), Dr. McKnight's constructive discharge claim is a common law claim, not a statutory claim brought under the WVHRA, and thus she was required to satisfy the heightened pleading standard. *See Blessing v. Supreme Court of Appeals of W. Va.*, No. 13-0953, 2014 W. Va. LEXIS 580, at *3 (May 27, 2014) (mem. decision) (characterizing a constructive discharge claim as a common law claim); *Slack v. Kanawha Cty. Hous. & Redevelopment Auth.*, 423 S.E.2d 547, 549 (W. Va. 1992) (recognizing a constructive

discharge cause of action and outlining what an employee must prove to succeed on a claim: a retaliatory discharge plus "intolerable conditions").

Although application of the heightened pleading standard would have been appropriate, when dismissing this civil action, the circuit court recognized that neither the notice pleading standard nor the heightened pleading standard had been satisfied. Importantly, the notice pleading standard does not permit a plaintiff to rely on legal conclusions; even under the notice pleading standard, a complaint is insufficient unless it contains allegations of essential material facts that, if true, would permit the plaintiff to recover. *Brown v. City of Montgomery*, 755 S.E.2d 653, 661 (W. Va. 2014); *Fass v. Nowsco Well Serv., Ltd.*, 350 S.E.2d 562, 563 (W. Va. 1986). The circuit court correctly found that the McKnights' complaint failed to meet even the more lenient notice pleading standard.

In a recent case that the McKnights cite to, (Pet'r's Brief, at 19-20), our Supreme Court of Appeals, discussing the notice pleading standard, explained that the Complaint needs to "outline the alleged occurrence" that, if proved, would justify relief. *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 854 S.E.2d 870, 883 (W. Va. 2020). The Court noted, "Stated in the vernacular, a complaint need only provide the who, what, where, and when of a problem, so that the responding party can formulate a response and the court can begin to decide how to remedy that problem." *Id.*, 854 S.E.2d at 884 n.5. The Court also reiterated that a "'trial court should not dismiss a complaint where sufficient facts have been alleged that, if proven, would entitle the plaintiff to relief.'" *Id.*, 854 S.E.2d at 884 (citation omitted). While the Court stated that the *legal theory* need not be perfectly stated, *id.* (citation omitted), plainly, to survive dismissal, a complaint must contain allegations of *fact* that, if true, would permit the plaintiff to recover.

In the present civil action, ***the circuit court explicitly found that neither the heightened pleading standard nor the notice pleading standard was met*** with regard to the constructive discharge claim (JA 0286, ¶ 31); with regard to the sex discrimination claim against GSU brought under the WVHRA in Count I (JA 0287, ¶ 36); and with regard to the hostile work environment claim brought under the WVHRA in Count III (JA 0298, ¶ 65). The circuit court impliedly applied the notice pleading standard with regard to the sex discrimination claim against Morris and Barr in Count II, finding that the allegations of fact in the Complaint about their alleged acts and omissions did not implicate the WVHRA at all, and also finding that although Morris and Barr had been sued in their individual capacities only, although all conduct alleged of them occurred in their official capacities. (*See* JA 0292, ¶ 48; J 0294, ¶¶ 51, 53, 55.) The failure of all of Dr. McKnight's claims necessarily resulted in the dismissal of Mr. McKnight's derivative loss of consortium claim. (JA 0298-99, ¶¶ 66-68.)

As is shown in the following sections, the circuit court did not err in finding that, even under the notice pleading standard, the McKnights' Complaint lacks any factual allegation that would permit Dr. McKnight to succeed on any of her claims, and thus Mr. McKnight's derivative loss of consortium claim also fails as a matter of law.

C. The Circuit Court Did Not Err When It Dismissed Dr. McKnight's Constructive Discharge Claim

A claim for constructive discharge "arises when the employee claims that because of age, race, sexual, or other unlawful discrimination, the employer has created a hostile working climate which was so intolerable that the employee was forced to leave his or her employment." Syl. Pt. 4, *Slack v. Kanawha Cty. Hous. & Redevelopment Auth.*, 423 S.E.2d 547 (W. Va. 1992). To succeed on a constructive discharge claim, "a plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be

compelled to quit." Syl. Pt. 6, in part, *Slack*, 423 S.E.2d at 549. "Proof of this element may be determinative of the case: If the working conditions are not found to be intolerable, then there is no need for the court to consider the constructive discharge claim any further." *Slack*, 423 S.E.2d at 556 (citations omitted).

As the District Court for the Southern District of West Virginia stated when addressing a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6),

> Intolerability "is not established by showing merely that a reasonable person, confronted with the same choices as the employee, would have viewed resignation as the wisest or best decision, or even that the employee subjectively felt compelled to resign." . . . Rather, intolerability "is assessed by the objective standard of whether a reasonable person in the employee's position would have felt *compelled* to resign, ... that is, whether he would have had *no choice* but to resign." . . . **"[M]ere dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions" do not constitute objectively intolerable conditions. . . . "Because the claim of constructive discharge is so open to abuse by those who leave employment on their own accord, [the Fourth Circuit] has insisted that it be carefully cabined." . . .**

Cox v. Huntington Museum of Art, Inc., No. CV 3:20-0142, 2020 WL 1958635, at *4 (S.D.W. Va. Apr. 23, 2020) (not reported) (citations omitted; emphasis added).

The *Cox* court determined that the plaintiff had not plausibly alleged intolerable working conditions where she alleged that one of her subordinates stopped communicating with her and refused to fulfill his responsibilities, the Executive Director failed to remedy the subordinate's behavior, and the plaintiff was reprimanded for inappropriately touching the subordinate on the arm, which the plaintiff denied doing. *Id.*, at *1, *4. The Court stated that although "Cox may have believed resignation was her best choice when faced with an allegedly insubordinate coworker and unfair supervisor, these conditions would not compel a reasonable person to resign." *Id.*, at *4. The court granted the employer's Rule 12(b)(6) motion to dismiss, with prejudice. *Id.*, at *6.

Similarly, the Court of Appeals for the Fourth Circuit found that an employee was not subjected to intolerable working conditions, and thus had not been constructively discharged, where she alleged that, after her supervisor was discharged for sexually harassing her, her co-workers would move away rather than sit near her, bus drivers stopped talking among themselves when she entered the room and spoke falsely about her on their routes, management stopped greeting her, she was not selected for a promotion, and she was disciplined because she claimed an hour on her time sheet that she did not work. *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 266 (4th Cir. 2001). The employee broke out in a rash from the stress and took medical leave, and she never returned. *Id.* The court affirmed summary judgment in the employer's favor, determining that the employee's allegations "would not have compelled the reasonable person to resign. These incidents might have made the workplace less enjoyable for a reasonable person, but not intolerable." *Id.*, 259 F.3d at 273.

It is also important that, in the context of professors, it is not an adverse employment action – much less an intolerable working condition – when teaching assignments are changed. For example, the Fourth Circuit affirmed summary judgment in favor of a university and a department chairperson where the plaintiff-professor, Mveng-Whitted, who alleged race discrimination, had been assigned to teach courses she did not want to teach and that she thought harmed her career; her department chairperson did not recommend her for promotion and instead criticized her teaching, research, and lack of group memberships, and called her "non-collegial"; she was relieved of all teaching assignments in her former department when she changed to a different department; she was assigned to teach only one class each semester in one year, although she normally taught three classes; and she was removed from committees. *Mveng-Whitted v. Larose*,

No. 3:11-CV-00842-JAG, 2013 WL 4880364, at *2–6 (E.D. Va. Sept. 12, 2013) (not reported), *aff'd*, 570 F. App'x 307 (4th Cir. 2014) (unpublished). The district court wrote,

> Despite the many wrongdoings she alleges against VSU [the university] and [the department chairperson], Mveng–Whitted remains a tenured professor at the University. Her salary has increased during her time at VSU, her benefits remain unchanged, and she is scheduled to teach a full course load at the University this fall. No reasonable juror could conclude that Mveng–Whitted suffered an adverse employment action, or that the defendants had discriminatory motives for any actions respecting the plaintiff.

Id., 2013 WL 4880364, at *1. The Fourth Circuit affirmed "for the reasons stated by the district court." *Mveng-Whitted*, 570 F. App'x at 308.

Similarly, in the present case, Dr. McKnight's allegations of fact demonstrate that she cannot succeed on a constructive discharge claim. The allegations of fact in the Complaint do not describe working conditions so intolerable that a reasonable person would be compelled to quit. She alleges the following:

- Morris wanted and initially lobbied to deny Dr. McKnight tenure, Barr gave a negative evaluation of Dr. McKnight to the Promotion and Tenure Committee, and Dr. McKnight was not presented with opportunities to serve on committees or assigned a full slate of student advisees – but nevertheless she was granted tenure. (JA 0012, ¶¶ 47, 49; JA 0014, ¶¶ 66-69; JA 0046.)
- Dr. McKnight was advised that she would be promoted and granted tenure when she completed her Appalachian Studies certificate, and she was so promoted and granted tenure. (JA 0013, ¶¶ 59-60; JA 0045; JA 0046.)
- Dr. McKnight's office was moved to a room in the Department of Social Sciences – the department in which she was an Assistant Professor – and her colleagues allegedly referred to that office as the "broom closet." (JA 0015, ¶ 76,)

- Dr. McKnight's 2021-2022 contract required her to teach 12 credit hours, but she was offered only 11 credit hours to teach for the fall 2021 semester. However, she does not allege that she was paid any less than the contractual amount, and a review of her contract reveals that she was "expected to teach 24 credit hours during the academic year" and did not dictate that a certain number of those hours needed to be in the fall. (JA 0013, ¶ 63; JA 0045; JA 0046.)
- Dr. McKnight was told that she would no longer be paid for any services she provided to the Bluegrass program (but that she could perform voluntary services for it). (JA 0015, ¶ 77.)
- Dr. McKnight's 2021-2022 contract did not provide that she would operate the Pioneer Stage for that academic year despite GSU's alleged agreement to provide her with a contract or stipend to operate it through 2023. (JA 0015, ¶ 78.)
- Dr. McKnight was given the opportunity to teach only one course in the Appalachian Studies program after she obtained her graduate certificate in Appalachian Studies. (JA 0013-15, ¶¶ 60, 72.) Of course, she resigned her employment during the fall semester of 2021 (in November) after obtaining her certificate earlier that year, meaning that in the single semester she taught after she earned her certificate, she was assigned a class in that program. (JA 0013, ¶ 60; JA 0016, ¶ 82.)

Additionally, within a different cause of action, Dr. McKnight claims that once, Morris referred to her as "this girl" and commented that she should be staff, and one time, Barr suggested that a different female must have slept with someone to get a promotion. (JA 0018, ¶¶ 104, 108.)

As the circuit court correctly concluded, Dr. McKnight's allegations of fact do not permit her to succeed on a constructive discharge claim as a matter of law. Her allegations show that her

working conditions were *not* "so intolerable that a reasonable person would be compelled to quit." *See* Syl. Pt. 6, in part, *Slack*, 188 W. Va. at 146. Rather, her allegations of fact demonstrate that she was merely dissatisfied with her work assignments, felt unfairly criticized, and found some of her working conditions to be unpleasant. These allegations do not give rise to a viable claim of constructive discharge. *Cox*, 2020 WL 1958635, at *4. Dr. McKnight's allegations of fact are less severe than evidence that was insufficient to sustain a constructive discharge claim in *Matvia*, as in *Matvia*, the plaintiff claimed that she was disciplined and was denied a promotion, whereas here, Dr. McKnight was granted a promotion and tenure and does not claim that she was disciplined.

Because, even taking her allegations of fact as true, Dr. McKnight's working conditions were not intolerable as a matter of law, there was no need for the circuit "court to consider the constructive discharge claim any further." *Slack*, 188 W. Va. at 153. Accordingly, the circuit court did not err in determining Dr. McKnight's constructive discharge claim failed as a matter of law.

On appeal, the McKnights claim that the circuit court erred "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." (Pet'r's Brief, at 18 (citing JA 0281, ¶ 22-23).) However, the part of the circuit court's order they cited in support of this claim is simply a recitation of the law governing constructive discharge claims, including what a plaintiff must prove to succeed on such a claim, which is entirely appropriate and necessary for the circuit court to have considered. (*See* JA 0281-82, ¶¶ 22-23.) Clearly, the circuit court did not err by assessing the McKnights' Complaint in light of the law governing the constructive discharge claim.

In their appeal, the McKnights also take issue with the fact that the circuit court determined that Dr. McKnight's workplace was not intolerable as a matter of law based on the allegations of fact in the Complaint, rather than letting Dr. McKnight attempt to develop her claim through

discovery. The McKnights point out that the circuit court relied on some cases that were decided at the summary judgment stage.

Clearly, however, if Dr. McKnight had been subjected to a hostile working climate that was so intolerable that she was forced to resign, she would already know it. She personally experienced her work environment, and it is her experience – her work environment – that her claim must be based on. Discovery cannot save Dr. McKnight's constructive discharge claim because she *already knows* what her work environment was like; discovery cannot reveal that information to her. If her working climate had been truly intolerable, she would be able to articulate allegations of fact that, if true, would permit her to recover on her claim. However, she failed to bring any such allegations of fact, demonstrating instead that she *cannot* prove her claims no matter what discovery could reveal.

In deciding the motion to dismiss, the circuit court properly "ignore[d] [Dr. McKnight's] legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations.'" *See Brown v. City of Montgomery*, 755 S.E.2d 653, 661 (W. Va. 2014) (citation omitted). Because Dr. McKnight was not able to bring even *allegations* of fact showing that her work environment was actionable, she will never be able to make the requisite showing at summary judgment or at trial. Again, she already knows the facts that made her work environment unpleasant (allegedly intolerable); she cannot discover that information. Notably, Dr. McKnight never moved to amend her Complaint to add additional allegations of fact in an attempt to demonstrate that she could succeed on her constructive discharge claim.

When dismissing the constructive discharge claim, the circuit court did not require Dr. McKnight to prove her claim, but it did hold her to her burden of bringing allegations of fact that,

if true, would permit her to recover. Notably, in her appellate brief, Dr. McKnight points the Court to no allegations of fact in her Complaint that, if true, would show that her workplace was intolerable. Under the notice pleading standard, Dr. McKnight failed to bring allegations of fact that would permit her to succeed on her claim, and the circuit court committed no error in dismissing her claim. (JA 0281-86.) The circuit court's order dismissing Dr. McKnight's constructive discharge claim should be affirmed.

D. The Circuit Court Did Not Err When It Dismissed Dr. McKnight's Sex Discrimination Claim in Count I

In Count I, Dr. McKnight brought conclusory allegations "[u]pon information and belief" that GSU discriminated against her based on sex with regard to compensation, committee assignments, instructional opportunities, student advising, instructional hours, promotion, and tenure, in violation of the West Virginia Human Rights Act ("WVHRA"). (JA 0016, ¶¶ 88-89.) However, as the circuit court properly concluded, Dr. McKnight has not brought allegations of fact that permit her to survive dismissal. This is because Dr. McKnight's claim is viable only if she suffered an adverse employment action or decision, but her Complaint demonstrates that she did not suffer any adverse action/decision; rather, she was promoted and given tenure, with a pay *increase.*

To succeed on her sex-based compensation discrimination claim, Dr. McKnight would eventually have to prove "'(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action with respect to compensation; and (4) that similarly-situated employees outside the protected class received more favorable treatment.'" *Thompson v. Vista View, LLC,* No. CIV.A. 2:06-CV-00585, 2009 WL 2705857, at *4 (S.D.W. Va. Aug. 24, 2009)

(not reported; citation omitted) (addressing Title VII of the Civil Rights Act of 1964).[4]

To succeed on a claim of employment discrimination outside of the context of compensation, Dr. McKnight would eventually have to prove that she "'is a member of a protected class,'" that her "'employer made an adverse decision concerning'" her, and that but for her "'protected status, the adverse decision would not have been made.'" Syl. Pt. 1, *Knotts v. Grafton City Hosp.*, 786 S.E.2d 188, 190 (W. Va. 2016) (citation omitted).

Importantly, changes to an employee's duties do not constitute an adverse action. *Mveng-Whitted v. Larose*, 2013 WL 4880364; *Csicsmann v. Sallada*, 211 F. App'x 163, 168 (4th Cir. 2006) (unpublished) (reassignment to a new position where the plaintiff's salary, title, bonus eligibility, health care, and retirement benefits remained the same was not an adverse employment action, even where plaintiff's job responsibilities varied); *Boone v. Goldin*, 178 F.3d 253, 256-57 (4th Cir. 1999) (reassignment without some detrimental effects, such as a significant change in working conditions, does not constitute an adverse employment action).

Here, the circuit court correctly concluded Dr. McKnight failed to state a claim even under the notice pleading standard. While Dr. McKnight's Complaint makes it clear that she was dissatisfied with the duties assigned to her, she offers no allegations of fact, as opposed to unsupported, sweeping conclusions, that she experienced a civil rights violation.

Dr. McKnight alleges that beginning with the 2020-2021 academic year, she was no longer employed to work in the Bluegrass Program; in and after 2020, she was not offered the opportunity to serve on committees and was not assigned a full slate of student advisees; and her office was moved to a room that some referred to as the "broom closet." She also claims that she was given

[4] Claims under the WVHRA are analyzed using the same framework as claims brought under Title VII, so cases brought pursuant to Title VII are persuasive authority in West Virginia. *See, e.g., Barefoot v. Sundale Nursing Home*, 457 S.E.2d 152, 159 (W. Va. 1995); *Paxton v. Crabtree*, 400 S.E.2d 245, 258 n.26 (W. Va. 1990).

a negative evaluation and that her credentials were questioned.

Crucially, however, Dr. McKnight does not allege facts that, if true, would show that she suffered an adverse employment action with respect to compensation or otherwise. For example, she does not allege that she was denied a promotion or given reduced benefits when the changes to her job duties were made. Her only allegation approaching such a claim 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." (JA 0015, ¶ 78.) But even that allegation is just that GSU did not follow through with a promise, not that it engaged in sex discrimination.

Dr. McKnight's allegation and argument that she requested but was not assigned additional classes to teach, and thus had one fewer instructional hour in the fall of 2021 than she wanted, also does not constitute an adverse employment action. Had she not resigned, she would have had an opportunity to meet her annual teaching hours requirement in the spring semester. Dr. McKnight does not allege that she was paid any less than she otherwise would have been paid during the 2021-2022 school year based on her instructional hours.

Dr. McKnight's allegations that she was only assigned to teach one course in Appalachian Studies in the fall of 2021, that she was denied the opportunity to advise certain students in Appalachian Studies, and that two male professors were hired also are not allegations of adverse employment actions. While she may have preferred to have a schedule with more classes in the Appalachian Studies program, to advise more students, and to teach classes that others were hired to teach, her allegations do not demonstrate that she suffered any adverse employment action. *See Mveng-Whitted* 2013 WL 4880364, at *2–6 (unpublished) (finding no adverse employment action where a professor was assigned undesirable classes she thought harmed her career, was assigned

only one class (rather than her normal three classes) in each semester for one year, was removed from committees, and got criticism rather than a recommendation for a promotion from her department chairperson).

Indeed, it is absurd to allege that hiring additional professors constitutes an adverse employment action, even if other already-employed professors can teach the same classes. Otherwise, a school could never grow to accommodate additional students or replace professors whose employment has ended. A professor who is merely dissatisfied with work assignments has not suffered an adverse employment action; otherwise, every professor with a less-than-ideal teaching schedule would have a cause of action, a situation that would obviously be untenable.

Moreover, the fact remains that Dr. McKnight's terms and conditions of employment significantly improved just before she resigned. Dr. McKnight earned her Doctor of Education degree in April 2018. (JA 0011, ¶ 37.) She was advised that she would be promoted and awarded tenure on completion of her graduate certificate in Appalachian Studies. (JA 0013, ¶¶ 59-60.) She completed that certificate in the spring of 2021. (JA 0013, ¶ 60.) The very next semester, ***Dr. McKnight was offered, and she executed, a contract for employment reflecting that she had been granted tenure and a promotion with a 10% ($5,088.20) raise for the 2021-2022 academic year***. (JA 0045, JA 0046.) Thus, the terms and conditions of her employment *improved*. There was simply no adverse employment action. Dr. McKnight resigned on November 9, 2021, just over a month after signing her revised contract (noting her promotion, tenure, and raise) on October 27, 2021. (JA 0016, ¶ 82; JA 0045; JA 0046.)

Again, it is useful to consider the facts of *Mveng-Whitted*. The plaintiff-professor there, like Dr. McKnight, could not succeed on her discrimination claim despite job assignments she thought hurt her career; despite a negative evaluation by her department chairperson when she was

up for promotion; although her teaching load was lower than normal in one year; and although she was removed from committees. *Mveng-Whitted*, 2013 WL 4880364, at *2–6. As the *Mveng-Whited* court wrote,

> Mveng–Whitted received a revised continuing contract at her current rank, with tenure. Mveng–Whitted has suffered no break in employment and no reduction in salary or benefits. She continues to hold a tenured appointment as an associate professor. . . . Her salary has *increased.* The University Registrar affirms that Mveng–Whitted will teach three courses in the fall of 2013, a course load similar to those she has handled in the past. . . . Such circumstances do not an adverse action make.

Id., 2013 WL 4880364, at *10 (citations to the record omitted). (Again, the Fourth Circuit affirmed *Mveng-Whitted* "for the reasons stated by the district court." *Mveng-Whitted*, 570 F. App'x at 308.)

Thus, the face of the Complaint demonstrates that Dr. McKnight did not suffer an adverse employment action or decision. Therefore, even if her allegations of fact are true, she will not be able to prove a necessary element of her claim. On appeal, Dr. McKnight again takes issue with the fact that the circuit court relied on cases that were decided at the summary judgment stage. (Pet'r's Brief, at 19 n.4.) But if Dr. McKnight had suffered an adverse employment action or decision (such as a demotion or decrease in pay), she would already know it; that is not something she could uncover through discovery mechanisms. Furthermore, Dr. McKnight's original and revised contracts with GSU for the 2021-2022 academic year demonstrate that Dr. McKnight was granted tenure and a promotion with a ten percent raise just before she resigned. (JA 0045, JA 0046.)

Dr. McKnight's WVHRA discrimination claim in Count I fails as a matter of law because her allegations of fact demonstrate that she was not subjected to any adverse employment action or decision. Dr. McKnight's allegations demonstrate only that her job duties changed, and she liked her duties better beforehand – but those circumstances are not actionable. Accordingly, even

under the notice pleading standard, Dr. McKnight failed to set forth a viable claim under the WVHRA, and the circuit court did no err when it dismissed Count I. (*See* JA 0286-91.)

E. The Circuit Court Did Not Err When It Dismissed Dr. McKnight's Discrimination Claims against Morris and Barr in Count II

In Count II, Dr. McKnight claims that Morris and Barr are liable in their individual capacities for allegedly discriminating against Dr. McKnight based on her sex, in violation of the WVHRA (W. Va. Code § 5-11-9(7)). (JA 0017, ¶¶ 96-102.) The circuit court did not err in concluding that Dr. McKnight's claim fails for two reasons. (JA 0292-94.) First, her allegations of fact are insufficient to state a claim against either Morris or Barr for a violation of the WVHRA. Second, Dr. McKnight's allegations of fact demonstrate that, at all relevant times, Morris and Barr were acting within the scope of their employment, not in their individual capacities, which is the only capacity in which they were named as defendants to this civil action.

1. Dr. McKnight's Claims Against Morris and Barr Do Not State a Claim Under the WVHRA

Regarding the first rationale for dismissing Count II, the WVHRA protects against discrimination in employment when the discrimination is based on certain protected classes, including sex. W. Va. Code § 5-11-2, § 5-11-3(h), § 5-11-9. The WVHRA thus prohibits discriminatory practices that are based on those protected classes, including by prohibiting any person from engaging in threats, reprisal, and/or harassment; from aiding, abetting, inciting, compelling, or coercing another to engage in an unlawful discriminatory practice; from willfully obstructing or preventing someone from complying with the WVHRA; and from engaging in reprisal or discrimination against a person due to that person's opposition to practices or acts prohibited by the WVHRA. W. Va. Code § 5-11-9(7)(A) – (C).

Dr. McKnight's allegations do not constitute any violation of the WVHRA. On appeal, Dr. McKnight claims that the circuit court ignored some of her allegations against Morris and Barr. (Pet'r's Brief, at 22.) She also she claims that she incorporated into Count II "all of the actions and conduct attributed to them within her Complaint," although technically, she incorporated only paragraphs 1-95 of the Complaint into Count II (which consists of ¶¶ 96-103), so her allegations about Morris and Barr set forth in Count III (specifically, in paragraphs 104, 108, and 114) were not incorporated into Count II. (Pet'r's Brief, at 22-23; JA 0017 ¶ 96.) Dr. McKnight's allegation in paragraph 114 of her Complaint (JA 0019) is merely a legal conclusion that should be disregarded; in it, she alleges that she believes that Defendants retaliated against her "based on the fact that she was a female." Even considering the allegations contained in paragraphs 104 and 108 of the Complaint (which were not incorporated within Count II), Dr. McKnight's claim against Morris and Barr fails to state a claim on which relief may be granted.

Dr. McKnight alleges that Morris instructed McKnight to contact only him (Morris) with regard to the documentation she was to submit as part of her promotion and tenure application (rather than the former Chair of the Fine Arts Department); permitted Barr to submit his evaluation of Dr. McKnight after the deadline; once referred to Dr. McKnight as "this girl" and opined that she should be staff, not faculty[5]; and lobbied the Promotion and Tenure Committee to deny tenure to Dr. McKnight. While her allegation does not implicate Morris or Barr, she also alleges that she was denied a monetary stipend to run the Pioneer Stage. (Pet'r's Brief, at 23-24; JA 0015, ¶ 78.)

But Dr. McKnight also alleges that Morris then agreed with the Promotion and Tenure Committee's recommendation that Dr. McKnight be granted tenure, with the caveat that she needed to complete a graduate certificate in Appalachian Studies first because her credentials were

[5] The allegation that Morris commented that "this girl" should be staff is contained in paragraph 108 of the Complaint, which was not incorporated into Count II.

not yet sufficient. (JA 0013, ¶ 54.) Certainly, it is not sex discrimination to suggest that a professor in a program should have a certificate in that very subject area before being granted tenure. Moreover, the semester after Dr. McKnight earned that certificate, she was granted tenure, a promotion, and a raise. Dr. McKnight does not allege that Morris treated similarly situated males' tenure applications differently than he treated hers, and she concedes that he ultimately supported her application for tenure.

Dr. McKnight also alleges that she was not presented with opportunities to serve on committees and was not assigned a full slate of student advisees after Morris became Provost, but she does not allege that Morris caused these circumstances. While she alleges that Morris and GSU hired a male instructor in the Appalachian Studies program (and another male instructor to teach history classes), that is not evidence of discrimination. In the fall of 2021, Dr. McKnight was assigned to teach nearly half (11) of the 24 credit hours she was expected to teach over the course of the academic year, including a class in the Appalachian Studies program. That was the only semester she taught after earning her certificate in Appalachian Studies and before she resigned, so there is no evidence that she was being phased out – to the contrary, she was granted tenure and a promotion. Furthermore, it is not an adverse action or discrimination to refuse Dr. McKnight, a professor, a particular job assignment; if Morris or Barr could be liable because Dr. McKnight offered to teach other specific courses or types of courses, but the schedule she was provided called for her to teach other appropriate courses, then just about every professor in the country would have a viable claim. Such a situation would be untenable and would put a severe strain on already-strained institutions of higher education.

Finally, Dr. McKnight alleges that "Morris instructed one or more" of Dr. McKnight's colleagues not to contact her after she filed her grievance. (Compl., ¶ 81.) Morris's alleged

instruction simply reflects the fact that an investigation was being conducted pursuant to her grievance, and the persons involved were not to interact during that time.

Regarding Barr, Dr. McKnight alleges, on information and belief, that he gave a negative evaluation of her to the Promotion and Tenure Committee. She alleges that after she rebutted that alleged evaluation, she was not offered the opportunity to teach in the Bluegrass Program. She does not, however, allege that Barr prevented her from providing such instruction; she does not allege any facts linking her rebuttal to her teaching opportunities; and she does not allege that she suffered any loss of pay or adverse action as a result. She also alleges that Barr reassigned students to himself to advise after they had been assigned to Dr. McKnight to advise, but she does not allege or provide any evidence that the reassignments were due to her sex or that they resulted in a reduction in pay or any other adverse action. Dr. McKnight's allegations, even if true, do not demonstrate that Barr violated the WVHRA.

Dr. McKnight also alleges that Barr once commented that a different female must have slept with someone to get a promotion. (JA 0018, ¶ 104.) This allegation was not incorporated into Count II, but nevertheless, it insufficient to state a sex discrimination claim under the WVHRA. Barr's comment was not a threat, reprisal, or harassment against Dr. McKnight, and it did not prevent Dr. McKnight from complying with the WVHRA. *See* W. Va. Code § 5-11-9(7)(A) – (C). The comment was not about Dr. McKnight and did not lead to any adverse employment action against her.

The circuit court did not err when it dismissed Dr. McKnight's claim against Morris and Barr on the basis that she has not alleged that either of them engaged in any conduct made unlawful by the WVHRA.

2. All of the Allegations Against Morris and Barr Take Issue with Their Official Actions, Meaning Dr. McKnight Has Not Asserted a Claim Against Them in Their Individual Capacities, the Only Capacity in Which She Named Them

Because GSU is a State agency, Morris (the Provost and Vice President of Academic Affairs) and Barr (the Chair of the Fine Arts Department) are State officials. As such, in some circumstances, they are entitled to qualified immunity; and depending on the circumstances, their acts or omissions can give rise to liability by them personally and/or by the State agency they work for. These analyses hinge in part on whether the official was acting within the scope of his employment (his official capacity) or outside of the scope of his employment (his individual capacity). If a public official acting within the scope of his employment does not act in violation of the plaintiff's clearly established statutory or constitutional rights, or with fraud, malice, or oppression, then the public official is immune from liability. Syl. Pt. 11, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 766 S.E.2d 751, 763 (W. Va. 2014). A State agency may be liable only if its employee was acting within the scope of his/her employment. Syl. Pt. 12, in part, *A.B.*, 766 S.E.2d at 756.

"The conventional reason for permitting" suits against State officers "is that where a State official is acting unlawfully or unconstitutionally, he is acting beyond the scope of his office, and the suit is against him as an individual and not against the State." *Ables v. Mooney*, 264 S.E.2d 424, 428 (W. Va. 1979) (citation omitted).

Although Dr. McKnight asserts a statutory claim against Morris and Barr, the capacity in which she sued them is still important because it indicates that the claim is directed at them individually; it is not actually a claim against GSU, a State agency, through its officials, and thus the claim does not seek monetary damages from the State. The difference is far from semantic; it has real implications regarding not only the applicability of qualified immunity but also what entity

or person could be responsible for any monetary damages that could be awarded.

Although she has named them in their individual capacities only, all of Dr. McKnight's allegations against Morris and Barr have to do with their official actions at GSU. There simply is no claim about any conduct that either of them engaged in outside of the scope of their employment, that is, in their individual capacities. Specifically, all of Dr. McKnight's allegations about Morris have to do with his official conduct as a GSU employee: his involvement in her tenure application process and with the terms and conditions of her employment; his alleged comment about Dr. McKnight at a Board of Governors meeting; his hiring of other instructors at GSU; and his involvement with her grievance. Similarly, Barr's alleged conduct in evaluating Dr. McKnight as part of the tenure review process, assigning students to advisors, and commenting about another employee at a work meeting were clearly undertaken as part of his employment, not in his individual capacity.

Thus, as the circuit court correctly found, Dr. McKnight's claim against Morris and Barr in their individual capacities fails on this additional basis. Notably, the McKnights did not move or even request to amend their Complaint to assert a claim against Morris or Barr in their official capacities. Regardless, any such amendment would have been futile because, as is shown above, the allegations against Morris and Barr do not outline any violation of the WVHRA.

Because Dr. McKnight's allegations against Morris and Barr all address acts that do not implicate the WVHRA, her claim fails. Her claim also fails because all of their alleged acts were clearly undertaken in their official capacities, and Dr. McKnight has asserted the claim against them only in their individual capacities. For these reasons, the circuit court did not err when it dismissed Count II. (JA 0292-94.)

F. The Circuit Court Did Not Err When It Dismissed Dr. McKnight's Hostile Environment Claim in Count III

"An employee may state a claim for hostile environment sexual harassment if unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature have the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment." Syl. Pt. 7, *Hanlon v. Chambers*, 464 S.E.2d 741, 745 (W. Va. 1995). A plaintiff-employee who claims sexual harassment based on a hostile work environment in violation of the WVHRA "must prove that (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) it was imputable on some factual basis to the employer." Syl. Pt. 5, *Hanlon v. Chambers*, 464 S.E.2d 741, 745 (W. Va. 1995). The third element has "both a subjective and objective standard," meaning that a plaintiff must show both that she did, and that a reasonable person would, perceive the work environment to be hostile. *Biddle v. Fairmont Supply Co.*, No. CV 1:14CV122, 2015 WL 5634611, at *7 (N.D.W. Va. Sept. 24, 2015) (not reported), *aff'd*, 648 F. App'x 382 (4th Cir. 2016) (unpublished per curiam opinion); *see also Erps v. W. Va. Hum. Rts. Comm'n*, 680 S.E.2d 371, 379 (W. Va. 2009) (citation omitted).

"[I]n hostile environment harassment cases (sexual, racial, or whatever), the offensive conduct often does not rise to the level of actionability until after there has been a significant accumulation of incidents." *Hanlon*, 195 W. Va. at 112, 464 S.E.2d at 754. The utterance of an ethnic or racial epithet, even if it causes offense, is not severe or pervasive enough to alter an employee's conditions of employment, for example. *Erps*, 680 S.E.2d at 379 (citation omitted).

"[W]hen determining whether the harassing conduct was objectively severe or pervasive, [the court] must look at all the circumstances, including the frequency of the discriminatory

conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (citations and internal quotation marks omitted; addressing a claim under Title VII of the Civil Rights Act of 1964). For example, harassment was not objectively pervasive where it consisted of "only five instances . . . over a roughly fifteen-month period of time." *Nathan v. Great Lakes Water Auth.*, 992 F.3d 557, 568 (6th Cir. 2021) (addressing a claim under Title VII of the Civil Rights Act of 1964).

To illustrate the high bar a plaintiff must meet to establish that offending conduct is sufficiently severe or pervasive, the West Virginia Supreme Court of Appeals decision in *Egan v. Steel of West Virginia, Inc.*, No. 15-0226, 2016 WL 765771 (W. Va. Feb. 26, 2016) is instructive. The plaintiff's allegations in that case included the use of profanity, a co-worker's use of a sexually graphic gesture, discussion of what the "F" word stood for, and the inscription "pelvis pounder" on a piece of machinery. *Id*. at *2. Despite these overt sexual comments and general profanity, the Court, noting that the plaintiff-employee had not complained about the conduct to Human Resources representatives, found that the evidence did not show that the behavior was severe or pervasive. *Id.* at *6.

Relying on the *Egan* analysis in a recent order, the Berkeley County Circuit Court likewise determined that the conduct alleged in that lawsuit was not severe or pervasive under the WVHRA and granted summary judgment to the employer. Judge Lorensen explained the basis for his ruling:

> If the overtly sexual comments, jokes, and innuendo in *Egan* are not severe or pervasive enough to support a sexual harassment claim, ***then certainly Mr. Folmer's alleged conduct of criticizing Plaintiff's work performance, talking down to her, keeping her after work to discuss performance evaluations . . . commenting on the sexual orientation of male and female employees*** **other** ***than Plaintiff, . . .*** clearly do not rise to the level of "severe" or "pervasive" sexual harassment. Accordingly, summary judgment in

> the defendants' favor is appropriate on the "severe or pervasive" requirement alone.

Order Granting Defs.' Joint Mot. for Summ. J., *Guerino v. The Charles Town Gen. Hosp. DBA Jefferson Med. Ctr.*, CC-02-2020-C-132, at 6 (Circuit Ct. of Berkeley Cty., W. Va., Dec. 15, 2021) (emphasis added). (A copy of the *Guerino* order is in the Joint Appendix at JA 0127-36; the quote above appears on JA 0132.) Judge Lorensen also recognized, as had the U.S. Supreme Court before him, that civil rights laws are not general civility codes, and ordinary workplace tribulations, including occasional abusive language, is not actionable. *Id.*, at 5 (JA 0131); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

Dr. McKnight again takes issue with the fact that the circuit court relied on cases decided at the summary judgment stage or following trial. (Pet'r's Brief, at 28.) She also claims that the circuit court should not have concerned itself with whether Dr. McKnight's allegations of fact would permit her to succeed on her claim. (Pet'r's Brief, at 28.) Dr. McKnight argues that she should be permitted to engage in discovery because it "could lead to additional evidence which would support [Dr.] McKnight's hostile environment claim." (Pet'r's Brief, at 28-29.) She does *not* argue that she could amend her Complaint, nor did she ever move the circuit court for leave to amend her Complaint, to add allegations of fact about her own work environment, as she experienced it. And she does not argue that any such additional allegations would state a claim upon which relief could be granted.

Clearly, however, if Dr. McKnight had been subjected to unwelcome conduct that was so severe or pervasive that her work environment was abusive, she would already know it. The same infirmity exists with Dr. McKnight's hostile work environment claim as exists with her constructive discharge claim: She personally experienced her work environment, and it is her experience – her work environment – that her claims must be based on. Discovery cannot reveal

anything to Dr. McKnight about the alleged hostility of her work environment that she does not already know. If it had been hostile, then Dr. McKnight would already know enough to bring sufficient allegations of fact to set forth a viable claim in her Complaint; she would need discovery only to attempt to prove that her allegations were true. There is nothing she can "discover" about *her own experience*; she necessarily already knows what it was.

Dr. McKnight's inability to bring allegations of fact that if true, demonstrate that her work environment was actionably hostile demonstrates that she cannot prove her claim no matter what discovery could reveal. Her allegations are that once, Morris referred to her as "this girl" and commented that she should be staff; that one time, Barr suggested that a different female must have slept with someone to get a promotion; and that Dr. McKnight was dissatisfied with some of her work assignments, criticisms of her work, and reviews of her qualifications. Even if true, these allegations do not describe a workplace that was abusive due to severe or pervasive sexual harassment. If even the uttering of an offensive ethnic or racial epithet is not severe or pervasive, then the alleged one-time reference to Dr. McKnight as "this girl" and Barr's alleged stray comment about another woman also are not actionable. *See Erps*, 680 S.E.2d at 379 (citation omitted).

Dr. McKnight's dissatisfaction with work assignments and criticisms are also insufficient to state a claim for hostile work environment because what Dr. McKnight has described is not severe or pervasive sexual harassment, particularly given the facts of *Egan*. In complaining about her work assignments and criticisms she faced, Dr. McKnight has *not* described "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that unreasonably interfered with her work performance or created a hostile work environment. *See* Syl. Pt. 7, *Hanlon*, 464 S.E.2d at 745. Her dissatisfaction with her work

assignments and with criticisms of her work and qualifications are not complaints of conduct of a sexual nature and thus do not support a hostile work environment claim. Thus, when considering the cumulative effect of the circumstances that Dr. Knight relies on as the basis for her hostile work environment claim, it becomes apparent that her claim rests on two isolated incidents (not pervasive conduct) that are far from severe: being called "this girl" and hearing a comment about another woman.

When deciding this motion to dismiss, the circuit court correctly ignored Dr. McKnight's "legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations.'" *See Brown v. City of Montgomery*, 755 S.E.2d 653, 661 (W. Va. 2014) (citation omitted). Because Dr. McKnight is not able to bring even *allegations* of fact that, if true, would show that her work environment was actionable, she will never be able to make the requisite showing at summary judgment or at trial. Again, she already knows what her work environment was like; she cannot discover that information. Even under the notice pleading standard, Dr. McKnight's hostile work environment cause of action fails to state a claim on which relief can be granted. Therefore, the Court should affirm the circuit court's decision to dismiss Count III under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

G. Mr. McKnight's Loss of Consortium Claim Should Not Be Revived or Remanded

"A claim for loss of consortium cannot be maintained independent of a cognizable personal injury claim." *S. Env't, Inc. v. Bell*, 854 S.E.2d 285, 293 (W. Va. 2020) (citing *State ex rel. Small v. Clawges*, 745 S.E.2d 192 (W. Va. 2013)). When a personal injury claim is not cognizable and is dismissed, a derivative loss of consortium claim "must also be dismissed." *Id.*

Because all of Dr. McKnight's substantive claims all fail (her constructive discharge claim and her claims in Counts I, II, and III), Mr. McKnight's derivative claim for loss of consortium in

Count IV also necessarily fails. Mr. McKnight does not dispute this conclusion. Rather, he seeks the reinstatement of his claim only if any of Dr. McKnight's claims survive. As is shown above, Dr. McKnight has failed to state a claim upon which relief can be granted, and therefore the circuit court did not err when it dismissed Mr. McKnight's derivative claim, which should not be revived.

CONCLUSION

For all of the foregoing reasons, the circuit court's decision to dismiss the Complaint in this civil action should be affirmed.

Respectfully submitted this 19th day of December, 2023,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2023, a copy of the foregoing "***Brief of Respondents, the Board of Governors of Glenville State University, Gary Z. Morris, and Jason P. Barr***" was filed electronically via File & ServeXpress. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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