

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

DIANE JUDY,
Plaintiff,

v.

Civil Action No. CC-16-2020-C-28
Honorable H. Charles Carl, III

EASTERN WEST VIRGINIA
COMMUNITY AND TECHNICAL COLLEGE,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter came before the Court upon a *Motion to Dismiss of Defendant, Eastern West Virginia Community and Technical College* and *Memorandum in Support* filed by Benjamin P. Warder, counsel for Defendant, on September 17, 2020; upon *Plaintiff's Response* filed by Harley O. Staggers, Jr., counsel for Plaintiff, on September 24, 2020; upon *Defendant's Reply* filed by Mr. Warder on October 1, 2020; and upon *Plaintiff's Supplemented Evidence in Response to Defendant's Motion to Dismiss* filed by Mr. Staggers on November 17, 2020.

The Court has carefully considered the Motion, Response, Reply, Supplemented Evidence, and pertinent legal authority. In support of its decision, the Court makes the following findings of fact and conclusions of law:

THE COMPLAINT

1. On August 18, 2020, Plaintiff filed her *Complaint* in this matter. In her *Complaint*, Plaintiff alleges the following:
 - a. Plaintiff was employed by Eastern West Virginia Community and Technical College ("Eastern") as a Commercial Driver's License ("CDL") Instructor from April 2018 to May 2019.
 - b. On December 12, 2018, Plaintiff complained about the lack of bathroom facilities

at a training site for the CDL course.

- c. On January 2, 2019, Eastern advised Plaintiff to return to campus for bathroom breaks, which Plaintiff says was “impractical.”
- d. On January 30, 2019, Eastern discussed with Plaintiff the possibility of placing a portable toilet on the trailer that Eastern used to train students in the CDL program.
- e. On March 13, 2019, Eastern sent a text message to Plaintiff advising that Eastern was moving its trailer to Tucker County to be used for CDL training there. Plaintiff advised Eastern she was still interested in keeping her “job.” Plaintiff further alleged that “[m]ale students made comments that it could be a deterrent to [Eastern] having a female teach men.”
- f. On March 23, 2019, Eastern informed Plaintiff that it had another CDL Instructor, a male, to teach the CDL course and Plaintiff would no longer be needed after the current semester.
- g. On April 17, 2019, Plaintiff requested Eastern to reconsider and she offered to travel to Tucker County to teach the CDL course.
- h. Plaintiff alleged that Eastern replaced her with a male CDL Instructor who was “substantially younger than her.”
- i. Plaintiff “believes and therefore asserts” that Eastern was motivated, in part, to “discriminate against her” in violation of West Virginia Code § 5-11-9 because she is female.

2. Defendant moves to dismiss the *Complaint* pursuant to Rule 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure.

STANDARD OF REVIEW FOR MOTION TO DISMISS

3. Pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure, “[w]henever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.” Syl. pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W.Va. 492, 211 S.E.2d 705 (1975).

4. Pursuant to Rule 12(b)(6),

The trial court, in appraising the sufficiency of a Complaint on a Rule 12(b)(6) Motion, should not dismiss the Complaint unless it appeared beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. All that the pleader is required to do is set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings.

Mandolidis v. Elkins Industries, Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978) (citations omitted).

5. “The purpose of a motion under Rule 12(b)(6)...is to test the sufficiency of the complaint.” *Doe v. Logan Co. Bd. of Educ.*, 242 W.Va. 45, 49, 829 S.E.2d 45, 49 (2019). When testing the sufficiency of a complaint “[w]hether a complaint states a claim upon which relief may be granted is to be determined solely from the provisions of such complaint[.]” Syl. pt. 11, *Vanderpool v. Hunt*, 241 W.Va. 254, 823 S.E.2d 526 (2019).

6. “For purposes of the Motion to Dismiss, the Complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true.” *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978). The standard required to overcome a motion to dismiss is a liberal one and the burden of proof is light. *Id.*

7. However, despite this liberal standard, complaints must minimally place a defendant on notice of the claim against it.

West Virginia Rule of Civil Procedure 8(a)(2) requires a “short and plain statement of the claim showing that the pleader is entitled to relief[.]” In that regard, the Court has explained that “Rule 8 of the Rules of Civil Procedure requires clarity but not detail.” *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). Moreover, we have observed that “[t]he primary purpose of these provisions is rooted in fair notice. Under Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, *what it is*.” *Id.* (emphasis added).

Newton v. Morgantown Mach. & Hydraulics of W.Va. Inc., 242 W. Va. 650, 653, 838 S.E.2d 734, 737 (2019) (quoting *Malone v. Potomac Highlands Airport Auth.*, 237 W.Va. 235, 240, 786 S.E.2d 594, 599 (2015)).

8. “[A]lthough the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party’s legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted.” *Malone*, 237 W.Va. at 241, 786 S.E.2d at 600 (quoting *Kopelman & Assoc. L.C. v. Collins*, 196 W.Va. 489, 493, 473 S.E.2d 910, 914 (1996)).

9. Also,

[M]ore detail often is required than the bald statement of plaintiff that he has a valid claim of some type against defendant. Moreover, if the allegations in the complaint, taken as true, do not effectively state a claim, the added assertion by plaintiff that they do state a claim will not save the complaint.

Malone, 237 W.Va. at 240-41, 786 S.E.2d at 599-600 (quoting *Sticklen v. Kittle*, 168 W.Va. 147, 164, 287 S.E.2d 148, 157-158 at n.12 (1981)).

10. General allegations are insufficient. Rather, “[e]specially in the wrongful discharge context, sufficient facts must be alleged which outline the elements of the plaintiff’s claim.” *Fass v. Newsco Well Serv., Ltd.*, 177 W.Va. 50, 53, 350 S.E.2d 562, 564-64 (1986). Furthermore, “in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff.” *W.Va. Bd. of Educ. v. Marple*, 236 W.Va. 654, 661, 783

S.E.2d 75, 82 (2015) (quoting *Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996)).

QUALIFIED IMMUNITY

11. In its *Motion*, Defendant argues it is entitled to qualified immunity. The State's entitlement to immunity "is an immunity from suit rather than a mere defense to liability" which is "effectively lost if the case is erroneously permitted to go to trial." *W.Va. Bd. of Educ. v. Marple*, 236 W.Va. 654, 660, 783 S.E.2d 75, 81 (2015).

12. Regarding qualified immunity:

To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

Syl. pt. 10, *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014).

13. A court must then determine whether a plaintiff has alleged conduct that violated a clearly established statutory or constitutional right or law:

To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.

Id. A.B., syl. pt. 11.

14. Here, Eastern has argued in its *Motion* that Plaintiff was an independent contractor and the West Virginia Human Rights Act (“HRA”) does not apply to independent contractors. The Court finds Eastern’s argument to be well-taken, although it would be a question of fact, for purposes of a motion to dismiss, regarding whether or not Plaintiff was an independent contractor. Nevertheless, the Court is deciding the *Motion* based upon the issue of qualified immunity and declines to make any findings or conclusions regarding whether the HRA applies to independent contractors. For the purposes of the qualified immunity issue, the Court finds that whether or not Plaintiff was an independent contractor is irrelevant to the Court’s findings regarding qualified immunity in this case.

15. Regarding qualified immunity, the Court finds that Eastern’s decision regarding whether or not to continue its contract with Plaintiff as its CDL Instructor falls within the category of discretionary functions. *See Marple*, 236 W.Va. at 663, 783 S.E.2d at 84 (quoting *A.B.*, 234 W.Va. at 514, 766 S.E.2d at 773 “It is undisputed that ‘the broad categories of training, supervision, and employee retention...easily fall within the category of discretionary governmental functions.’”) The Court further finds the West Virginia Human Rights Act (“HRA”) is clearly established statutory law in West Virginia. W.Va. Code § 5-11-1 et seq. Therefore, the Court must determine whether Plaintiff has demonstrated that such acts or omissions are in violation of the HRA.

16. The HRA provides, in pertinent part: “It shall be an unlawful discriminatory practice...[f]or any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment[.]” W.Va. Code § 5-11-9(1). “Discriminate” or “discrimination” means “to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age,

blindness, disability or familial status [.] W.Va. Code § 5-11-3(h).

17. To make a prima facie case of employment discrimination, a plaintiff must prove the following:

“(1) That the plaintiff is a member of a protected class. (2) That the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff’s protected status, the adverse decision would not have been made.” Syllabus Point 3, *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986).

Syl. pt. 2, *Johnson v. Killmer*, 219 W.Va. 320, 633 S.E.2d 265 (2006).

18. The “but for” test of discriminatory motive is a threshold inquiry, “requiring that a plaintiff show an inference of discrimination.” Syl. pt. 2, *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 457 S.E.2d 152 (1995).

19. The Court finds that Plaintiff is a member of a protected class due to her sex and age. However, the Court further finds that Plaintiff has failed to state what equal opportunities she was denied because of her age or sex. The Court further finds that Plaintiff has not explicitly stated what action Eastern took that was an “adverse decision,” other than alleging that Eastern informed her she would no longer be needed as a CDL Instructor.

20. Nevertheless, the Court further finds that even if Eastern made an adverse decision, Plaintiff has failed to state any allegations that, but for her protected status, the adverse decision would not have been made. The Court further finds that just because the current CDL Instructor at Eastern is male and younger than Plaintiff, does not mean that Plaintiff has pleaded an actionable HRA claim. The Court further finds it appears beyond doubt that Plaintiff can prove no set of facts in support of her claim which would entitle her to relief. The Court is mindful that motions to dismiss are viewed with disfavor and rarely granted. Keeping that standard in mind, the Court has construed the allegations in the *Complaint* as true, but finds

Plaintiff has not alleged sufficient facts that, but for Plaintiff's protected status, Eastern's alleged adverse decision of no longer using Plaintiff as a CDL Instructor, would not have been made.

21. Therefore, the Court concludes that the allegations in the *Complaint* are not an actionable claims against Eastern under the HRA for age or sex discrimination. As a result, the Court concludes Plaintiff has failed to establish a violation of clearly established statutory law pursuant to *A.B.* Furthermore, the Court finds Plaintiff has failed to allege that Eastern's actions toward her were fraudulent, malicious, or oppressive, pursuant to *A.B.* In sum, the Court concludes that Eastern is entitled to qualified immunity.

22. Plaintiff filed a *Motion to Amend* on September 21, 2020, seeking to amend the *Complaint* to limit the relief that she requested "under and up to" Eastern's applicable insurance coverage. The Court would have granted this *Motion*; however, due to the Court's ruling on the *Motion to Dismiss*, the need for an *Amended Complaint* is moot.

WHEREFORE, the Court does hereby **ADJUDGE** and **ORDER** the Defendant's *Motion to Dismiss* is **GRANTED** and Plaintiff's *Complaint* is **DISMISSED with prejudice**.

It is further **ORDERED**:

- ❖ The Circuit Clerk shall transmit this Order to all counsel of record.
- ❖ The Court notes the objections and exception of the parties to any adverse findings or rulings herein.
- ❖ This is a Final Order from which any party may appeal to the West Virginia Supreme Court of Appeals under applicable rules.
- ❖ Nothing further is remaining to be done in this matter, and the Circuit Clerk shall remove this action from the docket and place it among the matters ended.

Entered this 7th day of December, 2020.



H. CHARLES, CARL, III, JUDGE