

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

JOSEPH KUILEMA,

Plaintiff-Appellant,

v

CALVIN UNIVERSITY,

Defendant-Appellee.

Sup Ct No. 168943

CoA No. 367310

Kent County Circuit Court

Case No. 23-03561-CZ

Charissa C. Huang (P75501)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff/Appellant
100 Monroe Center, NW
Grand Rapids, MI 49503
616.774.8000
chaung@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant-Appellee
45 Ottawa Avenue, SW - Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com

Lori H. Windham* (D.C. Bar No. 501838)
Daniel L. Chen* (D.C. Bar No. 1781783)
Attorneys for Defendant-Appellee
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Avenue, NW – Suite 400
Washington, DC 20006
(202) 955-0095
lwindham@becketlaw.org
dchen@becketlaw.org
**Pro Hac Vice Pending*

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STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF KENT

JOSEPH KUILEMA,

Plaintiff,

CASE NO. 23-03561-CZ

v

HON. CHRISTINA ELMORE

CALVIN UNIVERSITY,

Defendant.

Charissa C. Huang (P75501)
Kevin J. Cowan (P85674)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, N.W.
Grand Rapids, MI 49503
(616) 774-8000
chuang@shrr.com
kcowan@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant
45 Ottawa Avenue, SW, Ste. 1100
Grand Rapids, MI 49503
(616) 831-1765
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

**PLAINTIFF JOSEPH KUILEMA'S BRIEF IN OPPOSITION TO CALVIN
UNIVERSITY'S MOTION TO DISMISS UNDER MCR 2.116(C)(8)**

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SUMMARY OF POSITION

Professor Kuilema was terminated from his employment because he officiated a wedding between a couple that Calvin University believed to be a same sex couple. (**Exhibit 1**, Complaint, ¶¶ 66-77, 84-85, 93-99, 101, 113-128). Professor Kuilema was also terminated in retaliation for opposing the showing of a film for a Calvin University course, which he believed perpetuated racism against Black individuals and would negatively impact students of color. (**Exhibit 1**, Complaint, ¶¶ 78-83, 140-144, 146-148). Furthermore, he was terminated in retaliation for opposing the interrogation of one of the individuals in the couple for whom he officiated the wedding, who was also an employee of Calvin. (**Exhibit 1**, Complaint, ¶¶ 86-87, 130-133, 137-139, 142, 144-148). These events are detailed in his 148 paragraph Complaint.

Defendant Calvin University argues that this Court should summarily dismiss Professor Kuilema's claims because there is no such thing as an associational discrimination claim under Michigan law; his associational discrimination claim should be dismissed because he doesn't assert that they wouldn't have terminated him if he were of a different sex; his retaliation claim, to the extent that it is premised upon his opposition to the film that perpetuated racist stereotypes, would require the Court to weigh in on a "curriculum dispute" that the Court should not decide; and his retaliation claim, to the extent that it is premised upon his opposition to the interrogation of the other Calvin employee, is either time barred or doesn't support a claim because the questioning did not create a hostile work environment. Defendant also argues the Court should apply the "ministerial exception" to Professor Kuilema, thus barring his claims because his job was so religious that allowing him to sue the University would infringe upon its First Amendment rights as a religious institution, and that the Court should abstain from adjudicating the claims because doing so would require the Court to make rulings about religious governance in violation of the University's First Amendment rights as a religious institution.

However, Defendant's request that this Court dismiss Professor Kuilema's associational discrimination claim entirely ignores that the Michigan Supreme Court has already recognized that the Elliott Larsen Civil Rights Act ("ELCRA") should be read to provide protection from discrimination for "associating with coemployees," and that discrimination on the basis of racial association is a form of discrimination. Defendant provides this Court with no reason why each of the protected categories under the ELCRA should not be treated exactly the same, such that sex association should not be treated in the same way as racial association. Defendant's argument fares no better under federal case law where the Sixth Circuit has held Title VII protects individuals "who are not members of a protected class but are nevertheless victims of discriminatory animus toward third persons with whom they associate." Nor does the plain language of ELCRA weigh in Defendant's favor. This Court should reject Defendant's contrived reading of the statute and case law – all of which support that associational discrimination is actionable.

Defendant also conflates the standards applicable to retaliation claims with standards that are applicable to discrimination claims, and then asks the Court to apply the wrong standards to Plaintiff's retaliation claim in order to arrive at the conclusion that Plaintiff fails to state a claim. Plaintiff has asserted facts to support the proper legal elements for his retaliation claim under ELCRA, his retaliation claim should not be dismissed under MCR 2.116(C)(8), and the Court should decline Defendant's invitation to impose pleading standards upon Plaintiff that are not supported by case law that dictates the specific analysis that applies to retaliation claims.

Finally, Defendant goes to great lengths to argue, in numerous ways, that this case should not be decided by this Court. Plaintiff respectfully requests that this Court exercise its jurisdiction over his claims, which are properly before this Court. Contrary to Defendant's contentions, the adjudication of Plaintiff's claims of discrimination and retaliation under the Elliott Larsen Civil

Rights Act does not require this Court to decide the merits of any curriculum dispute, nor does it require this Court to decide any ecclesiastical matters of religious rituals, liturgy, or tenets of faith. Nor does Professor Kuilema's former position as Assistant Professor of Social Work, nor the duties that entailed, relegate him into the "ministerial exception" such that the Court should decline jurisdiction over him as a Plaintiff. This Court's adjudication of Plaintiff's ELCRA claims is proper.

For these reasons, as discussed in detail below, Plaintiff respectfully requests that this Court deny Defendant's Motion.

LEGAL ARGUMENT

I. Standard of Review.

A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint solely on the basis of the pleadings" alone. *Sullivan v State*, 328 Mich App 74, 80; 935 NW2d 413 (2019) (citations omitted). The Court must "accept[] all well-pleaded factual allegations as true and construe[] them in the light most favorable to the nonmoving party." *Id.* (internal citations omitted). Motions under MCR 2.116(C)(8) may only be granted if the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Karam v Law Offices of Ralph J Kliber*, 253 Mich App 410, 419; 655 NW2d 614 (2002).

II. Professor Kuilema's Claims Are Not Time Barred.

Although Defendant has brought its Motion under MCR 2.116(C)(8), in its accompanying Brief, it appears to also argue that Professor Kuilema's claims are time barred. Such an argument should have been brought under MCR 2.116(C)(7), but regardless, Defendant's adverse actions which give rise to his claims of associational discrimination and retaliation occurred after he officiated the wedding in October 2021. (**Exhibit 1**, Complaint, ¶ 72). On December 13, 2021, Professor Kuilema was informed that the Provost had received "evidence" of him officiating the

wedding. (**Exhibit 1**, Complaint, ¶ 73-74, 84). On April 18, 2022, Professor Kuilema was informed that the Professional Status Committee had made the decision to not recommend him for reappointment, with his final paycheck being disbursed on August 15, 2022. (**Exhibit 1**, Complaint, ¶ 94, Exhibit 4). He appealed the decision to effectively terminate him, to no avail. (**Exhibit 1**, Complaint, ¶ 96-97).

Professor Kuilema's Complaint was filed on April 14, 2023. His claims are not barred by the three-year statute of limitations that applies to claims under the ELCRA. *Garg v Macomb Cty Cmty Mental Health Servs*, 472 Mich 263, 281-82; 696 NW2d 646 (2005). Plaintiff also does not, and he need not, rely on any continuing violations theory in order to pursue his claims. While Michigan does not abide by the continuing violations doctrine, plaintiffs are not prohibited from providing context to their claims. The mere fact that additional events that occurred more than three years prior to the filing of the Complaint may be included in a Complaint to provide additional context to the Plaintiff's experiences during the course of his employment does not diminish his ability to recover under the ELCRA. *Id.*; MCL 600.5805(2).

III. Professor Kuilema Has Stated Claims of Discrimination and Retaliation Under the ELCRA.

a. The ELCRA Prohibits Discrimination Based Upon Affiliation and Association with Protected Classes of People.

Associational discrimination is a claim. Michigan Supreme Court precedent examining ELCRA, federal cases analyzing Title VII, and the plain statutory language of the ELCRA, support that associational discrimination is a cognizable form of unlawful discrimination. Defendant attempts to characterize the decision of the Michigan Supreme Court in *Graham v Ford*, 237 Mich App 670, 602 NW2d 713 (1999), as a case where the plaintiffs were discriminated against solely because of their own race. However, our Supreme Court explicitly concluded in *Graham*: "In light of the broad language of § 202 and "the policies behind the act," we believe § 202 should be read

to provide *protection from discrimination for associating with coemployees* in the workplace.” *Id.* at 678 (emphasis added). The Michigan Supreme Court also specifically cited to the United States Supreme Court’s ruling in *Bob Jones Univ v United States*, 461 US 574, 605, 103 S Ct 2017, 76 L Ed 2d 157 (1983), that “*discrimination on the basis of racial affiliation and association is a form of discrimination.*” *Graham*, at 677 (emphasis added). In its Opinion, the Court pointed out numerous times that the evidence supported discrimination based upon *both* race *and* race association. *Id.* at 676 (“Ford discriminated...on the basis of their association with white employees of defendant Department of Corrections”), at 678 (“We are satisfied that the record in this case provides sufficient evidence of defendant Ford’s discriminatory predisposition and animus toward plaintiffs based on race and race association . . .”), and at 681 (“In light of this evidence, we believe that plaintiffs’ claims of discrimination based on race and race association should have been presented to the factfinder.”).

Defendant additionally claims that “[w]hen a statutory regime prohibits associational discrimination, it will explicitly say so. The Americans with Disabilities Act, for example, prohibits discrimination on the basis of ‘the known disability of an individual with whom the qualified individual is known to have a relationship or association.’ 42 USC § 12112(b)(4).” (Def’s Brief, p. 14). However, defendant’s argument ignores that Title VII prohibits associational discrimination, without any explicit statutory provision addressing the prohibition. The Sixth Circuit has held that “Title VII protects not only individuals who themselves are members of a protected class, but also *those individuals who, though not members of a protected class, are nevertheless ‘victims of discriminatory animus toward third persons with whom the individuals associate.’*” *Booker v Dee Sign Co*, No 1:006cv667, 2008 WL 839786 (SD OH Mar 2008) (emphasis added) (**Exhibit 2**) (citing *Tetro v Elliott Popham Pontiac, Oldsmobile, Buick, and*

GMC Trucks, Inc, 173 F3d 988 (CA 6 1999) (discussing the intent of Title VII, that it must be applied according to its general intent to prohibit discrimination)).

The Michigan Supreme Court has determined that discrimination based upon race association is a cognizable claim. *Graham*, supra at 676-681. Defendant provides the Court with no reason why each of the protected categories under the ELCRA should not be treated exactly the same. And as such, defendant has not and cannot provide a legitimate reason why discrimination based upon sex association should not be a cognizable claim, when our Supreme Court has established that discrimination based upon race association is a claim. See also, *Price Waterhouse v Hopkins*, 490 US 228, 243 n.9, 109 S Ct 1775, 104 L Ed 2d 268 (1989) (finding that principles with respect to sex discrimination apply “with equal force to discrimination based on race, religion, or national origin, and vice versa.”).

Further, Defendant’s reliance upon *Rouch World, LLC v Dept of Civil Rights*, 510 Mich 398 (2022), *Bostock v Clayton Cnty*, 140 S Ct 1731 (2020), and *Frith v Whole Foods Mkt, Inc*, 38 F4th 263 (CA 1, 2022), in attempting to argue that associational discrimination does not present a claim, is misplaced. None of the plaintiffs in *Rouch World* or *Bostock* brought associational claims. The Court applied “swap tests” to the plaintiffs themselves in those cases because they were alleging that they were discriminated against because of their own sex, which was the protected characteristic toward which the defendants directed their animus. Here, Professor Kuilema’s claim is not that he was discriminated against because of his own sex, but because of his association with a third party, another Calvin employee, whose sex was the protected characteristic against which the defendant had animus. Applying the “swap test” to this case, if the defendant had perceived that the other Calvin employee’s sex were different, defendant would not have taken adverse action against Professor Kuilema because of his association with, and

advocacy for, the other employee. Professor Kuilema has asserted a cognizable claim of associational discrimination under the ELCRA, and the application of the “swap test” discussed in *Rouch World* and *Bostock* to this set of facts does not change this.

Defendant’s reliance upon *Frith v Whole Foods Mkt, Inc*, 38 F4th 263 (CA 1, 2022), also fails to provide support for the position that the ELCRA does not prohibit discrimination based upon association. In *Frith*, the First Circuit addressed the Title VII claim brought specifically under 42 USC § 2000e-2(a)(1), which makes it an unlawful employment practice “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, ***because of such individual’s*** race, color, religion, ***sex***, or national origin.” 42 USC § 2000e-2(a)(1) (emphasis added). *Id.* at 271. Thus, the *Frith* Court, relying heavily on a textual reading of the provision, concluded that it would recognize associational discrimination claims pursuant to § 2000e-2(a)(1) only where the plaintiff has been discriminated against because of his, her, or their protected characteristic. *Id.* at 271–74. In doing so, the Court also specifically acknowledged that “it would be a mistake to doubt the continuing viability of associational discrimination claims merely because some courts may have pushed the concept beyond the bounds of Title VII.” *Id.* at 272.

The plain text of the Michigan statute that applies in this case is different than § 2000e-2(a)(1). The ELCRA as codified at MCL § 37.2202(1)(a), states: “An employer shall not . . . (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, ***because of religion, race, color, national origin, age, sex, height, weight, or marital status.***” (Emphasis added). Applying a strict textual reading of the Michigan statute here, as the *Frith* Court did, and as Defendant suggests this Court should do, renders a different result. The Michigan statute says

it prohibits discrimination against an individual with respect to employment because of sex, among other protected categories. It does not say it prohibits discrimination against an individual because of such individual's belonging to a protected category. Thus, applying a textualist reading to the ELCRA, it prohibits discrimination, broadly, for any reason involving the protected categories, and not solely under the circumstance where plaintiffs themselves belong to one or more protected categories.

The Michigan Supreme Court has said that specifically in light of the broad language of the ELCRA, and the policies behind the act, it should be read to provide protection from discrimination for associating with co-employees in the workplace.” *Graham*, at 678. The Sixth Circuit has said that Title VII protects individuals who are not members of a protected class but are nevertheless victims of discriminatory animus toward third persons with whom they associate. *Booker, supra* (**Exhibit 2**). Even applying the textualist reading to the ELCRA, as Defendant urges this Court to do, supports that the individual bringing the ELCRA claim may do so “because of sex,” even when it is not that individual’s sex that is the target of the discriminatory animus. For these reasons, Plaintiff respectfully requests that this Court deny Defendant’s request to rule as a matter of law that associational discrimination is not a cognizable claim. The parties should be allowed to proceed to discovery on Count I.

b. Professor Kuilema Has Stated A Claim For Retaliation.

i. Professor Kuilema’s Retaliation Claim Does Not Present What Defendant Alleges Is A “Curriculum Debate” For This Court To “Police.”

While Defendant attempts to argue that Professor Kuilema’s retaliation claim asks the Court to “police” a “curriculum debate,” the plain language of the Complaint demonstrates that is not true. Plaintiff’s claim is not premised on, nor does it require, *any* determination of whether showing the film “*How Jack Became Black*” actually perpetuates racist stereotypes against Black

individuals or whether it should be a part of any curriculum. Plaintiff's claim also does not require any determination of whether showing such a film creates a hostile work or educational environment. This is not a "curriculum case" even though defendant attempts to frame it as such.

Rather, Professor Kuilema's retaliation claim as it pertains to the film "*How Jack Became Black*," is premised upon the following facts:

- He voiced his good faith belief that showing the film perpetuated racism against Black individuals and would negatively impact students of color, (**Exhibit 1**, Complaint, ¶¶ 78-79, 140-142);
- His opposition to the showing of the film "*How Jack Became Black*" raised the specter of a discrimination complaint under the educational provisions of ELCRA, which declares "the full and equal utilization of. . . educational facilities without discrimination because of. . . race [and/or] color" to be a civil right, MCL 37.2102(1), and provides that an educational institution shall not discriminate against "an individual in the full utilization of or benefit from the institution or services, activities, or programs provided by the institution" because of "race" or "color," and "shall not discriminate against a student in the terms, conditions, or privileges of the institution" because of "race" or "color[.]" MCL 37.2402(a)-(b). (**Exhibit 1**, Complaint, ¶ 140);
- After Professor Kuilema addressed his concern for the impact the film would have on students of color, Calvin replaced a faculty member who was supportive of him, with the administrator who he disagreed with regarding the showing of the film, on the Professional Status Committee to decide whether he would be reappointed to his position, (**Exhibit 1**, Complaint, ¶¶ 80-82);
- During the deliberations of the Professional Status Committee, his opposition to showing the film was specifically discussed and considered in the decision to not reappoint him to his position at Calvin, (**Exhibit 1**, Complaint, ¶ 83);
- His urging of his colleagues, who shortly thereafter participated in the decision not to reappoint him, to consider the impact that the film could have on students of color, and his opposition to showing the film for the above-described reasons having to do with race, were significant and/or motivating factors in Calvin's adverse employment decision to not reappoint him. (**Exhibit 1**, Complaint, ¶141).

Thus, contrary to Defendant's characterization in reliance upon *Higbee v E Michigan Univ*, No. 18-13761, 2019 WL2502733, at *3 (ED Mich, June 17, 2019) (**Exhibit 3**), that Professor Kuilema was merely opposing a "general climate of institutional racism," (Def's Brief, p. 15), the

Complaint here provides, in detail, that he was opposing the *specific act* of showing a particular film in this course, which resulted in the series of above-described events, and which ultimately concluded with his effective termination of employment from the University.

Defendant also incorrectly relies upon *Pruitt v Michigan State University*, unpublished per curiam opinion of the Court of Appeals, issued April 28, 2011 (Docket No. 295957), 2011 WL 1600499, at *4 (**Exhibit 4**), in attempting to argue that Professor Kuilema’s retaliation claim can only implicate the educational provisions of ELCRA if he shows that a “particular student” suffered from denial of admission to a program or a failing course grade. In *Pruitt*, the plaintiff student brought claims of discrimination and retaliation under ELCRA, and in borrowing from the employment context, the Court opined that for the student’s discrimination claim he would likely need to establish adverse action akin to denial of admission or a failing course grade, which would be akin to adverse action for a discrimination claim in the employment context. However, where plaintiff has brought a retaliation claim, “to be protected by ELCRA, the employee *need not oppose an actual* violation; rather, [his] belief that the opposed practices are unlawful must only be reasonable.” *Wojan v Alcon Lab'ys, Inc*, No 07-11544, 2008 WL 4279365, at *12 (ED Mich Sept 15, 2008) (internal citations omitted) (emphasis added) (**Exhibit 5**).

The requirement that the opposition need only be based on a “reasonable and good faith” belief has an objective and subjective component. *Caldwell v Gasper*, No 22-1031, 2022 WL 16629161, at *7 (6th Cir Nov 1, 2022), cert denied, No 22-832, 2023 WL 3158377 (May 1, 2023) (**Exhibit 6**). Defendant dismissively claims that there is “no indication” that anything it did that Professor Kuilema opposed had the effect of denying individuals “the full utilization of or benefit from the institution” or was discriminatory against students of color in violation of ELCRA. But, whether a reasonable person in the same factual circumstances with the same training and

experience as Plaintiff would believe that the conduct complained of was unlawful, is a fact intensive inquiry. *Yazdian v ConMed Endoscopic Techs, Inc*, 793 F3d 634 (6th Cir 2015). As Professor Kuilema is not a lawyer who is studied in civil rights or employment law, the correct inquiry to apply in assessing the objective component is whether people working as professors of social work under the same circumstances could have reasonably believed that showing a film that perpetuated racist stereotypes in the class, was unlawful.¹ This fact intensive inquiry is not appropriately resolved on defendant's Motion on the pleadings. As Professor Kuilema has adequately pled a retaliation claim arising from the series of events in his employment which followed his opposition to the showing of "*How Jack Became Black*," plaintiff respectfully requests that the Court deny Defendant's Motion. The parties should proceed to discovery on Count II.

ii. Professor Kuilema's Opposition To the Interrogation of The Other Calvin Employee About Their Wedding Supports A Retaliation Claim Under The ELCRA.

Contrary to Defendant's speculations about timing issues with respect to Professor Kuilema's retaliation claim, his claim has been timely filed. Professor Kuilema asserted his opposition to Defendant's interrogation of the other employee regarding their wedding before any determination had been made regarding his reappointment, beginning in December of 2021 and continuing into January and February of 2022. The Complaint states that the wedding took place in October 2021 (**Exhibit 1**, Complaint ¶ 72) and that after the wedding, the Calvin employee whose wedding Professor Kuilema officiated was questioned. (**Exhibit 1**, Complaint, ¶ 86).

¹ Further, the recent request by the Michigan Civil Rights Commission to the Attorney General for a legal opinion regarding whether censorship of content and materials in educational institutions may constitute violation of ELCRA, further supports that reasonable minds could differ on whether the showing or not showing of a film in an educational setting could implicate ELCRA. (**Exhibit 7**, Request for Legal Opinion, May 26, 2023).

Professor Kuilema’s retaliation claim is premised upon adverse actions that took place after his opposition to this interrogation. Thus, the claim has been brought within the statute of limitations.²

Defendant also relies upon *Radtke v Everett*, 442 Mich 368, 388, 395; 501 NW2d 155 (1993), in requesting that the Court dismiss the retaliation claim. Defendant’s reliance upon *Radtke*, however, does not make sense because the plaintiff in *Radtke* did not bring a retaliation claim. Instead, the plaintiff in *Radtke* brought a discrimination claim under a theory of hostile work environment. Thus, Defendant again conflates the standards as applied in the context of discrimination claims, with those that are applied to retaliation claims. Here, Plaintiff has brought a retaliation claim based upon adverse actions that were taken against him by his employer after he opposed the interrogation of another employee about their marriage, specifically because he believed the questioning was discriminatory and unlawful. Whether or not the questioning or investigation of the other employee’s wedding was violative of ELCRA or would support a discrimination claim, is not an element that this Plaintiff is required to state, or to prove, for his retaliation claim. He is only required to satisfy these elements: “(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.” *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 161, 934 NW2d 665, 670–71 (2019) (citing to *Rymal v Baergen*, 262 Mich App 274, 300, 686 NW2d 241 (2004)).

² Defendant appears to take issue with the facts provided in the Complaint regarding the denial of tenure, arguing that Plaintiff is time barred from bringing any claim for that denial. Plaintiff agrees that any claim seeking damages for the denial of tenure, which took place in 2018, would be time barred. To clarify, none of Plaintiff’s claims are premised upon the denial of tenure from 2018 being an “adverse employment action” giving rise to the claim.

Complaints referencing a “hostile work environment” have been found sufficient to constitute protected activity. See *Yazdian v ConMed Endoscopic Techs, Inc*, 793 F3d 634, 645–47 (6th Cir 2015) (“These statements—particularly the hostile-work-environment charge—put ConMed on notice that plaintiff believed his manager’s conduct was illegal.”).³ Further, contrary to Defendant’s argument, the Plaintiff does not need to be correct that the events she reported, in good faith, actually constitute a hostile work environment violative of the ELCRA. “The plaintiff need not show that a violation actually occurred. It is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case.” *Nemeth v Citizens Fin Grp, Inc*, No. 2:08-CV-15326, 2011 WL 2531200, at *17 (E.D. Mich. June 24, 2011) (citing *David v ANA Television Network, Inc*, Nos. 98–2288 & 98–2289, 2000 WL 222575, at *5 (6th Cir. Feb.16, 2000)) (**Exhibit 8**). Thus, even legally mistaken complaints receive protection from retaliation provided that the employee had at least a good faith belief that the conduct complained about was unlawful. *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1312-13 (6th Cir. 1989) (citing numerous cases).

The Complaint sufficiently pleads that: 1) Professor Kuilema engaged in protected activity that was known to the Defendant by, among other acts, opposing the questioning of the employee about their wedding because he had a good faith belief that the questioning was discriminatory, 2) that the Defendant made the decision to not reappoint him, effectively terminating his position, and 3) that there was a causal connection between the protected activity and the adverse employment action. (**Exhibit 1**, Complaint, ¶¶ 131-142). For these reasons, Plaintiff respectfully

³ A retaliation claim under the Elliott-Larson Civil Rights Act (ELCRA) is analyzed the same as retaliation claims under Title VII. *Chambers v City of Detroit*, 786 F Supp 2d 1253, 1268-69 (ED Mich, 2011).

requests that this Court deny Defendant's Motion to dismiss his retaliation claim and allow the parties to proceed to discovery on Count II.

IV. Professor Kuilema's Claims Are Not Barred By The First Amendment.

a. The Ministerial Exception Does Not Bar Professor Kuilema's Claims.

Calvin next argues that the ministerial exception provides it blanket protection from claims arising from all professor-related employment decisions, so Kuilema cannot properly state a claim.⁴ That is not how the ministerial exception works. The Religion Clauses of the First Amendment protect religious institutions' right to decide faith and doctrine-based matters without government intrusion. *Our Lady of Guadalupe Sch v Morrissey-Berru*, __ US __; 140 S Ct 2049, 2060; 207 L Ed 2d 870 (2020). They do not grant religious institutions general immunity from the law. *Id.* Rather, they only permit such institutions to control selection and termination over "those who will personify" its beliefs. *Hosanna-Tabor Evangelical Lutheran Church & Sch v EEOC*, 565 US 171, 188; 132 S Ct 694; 181 L Ed 2d 650 (2012). To that end, the ministerial exception only applies to "certain employment discrimination claims brought against religious organizations" – not every claim involving a religious institution employee. *Our Lady*, 140 S Ct at 2061.

The leading Michigan case on the ministerial exception is *Weishuhn v Lansing Catholic Diocese*, 287 Mich App 211; 787 NW2d 513 (2010). There, the Court of Appeals announced several factors trial courts must consider when deciding whether the ministerial exception applies:

⁴ The correct subrule under which Defendant should have moved to pursue its ministerial exception argument, is MCR 2.116(C)(4), for lack of subject matter jurisdiction. See *Weishuhn v Lansing Catholic Diocese*, 287 Mich App 211; 787 NW2d 513 (2010). Submission of affidavits, depositions, admissions or other documentary evidence is allowed for motions pursuant to MCR 2.116(C)(4). MCR 2.116(G)(2). But, Calvin argues its current Motion under subrule (C)(8) only. Thus, Professor Kuilema will address Calvin's arguments on this issue, as it pertains to only the pleadings, since Defendant moved under (C)(8).

1) whether a plaintiff's primary duties centered on her religious duties and responsibilities to teach and spread the faith, church governance, religious order supervision, and either supervision or participation in religious ritual and worship; 2) whether a plaintiff's duties involved religious significance; 3) whether a plaintiff's position was "inherently, primarily, or exclusively religious" that required proselytizing on behalf of the defendants, was connected to defendant's doctrinal mission, and was "important to defendants' spiritual and pastoral mission"; and 4) whether a plaintiff's functions related to worship and were essentially liturgical in a way that those functions were "inextricably intertwined with defendants' religious doctrine" so plaintiff was "intimately involved in the propagation of defendants' doctrine and observance and conduct of defendants' liturgy by defendants' congregation." *Id.* at 217.

The Sixth Circuit, relying on *Hosanna-Tabor*, supra, also outlined four factors a trial court should consider in assessing whether the ministerial exception applies to an employee: 1) whether an employee's title "conveys a religious—as opposed to secular—meaning"; 2) whether the employee's title reflects "a significant degree of religious training" setting her apart from laypersons; 3) whether the employee is "an ambassador of the faith" and has a "leadership role within [the] church, school, and community"; and 4) "whether the employee performs 'important religious functions . . . for the religious organization.'" *EEOC v RG & GR Harris Funeral Homes, Inc.*, 884 F3d 560, 582-583 (CA 6, 2018), quoting *Conlon v InterVarsity Christian Fellowship*, 777 F3d 560, 582-583 (CA 6, 2018).

Calvin argues that because *Weishuhn* predates *Our Lady*, any reliance on *Weishuhn*'s four factor test is inappropriate. Instead of offering its own method or test to determine whether the ministerial exception applies though, Calvin apparently takes the position that the ministerial exception applies to all teachers at religious schools. (Def's Brief, p. 19-20). That position is

wrong. Further, nowhere in *Our Lady* did the Court overturn *Hosanna-Tabor*'s factor approach. In *Our Lady*, the Supreme Court did not forbid a factor-based analysis. Rather, as Calvin acknowledges in its Brief, *Our Lady* recognized that there may not be a "list" of factors that "must be met—or even that they are necessarily important—in all other cases" and factors "are not inflexible requirements and may have far less significance in some cases." *Our Lady*, 140 S Ct at 2064. That does not mean that an analysis of factors as they pertain to a plaintiff's employment is irrelevant, or not useful, in order to determine what matters most to the ministerial exception analysis—"what an employee does." *Id.* ("What matters, at bottom, is what an employee does.").

The ministerial exception does not provide blanket immunity for religious institutions against all potential employment claims. Rather, it prohibits claims from employees whose responsibilities and duties were primarily religious and included spreading the faith and leading rituals and worship. The employer must demonstrate that the employee's functions were inextricably intertwined with its religious doctrine. Professor Kuilema's Complaint makes it clear that his duties as a Professor in the Social Work Department were not primarily religious. He "was not tasked with, [responsible] for, or expected to teach Reformed Christianity, or to spread Reformed Christianity." (**Exhibit 1**, Complaint, ¶ 17). Further, he had no duties concerning "church governance, supervising of a religious order, or supervising or participating in religious and ritual worship" at Calvin. (*Id.*) Professor Kuilema did not plan church functions or prayers and did not incorporate CRC teaching into his courses. (**Exhibit 1**, Complaint, ¶ 18). And, he did not proselytize nor involve himself with his students' prayers or church outings. (**Exhibit 1**, Complaint, ¶¶ 18, 19, and 23).

Professor Kuilema's claims satisfy the Sixth Circuit's factors, too. His title was "Assistant Professor of Social Work." (**Exhibit 1**, Complaint, ¶ 24). There is no interpretation of this title that

would reflect any degree of religious training. (**Exhibit 1**, Complaint, ¶ 25). He was not an ambassador of faith. He did not teach any religion classes, did not attend chapel services with his students, and did not incorporate any devotional exercises into his lesson plans. (**Exhibit 1**, Complaint, ¶¶ 19 and 21). Lastly, Professor Kuilema did not perform any religious functions for Calvin.⁵ He only taught classes related to the social work program. (**Exhibit 1**, Complaint, ¶ 16).

The case law supports his position. While Defendant claims that Professor Kuilema's claims as presented in his Complaint are "the same" as those in *Weishuhn*, (Def's Brief, p. 23), the plaintiff's job in *Weishuhn* was very different than Professor Kuilema's former position at Calvin. As correctly noted by Defendant, in *Weishuhn*, the plaintiff taught math classes, **but Defendant conveniently ignores that she also taught religion classes**. 287 Mich App at 214. She planned masses for several grades and assisted in preparing student liturgies. *Id.* At her deposition, the plaintiff testified that her work responsibilities were ministerial – she provided religious direction to her students, and she testified "religion was an integral part of the school's curriculum and her lesson plan." *Id.* at 215 (emphasis added). The plaintiff explained further **that she talked about God and religion as much in her math class as she did in her religion classes**, and she does not separate religion as "it's part of who [she is] **and what [she teaches]**." *Id.* at 219 (emphasis added). Based on these facts, the court upheld the trial court's determination that the ministerial exception applied to the plaintiff's employment. *Id.* at 221. Here, Professor Kuilema only taught social work and did not teach religion classes at Calvin. (**Exhibit 1**, Complaint, ¶ 16). He played no part in planning or leading religious ceremonies or preparing liturgies at Calvin. He also

⁵ While Defendant claims that he held "a formal religious office" by serving as an elder at his church, he did not serve in any religious leadership role or hold a religious office at Calvin, within the scope of his employment duties. He was never employed by Sherman Street Church, and the Church is not a defendant in this case.

separated his religion from his teachings and, in fact, even regularly criticized the CRC's doctrines. The Complaint makes it clear that Kuilema's functions were in no way inextricably intertwined with Calvin's religious beliefs.

Defendant points to *Adams v Indiana Wesleyan Univ*, No. 3:09-CV-468, 2010 WL 2803077, at *8 (ND Ind, July 15, 2010) (**Exhibit 9**), and *Stately v Indian Cmty Sch of Milwaukee, Inc*, 351 F Supp 2d 858, 869 (ED Wis, 2004), in its request that the Court "dismiss similar claims on similar allegations." However, neither *Adams* nor *Stately* are comparable to this case. In *Adams*, the plaintiff professor incorporated church doctrine into classroom activities, used scriptural principles to illustrate ideas, and led in-class devotions. *Id.* at *2-3. Professor Kuilema did not incorporate religious teaching into his courses and did not incorporate devotional exercises into his course or lesson plans. (**Exhibit 1**, Complaint, ¶¶ 18-19). Further, in *Adams*, the plaintiff was "charged with incorporating the doctrine of the Wesleyan Church into her curriculum." *Adams*, at *8. While Defendant points out that Professor Kuilema was to "respect" the judgment of the church, (Def's Brief, p. 21), he was not tasked with incorporating any religious doctrine or teaching into his curriculum. Professor Kuilema's former position at Calvin is similarly distinguishable from that of the plaintiff in *Stately*, a case that was decided before both *Hosanna Tabor* and *Our Lady*. The plaintiff in *Stately* assumed a "leadership role" in religious ceremonies at the school and was "expressly charged with taking a deep interest in the students' spiritual health." *Stately*, at 869. Here, Professor Kuilema was not in a leadership role in religious ceremonies at Calvin and was not charged or required by Defendant to take a deep interest in any students' spiritual health. Defendant's urging that this Court should arrive at the same result as the courts in *Stately* and *Adams* does not make sense when the facts of this case are markedly different.

Defendant also cites to a number of cases for the general proposition that courts “routinely bar” employment discrimination claims because teachers at such a school are “entrusted with transmitting” the faith to the next generation, and that when a school “entrusts” a teacher with the responsibility of “forming students in faith,” “judicial intervention” threatens the school’s First Amendment rights. (Def’s Brief, p. 20). The problem with Defendant’s argument is that *this particular defendant*, Calvin, did *not* entrust Professor Kuilema with the “transmission” of faith to the next generation, nor did it place a responsibility of “forming” anyone “in faith” upon him. And, for the purposes of the adjudication of this (C)(8) Motion on the pleadings, nowhere within Plaintiff’s Complaint are those allegations by Defendant supported. Furthermore, even if these allegations were supported, all of the plaintiffs in the cases cited by Defendant are easily distinguishable from this particular plaintiff, with respect to what they actually did and the tasks they were charged with in their employment:

- In *Hosanna Tabor*, supra, the defendant school held the plaintiff out as a minister, she held the formal title of “Minister of Religion, Commissioned”, she taught religion classes, and led students in prayer and devotional exercises every day.
- In *Grussgott v Milwaukee Jewish Day Sch, Inc*, 882 F3d 655 (CA7, 2018), the plaintiff teacher was expected to follow a Jewish based curriculum and taught her students the specifics of Jewish holidays and prayers while leading them in prayer.
- In *Fratello v Archdiocese of NY*, 863 F3d 190 (CA2, 2017), the plaintiff principal of a Catholic school implemented a new prayer system where she would lead the entire eighth grade in prayer every day, planned and executed religious assemblies for students which included selecting hymns and persons to recite prayers, and directed teachers on how to incorporate religion into the curriculum.
- In *Yin v Columbia Int’l Univ*, 335 F Supp 3d 803 (DSC 2018), the plaintiff program director required her students to pray over the course of the semester, prepared students to pray together over the course of the semester and for ministry roles, advised students to follow the Lord’s calling, and headed the Advisor/Advisee Chapels group.

Under far more similar circumstances, in the recent case of *DeWeese-Boyd v Gordon College*, 487 Mass 31, 33; 163 NE3d 1000 (2021), a Christian college fired a professor in its Social

Work Department after she voiced her opposition to the college's mistreatment of LGBTQ+ individuals. Citing both *Hosanna-Tabor* and *Our Lady*, the *DeWeese-Boyd* court held that the ministerial exception did not apply to the plaintiff because she "did not teach religion, the Bible, or religious doctrine; did not lead her students in devotional exercises or chapel services; and was not required to pray or attend chapel with her students." *Id.* at 49. As similar facts apply in this case, this Court should reach the same result. Analyzing whether the ministerial exception applies to bar claims inevitably requires a fact intensive inquiry. The facts here, and certainly the pleadings as they pertain to Professor Kuilema's former position at Calvin, do not render his claims "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Karam*, *supra* at 419.

Calvin attempts to circumvent the facts that Professor Kuilema did not teach religion, did not proselytize, and did not perform any important religious functions at Calvin, by arguing that it expects all of its professors "to incorporate the tenets of its faith in all aspects of their teaching," and that because Professor Kuilema met this expectation regarding "integration" of faith in his work, the ministerial exception should bar his claims. (Def's Brief, p. 20). However, upon reviewing the same argument made by Gordon College, the *DeWeese-Boyd* Court determined that the Social Work professor's "integration" of Christian faith into her work did *not* render the ministerial exception applicable to her. *DeWeese-Boyd*, at 1016-1018.⁶ The Court further explained that applying the exception to the professor would constitute a significant expansion of

⁶ The Court specifically observed that *DeWeese-Boyd*'s responsibility to integrate the Christian faith into her teaching, scholarship, and advising, was "not tied to a sectarian curriculum" because it did not involve "teaching any prescribed religious doctrine, or leading students in prayer or religious ritual" even though it involved integrating "Christian faith generally into teaching and writing about social work." *Id.* at 49.

the ministerial exception doctrine that would cause an “eclipsing and elimination of civil law protection against discrimination” that would be “enormous”:

Having evaluated “all relevant [material] circumstances,” *Our Lady of Guadalupe*, 140 S. Ct. at 2067, we conclude that a faculty member with DeWeese-Boyd’s responsibilities at Gordon is significantly different from the ordained ministers or teachers of religion at primary or secondary schools in the cases that have *52 come before the Supreme Court. DeWeese-Boyd **1017 was not ordained *53 or commissioned; she was not held out as a minister and did not view herself as a minister; and she was not required to undergo formal religious training, pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum. ***Her responsibility to integrate the Christian faith into her teaching, scholarship, and advising was different in kind, and not degree, from the religious instruction and guidance at issue in Our Lady of Guadalupe and Hosanna-Tabor.*** See *Hosanna-Tabor*, 565 U.S. at 199, 132 S.Ct. 694 (Alito, J., concurring) (“The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith”).

We recognize that some of the language employed in *Our Lady of Guadalupe* may be read more broadly, in a way that would include every educator at a religious institution. As Gordon has stated, the integrative function applies to all teachers at the college, whether they teach computer science, calculus, or comparative religion.²⁴ See *Richardson v. Northwest Christian Univ.*, 242 F. Supp. 3d 1132, 1138-1139, 1145–1146 (D. Or. 2017) (“If plaintiff was a minister, it is hard to see how any teacher at a religious school would fall outside the exception. Courts have properly rejected such a broad reading ..., which would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws”).

It would also apply, Gordon implies, to all its employees, as integrating the Christian faith into daily life and work is part of *54 the college's mission for everyone in the community, whether they be coaches, food service workers, or transportation providers. This would provide a significant expansion of the ministerial exception well beyond “individuals who play certain key roles” in a religious institution. *Our Lady of Guadalupe*, 140 S. Ct. at 2060. It would also change the existing understanding of those “personnel who are essential to the performance” of the religious instructions, services, and rituals. *Hosanna-Tabor*, 565 U.S. at 199, 132 S.Ct. 694 (Alito, J., concurring). ***The integration of religious faith and belief with daily life and work is a common requirement in many, if not all, religious institutions. As a result, the breadth of this expansion of the ministerial exception and its eclipsing and elimination of civil***

law protection against discrimination would be enormous. *Id.* at 1016–18 (emphasis added).

The same considerations exist in this case. Application of the ministerial exception to Professor Kuilema who did not teach religion, did not proselytize the faith, did not incorporate religious devotional exercises into his lessons, did not hold an inherently or primarily religious position, and did not perform religious functions at Calvin, would render the ministerial exception applicable to bar any and all civil law protection against discrimination and retaliation under ELCRA, undoubtedly for all professors at Calvin, and set the same precedent for professors at other higher educational institutions like Calvin in the State of Michigan. Plaintiff respectfully requests that this Court decline Defendant’s invitation to summarily grant it with general immunity from employment discrimination and retaliation laws, which the ministerial exception is not intended to allow. See *Our Lady*, supra at 2060. Defendant’s Motion should be denied.

b. The ecclesiastical abstention doctrine does not bar Professor Kuilema’s claims.

Like the ministerial exception, “the ecclesiastical abstention doctrine arises from the Religion Clauses of the First Amendment” and prevents “judicial interference in the *purely ecclesiastical affairs* of religious organizations.” *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 337-338; 901 NW2d 566 (2017) (quoting *Berry v Bruce*, 317 Mich 490, 499; 27 NW2d 67 (1947)) (emphasis added). The doctrine ensures that a civil court does not “substitute its opinion in lieu of that of the authorized tribunals of the church in ecclesiastical matters.” *First Protestant Reformed Church v Dewolf*, 344 Mich 624, 631; 75 NW2d 19 (1956). “Religious doctrine refers to ritual, liturgy of worship and tenets of the faith.” *Maciejewski v Breitenbeck*, 162 Mich App 410, 414; 413 NW2d 65 (1987).

Further, whether a claim “is brought against a religious entity, or simply appears to be the sort that ‘*likely* involves ecclesiastical policies’” is not dispositive. *Winkler*, supra at 341 (quoting

Dlaikan v Roodbeen, 206 Mich App 591, 593; 522 NW2d 719 (1994)). When attempting to invoke the doctrine, the important inquiry is “whether the actual adjudication of a particular legal claim **would require** the resolution of ecclesiastical questions.” *Id.* at 341 (emphasis added). And, if yes, then a court must refrain from answering the question, defer to the religious entity’s position, and adjudicate the claim accordingly. *Id.* In other words, a court must accept a religious entity’s decision on ecclesiastical matters as final and binding in its application of that issue to the case. *Id.* at 340. So, the ecclesiastical abstention doctrine does not generally bar all claims that **could** involve the resolution of an ecclesiastical question. The doctrine’s application is more nuanced and is based on whether the particular legal claims of each case **would require** resolution of ecclesiastical matters.

Calvin argues that because Kuilema’s claims are based on the “religious differences” between the parties, his claims are barred by the ecclesiastical abstention doctrine. Ecclesiastical matters include issues related to rituals, liturgy, and tenets of faith. None of these issues are invoked in his claims. Professor Kuilema’s claims only require a determination of whether Calvin discriminated and retaliated against him for his association with a protected class and his participation in protected activity under the ELCRA. The case law supports his position.

In *Bogle v Sewell*, the plaintiffs argued that the defendant church’s process for adopting new bylaws violated its membership-based structure, so they sued for a declaratory judgment under the Michigan Nonprofit Corporation Act. Unpublished per curiam opinion of the Court of Appeals, issued May 26, 2022 (Docket No. 357910), p *2 (**Exhibit 10**). The court found that the main issue of the plaintiffs’ claims, whether the church operated on a membership or directorship basis, was not an ecclesiastical question, and resolution of the dispute “did not require the trial court to interpret any of the Church’s religious doctrine or to pass judgment on what it believed to

be the form of corporate governance most in line with the Church’s discipline or values.” *Id.* at *4. As such, the doctrine did not prevent the plaintiff’s claims from moving forward.

Like the plaintiff’s claims in *Bogle*, Professor Kuilema’s claims will not require this Court to interpret religious doctrine or judge Calvin’s values. They do not require that this Court wade into any theological thicket. Rather, for his associational discrimination claim, the relevant inquiry is whether he associated with a protected class, Calvin knew of this association, he suffered an adverse employment action, and there was a causal connection between his association and the adverse employment action. See *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 161; 934 NW2d 665 (2019). Likewise, Professor Kuilema’s retaliation claim will involve largely the same proofs. See *Meyer v City of Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000). Nothing in these analyses requires interpretation of religious doctrine, and Kuilema properly alleges all elements for each claim in his Complaint. (**Exhibit 1**, Complaint, ¶¶ 115-148).

In *Hullibarger v Archdiocese of Detroit*, unpublished per curiam opinion of the Court of Appeals issued July 8, 2021 (Docket No. 354439), p *1 (**Exhibit 11**), the plaintiff’s son committed suicide.. At the funeral, the presiding priest revealed the cause of the boy’s death, condemned his choice, openly questioned the boy’s eternal fate, and lectured to all about the wrongs associated with suicide. *Id.* The plaintiff sued for various torts and the defendant countered with the ecclesiastical abstention doctrine. *Id.* at *2. The court found that adjudication of the plaintiff’s claims would involve “an inquiry into religious doctrine and practices regarding sermons and funeral services, suicide, as well as why [the priest] chose the words that he did, and personnel issues regarding hiring practices of the Catholic Church.” *Id.* at *3. Thus, the doctrine prohibited the trial court from deciding those claims. *Id.*

Distinct from the plaintiff in *Hullibarger*, Kuilema is not a minister figure tasked with spreading and educating others about the CRC's beliefs. And, his acts of officiating a non-religious wedding unaffiliated with Calvin on his own time, speaking up against racially problematic teaching materials, and questioning the interrogation like tactics against fellow employees who belongs to a protected class, is quite different from a priest proselytizing about sin and eternal fate to a church full of followers. Funerals and the afterlife are important themes in the Catholic faith. Simply, Professor Kuilema's claims do not involve any such themes related to Calvin's religious doctrine, rituals, liturgy, or tenets of faith.

While Defendant takes issue with certain assertions within the Complaint, factfinding regarding any of the statements Defendant alleges impinge on its First Amendment rights, is nevertheless not determinative of Plaintiff's claims of associational discrimination and retaliation under the ELCRA. For instance, in order to prevail on his claims, Plaintiff need not establish whether sexual abstinence for gay people was an issue of pastoral guidance or of confessional status. Plaintiff's claims also do not require any determination as to whether Synod (the governing body of the CRC) treats same sex sexual relationships differently from same sex marriage, or any theological distinctions on issues of marriage and gender identity. Further, Plaintiff's claims do not require a determination as to what the CRC's position was on same sex relationships, at the time Defendant took adverse actions in retaliation against him for officiating the wedding. Regardless of the tenets of the religion, or any status of the religious beliefs of Calvin that existed at the time the adverse employment action was taken, Professor Kuilema's claims he was discriminated against because he officiated the wedding of an LGBTQ+ Calvin employee, and that he was retaliated against for his opposition to what he in good faith believed were unlawful, discriminatory acts of Defendant. **Regardless of any religious doctrine or religious beliefs the**

Defendant may hold, the Defendant's termination of Professor Kuilema's employment was discriminatory and retaliatory in violation of the ELCRA.

No ecclesiastical matters must be determined by the Court in order to adjudicate these claims.⁷

Like the ministerial exception, application of the ecclesiastical abstention doctrine to this case is an improperly broad result. As a religious institution, it is inevitable that claims against Calvin could involve very general background knowledge of its faith. The doctrine should be reserved for cases where a court is required to decide central issues related to ecclesiastical matters of importance, like worship, rituals, and basic pillars of the respective faith.

Calvin's status as a religious institution does not insulate it from Professor Kuilema's claims. Nor does it provide a license to discriminate against protected classes, those that associate with protected classes, or those who engage in protected activity. Professor Kuilema's claims are no different from claims a professor at a secular college would have. Calvin's assertion of religion-based principles of law is just a distraction from the crux of this case—employment discrimination and retaliation. While the claims may involve some basic level understanding of religion, they will not require the Court's **determination** of any religious doctrine. Thus, Kuilema satisfies his burden to state a claim under MCR 2.116(C)(8) and Calvin's argument on this issue fails.

V. Conclusion.

Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Dismiss in full and award any other relief which this Court deems fair and just.

⁷ As none of the legal elements of Professor Kuilema's ELCRA claims require that the Court determine any ecclesiastical matters, Defendant's Motion to dismiss the Complaint based upon the ecclesiastical abstention doctrine should be denied. However, in the alternative, should the Court find that paragraphs of the Complaint asserting certain facts should be revised based upon the ecclesiastical abstention doctrine, leave to amend the Complaint as such would be appropriate. MCR 2.118(A)(2) ("Leave shall be freely given when justice so requires.").

Date: July 7, 2023

Respectfully Submitted,



By: _____

Charissa C. Huang (P75501)
Kevin J. Cowan (P85674)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff Joseph Kuilema
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
chuang@shrr.com
kcowan@shrr.com

PROOF OF SERVICE

On July 7, 2023, the undersigned sent a copy of the foregoing instrument to all parties or attorneys of record to the above cause of action by:

- | | |
|---|---|
| <input type="checkbox"/> First Class Mail | <input type="checkbox"/> Certified Mail |
| <input type="checkbox"/> Facsimile | <input type="checkbox"/> Hand Delivery |
| <input type="checkbox"/> Overnight Mail | <input type="checkbox"/> Other: |
| <input checked="" type="checkbox"/> Email | |

This statement is true to the best of my information, knowledge and belief.

/s/ Francine Robinson
Francine Robinson

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF KENT

JOSEPH KUILEMA,

Plaintiff,

CASE NO. 23-03561-CZ

v

HON. CHRISTINA ELMORE

CALVIN UNIVERSITY,

Defendant.

Charissa C. Huang (P75501)
Kevin J. Cowan (P85674)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, N.W.
Grand Rapids, MI 49503
(616) 774-8000
chuang@shrr.com
kcowan@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant
45 Ottawa Avenue, SW, Ste. 1100
Grand Rapids, MI 49503
(616) 831-1765
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

**EXHIBITS TO PLAINTIFF JOSEPH KUILEMA'S BRIEF IN
OPPOSITION TO CALVIN UNIVERSITY'S MOTION TO DISMISS
UNDER MCR 2.116(C)(8)**

EXHIBIT 1

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF KENT

JOSEPH KUILEMA,

Plaintiff,

v

CALVIN UNIVERSITY,

Defendant.

03561
CASE NO. 23-_____ -CZ

HON. CHRISTINA ELMORE
113-582151

Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
chuang@shrr.com

COMPLAINT AND JURY DEMAND

NOW COMES plaintiff, Joseph Kuilema, by and through his attorneys, Smith Haughey Rice & Roegge, and for his Complaint against Calvin University, states as follows:

Parties and Jurisdiction

1. This is an action for retaliation and associational discrimination pursuant to the Michigan Elliot-Larsen Civil Rights Act (the "ELCRA"), MCL 37.2101 *et seq.*
2. Plaintiff Joseph Kuilema ("Kuilema") is an individual, and is and at all relevant times was, a resident of Kent County, Michigan who worked and taught at Calvin University.
3. Calvin University ("Calvin") is a Michigan nonprofit corporation conducting business in Kent County, Michigan.

4. The events giving rise to these causes of action occurred, mostly or at least in substantial part, in Kent County, Michigan.

5. Jurisdiction is proper in this Court pursuant to MCL 600.601 and MCL 600.605.

6. Venue is proper in this Court pursuant to MCL 600.1621 because, at all relevant times, Calvin conducted business in Kent County, Michigan.

7. The amount in controversy exceeds \$25,000, exclusive of interest, costs, and attorney fees.

General Allegations

8. Plaintiff incorporates by reference all preceding paragraphs as if fully restated here.

9. Kuilema began his career as a social work professor at Calvin in 2008.

10. Calvin was incorporated to “provide students courses in the liberal arts including, but not limited to, the sciences, history, philosophy, professional, and pre-professional disciplines, and in theology and religion, which are of a positively Reformed character entirely in accord with the doctrinal standards of the Christian Reformed Church in North America.” (Exhibit 1, Calvin’s Articles of Incorporation).

11. Calvin’s purpose is to “enrich the education experiences of its students by offering exposure to a variety of disciplines, all from a distinctly Reformed perspective.”

12. Throughout his career at Calvin, Kuilema displayed characteristics consistent with Calvin’s purpose and the doctrinal standards of the Christian Reformed Church (the “CRC”) in North America.

13. In 2010, Calvin reappointed Kuilema to continue teaching and advising students in the social work program.

14. In 2013, Calvin reappointed Kuilema a second time to continue teaching and advising in the social work department.

15. And in 2015, Calvin reappointed Kuilema for a third time to continue his teaching and advising in the social work department.

16. Kuilema was appointed to the Sociology and Social Work Department, where he taught classes for the social work program. Kuilema also taught in the Global Development Studies program (initially the International Development Studies program). Additionally, Kuilema led a Ghana program, which was not departmentally specific, as well as taught courses within Calvin's Honors program.

17. Kuilema's responsibilities included teaching courses from a Reformed Christian perspective, but he was not tasked with, reasonable for, or expected to teach Reformed Christianity, or to spread Reformed Christianity. Further, Kuilema was not otherwise charged with duties regarding church governance, supervising of a religious order, or supervising or participating in religious and ritual worship.

18. Kuilema's duties did not have religious significance. He did not teach religion, he was not involved in planning church outings or prayers, he did not prepare students for any religious functions, and he did not incorporate religious teaching into his courses.

19. Kuilema further did not teach religion or religious texts for any purpose of spreading religious teachings, nor did he lead his students in prayer, take students to any form of Christian church services, or incorporate devotional exercises or church services into his course or lesson plans.

20. Rather, Kuilema used to his courses to teach students about different faiths and belief systems. Kuilema not only operated in this manner for the entire duration of his time

teaching at Calvin, but he was often met with praise from students and other colleagues who also valued the acknowledgment and teaching of differing viewpoints, particularly when it came to important topics such as faith and intersectional identities such as race and sexual orientation.

21. Calvin also did not require Kuilema to pray or attend church services or Chapel with his students.

22. Kuilema did not hold an inherently, primarily, or exclusively religious position, or even a position related to religion or religious purposes.

23. Kuilema's position did not entail proselytizing on behalf of Calvin.

24. Kuilema held the title of Assistant Professor of Social Work.

25. Kuilema's title did not reflect any degree of religious training that would set him apart from other individuals.

26. Kuilema also did not perform any important religious functions for Calvin.

27. Throughout his time at Calvin, Kuilema received above average evaluation scores for his teaching and advising, scoring higher than departmental and university wide averages.

28. Kuilema excelled in his position as a professor and advisor in the social work department. His accomplishments have been well documented by the formal praise which he has received from his students and others.

29. Over the course of his career, Kuilema addressed the CRC's perspective on certain issues. However, in these situations, Kuilema did not *teach* the CRC's perspective in a way which furthered its influence on students. Rather he was bluntly honest and vocal with his students, fellow faculty, and fellow Calvin community members whenever he disagreed with the CRC's position, particularly in regard to its positions regarding LGBTQ+ persons.

30. Kuilema routinely and openly expressed concerns about Calvin's treatment of and toward LGBTQ+ persons.

31. For instance, in 2016, Kuilema began preparing a piece regarding the history of terminations of LGBTQ+ employees at Calvin (the "Article"), with hopes of publishing such piece in Chimes—Calvin's student newspaper. The Article was an unequivocal denouncement of Christian Reform's, and inherently Calvin's, practiced treatment of persons belonging to and associated with the LGBTQ+ community.

32. Kuilema worked on the Article within the confines of Calvin processes, even forwarding the Article for review to then-Academic Dean Elizabeth Vander Lei and then-Provost Cheryl Brandsen. This was done in the interest of "high trust practices" at Calvin.

33. Kuilema wrote the Article because he believed that silence was a tool of oppression, and he did not want to contribute to the oppression already facing the LGBTQ+ community. He specifically made the decision to speak out so as to not be tenured under false pretenses.

34. Unsurprisingly, Kuilema was refused authority to publish the Article.

35. In an attempt to salvage the piece and prevent the suppression of its offered support to the LGBTQ+ community, Kuilema appealed the publication denial through Calvin's administrative processes.

36. Kuilema forwarded the Article to Calvin's Board of Trustees (the "Board") with an explanation of why he would like it published, and requested support to publish the piece. He was denied.

37. The Professional Status Committee (the "PSC") also reviewed the Article.

38. In 2017, Kuilema began preparing his dossier for tenure appointment at Calvin.

39. When Kuilema began preparing his documents for tenure appointment, he again expressed concerns with Calvin administration about Calvin's treatment of and toward LGBTQ+ individuals.

40. Kuilema expressed that, if his public support of LGBTQ+ individuals would cause Calvin to terminate him, he would want to know sooner rather than later to avoid going through a tenure process that was designed to be unfruitful.

41. Kuilema particularly voiced these concerns to then-Provost Cheryl Brandsen and Kevin Dulk, a member of PSC.

42. Tenured members of the Sociology and Social Work Department unanimously recommended Kuilema for tenure in Fall 2017.

43. Academic Dean Vander Lei also agreed with the unanimous recommendation to appoint Kuilema to tenure at Calvin.

44. The PSC also reviewed Kuilema's dossier and unanimously voted in favor of appointing Kuilema to tenure at Calvin.

45. Consistent with Calvin processes, Kuilema had received the necessary votes in his favor to be appointed as a tenured professor at Calvin.

46. Kuilema was also interviewed by the Academic Affairs sub-committee of the board, who also endorsed him for tenure. In February 2018, despite the unanimous recommendations for Kuilema's tenure, the Board deviated from its usual practices and procedures to abide by unanimous recommendations from individual academic Departments, the Academic Affairs Committee, Academic Deans, and the PSC, and instead denied Kuilema tenure.

47. Between and around the time of two meetings regarding whether to grant Kuilema tenure, the Board had become aware that Kuilema had officiated a wedding between LGBTQ+ persons.

48. In denying Kuilema tenure, the Board stated that Kuilema's "tone and strategy" in disagreeing with the CRC's position that "[s]exual abstinence is the biblically prescribed course of conduct for homosexual persons," caused the Board to conclude that Kuilema should not be granted tenure.

49. This determination was based on the CRC's interpretation of scripture to require sexual abstinence for gay people. This position, however, was an unofficial view based on pastoral guidance, rather than a binding issue of confessional status.

50. The Board's decision not to grant tenure also acknowledged that disagreements with the CRC have "occurred throughout the history of Calvin College" and that there was freedom to disagree with Synod (the annual decision-making meeting of the CRC), known as "ecclesiastical freedom." (**Exhibit 2**, February 5, 2018 Denial Letter).

51. Still, despite Kuilema's freedom to disagree with a position of the CRC, the Board denied Kuilema tenure, reasoning that his "tone and strategy" needed to demonstrate a commitment to working within college policies and procedures in the manner expected of faculty.

52. By "tone and strategy," Calvin was referring to Kuilema's longstanding and continued advocacy, support, advisement, and mentorship of members of the LGBTQ+ community and individuals who had been marginalized based on race.

53. Indeed, Kuilema expressed several times to Calvin administration throughout his career at Calvin, that Calvin was wronging LGBTQ+ people.

54. Kuilema adamantly voiced his opinions in opposition to the CRC's position on same-sex marriage.

55. Kuilema also assisted in organizing a department sponsored LGBTQ+ teach-in.

56. Despite Kuilema's "tone and strategy" surrounding LGTBQ+ issues, the Board reappointed Kuilema to a two-year term, which could be renewed indefinitely and did not preclude later consideration for tenure.

57. The same day that the Board denied Kuilema tenure, Provost Brandsen wrote to Kuilema to help ensure that his "tone and strategy" met with Calvin's expectations moving forward.

58. Provost Brandsen informed Kuilema that she would work with him within the next month to clarify expectations over the course of Kuilema's two-year reappointment.

59. In March 2018, Kuilema circled back with Provost Brandsen regarding his expectations, but he never received a response.

60. A week later, Kuilema again reached out to Provost Brandsen regarding his expectations, but Provost Brandsen again did not provide any response.

61. Then, after engaging in "high trust processes/procedures" for over a year while attempting to publish the Article in the Chimes, the PSC rejected Kuilema's efforts to publish the Article.

62. The PSC's rejection of Kuilema's request to publish the Article came after Kuilema's tenure denial and after Kuilema had engaged in high trust procedures for months before he submitted his tenure dossier.

63. Despite everything that had happened, over the course of 2018 and 2019, Kuilema worked on his “tone and strategy” to meet behavioral expectations of Calvin to become tenured faculty.

64. In 2019, Provost Brandsen informed Kuilema that he would not be put up for tenure and instead would be reappointed for another two-year term to allow the Board to reconsider tenure in two years.

65. Kuilema continued to work on his “tone and strategy” to conform to Calvin’s expectations.

66. In September 2020, a former student of Kuilema asked Kuilema to officiate their wedding. At the time of the wedding, the former student, who is a transgender man, identified as a queer individual, and was identified as female in government-issued documents. The former student’s spouse also identified as a queer individual, and was at the time of the wedding, and is currently, identified as female in legal, government-issued documents.

67. This former student was also a former Calvin employee who worked at Calvin during these relevant time periods.

68. Kuilema was honored and delighted to officiate the wedding and agreed to so officiate. The wedding was set for October 2021.

69. Prior to agreeing to officiate, however, Kuilema consulted his pastor, church council and even his Department Chair and colleagues to ensure that this was not in opposition to the Christian Reform faith or the values of Calvin. Kuilema received unanimous support that officiating the wedding was consistent with such beliefs.

70. In June 2021, Provost Brandsen again informed Kuilema that he would not be appointed for tenure and again reappointed Kuilema to a two-year term.

71. At the time this tenure denial, Provost Brandsen concluded that tenure would be inappropriate because the Synod had not come to any conclusions about the “report on human sexuality” and that, because Calvin knew Kuilema’s views, it was in both Calvin’s and Kuilema’s best interests to not move forward with tenure consideration at that time.

72. In October 2021, Kuilema officiated the wedding.

73. Then, in December 2021, newly appointed Provost Noah Toly received “evidence” of Kuilema officiating the wedding— photographs of Kuilema and the couple on their wedding day. Kuilema was never shown this “evidence” or permitted an opportunity to authenticate it.

74. Despite the PSC and then-Dean already recommending Kuilema’s appointment, his reappointment was then placed on hold after Calvin decided to revisit the decision in light of the new “evidence” – effectively changing their decision.

75. According to Calvin’s established policies and procedures, concerns of this nature are typically addressed in the disciplinary process, which is reserved for concerns regarding a faculty member’s conduct or performance – not the reappointment process.

76. Yet, instead of being addressed through Calvin’s disciplinary process, Kuilema’s matter was brought before the Professional Status Committee (PSC), which is a task force that Calvin uses to make determinations about “Controversial Topics.”

77. If the concerns over Kuilema’s officiating of the wedding had been addressed within the disciplinary process under Calvin’s own established policies and procedures, Kuilema would have been afforded faculty representation within these deliberations. However, because Calvin determined contrary to its regular practices, that the concerns regarding Kuilema should be addressed in a reappointment process instead, Kuilema was not afforded the same protections he would have received in the disciplinary process before a faculty panel comprised of individuals,

who pertinently, would have been most knowledgeable regarding his professional conduct and job performance.

78. In addition to being struck of the safeguards of the disciplinary process, the panel that participated in PSC determinations regarding Kuilema's matter was comprised of individuals with whom Kuilema has had substantial disagreements and/or tension. Particularly, Kuilema had recently objected to the showing of a faculty selected film, "*How Jack Became Black*," because it perpetuated racist views and harmful stereotypes against Black individuals.

79. In opposing the showing of the film, "*How Jack Became Black*", Kuilema specifically urged his colleagues to consider the impact this may have on our students of color, many of whom already experience Calvin as a hostile and racist place.

80. Two faculty members with which Kuilema strongly disagreed regarding the showing of the film, were coincidentally included on the PSC panel.

81. Further, one of the individuals, in particular, who disagreed with Kuilema over the film showing, the then Dean for Academic Administration Laura DeHaan, an individual who was publicly known to be critical of Kuilema, was chosen to replace a known and outspoken supportive faculty member on the PSC panel, Professor Emily Helder.

82. Calvin has failed to provide a legitimate explanation as to why two individuals who were publicly known to be especially unfavorable to Kuilema, and therefore biased, were appointed to the PSC panel to deliberate regarding his reappointment process. Calvin has further failed to provide any evidence that it even considered or inquired into the effect of bias and the clear detrimental impact on Kuilema's reappointment process caused by the appointment of the two individuals.

83. Further, Kuilema's opposition to the showing of the film, "*How Jack Became Black*" due to its perpetuation of racist views and harmful stereotypes against Black individuals, and his concern for the impact showing the film would have on students of color, was specifically discussed and considered during the PSC panel deliberations, in which the PSC determined that Kuilema should not be reappointed to his position with Calvin.

84. Then, in a memo dated December 13, 2021, Provost Toly indicated that the "evidence" of Kuilema officiating a wedding "may relate to various reappointment criteria." (**Exhibit 3**, December 13, 2021 Memo).

85. In meetings and "investigations" over the next several weeks, Kuilema answered all questions asked of him thoroughly and earnestly.

86. One of the individuals who Kuilema officiated the wedding for, who was employed by Calvin at the time, was also questioned by Calvin administration during the investigation of Kuilema.

87. Kuilema specifically raised concerns with Calvin administration regarding the questioning toward the individual as discriminatory and creating a hostile work environment.

88. Kuilema's decision to officiate a civil marriage ceremony was not contrary to the official position of the CRC, because the report on human sexuality about confessional status concerned sex, not marriage. Further, the topic of sex between persons of the same gender had not even been voted on by Synod yet.

89. Furthermore, at the time of officiating the wedding, Calvin did not have an official position on civil marriage, but only sexual relations.

90. Kuilema also officiated the wedding as a private citizen, as permitted under Calvin's Faculty Handbook, and not in any capacity as a Calvin faculty member.

91. As aforementioned, Kuilema consulted people in authority at both Calvin and his church regarding his officiating, all of whom concluded that the marriage fell under ecclesial authority and not Calvin authority. Kuilema also received confirmation from his church elders that officiating the wedding was not just consistent with the CRC's and Calvin's positions on sexual relations, but that Kuilema had ecclesial freedom to do so.

92. Moreover, the Faculty Handbook did not define marriage, and the Staff Handbook plainly excluded its applicability from "those with faculty rank."

93. Considering all this, Kuilema had officiated the wedding in accordance with Calvin policies, the CRC doctrine, and his Christian Reformed Church's approval.

94. Notwithstanding, the PSC recommended not to appoint Kuilema for another reappointment at Calvin and terminated his employment effective August 2022. (**Exhibit 4**, Reappointment Denial).

95. Dean Benita Wolters-Fredlund recommended that Kuilema not be appointed because of "his failure to consult with me (his Dean), the Provost, or the President about his decision to officiate at the wedding of a Calvin employee was problematic." (**Exhibit 5**, Dossier Summary).

96. In April 2022, Kuilema appealed the decision of the Board and PSC not to reappoint him.

97. PSC and the Board ultimately denied Kuilema's appeal.

98. The Dossier Summary, final PSC Discussion Summary, and the final letter from the Chair of the Board denying Kuilema's appeal all confirm that the decision not to reappoint him was because he failed to meet the "expectation" that he consult on the "controversial matter" of his involvement in the wedding. (**Exhibit 6**, PSC Discussion Summary).

99. Calvin's stated reasoning for not reappointing and effectively terminating Kuilema, unequivocally establishes that it had to do with his officiating the wedding.

100. Calvin incorrectly believed that officiating the wedding was contrary to the CRC's position regarding same sex relationships and terminated Kuilema for that mistaken belief.

101. The wedding was in fact a queer wedding between a lesbian woman and transgender man – though all of Calvin's actions stemmed from their mistaken belief that the wedding was between two lesbian women.

102. Then, in the Summer of 2022, Synod met to discuss its views on same sex relationships, which it calls "homosexual relationships," by reviewing the report of the Committee to Articulate a Foundation-laying Biblical Theology of Human Sexuality (HSR).

103. Before this meeting, the CRC's position on "homosexual sex" had the status of a synodical decision, but its views on the topic were deemed a matter of pastoral advice.

104. Because the CRC's position on "homosexual sex" was only a matter of pastoral advice prior to the Synod meeting in the Summer of 2022, prior to that meeting, members of the CRC who disagreed with Synod's views on "homosexual sex" were publicly allowed to do so, including Christian Reformed ministers. Indeed, prior to the Synod meeting in Summer of 2022, CRC ministers officiated religious same-sex marriages without losing their credentials.

105. However, in the Summer of 2022, Synod raised its views on "homosexual sex" from pastoral advice to an interpretation of the confessions.

106. Confessional status binds those who hold church offices, confessing members, and professors at denominational schools, like Calvin.

107. Confessional status also requires teachings to be upheld by professors at denominational schools, and those who publicly speak against a confessional teaching may be

disciplined. This means that individuals can no longer publicly or even privately disagree with Synod regarding “homosexual relations.” Any Calvin employee who disagrees with Synod, is required to submit a document called a “gravamen” to their church and to Calvin indicating that they have this disagreement.

108. Calvin’s decision to terminate Kuilema for officiating the wedding came before Synod’s 2022 decision.

109. Further, after Synod’s 2022 decision, a group of numerous faculty members at Calvin filed their dissent from the Synod decision, which at the time the Synod’s decision was made, would have required Calvin to terminate all faculty members who publicly disagreed with the Synod decision.

110. Not wanting to terminate all the faculty members who had filed dissenting documents, the Board indicated that it would instead “revise” its professors’ guidelines on how to continue their work in a way that respects the authority of the Synod while also protecting their academic freedom.

111. Kuilema did not receive the same treatment and was terminated even before the Synod raised its views on homosexual relations from a synodical decision that was deemed a matter of pastoral advice, to confessional status.

112. And Synod’s decision, as well as Calvin’s policies and guidelines at all relevant times, make clear that the issue lies in “homosexual *sex*,” not marriage.

113. Therefore, Kuilema’s decision to officiate the wedding was not even contrary to Synod’s after-the-fact decision, or Calvin’s policies.

114. Calvin's decision to terminate Kuilema based on his association with LGBTQ+ individuals constituted retaliation and associational discrimination in violation of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq.* ("ELCRA").

COUNT I
Associational Discrimination Under the Michigan Elliott-Larsen Civil Rights Act

115. Plaintiff incorporates by reference all preceding paragraphs as if fully restated here.

116. The purpose of the ELCRA is to prevent discrimination against persons based on their membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Bryant v Automatic Data Processing, Inc*, 151 Mich App 424; 390 NW2d 732 (1986).

117. The certain classes enumerated in the ELCRA include religion, race, color, national origin, sex, height, weight, or marital status. MCL 37.2202(1)(a).

118. The ELCRA prohibits discrimination based upon affiliation and association with protected classes of people. *Graham v Ford*, 237 Mich App 670, 677; 604 NW2d 713, 717 (1999).

119. At all times relevant to this Complaint, "sex" as used within the ELCRA, included both sexual orientation and gender identity. *Bostock v Clayton County, Georgia*, 140 S Ct 1731; 207 L Ed 2d 218 (2020); *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398; __ NW2d __ (July 28, 2022) (**Exhibit 7**).¹

120. Calvin terminated Kuilema on the basis of his association with individuals who were gay, and/or perceived to be gay, and/or were transgender.

¹ Additionally, on March 16, 2023, upon being passed in both the Michigan House of Representatives and Senate, Governor Gretchen Whitmer signed legislation amending the statutory language of the ELCRA to identify both sexual orientation and gender identity as protected classes under the Act. This amendment is effective 91 days after adjournment of the 2023 regular session *sine die*.

121. Calvin terminated Kuilema because he officiated the queer wedding.

122. Kuilema's association with LGBTQ+ individuals and/or his officiating of the wedding was a motivating factor in Calvin's termination of Kuilema.

123. Calvin discriminated against Kuilema because of his association with persons belonging to a protected class under the ELCRA.

124. Calvin's decision to terminate Kuilema and its basis for doing so violates the ELCRA and Kuilema's civil rights.

125. As a result of Calvin's violations of the ELCRA and Kuilema's civil rights, Kuilema was unable to become tenured faculty at Calvin.

126. As a result of Calvin's violations of the ELCRA and Kuilema's civil rights, Kuilema was not reappointed to his position at Calvin.

127. Calvin's decision not to reappoint Kuilema operated as a termination of his employment.

128. As a proximate result of Calvin's violations of its duties under the ELCRA described above, Kuilema suffered economic damages, violation of civil rights, emotional and mental distress, humiliation, embarrassment, and other direct and consequential damages.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor against Calvin for all compensatory damages, exemplary damages, punitive damages, and equitable and injunctive relief to which the Court finds him entitled, together with costs, interest, and attorney fees as provided by the ELCRA.

COUNT II

Retaliation Under the Michigan Elliott-Larsen Civil Rights Act

129. Plaintiff incorporates by reference all preceding paragraphs as if fully restated here.

130. The ELCRA prohibits persons, including corporations, from retaliating against a person because the person has opposed a violation of the ELCRA. MCL 37.2701(a).

131. During Calvin's investigation into Kuilema's officiating of the wedding, Calvin administration also questioned and investigated his former student.

132. Kuilema advised Calvin that such questioning and investigation was discriminatory and created a hostile work environment for the individual.

133. Kuilema in good faith believed that Calvin's questioning and investigating one of the individuals in the wedding he officiated amounted to unlawful discrimination based upon sexual orientation and/or gender identity.

134. Kuilema had a good faith belief that Calvin's Administration was engaging in unlawful employment practices.

135. Kuilema expressly notified Calvin of his good faith belief of its unlawful practices and particularly its discriminatory behavior in his appeal to his denial of tenure.

136. In his appeal, Kuilema explained his belief that Calvin had acted discriminatorily in its denial of tenure based upon his advocacy and association with LGBTQ+ persons.

137. Kuilema's complaints of discriminatory conduct during the investigation raised the specter of a discrimination complaint.

138. Soon after Kuilema complained of the discriminatory and hostile nature of Calvin's investigation into the individual from the marriage, Calvin decided not to reappoint Kuilema and terminated Kuilema.

139. Kuilema's advising and complaints of the discriminatory nature of Calvin's investigation, were significant and/or motivating factors in Calvin's adverse employment decisions against Kuilema.

140. Kuilema's opposition to the showing of the film "*How Jack Became Black*" also raised the specter of a discrimination complaint under ELCRA, which recognizes and declares "the full and equal utilization of . . . educational facilities without discrimination because of . . . race [and/or] color" to be a civil right, MCL 37.2102(1), and provides that an educational institution shall not discriminate against "an individual in the full utilization of or benefit from the institution or services, activities, or programs provided by the institution" because of "race" or "color," and "shall not discriminate against a student in the terms, conditions, or privileges of the institution" because of "race" or "color[.]" MCL 37.2402(a)-(b).

141. Kuilema's urging of his colleagues, who shortly thereafter participated in the decision not to reappoint him, to consider the impact that the film "*How Jack Became Black*" could have on Calvin's students of color, and his opposition to showing the film due to its perpetuation of racism against Black individuals, was a significant and/or motivating factor in Calvin's adverse employment decisions against Kuilema.

142. Calvin's decisions not to reappoint Kuilema and to terminate him took place directly after Kuilema officiated the wedding and engaged in protected activities of opposing violations of the ELCRA he in good faith believed were unlawful.

143. Calvin's decision not to reappoint Kuilema and its termination of Kuilema also took place directly after Kuilema's colleagues on the PSC panel specifically discussed his concerns and complaints regarding the showing of the film "*How Jack Became Black*."

144. Calvin's decision to not reappoint Kuilema and to subsequently terminate Kuilema was done out of retaliation against Kuilema, such that Calvin's decision to terminate Kuilema for associating with LGBTQ+ individuals, and for opposing violations of ELCRA, well might have dissuaded a reasonable worker from engaging in protected activity under the ELCRA.

145. Calvin owed Kuilema duties under the ELCRA, which included a duty not to retaliate against Kuilema for opposing a violation of the ELCRA based upon treatment of or actions against individuals who were gay, and/or perceived to be gay, and/or transgender.

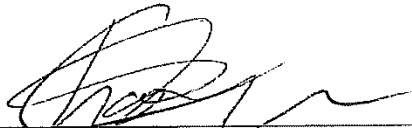
146. Calvin owed Kuilema duties under the ELCRA, which included a duty not to retaliate against Kuilema for opposing a violation of the ELCRA based upon treatment of or actions against students of color.

147. Calvin violated its duties to Kuilema under the ELCRA.

148. As a proximate result of Calvin's violations of its duties under the ELCRA, Kuilema suffered wage loss, violation of civil rights, emotional and mental distress, humiliation, embarrassment, and other direct and consequential damages.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor against Calvin for all compensatory damages, exemplary damages, punitive damages, and equitable and injunctive relief to which the Court finds him entitled, together with costs, interest, and attorney fees as provided by the ELCRA.

Date: April 14, 2023

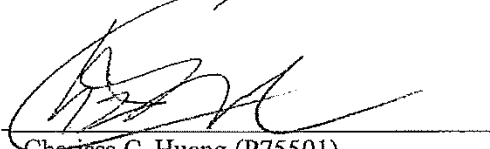
By: 
Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff Joseph Kuilema
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
616-774-2461 (fax)
chuang@shrr.com
layoub@shrr.com

JURY DEMAND

NOW COMES Plaintiff, Joseph Kuilema, by and through his attorneys, Smith Haughey Rice and Roegge, and hereby demands a trial by jury of the issues in this case.

Date: April 14, 2023

By:



Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff Joseph Kuilema
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
616-774-2461 (fax)
chuang@shrr.com
layoub@shrr.com

EXHIBIT 4

Office of the Provost
Spoelhof Center
3201 Burton St. SE
Grand Rapids, MI 49546-4388



April 18, 2022

Professor Joseph Kuilema
Department of Sociology & Social Work

Dear Joe,

The Professional Status Committee (PSC) has considered your reappointment dossier, the recommendation from the faculty of your department, the recommendation from the dean of Humanities, Arts, & Social Sciences, and additional evidence that has been under consideration since December 2021. I must tell you that the PSC decided not to recommend your reappointment to the faculty of Calvin University. Your contract will conclude in August 2022. (The final paycheck will be disbursed on August 15, 2022.)

In order to help you understand the content of the conversation occasioned by your review, I want to share with you the two enclosed memos. The first memo is the summary of your reappointment dossier; the second memo is a summary of the PSC's final discussion regarding your reappointment.

You are entitled, per the Handbook for Teaching Faculty, to appeal this decision to the president. If you choose to do this, I ask that you do this within 10 business days of receipt of this communication (May 2, 2022).

I know this is not the outcome you were hoping for, Joe. Please let me know if you have questions or wish to discuss.

Sincerely,

Noah J. Toly, Ph.D.
Provost

cc: Benita Wolters-Fredlund, dean
Jon Hill, chair
Rachel Venema, program director
file

EXHIBIT 2

Booker v. Dee Sign Co., Not Reported in F.Supp.2d (2008)
2008 WL 839786

2008 WL 839786
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio,
Western Division.

Ronald L. BOOKER, et al., Plaintiffs,
v.
DEE SIGN COMPANY, et al., Defendants.

No. 1:06cv667.
|
March 26, 2008.

Attorneys and Law Firms

Jonathan Hollingsworth, J. Hollingsworth, LLC, Dayton, OH, for Plaintiffs.

Curtis L. Cornett, Rachael D. Deep, Cors & Bassett LLC, Cincinnati, OH, for Defendants.

OPINION & ORDER

MICHAEL R. BARRETT, District Judge.

*1 This matter is before the Court upon Defendants Dee Sign Company, Craig Dixon, and James Dugger's Motion for Summary Judgment. (Doc. 19) Plaintiffs Ronald L. Booker and Kimberly A. Booker have filed a Response in Opposition (Doc. 40), and Defendants have filed a Reply (Doc. 42). The Court permitted Plaintiffs to file a Supplemental Memorandum in Opposition (Doc. 46), to which Defendants were permitted to file a Response (Doc. 47). This matter is now ripe for review.

I. BACKGROUND

In 1994, Plaintiff Ronald Booker began working for Defendant Dee Sign as an insert and main panel printer. (Ronald Booker Depo. at 19-20) In 1995, Ronald moved

to Florida, and left Dee Sign. (*Id.* at 21) However, Ronald continued to work in the printing industry. In 2001, Ronald returned to Ohio and was rehired by Dee Sign. (*Id.* at 21-22) At that time, Ronald performed both insert and main panel printing, and was paid \$8.50 per hour. (*Id.* at 77-78, 84) Ronald received periodic raises, and in May of 2005 was being paid \$12.00 per hour. (*Id.* at 87)

In January of 2005, Plaintiff Kimberly Booker applied for temporary employment at Dee Sign through a temporary service. (Doc. 26, Kimberly Booker Depo. at 10-12) At the time, she was dating Ronald Booker, and the two were later married. Kimberly Booker was interviewed by Bill Haunert, who is the screen room supervisor for Dee Sign. Haunert assured Kimberly that the relationship between her and Ronald would not be a problem because she would be assigned to a different department. (*Id.* at 12-13) Haunert told Kimberly to report for work the following Monday. (*Id.* at 14-15) However, the Friday before Kimberly was to start work, the temporary service called her and told her not to report for work. (*Id.* at 24) The temporary service told Kimberly that Dee Sign had a policy that did not allow two people who were involved in a personal relationship to work in the same department. (*Id.*) Ronald is African-American, and Kimberly is Caucasian.

On Friday, September 30, 2005, Ronald Booker's car would not start. Ronald called into work and told Defendant James Dugger about his car problems, and said that he probably would not be in to work that day. (Doc. 20, Ronald Booker Depo. at 104, 109-110) Dugger is the supervisor of the main panel area of the Print Department. (Docs. 24, 25, James Dugger Depo. at 4) Dugger asked him to come in if he was able to get his car fixed. (Ronald Booker Depo. at 111) Ronald worked on his car, and had it started by 9:00 or 10:00 that morning. (*Id.* at 105-106) Ronald nevertheless decided to replace the car's vacuum line, tires, and brakes. (*Id.* at 106, 115-18)

In the meantime, Dugger had a conversation with one of Booker's co-workers, who told Dugger that the previous day he overheard Ronald say that he was going to miss work on Friday because it was supposed to be a beautiful day, and he wanted to spend it with Kimberly at a local fair. (Dugger Depo. at 72-73) Ronald does not deny that he made the statement, but maintains that he made this statement in a joking manner. (Ronald Booker Depo. at 118, 121) Dugger attempted to reach Ronald at least three times during the day, but only reached an answering machine. (Dugger Depo. at 72) Dixon also attempted to reach Ronald, but to no avail. (Doc. 23, Craig Dixon Depo., Ex. 28)

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*2 Dugger and Defendant Craig Dixon made the decision to suspend Ronald for one day for calling in under false pretenses. (Dugger Depo. at 92; Dixon Depo. at 100-101) Dixon acts as the Chief Operating Officer and General Manager for Defendant's Ohio facility, and is responsible for its daily operations. Dugger reached Ronald by telephone on the afternoon of September 30th, and informed him that he was suspended for the following Monday. (Ronald Booker Depo. at 113-14)

On October 4, 2005, Ronald returned to work and requested a meeting with Dugger and Dixon. (Booker Depo. at 124-25) During the meeting, Dugger and Dixon began discussing Ronald's other alleged violations of company policy. (*Id.* at 129-130) At one point Dixon asked Dugger to leave the room. (Dixon Depo. at 46-47) Ronald also began to leave the room, stating that he was not going to "stay in this room with his enemy." (Booker Depo. at 130-31) Dixon extended his arms to physically restrain Ronald from leaving, and told Ronald to sit down. (Booker Depo. at 130-31) Ronald felt threatened and told Dixon that if he touched him, he would file assault charges. (*Id.* at 130) Dixon then stepped aside, and allowed Ronald to leave. (Dixon Depo. at 74-81) On the way out of the room, Booker told Dugger that "he was not going to let any Nazi intimidate him." (Ronald Booker Depo. at 130-31) Dugger later attempted to talk to Ronald at his work station, but Ronald held up his hands and told him not to "walk up" on him like that and that he "didn't trust" him. (Dugger Depo. at 149)

After this incident, Dugger felt that he could not longer effectively manage Ronald, and he recommended firing Booker. (Dugger Depo. at 269-70) Dixon agreed with the recommendation. (Dixon Depo. 44) Defendants' stated reason for terminating Ronald is his disrespectful and insubordinate conduct. Specifically, Defendants point to Ronald's refusal to remain in the meeting as Dixon requested, referring to Dixon as the enemy, calling Dixon a Nazi, failing to take direction from Dugger, and telling Dugger that he did not trust Dugger.

Ronald Booker brings claims against Dee Sign for (1) race discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq* based upon his termination; (2) race discrimination in violation of Title VII based upon the discrepancy in his pay; and (3) race discrimination under Ohio Revised Code § 4112.02(A) based upon his termination. Ronald Booker also brings claims against Dixon and Dugger under Ohio Revised Code § 4112.02(A) based upon his termination. Kimberly Booker brings claims against Dee Sign for (1) associational race discrimination in violation of Title VII based upon the

refusal to hire her or her termination; and (2) associational race discrimination under Ohio Revised Code § 4112.02(A) based upon the refusal to hire her or her termination.

II. ANALYSIS

A. Motion for Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of showing an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden of production, the non-moving party cannot rest on his pleadings, but must present significant probative evidence in support of his complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The mere existence of a scintilla of evidence to support the non-moving party's position will be insufficient; the evidence must be sufficient for a jury to reasonably find in favor of the non-moving party. *Id.* at 252.

*3 Moreover, this Court does not have a duty to search the entire record to establish that there is no material issue of fact. *Karnes v. Runyon*, 912 F.Supp. 280, 283 (S.D. Ohio 1995); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989). The non-moving party must designate those portions of the record with enough specificity that the Court can readily identify those facts upon which the non-moving party relies. *Karnes*, 912 F.Supp. at 283.

B. Title VII

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Sixth Circuit has held that Title VII protects

not only individuals who themselves are members of a protected class, but also those individuals who, though not members of a protected class, are nevertheless “victims of discriminatory animus toward third persons with whom the individuals associate.” *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir.1999).

C. Plaintiff Ronald Booker’s claims under Title VII

1. Pay discrimination

In order to establish a *prima facie* case of pay discrimination under Title VII, the plaintiff must show that the employer paid lower wages to employees of the protected class than those outside the class, for equal work. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974); *Odomes v. Nucare*, 653 F.2d 246, 250 (6th Cir.1981).

In support of his claim of pay discrimination, Ronald Booker points to Defendants’ Answer, which states that main panel printers are paid \$12.00 to \$14.00 per hour based on their experience and productivity. Ronald states that he did not begin making \$12.00 per hour until May 21, 2005.

While it was not argued by Defendants until their Response to Plaintiff’s Supplemental Memorandum in Opposition, Ronald Booker’s Charge of Discrimination filed with the EEOC makes no mention of pay discrimination. (Doc. 19, Ex. E, Craig Dixon Decl., Ex. 4) Under Title VII, employment discrimination plaintiffs must exhaust all administrative remedies before seeking relief in federal court. *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 832 (1976). The exhaustion of administrative remedies is a condition precedent to a Title VII claim. *Zipes v. TWA*, 455 U.S. 385, 392-98 (1982).

However, the Court also notes that it is to review the administrative complaint liberally so as “to encompass all charges reasonably expected to grow out of the charge of discrimination.” *Haithcock v. Frank*, 958 F.2d 671, 675 (6th Cir.1992) (internal quotation marks and citations omitted). Even liberally construed, there is nothing in Ronald Booker’s EEOC charge which would indicate that Ronald was claiming pay discrimination. “Federal courts do not have subject matter jurisdiction of Title VII claims unless the claimant explicitly files the claim in an EEOC charge or the claim can reasonably be expected to grow

out of the EEOC charge.” *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 254 (6th Cir.1998), citing *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 544-45 (6th Cir.1991). Because Ronald Booker failed to satisfy this requirement, the Court dismisses Ronald Booker’s pay discrimination claim based on a lack of jurisdiction.

2. Termination

*4 In a case alleging employment discrimination in violation of Title VII, a plaintiff can withstand a motion for summary judgment either by presenting direct evidence of discrimination or circumstantial evidence from which a jury may infer a discriminatory motive. *Rallins v. Ohio State University*, 191 F.Supp.2d 920, 928 (S.D. Ohio 2002), citing *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 348-49 (6th Cir.1997). Ronald Booker has not presented any direct evidence of discrimination.

A Title VII race discrimination claim is to be analyzed using the burden-shifting approach first announced in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). To establish a *prima facie* case of discrimination under Title VII, a plaintiff must show that (1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees. *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir.2004).

If the plaintiff succeeds in establishing a *prima facie* case, an inference of discrimination arises, and the burden then shifts to the defendant to articulate some legitimate nondiscriminatory reason for its actions. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). If the defendant articulates a nondiscriminatory reason for its actions, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons put forth by the defendant were not its true reasons but were a mere pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 802. The plaintiff may prove pretext by showing either that: (1) the proffered reason had no basis in fact, (2) the proffered reason did not actually motivate the adverse action, or (3) the proffered reason was insufficient to motivate the adverse action. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir.1994). The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against her remains at all

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times with the plaintiff. *Burdine*, 450 U.S. at 253.

Defendants argue that Booker cannot establish that he was treated differently than similarly-situated, non-protected employees.

To be deemed “similarly situated” a plaintiff must establish that all relevant aspects of his employment situation were nearly identical to those he claims are similarly situated. *Ercegovich v. Good Year Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1992). Furthermore, “the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” *Id.* at 352, quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992).

*5 Ronald Booker first argues that his one-day suspension was unfounded because there is no evidence that he ever lied about his reason for missing work. Ronald then points to two other employees who he argues are “similarly situated.” Ronald states that Clifton Mills admits to making multiple false call-ins to Dee Sign for his reasons for being absent, but was only suspended one day for “excessive tardies.” Ronald also states that Matt Bingle had attendance problems, but was never disciplined.

The Court notes that in arguing that he was treated differently than these employees, Ronald Booker is conflating two different adverse actions which were taken against him. The first adverse action was his suspension, and the second was his termination. According to his Complaint, Ronald’s discrimination claims are based upon his termination, not his suspension. Moreover, Defendants have made it clear that the reason for his termination was not that Ronald called in under alleged false pretenses, but for his insubordinate conduct upon returning to work from his suspension.¹

Ronald points to three Caucasian employees who he claims are “similarly situated” with respect to their insubordinate behavior. Ronald states that Jason Smith was falsely accused of smoking marijuana while on break in the company parking lot. Dixon had a meeting with Smith where he interrogated and chastised him, but when Dixon could not prove the accusation, he did not discipline Smith. (Jason Smith Depo. at 37-40, 46-48)

Next, Ronald points to an altercation between Jason Everspaugh and Dixon. Ronald explains that Everspaugh had run out of gas, Dixon brought him gas, but refused to

give him a ride back to his car. When Everspaugh later saw Dixon, the two men had a heated exchange, but Everspaugh’s supervisor, Haunert, pulled Everspaugh aside and he eventually calmed down. (Doc. 28, Jason Everspaugh Depo. at 41-44, 71-74) Everspaugh and Dixon avoided one another after that day. (*Id.* at 45) Ronald states that Everspaugh was not terminated after this incident.

Finally, Ronald points to a verbal altercation between Jeffery Williams and Dixon. Williams was discussing leaving work early with Dixon and Dugger, and at one point in the conversation, Dixon cursed a few times. (Doc. 40, Ex. 12, Jeffery Williams Depo. at 57-59) Williams responded by yelling back. (*Id.*) Dixon began to walk away, and Williams told Dugger that if Dixon ever talked to him like that again, he would leave. (*Id.*) Ronald states that Williams was not terminated after this incident.

The Court finds Ronald Booker has carried his burden of proving that he was treated differently than similarly-situated, non-protected employees. *See Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660 (2000) (explaining that the *prima facie* requirement for making a discrimination claim “is not onerous” and “poses a burden easily met”) (citations omitted); *see also Jackson v. Federal Express Corp.*, No. 06-5844 (6th Cir. March 6, 2008) (slip op.) (finding that the district court impermissibly placed a burden of producing a significant amount of evidence regarding similarly situated employees in order to establish a *prima facie* case; and explaining that burden is better suited for the pretext stage). The three employees identified by Ronald Booker are similarly situated in that they were involved in a verbal altercation with Dixon, who was their supervisor.² However, these employees were not terminated for this behavior. Therefore, Ronald has established a *prima facie* case of discrimination.

*6 Nevertheless, the Court finds that Ronald cannot establish that Defendants’ nondiscriminatory reason is pretextual. Ronald attempts to show pretext by relying on the same “similarly situated” evidence.

A plaintiff can establish pretext under the third *Manzer* prong—that the proffered reason was insufficient to motivate the adverse action—by demonstrating that he was treated differently than similarly situated employees. *Smith v. Leggett Wire Co.*, 220 F.3d 752, 762 (6th Cir.2000). This type of evidence “consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the

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plaintiff.” *Manzer*, 29 F.3d at 1084.

As to Smith, Ronald does not cite any insubordinate behavior by Smith, but only points to his run-in with Dixon. Therefore, the Court finds that Defendants’ treatment of Smith does not show that Defendants’ reason for their termination of Ronald was pretextual.

As to the altercation between Everspaugh and Dixon, Everspaugh testified that after the initial exchange with Dixon, he calmed down at the suggestion of his immediate supervisor, Haurert. In contrast, when Dugger attempted to talk to Ronald, Ronald told him that he did not “trust him,” thus alienating himself from the management and in Dugger’s view, foreclosing any resolution of the conflict. Therefore, the Court finds that Defendants’ treatment of Everspaugh does not show that Defendants’ reason for their termination of Ronald was pretextual.

Finally, as to the verbal altercation between Williams and Dixon, the Court finds that this incident is not similar to the incident between Ronald and Dixon. It was Dixon who walked away from Williams. In contrast, Ronald Booker left a meeting with Dixon and threatened to file assault charges against Dixon. Following this conflict, Ronald engaged in another conflict with Dugger when Dugger was attempting to talk to him.

Moreover, Ronald Booker has not presented any evidence that any of these incidents between Dixon and the other employees followed on the heels of a suspension. In other words, Ronald Booker was already in “hot water” when he was involved in the incidents with Dixon and Dugger. Instead of being conciliatory or cooperative, he chose to escalate the conflict.

Therefore, the Court concludes that Ronald has failed to show that Defendants’ proffered reason did not actually motivate his termination, and Ronald Booker’s claim of discrimination based upon his termination is dismissed.

D. Plaintiff Ronald Booker’s claims under Ohio law

The Ohio Supreme Court has held that “federal case law interpreting Title VII of the Civil Rights Act of 1964 is generally applicable to cases involving alleged violations of R.C. Chapter 4112.” *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm’n*, 421 N.E.2d 128, 131 (Ohio 1981).

*7 However, there is one important difference between

Ohio discrimination law and Title VII for purposes of Ronald Booker’s claims. Ronald Booker has brought claims against Dixon and Dugger individually in addition to his claims against Dee Sign. The Sixth Circuit has held that individual employees cannot be held liable under Title VII. *Wathen v. General Electric Co.*, 115 F.3d 400, 405 (6th Cir.1997) (holding “that an individual employee/supervisor, who does not otherwise qualify as an ‘employer,’ may not be held personally liable under Title VII.”). Yet, under Ohio law, a supervisor and employer may be jointly and severally liable for discriminatory conduct. *Genaro v. Central Transport, Inc.*, 703 N.E.2d 782 (Ohio 1999). However, because Ronald Booker has failed to show discrimination on part of his employer, the claims against Dixon and Dugger under Ohio law must also be dismissed. *Accord Novotny v. Reed Elsevier*, 2007 WL 2688171, *24 (S.D. Ohio 2007) (unpublished).

E. Plaintiff Kimberly Booker’s claims under Title VII

As explained above, a Title VII plaintiff must exhaust all administrative remedies before seeking relief in federal court. Kimberly Booker admits that she has not satisfied this prerequisite to filing suit, but argues that Defendants waived this defense by failing to raise it in their Answer.

The Supreme Court has held that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). The Court explained that the provision granting district courts jurisdiction under Title VII does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. *Id.* Instead, the Court explained that the provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts. *Id.* at 393-94.

However, Kimberly Booker has not presented this Court with an untimely charge of discrimination. Instead, Kimberly has not filed any charge at all. Accordingly, this Court does not have jurisdiction over her claims, and Kimberly Booker’s claim under Title VII is dismissed.

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F. Plaintiff Kimberly Booker's claims under Ohio law

As previously explained, the Ohio Supreme Court has held that federal case law interpreting Title VII is generally applicable to cases involving claims of discrimination under Ohio law. *Plumbers & Steamfitters Joint Apprenticeship Comm.*, 421 N.E.2d at 131. Therefore, the Court will apply the same *McDonnell Douglas* burden-shifting analysis outlined above to Kimberly Booker's claims of discrimination under Ohio law.

Without disputing the Kimberly Booker has established a *prima facie* case of discrimination, Defendants argue that it terminated or did not hire Kimberly because of the history it had with Ronald Booker's family members.³ Dixon had previously hired two of Ronald's sons, but had to fire both of them. (Booker Depo. at 62, 65) Ronald admits that their termination was warranted. (*Id.* at 64-65) When Dixon learned of the relationship between Ronald and Kimberly, he decided not to terminate or not hire Kimberly. (Dixon Depo. at 117-18) Defendants point out that this decision is in keeping with its policy that Dixon must approve all hires who are friends or family members of an existing Dee Sign employee. (William Haurnt Depo. at 44-45)

*8 The Court finds that Kimberly Booker has failed to show that Defendants' reason for terminating or not hiring her is pretext. Kimberly Booker's evidence that other family members of existing employees have been hired does not show that the proffered reason had no basis in fact. There is no evidence that Defendants had the same history of employment problems with these other families. There is also no evidence that the proffered reason did not actually motivate the adverse action. Once

Dixon learned of the relationship between Ronald and Kimberly, he made the decision that Kimberly should not work for Dee Sign. There is also no evidence to contradict Defendants' assertion that regardless of what Kimberly was told in her interview, that Dixon made the ultimate decision about her employment. Finally, Kimberly Booker has not shown that the proffered reason was insufficient to motivate the adverse action. Moreover, a federal court may not second-guess an employer's business judgment. *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 462 (6th Cir.2004) ("Our role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second guesses employers' business judgments.") (citation and quotation omitted). Therefore, Kimberly Booker's discrimination claims under Ohio law are dismissed.

III. CONCLUSION

Based on the foregoing, Defendants' Motion for Summary Judgment (Doc. 19) is hereby **GRANTED**. This matter shall be **CLOSED** and terminated from the docket of this Court.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 839786

Footnotes

¹ Moreover, even if Ronald could show that Defendants were "wrong" in their charge of false pretenses, this would not be sufficient to show that Defendants' reason for his termination was pretext for discrimination. The Sixth Circuit has explained that a plaintiff must allege more than a dispute over the facts upon which his discharge was based. *Braithwaite v. Timken Co.*, 258 F.3d 488, 494 (6th Cir.2001). Instead, a plaintiff must put forth evidence which demonstrates that the employer did not "honestly believe" in the proffered non-discriminatory reason for its adverse employment action. *Id.* In order to determine whether the defendant had an "honest belief," a court must consider whether the employer can establish its "reasonable reliance" on the particularized facts that were before it at the time the decision was made. *Id.*

As the Sixth Circuit has explained, a court need not "require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." *Smith v. Chrysler*, 55 F.3d 799, 807 (6th Cir.1998). While Ronald states that he provided Defendants with receipts for his car repair in discovery, Defendants did not have this information when they were making the decision to terminate Ronald. Therefore, the Court concludes that Defendants had an honest belief that Ronald had called in under false pretenses, and Ronald cannot show that this reason for his termination was pretext for discrimination.

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- 2 Defendants argue that Everspaugh is not similarly situated because his supervisor was Hawnert, not Dugger. However, the Sixth Circuit has explained that the *Ercegovich/Mitchell* "same supervisor" language may be applied so as to only require that the plaintiff and his or her comparator dealt with the same ultimate decision-maker, rather than the same supervisor. *McMillan v. Castro*, 405 F.3d 405, 414 (6th Cir.2005). Here, Ronald Booker and the employees he has identified all dealt with Dixon, who as the chief operating officer and general manager was the ultimate decision-maker.

- 3 Defendants do not agree with Kimberly Booker's assertion that Defendants offered her employment, and then rescinded the offer. However, for purposes of their Motion, Defendants do not dispute Kimberly Booker's characterization of the facts.

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EXHIBIT 3

Higbee v. Eastern Michigan University, Not Reported in Fed. Supp. (2019)

2019 WL 2502733, 2019 Fair Empl.Prac.Cas. (BNA) 222,320

2019 WL 2502733
United States District Court, E.D. Michigan,
Southern Division.

Mark HIGBEE, Plaintiff,
v.
EASTERN MICHIGAN UNIVERSITY, et
al., Defendant.

Case No. 18-13761
|
Signed 06/17/2019

Attorneys and Law Firms

Glen N. Lenhoff, Law Office of Glen N. Lenhoff, Grand
Blanc, MI, for Plaintiff.

James F. Hermon, Ryan J. VanOver, Dykema Gossett,
Detroit, MI, Jill M. Wheaton, Dykema Gossett, Ann
Arbor, MI, for Defendant.

OPINION AND ORDER GRANTING INSTITUTIONAL DEFENDANTS' MOTION TO DISMISS (ECF No. 28)

Sean F. Cox, United States District Judge

*1 In September 2016, racist graffiti appeared on the campus of Eastern Michigan University. Students protested, and the University instituted disciplinary actions against the protestors. Almost a year later, a former student was arrested for the vandalism. In the arrest's aftermath, Plaintiff—a history professor at the University—posted a message in a public Facebook group, criticizing the University's response to the graffiti and referring to African American administrators as “‘HN in C’ functionaries.” The University interpreted this phrase as a racial slur and suspended Plaintiff, without pay, for one semester. Plaintiff filed a grievance through his union, and an arbitrator reversed his suspension.

On December 4, 2018, Plaintiff filed this lawsuit, alleging two sets of claims. First, Plaintiff brings retaliatory discharge claims under Michigan's Elliott-Larsen Civil

Rights Act (“ELCRA”) against the University and its Board of Regents (“the Institutional Defendants”). Second, Plaintiff brings First Amendment retaliation claims, under 42 U.S.C. § 1983, against the individual Regents and other administrators who decided to punish him for the post (“the Individual Defendants”).¹

On February 14, 2019, the Institutional Defendants filed a motion to dismiss the ELCRA claims. (ECF No. 28).² For the reasons below, the Court will grant the Institutional Defendants' motion and dismiss the ELCRA claims.

BACKGROUND

Plaintiff Mark Higbee is a Professor of American History at Eastern Michigan University. Defs. Stat. of Material Facts ¶ 1. (ECF No. 27, PageID 94). Higbee teaches courses on African American History. *Id.* at ¶ 2.

In September 2016, racist messages were spray-painted on a residence hall at the University. *Id.* at ¶ 13; Ex. 3 (ECF No. 27-4). More racist graffiti appeared the next month. *Id.* Students protested the graffiti by organizing a peaceful sit-in at a University building. *Id.* After the protesters refused to leave the building at closing time, the University disciplined them by issuing formal reprimands and deferred suspensions. *Id.* The University later dropped all disciplinary action against the protesters. *Id.* Pl.'s Counter-Stat. Of Material Facts ¶ 15. (ECF No. 35, PageID 584).

More than a year after the first act of vandalism, an African American former student of the University was arraigned on criminal charges for creating the graffiti. Defs. Stat. of Material Facts. ¶ 16. In the aftermath of the arraignment, Higbee wrote the following post in “EMUTalk,” a public Facebook group:

EMU administrators, a small group of well paid white guys in suits (plus one woman and a few lower level “HN in C” functionaries), lacked the insight to imagine that they could ever, possibly, be remotely seen as responsible for institutional racist practices. And so they continued to act as the aggrieved party, needlessly alienating students who objected to racism. Why EMU officials, earning six figures or more, took this stance can only be explained by a combination of 1. ignorance about what racism is, 2. overconfidence that they are the good guys, 3. a lack of knowledge of EMU specifically and of higher education generally. Compl. ¶ 26.

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*2 In their motion to dismiss, the Institutional Defendants argue that “HN in C” is commonly understood to stand for “Head Nigger in Charge.” Institutional Defs.’ Br. 4, n.5 (ECF No. 28, PageID 142) (collecting cases in which a court has noted this meaning). In response, Higbee contends that, among scholars of the African American experience, “HN in C” is commonly understood to mean “Head Negro in Charge.” Higbee Aff. ¶ 5. (ECF No. 34, PageID 524-525).³

On December 13, 2017, the University suspended Higbee, without pay, for one semester and required him to attend and complete a one-on-one training session with a professional consultant. Compl. at ¶ 27. The University also banned Higbee from campus and from using its email system. *Id.*

As a member of the University’s Chapter of the American Association of University Professors, Higbee grieved his suspension and discipline. *Id.* at ¶ 29. On July 23, 2018 arbitrator Barry Goldman reversed the University’s sanctions. *Id.* at ¶ 31.

On December 4, 2018, Higbee filed his seventeen-count complaint in this action. In the first two counts, Higbee alleges state-law claims of retaliatory discharge against the Institutional Defendants.

On February 14, 2019, the Institutional Defendants filed the pending motion to dismiss (ECF No. 28), wherein they argue that Higbee’s Facebook post is not “protected activity” under the ECLRA’s prohibition against retaliation. Higbee filed a response to this motion. (ECF No. 31). The Court heard oral argument on this motion on May 30, 2019.

ANALYSIS

I. Applicable Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. The Court must construe the complaint in the light most favorable to the plaintiff and accept its allegations as true. *DirectTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). To survive a motion to dismiss, the complaint must offer sufficient factual allegations that make the asserted claims plausible

on their face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Legal conclusions couched as factual allegations will not suffice. *Rondigo, LLC v. Township of Richmond*, 641 F.3d 673, 670 (6th Cir. 2011). Rather, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In addition to the allegations in the complaint, the Court may also consider “other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice.” *Ashland, Inc. v. Oppenheimer & Co., Inc.*, 648 F.3d 461, 467 (6th Cir. 2011).⁴

II. The Institutional Defendants’ Motion

*3 In Counts I and II, Higbee alleges claims under the ELCRA against the Institutional Defendants. In these counts, Higbee contends that his Facebook post was activity protected under the ELCRA. See M.C.L.A. § 37.2701. In the Institutional Defendants’ motion, they argue that Higbee’s post was too vague to constitute protected conduct.

The ELCRA provides that “a person shall not ... [r]etaliat[e] or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceedings, or hearing under this act.” *MacDonald v. United Parcel Svcs.*, 430 F. App’x. 453, 464 (6th Cir. 2011) (quoting M.C.L.A. § 37.2701(a)). The statute is commonly understood as having two clauses: the “opposition clause” and the “participation clause.” See e.g. *Seals v. Bridgeport Spaulding School District*, 2018 WL 4829475 at *6 (E.D. Mich. 2018). At oral argument, Higbee asserted that he is bringing his ELCRA claims under both the opposition and participation clause.

A. Opposition

Higbee argues that his statement “oppose[d] two sections of the ELCRA: MCLA § 37.2402 and MCLA § 37.2701 itself.” Pl.’s Res. 12-13. (ECF No. 32, PageID 377-378).

M.C.L.A. 37.2402(a) provides “an educational institution

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shall not ... discriminate against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex.” Higbee argues that his post specifically complains that the University “failed to give students the full utilization or benefit of the institution by failing to recognize that black [] students were the subject of a racist attack and threat.” Pl.’s Resp 16. But the text of the post does not support this argument. Construing the post—as quoted in the Complaint—in Higbee’s favor, the only arguably discriminatory act that the University was alleged to have performed was “needlessly alienating students who objected to racism.” Compl. ¶ 26. Even if this act could be fairly described as denying the full utilization or benefit of the university, people who objected to racism are not a class protected by M.C.L.A. 37.2402(a). Thus, the Complaint does not contain sufficient factual allegations to state a plausible claim that Higbee was opposing M.C.L.A. § 37.2402(a). See *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312-1313 (6th Cir. 1989) (an employee opposing a discriminatory practice must have a “good faith belief that the practice is unlawful.”).

To the extent Higbee’s post could be understood as opposing “institutional racist practices” as a violation of M.C.L.A. § 37.2402(a), this argument also fails because there is no indication that these alleged practices deny individuals the full utilization of or benefit from the institution.

Next, Higbee advances an “opposition to retaliation for opposition” argument; he argues that his post was opposition to the University retaliating against the protesters for opposing the racist graffiti. But, to accept this argument, the Complaint would need to contain factual allegations to support the conclusion that the graffiti, itself, could be fairly understood to be a violation of the ELCRA. *Id.*

Thus, the Court concludes that Higbee’s complaint does not contain factual allegations sufficient to conclude that Higbee’s post was protected opposition activity.

B. Participation

*4 At the outset, the parties disagree about what standard should control the Court’s analysis under the participation clause. Defendants argue that the Sixth Circuit’s decision in *Booker*, 879 F.2d at 1313, which requires “the instigation of proceedings leading to the filing of a

complaint or a charge,” should control. On the other hand, Higbee argues that the Michigan Court of Appeals’ decision in *McElmore v. Detroit Receiving Hosp. and U. Med. Ctr.*, 196 Mich.App. 391 (1993) should control.

At least one other court in this district has confronted this precise issue. In *Gjokaj v. Crossmark, Inc.*, 2008 WL 1701532 (E.D. Mich. 2008), *aff’d* 362 Fed.App’x 450 (6th Cir. 2010), the Hon. Nancy Edmunds concluded that *McElmore* had “expressly rejected” the high standard announced in *Booker*, and that *McElmore* was applicable:

Defendant cites *Booker* for the proposition that “the instigation of proceedings leading to the filing of a complaint or charge ... is a prerequisite to protection under the participation clause.” *Booker*, 879 F.2d at 1313. This approach was expressly rejected by the Michigan Court of Appeals in *McLemore v. Detroit Receiving Hospital & University Medical Center*, 196 Mich.App. 391, 493 N.W.2d 441, 443 (Mich. Ct. App. 1993). The *McLemore* court held that, “[r]egardless of the vagueness of the charge or the lack of formal invocation of the protection of the act, if an employer’s decision to terminate or otherwise adversely effect [sic] an employee is a result of that employee raising the specter of a discrimination complaint, retaliation prohibited by the act occurs.” *Id.* Defendant suggests that the Court should ignore *McLemore* because it expressly rejects *Booker*. (Def.’s Reply at 3 n. 1.) Defendant’s suggestion is contrary to Sixth Circuit precedent, which holds that “this court is bound by decisions of the state’s intermediate appellate courts unless convinced that the Michigan Supreme Court would decide the question differently.” *United of Omaha Life Ins. Co. v. Rex Roto Corp.*, 126 F.3d 785, 789 (6th Cir. 1997). Given that *McLemore* expressly rejected the Sixth Circuit’s interpretation of Michigan law, and given that the Michigan Supreme Court declined to hear an appeal in the case, 506 N.W.2d 877 (1993), this Court is not convinced that the Michigan Supreme Court would decide the question differently than did the *McLemore* court. Accordingly, the Court will use the *McLemore* standard to assess Plaintiff’s claim under the “participation clause.”

Gjokaj, 2008 WL 1701532 at *6.

The Court agrees with Judge Edmunds’s analysis in *Gjokaj*, and will examine Higbee’s participation clause claim under the *McLemore* standard.

Under *McLemore*, participation activity is protected if it “rais[es] the spectre of a discrimination complaint.” 196 Mich.App. at 396. However, “an employee must do more than generally assert unfair treatment.” *Barrett v. Kirtland Community College*, 628 N.W.2d 63, 72 (Mich. Ct. App.

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2001). Instead, the “charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to [ELCRA].” *Id.*

Higbee’s post does not raise the specter of a claim of unlawful racial discrimination because his vague reference to “institutional racist practices” does not clearly convey the possibility that he would, or even could, assert a claim under the ELCRA. The University could not possibly have discerned which “institutional racist practices” Higbee was referring to in his post and, although an employee need not specifically invoke the ELCRA, Higbee’s post did not even imply that the alleged practices could be fairly understood as violations of the ELCRA. *See Stevens v. Estes Exp. Lines*, 833 F.Supp.2d 729, 736 (E.D. Mich. 2011) (applying Michigan law and concluding that disclosure of a suggestive note to an employer was not participation activity when it did “not demonstrate actionable sexual harassment”). At most, the post generally alleged unfair treatment to third parties. Thus, it is not protected activity

under the participation clause.

CONCLUSION

*5 For the reasons above, the Court **GRANTS** the Institutional Defendants’ Motion to Dismiss Count I and Count II (ECF No. 28). Accordingly, the Court **DISMISSES** Eastern Michigan University and its Board of Regents from this action.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 2502733, 2019 Fair Empl.Prac.Cas. (BNA) 222,320

Footnotes

- 1 The Court has supplemental jurisdiction over Higbee’s ELCRA claims because they are so related to Higbee’s jurisdiction-invoking § 1983 claims that they form part of the same case or controversy. 28 U.S.C. § 1367(a).
- 2 The Individual Defendants also filed a motion to dismiss the First Amendment retaliation claims, asserting qualified immunity. The Court will issue a separate Opinion and Order on the Individual Defendants’ motion.
- 3 At the motion-to-dismiss stage, the Court’s analysis is limited to the facts outlined in the complaint. However, the Court includes the parties’ positions regarding the meaning of “HN in C” to provide context, and to fully summarize the arguments raised in the parties’ briefing.
- 4 Higbee asks the Court to consider his affidavit and the arbitrator’s opinion in making its analysis. Because this is a motion to dismiss, considering these materials—which are not incorporated into the complaint—would be inappropriate. The Court will confine its analysis to the factual allegations in the complaint and the facts that the parties have agreed the Court can consider.

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EXHIBIT 4

2011 WL 1600499

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.Bradley PRUITT, Plaintiff–Appellant,
v.
MICHIGAN STATE UNIVERSITY, Erica
Bracamontes, Frances Chames, Margaret
Thompson, Mary Nettleman and Marsha
Rappley, Defendants–Appellees.

Docket No. 295957.

|
April 28, 2011.

West KeySummary

1 Civil Rights—Discrimination Against Males

Student failed to establish that he suffered an adverse action from state university, and therefore university could not be held liable for allegedly discriminating against him on the basis of gender under the Civil Rights Act. Student had received a written evaluation drafted by his instructor stating that he had engaged in inappropriate physical contact with her. However, the evaluation was omitted from student's dean's letter, and student was given a positive evaluation in the letter. M.C.L.A. § 37.2402.

Ingham Circuit Court; LC No. 08–001682–NZ.

Before: METER, P.J., and SAAD and RONAYNE
KRAUSE, JJ.**Opinion**

PER CURIAM.

*1 Plaintiff appeals a trial court order that granted summary disposition to defendants. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Plaintiff attended Michigan State University's College of Human Medicine. In the fall of 2005, Erica Bracamontes acted as plaintiff's instructor and evaluator during a clerkship rotation. On December 24, 2005, plaintiff received a written evaluation drafted by Bracamontes, in which she stated that plaintiff engaged in inappropriate physical contact with her and that she considered the contact to be disrespectful. Plaintiff complained about the evaluation to clerkship director Dr. Frances Chames, and to assistant dean Dr. Kent Bottles. In January 2006, Dr. Bottles wrote a letter to plaintiff in which he observed that the allegation against plaintiff was very serious and that plaintiff must change his "attitude and behavior." Dr. Bottles warned that if plaintiff engaged in further unprofessional conduct, he would be subject to a formal disciplinary hearing and Dr. Bottles would include the information in plaintiff's dean's letter, which is a comprehensive performance evaluation submitted to residency programs to which the medical student has applied. Dr. Bottles further stated that "any comments from your clerkship final grade letters, including preceptor evaluations, may be included in your dean's letter."

Dr. Chames included Bracamontes's comments in the final grade memorandum for plaintiff's clerkship. According to plaintiff, he complained to Dr. Chames numerous times about her inclusion of the comments, she agreed to rewrite the letter but, with each rewrite, she included Bracamontes's comments about plaintiff's conduct. Dr. Chames set up a meeting with the clerkship directors so that plaintiff could appeal the inclusion of the comments in his final grade. However, plaintiff maintains that Dr. Chames did not tell him when the meeting would take place, and this resulted in the denial of his appeal.

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Because Dr. Bottles left Michigan State in 2006, plaintiff's dean's letter was drafted by Dr. Margaret Thompson, assistant dean of the College of Human Medicine. Dr. Thompson included Bracamontes's comments in the letter. Plaintiff appealed the matter to the chairperson of internal medicine, Mary Nettleman, and she denied the appeal in January 2007. Plaintiff then filed a grievance to the College of Human Medicine Hearing Panel. The panel concluded that plaintiff should have been given feedback right away about his touching of Bracamontes so that he could correct his behavior or otherwise respond to Bracamontes's concerns. The panel also found that Dr. Chames should have notified plaintiff about when the clerkship directors would meet to discuss his initial appeal. The panel passed the matter on to Dean Marsha Rappley, who removed Bracamontes's comments from plaintiff's dean's letter. Plaintiff received a designation of "Very Good" in the dean's letter and the letter contains primarily positive comments about plaintiff's medical school performance. However, plaintiff complains that Dean Rappley should have removed other negative comments about plaintiff and should not have added a remark that "there have been faculty and administrator concerns about communication."

*2 Plaintiff filed his complaint on December 23, 2008, and he amended the complaint twice thereafter. Plaintiff alleged that Michigan State and its employees Bracamontes, Chames, Thompson, Nettleman and Rappley discriminated against him on the basis of his gender, in violation of the Civil Rights Act (CRA), MCL 37.2101, et seq. He specifically claimed that, because they are biased against males, defendants acted individually and in concert to violate the rules and procedures of the medical school in evaluating plaintiff and that they did so in order to give plaintiff a negative evaluation. Plaintiff also alleged that defendants treated him differently than similarly situated females and that they retaliated against him for raising allegations of gender bias.

The trial court granted summary disposition to defendants in an opinion and order filed on December 21, 2009. Specifically, the trial court ruled that plaintiff failed to establish a genuine issue of material fact that he was subject to a materially adverse action, that any actions were taken by defendants because plaintiff is male, or that defendants treated similarly situated female students differently.

II. ANALYSIS

A. STANDARD OF REVIEW AND APPLICABLE LAW

The trial court did not specify the subrule on which it relied in granting defendants' motion, but the court's opinion shows that it considered documentary evidence outside of the pleadings. Therefore, we review the decision under MCR 2.116(C)(10). As this Court explained in *Campbell v. Human Services Dep't*, 286 Mich.App. 230, 234–235, 780 N.W.2d 586 (2009):

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Kuznar v. Raksha Corp.*, 481 Mich. 169, 175, 750 N.W.2d 121 (2008). Summary disposition of all or part of a claim may be granted under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law." "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Corley v. Detroit Bd. of Ed.*, 470 Mich. 274, 278, 681 N.W.2d 342 (2004) (citation and quotation marks omitted). The moving party must specifically identify the matters that allegedly have no disputed factual issues, and the nonmoving party must support its position that a disputed factual issue does exist by using affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Coblentz v. City of Novi*, 475 Mich. 558, 569, 719 N.W.2d 73 (2006).

Plaintiff brought his claim pursuant to MCL 37.2402 of the CRA, which provides, in relevant part:

An educational institution shall not do any of the following:

(a) Discriminate against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex.

*3 (b) Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution, because of religion, race, color, national origin, or sex.

"The CRA also prohibits employers from retaliating against a person 'because the person has opposed a

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violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.’ “ *Chen v. Wayne State Univ.*, 284 Mich.App. 172, 201, 771 N.W.2d 820 (2009), quoting MCL 37.2701(a).

The education provisions in MCL 37.2402 have rarely been addressed by our courts. As this Court explained in *Fonseca v. Michigan State University*, 214 Mich.App. 28, 30, 542 N.W.2d 273 (1995), “[b]ecause the educational provisions of the act have received little judicial interpretation and because the statutory language employs terms of art used and judicially interpreted extensively in the specialized but extensive field of employment discrimination, we look to these decisions to help us interpret and apply the law to the facts.” Plaintiff does not dispute that he lacks direct evidence of gender bias. Accordingly, he was required to present a prima facie case of discrimination under the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Hazle v. Ford Motor Co.*, 464 Mich. 456, 462, 628 N.W.2d 515 (2001). Borrowing from the employment context, this approach required plaintiff to show that he belongs to a protected class, he suffered an adverse action, he was otherwise qualified, and the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. See *Sniecinski v. Blue Cross and Blue Shield of Mich.*, 469 Mich. 124, 134, 666 N.W.2d 186 (2003).

B. DISCUSSION

Plaintiff complains that defendants failed to adequately support their motion for summary disposition and, therefore, it was error for the trial court grant the motion. MCR 2.116(G) states that, when judgment is sought under MCR 2.116(C)(10), the moving party must submit documentary evidence in support. MCR 2.116(G) provides, in relevant part:

(4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing

that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Defendants submitted documents to support their motion for summary disposition, including a copy of the student handbook, a copy of medical student rights and responsibilities, the findings of the hearing committee, a letter from Dr. Bottles to plaintiff, an affidavit of Dr. Bottles, an affidavit of Dr. Thompson, and plaintiff’s revised dean’s letter. Defendants relied on the evidence to support their argument that there is no genuine issue of material fact that plaintiff ever suffered a materially adverse action, that defendants were predisposed to discriminate against males, or that they treated plaintiff differently as a male in this case. We hold that, contrary to plaintiff’s assertions, defendants supported their arguments as required by the court rule. In response, plaintiff failed to submit documentary evidence setting forth specific facts to establish that there is a genuine issue for trial. Accordingly, the trial court correctly granted summary disposition to defendants.

*4 We agree with the trial court that plaintiff failed to establish that he suffered an adverse action. To establish this element, plaintiff had to show that he suffered more than a minor inconvenience or change. In the employment context, materially adverse actions would include termination, demotion, salary cut, change to a lesser job title, or a significant loss of benefits. *Chen v. Wayne State Univ.*, 284 Mich.App. 172, 202, 771 N.W.2d 820 (2009). Here, plaintiff failed to present any evidence to establish that he suffered a similar action that would qualify as actionable under the CRA. It is undisputed that Bracamontes’s comments about plaintiff’s improper physical contact were removed from plaintiff’s dean’s letter. Further, Dean Rappley’s comment that “there have been faculty and administrator concerns about communication” does not constitute a materially adverse action against plaintiff. If plaintiff had alleged or shown that, for example, he was dismissed from the medical school or he received a lower graduating designation for reasons related to gender bias, this may have amounted to an adverse action. But plaintiff made no such allegation, he received a “Very Good” designation in the dean’s letter, and the letter contains overwhelmingly positive comments about his medical school performance.

If plaintiff had shown that the comments in the dean’s letter constituted an adverse action by defendants, he was also required to show that the action was motivated by an intent to discriminate based on gender. “A plaintiff who claims a decision was discriminatorily motivated must produce some facts from which a factfinder could reasonably infer unlawful motivation.” *Fonseca*, 214

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Mich.App. at 31, 542 N.W.2d 273. Plaintiff has produced no facts to establish that defendants, individually or in concert, had any unlawful motivation in recording plaintiff's unprofessional conduct. While the hearing panel concluded that Bracamontes should have talked to plaintiff about his unwanted physical contact, no evidence suggests that her failure to do so or any subsequent reporting of the incidents was motivated by plaintiff's gender. Moreover, plaintiff has made no factual showing to refute the accuracy or relevance of any of the comments contained in the dean's letter and he has not presented evidence to support his allegation that defendants intentionally, and with discriminatory motive, engaged in an effort to give him a negative evaluation.

Plaintiff contends that defendants treated Bracamontes more favorably because she is female. Specifically, he asserts that Bracamontes was never disciplined for failing to talk to plaintiff about his unwanted physical contact, but he was punished through the inclusion of this information in his reviews and dean's letter. Again, referring to the employment context, "[t]o avoid summary disposition under the disparate treatment theory, the plaintiff must present sufficient evidence to permit a reasonable juror to find that for the same or similar conduct the plaintiff was treated differently from a similarly situated male [or female] employee." *Duranceau v. Alpena Power Co.*, 250 Mich.App. 179, 182, 646 N.W.2d 872 (2002). To establish that another is similarly situated, plaintiff had to show that all relevant aspects of Bracamontes's situation were "nearly identical" to his situation. See *Town v. Michigan Bell Telephone Co.*, 455 Mich. 688, 700, 568 N.W.2d 64 (1997). It is undisputed that Bracamontes was a resident instructor in the clerkship program and that she was charged with instructing plaintiff and evaluating his performance in his student medical rotation. Plaintiff and Bracamontes were not similarly situated. Moreover, unlike plaintiff, there is no allegation that Bracamontes engaged in unwanted physical contact with a student, so plaintiff simply cannot establish that he was treated differently "for the same or similar conduct..." *Duranceau*, 250 Mich.App. at 182, 646 N.W.2d 872.

*5 Plaintiff asserts that defendants retaliated against him because he made allegations of gender bias. Our courts have ruled that, in an employment context, to establish a

prima facie case of retaliation under the CRA, a plaintiff must show: " (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." " *Garg v. Macomb County Community Mental Health Services*, 472 Mich. 263, 273, 696 N.W.2d 646 (2005), quoting *DeFlaviis v. Lord & Taylor, Inc.*, 223 Mich.App. 432, 436, 566 N.W.2d 661 (1997). Plaintiff claims he raised the issue of sexual bias during the grievance process and that he was punished when defendants referenced his unprofessional conduct in his dean's letter. However, the reference to Bracamontes's complaint was removed from plaintiff's letter, there is no evidence of an adverse action against plaintiff and, even if a negative comment in the letter could amount to an adverse action, plaintiff has failed to allege or document any facts to establish a causal connection between his allegation of sexual bias and any comments in the letter. Therefore, plaintiff failed to establish a claim for retaliation and the trial court correctly granted summary disposition to defendant.

Plaintiff also complains that discovery was not complete when the trial court granted summary disposition to defendants. The scheduling order in the lower court file shows that the discovery cut-off date was December 31, 2009. The trial court granted summary disposition to defendants on December 21, 2009, after the case was pending for a year. Further, in light of plaintiff's failure to even allege sufficient facts to support his claims, it does not appear that further discovery would uncover factual support to oppose defendants' motion for summary disposition. *State Treasurer v. Sheko*, 218 Mich.App. 185, 190, 553 N.W.2d 654 (1996). Accordingly, plaintiff's claim is without merit.

Affirmed.

All Citations

Not Reported in N.W.2d, 2011 WL 1600499

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EXHIBIT 5

Wojan v. Alcon Laboratories, Inc., Not Reported in F.Supp.2d (2008)

2008 WL 4279365, 156 Lab.Cas. P 35,486, 14 Wage & Hour Cas.2d (BNA) 150

2008 WL 4279365
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Rebecca L. WOJAN, Plaintiff,
v.
ALCON LABORATORIES, INC.,
Defendant.

No. 07-11544.
|
Sept. 15, 2008.

Attorneys and Law Firms

Thomas L. Stroble, Walter R. Sobczak, Byrwa & Sobczak, Bloomfield Hills, MI, Darcie R. Brault, Dib, Fagan, Royal Oak, MI, for Plaintiff.

Paul E. Bateman, Asilia S. Backus, Littler Mendelson, Chicago, IL, Charles C. Dewitt, Jr., Dewitt, Balke, Detroit, MI, for Defendant.

OPINION AND ORDER

VICTORIA A. ROBERTS, District Judge.

I. INTRODUCTION

*1 This matter is before the Court on Defendant's Motion for Summary Judgment. The Court **DENIES** Defendant's motion.

II. BACKGROUND

Plaintiff Rebecca Wojan brings this action against her

former employer, Defendant Alcon Laboratories, Inc. ("Alcon"). Plaintiff began working for Defendant on August 20, 2001 as a Glaucoma Sales Representative ("GSR") in the Detroit territory. She worked from a home office. Several months after she started, Plaintiff made a lateral transfer to the position of Medical Sales Representative ("MSR") for the same territory. She worked in conjunction with Jeff Dann, who became the GSR. As a GSR, and later as an MSR, Plaintiff was responsible for specific drugs within her territory. During the relevant time period, Plaintiff was responsible for Vigamox, Travatan, Patanol, TobraDex and for part of 2005, a newly launched product, Nevanac. Plaintiff's job duties included meeting with physicians and office staff to discuss the benefits of Alcon products. The goal was to increase the number of prescriptions for Alcon products written by the physicians for their patients. In both positions, Plaintiff also had certain administrative and record keeping duties.

District Manager, Tony Surdyk, was Plaintiff's immediate supervisor throughout her employment. On occasion, Surdyk attended field visits with Plaintiff. He evaluated her performance. Before each field visit, Plaintiff would complete her portion of a field visitation report and Surdyk would complete his portion during and after each visit. Surdyk also provided Plaintiff with a mid-year review and an annual performance evaluation, which included a self-evaluation by Plaintiff.

Tony DiLorenzo was the Regional Director for Plaintiff's territory and also Surdyk's immediate supervisor. DiLorenzo was replaced by John Briggs in December 2005. Plaintiff had limited contact with the regional directors, usually at national sales meetings.

All of the sales representatives were measured in part subjectively (20%), based on their district manager's assessment of their performance, and objectively (80%) by measuring performance by drug/territory against certain sales quotas. Sales representatives were also ranked annually by percentage of achievement to those quotas. In February or March of each year, Defendant assigned an annual market share goal or sales quota to each geographic territory. MSRs and GSRs worked as a team and were expected to reach the shared market share goal. The market share goal was based on the projected growth potential in a given territory; it was generated by Defendant's finance department and regional directors.

During her employment with Defendant, Plaintiff won numerous sales awards and was consistently rated as a high performing employee. In her 2002 performance

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evaluation, Plaintiff was rated “GSP” or good solid performance. GSP is defined as having:

“achieved or exceeded major Primary Accountabilities and Key Objectives. Solid work ethic, highly committed, results orientation, teamwork. Demonstrates solid skills in all areas as appropriate for the position. Technical knowledge supports achievement of all responsibilities.”

*2 She was ranked at 53. In her 2003 performance evaluation, Plaintiff was rated as GSP+. That year Plaintiff obtained the highest employee honor, the president’s club award, with a ranking of 12 in the nation. In her 2004 performance evaluation, Plaintiff was rated as GSP. Plaintiff also was the top winner of the Travatan Blue Physician Contest in 2004. She was ranked at 23.

On October 25 2004, Plaintiff took maternity leave under the Family Medical Leave Act (“FMLA”). A floater, Jacqueline Schoustal, was assigned to cover Plaintiff’s territory. Mrs. Schoustal was a new representative with no sales experience.

Plaintiff, a new single mother, returned to work on or about January 30, 2005. Upon her return, Plaintiff says both Surdyk and DiLorenzo began making comments regarding her leave. DiLorenzo told her she had “better not be out there just showing baby pictures, she better be out there selling.” (Wojan Dep. Tr. 85). She says she also was questioned about the sufficiency of her childcare arrangements and when she was getting married. (Wojan Dep. Tr. 85-86, 88).

In March 2005, Defendant issued its 2005 annual quotas and rankings. Plaintiff’s ranking dropped from 23 to 89. Because Defendant’s fiscal year begins on December 1st, the 2005 quotas ran retroactive to December 1, 2004. Consistent with its policy, Defendant did not modify Plaintiff’s quota to account for her leave. Plaintiff complained to Surdyk that the quota was unfair because she was out of the territory for three months on maternity leave. She also complained that the quota was unusually challenging and designed to set her up for failure. In June 2005, Plaintiff reiterated to Surdyk that she felt she was targeted and penalized for taking maternity leave. She again stated that the maternity leave penalty and the rigidity of the quotas set her up to fail. Mr. Surdyk did not report her complaints to Human Resources.

In October 2005, Plaintiff was placed on a 90-day performance improvement plan (“PIP”). Nikki Roblow, a human resources generalist, assisted Surdyk with the development of the PIP. Plaintiff later complained about the PIP, stating it was unfair because the quotas were so high. Plaintiff also complained that male representatives

who did not make quotas were not placed on PIPs. In December 2005, Briggs, Surdyk and Roblow decided to terminate Plaintiff, although it was not carried out at that time. Neither Briggs, nor Roblow were aware of Plaintiff’s FMLA leave or her discrimination complaints. In January 2006, Plaintiff asked Surdyk to extend her PIP; he denied the request.

At the beginning of March 2006, Defendant issued its 2006 annual quotas and rankings. Plaintiff ranked 75. The December 2004 and January 2005 sales numbers were used to partially evaluate Plaintiff’s 2005 performance.

Plaintiff was terminated on March 9, 2006.

Plaintiff filed this action alleging: Count I-sex discrimination in violation of the Elliott-Larsen Civil Rights Act (“ELCRA”), M.C. L. § 37.2201, *et seq.*; Count II-marital status discrimination in violation of the ELCRA; Count III-retaliation and interference in violation of the FMLA; Count IV-violation of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1140 *et seq.*; and Count V-retaliation under the ELCRA. The parties stipulated to dismiss Count IV. (See Order, Docket No. 41.) Defendant seeks summary judgment on the remaining claims.

III. STANDARD OF REVIEW

*3 Under Fed. R. Civ. P 56(c), summary judgment may be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir.1995). A fact is “material” and precludes a grant of summary judgment if “proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s] of law to the rights and obligations of the parties.” *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir.1984). The court must view the evidence in the light most favorable to the nonmoving party and it must also draw all reasonable inferences in the nonmoving party’s favor. *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir.1995).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Snyder v. AG Trucking Co.*, 57 F.3d 484, 488 (6th Cir.1995). To meet this burden, the movant may rely on any of the

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evidentiary sources listed in Rule 56(c). *Cox*, 53 F.3d at 149. Alternatively, the movant may meet this burden by pointing out to the court that the nonmoving party, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case, and on which that party will bear the burden of proof at trial. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir.1995); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir.1989). The moving party does not, however, have to support its motion for summary judgment with evidence negating its opponent's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985).

Once the moving party meets its burden, the burden shifts to the nonmoving party to produce evidence of a genuine issue of material fact. Rule 56(e); *Cox*, 53 F.3d at 150. The nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of its complaint. *Copeland*, 57 F.3d at 479. The mere existence of a scintilla of evidence to support the nonmoving party position will be insufficient; there must be evidence on which a jury could reasonably find for the nonmoving party. *Snyder*, 57 F.3d at 488; *Tolton*, 48 F.3d at 941.

IV. BURDEN SHIFTING FRAMEWORK

Michigan courts apply the *McDonnell Douglas* burden shifting approach to claims of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Dubey v. Stroh Brewery Co.*, 185 Mich.App. 561, 563, 462 N.W.2d 758 (1990). Once plaintiff has proven a *prima facie* case by a preponderance, the burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for its actions. *Id.* Once defendant meets its burden, plaintiff then has the burden to show by a preponderance that the purported legitimate, nondiscriminatory reason was merely a pretext for discrimination. *Id.* In order to prevail, a plaintiff must prove that her protected status was a motivating factor in the employer's decision. *Town v. Michigan Bell Telephone Co.*, 455 Mich. 688, 697, 568 N.W.2d 64 (1997). A plaintiff can establish pretext in three ways: (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. *Dubey*, 185 Mich. at 565-566, 152 N.W. 257

*4 Pregnancy discrimination claims can be based on a

theory of disparate treatment or disparate impact. *Smith v. Goodwill Industries of West Michigan, Inc.*, 243 Mich.App. 438, 450, 622 N.W.2d 337 (2000). "A claim of disparate impact involves 'employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'" *Id.* at 450-451, 622 N.W.2d 337 (quoting *Farmington Education Association v. Farmington School District*, 133 Mich.App. 566, 571, 351 N.W.2d 242 (1984)). To prove disparate treatment, a plaintiff must show that the defendant had a discriminatory motive. *Id.* at 451, 622 N.W.2d 337.

V. ANALYSIS

A. PLAINTIFF RAISES A GENUINE ISSUE OF FACT ON HER FMLA CLAIMS

There are two theories of recovery under the FMLA—the "interference" (or "entitlement") theory and the "retaliation" theory. Plaintiff asserts her claim under both the interference and retaliation theories. She establishes a *prima facie* case under both theories.

i. INTERFERENCE CLAIM

To state a *prima facie* interference or entitlement claim a plaintiff must show that:

- 1) she is an eligible employee; 2) defendant is a covered employer; 3) she was entitled to leave under the FMLA; 4) she gave defendant notice of her intent to take leave; and 5) defendant denied her FMLA benefits to which she was entitled.

Hoge, 384 F.3d at 244; *Cavin v. Honda of America Mfg., Inc.*, 346 F.3d 713, 719 (6th Cir.2003). The fifth element of an interference claim can also be that the employer has "somehow used the leave against her and in an unlawful manner, as provided in either the statute or regulations." *Bradley v. Mary Rutan Hosp.*, 322 F.Supp.2d 926, 940 (S.D. Ohio 2004). The Court finds that Plaintiff raises a genuine issue of material fact on her FMLA claim under the interference/entitlement theory.

Under 29 C.F.R. § 825.220(c), employers cannot use the taking of FMLA leave as a negative factor in employment

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actions, such as hiring, promotions or disciplinary actions. This negative-factor analysis is applicable in analyzing an interference claim. *Brenneman v. Medcentral Health Sys.*, 366 F.3d 412, 422 (6th Cir.2003). If an employer takes an employment action based, in whole or in part, on the fact that the employee took FMLA-protected leave, the employer has denied the employee a benefit to which he is entitled. An employer's intent is not directly relevant to the entitlement inquiry. *Edgar v. JAC Prods.*, 443 F.3d 501, 507 (6th Cir.2006). However, "interference with an employee's FMLA rights does not constitute a violation if the employer has a legitimate reason unrelated to the exercise of FMLA rights for engaging in the challenged conduct." *Id.* at 508 (citing *Arban v. West Publ'g Corp.*, 345 F.3d 390, 401 (6th Cir.2003)).

Here, Plaintiff clearly satisfies the first four prongs of the prima facie case. The parties do not dispute that Plaintiff Wojan is an "eligible employee" or that Defendant Alcon is a covered "employer" under the FMLA. Likewise, the parties don't dispute that Plaintiff was entitled to FMLA leave and gave Defendant notice of her intention to take leave. It is uncontroverted that Plaintiff took 12 weeks of qualifying FMLA leave and was restored to her same position upon her return to work. The problem, Plaintiff says, is that Defendant held her to the same quota and evaluated her performance during the time she was absent on FMLA leave. That absence caused her to have a poor performance score. The poor performance score caused her to be placed on a PIP. And, her PIP status affected her ability to improve her performance score. Hence, Plaintiff says the initial violation set in motion an unbroken chain of events resulting in her termination.

*5 The Sixth Circuit accepted the same argument in *Wysong v. Dow Chemical Co.*, 2007 U.S.App. LEXIS 22975, 2007 WL 2819880 (6th Cir.2007). In *Wysong*, the plaintiff appealed a district court judgment granting summary judgment for her employer on her claims under FMLA. The plaintiff argued she was wrongfully terminated in 2003 for taking a prior authorized FMLA leave in 2002. In 2003, the defendant placed the plaintiff on leave after its company doctor issued severe work restrictions for her due to a chronic neck injury. These restrictions were based, in part, on the doctor's knowledge that she had taken significant leave in the past. The work restrictions prevented her from working. Because she was not reporting to work, the defendant fired her. The defendant argued that its company doctor properly considered the plaintiff's prior 2002 absences in developing her restrictions, because he did not write the restrictions solely on the basis of those absences. The appeals court disagreed. Despite noting that intervening events happened between plaintiff's leave in 2002 and her

termination in 2003, the *Wysong* court found that the initial issuance of the severe restrictions set in motion an unbroken chain of events culminating in her termination. Accordingly, the court ruled that plaintiff met the fifth element of her interference claim. This Court adopts the reasoning of *Wysong*.

Although a year elapsed between Plaintiff's FMLA leave and her ultimate termination, the performance issue which resulted in her termination was based in part, on the score calculated during her absence. Defendant admits that Plaintiff's 2004 and 2005 quotas and performance scores were not adjusted to account for her FMLA leave. Defendant also admits that Plaintiff's sales performance declined because of her absence from the territory during FMLA leave. Thus, it is clear Defendant evaluated Plaintiff, in part, based upon time she was absent on FMLA leave, and took employment action against her based upon that evaluation.

As a legitimate, non-discriminatory reason, Defendant argues Plaintiff was fired due to poor performance. But, Defendant provides a 2007 Incentive Compensation Plan document, which would not be applicable to Plaintiff because it covers periods after her termination date. (See Defendant's Exhibit F).

Defendant says that a floater was obtained to cover Plaintiff's territory in her absence. But the floater was not evaluated based on her performance in Plaintiff's territory. Defendant also says that it does not adjust quota for any employee, for any reason, and thus did not act in a discriminatory manner towards Plaintiff when it failed to adjust her quota to account for her FMLA leave.

Defendant's position is in direct contravention of FMLA provisions which prohibit the taking of FMLA leave as a negative factor in employment actions. Moreover as to pretext, Plaintiff presents evidence that she had high performance prior to her leave; that several male sales representatives with worse ranking and performance were not placed on PIPs or terminated, or once placed on a PIP, were given an extension when they did not successfully complete; and, that other female employees who took FMLA leave to birth children faced similar action resulting in placement on PIP, termination, or both.

*6 A genuine issue of fact is presented here. A jury could reasonably find that Defendant used Plaintiff's FMLA leave against her, at least in part, as a negative factor in evaluating her performance and the terms and conditions of her employment. Defendant's motion for summary judgment on Plaintiff's FMLA interference claim is denied.

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ii. RETALIATION CLAIM

To state a retaliation claim, plaintiff must show that: “1) she availed herself of a protected right under the FMLA; 2) she was adversely affected by an employment decision; and 3) there was a causal connection between her protected activity and defendant’s adverse employment actions.” *Jeremy v. Northwest Ohio Development Center*, 33 F.Supp.2d 635, 639 (N.D. Ohio 1999). The Sixth Circuit held that the FMLA prohibits employers from taking adverse employment actions against employees based upon the employee’s exercise of FMLA leave. *Bryant v. Dollar General Corp.*, No. 07-5006 (6th Cir. Aug. 15, 2008). The Sixth Circuit concluded that the FMLA prohibits retaliation for taking leave under 29 U.S.C. § 2615, as well as retaliation for opposing a practice made unlawful by the FMLA. *Id.*

Where there is no direct evidence, the *McDonnell Douglas* burden shifting approach applies to FMLA retaliation claims. *Skyjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 315 (6th Cir.2001).

Plaintiff says there is direct evidence of retaliation. She says her 2005 quotas and ranking included data from December 2004 and January 2005, when she was absent on FMLA leave. The PIP was based, in part, on her performance during those months. Likewise, her termination was tied to failure to meet the PIP. Plaintiff says this constitutes direct evidence of use of her FMLA qualifying leave in the termination decision. The Court agrees.

But even if it were not, Plaintiff’s evidence also establishes a prima facie case under the *McDonnell Douglas* framework. The adverse actions upon which Plaintiff bases her claim are placement on a PIP and termination. Plaintiff says the causal connection between her FMLA leave and the adverse actions is supported by: (1) a field visit report in which Surdyk acknowledges that her sales fell due to her absence from the field for three months; (2) plaintiff’s deposition testimony that her supervisor told her that her poor performance was due to being out of the field for three months; and (3) another manager, Rossiter’s, deposition testimony that she would have made or come close to making all of her market share quotas if her PIP had been extended another 90 days. Plaintiff argues that the inclusion of sales data from the period when she was on FMLA leave lowered her overall ranking and sales performance for the subsequent year and constituted a negative factor in the resulting adverse employment actions.

The 8th Circuit has held that “a negative review is actionable ... where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient’s employment.” *LaCroix v. Sears*, 240 F.3d 688, 692 (8th Cir.2000). Here, the lower sales performance ranking was the reason Defendant placed Plaintiff on a PIP and ultimately terminated her.

*7 Defendant asserts a non-discriminatory reason for firing Plaintiff-her poor performance. Plaintiff, says this is merely a pretext.

Plaintiff argues that pretext is established by the temporal element between her leave, her complaints of FMLA violations and discrimination, and her termination. This evidence raises a genuine issue of fact. In Plaintiff’s Nov. 2001-Dec.2002 performance evaluation, Surdyk congratulates her “assertive, positive and professional attitude.” (See Plaintiff’s Exhibit B). In Plaintiff’s Nov. 2002-Nov.2003 performance evaluation, Surdyk advises Plaintiff that “your style is certainly effective.” (See Plaintiff’s Exhibit B). In Plaintiff’s Dec. 2003-Nov.2004 performance evaluation, Surdyk states:

“Rebecca, your performance in several Primary Accountabilities is very strong ... A few areas that stand out are the following. Rebecca your Interpersonal Skills coupled with your competitive business acumen for each and every product is the Trade Mark for Rebecca Wojan ... Finally and most importantly these excellent behaviors in the Primary Accountabilities drove our ultimate responsibility ... excellent sales results for two of three products. Your sales performance is strong and is a direct result of solid performance in all the behaviors and activities listed above.” (See Plaintiff’s Exhibit B).

He also says:

“Rebecca, your Enhanced Productivity is also exceeding most sales representatives.” (See Plaintiff’s Exhibit B).

As late as March 23, 2005, Surdyk compliments Plaintiff’s abilities. In a field visit report, he says:

“I know your activity and behaviors are back to the level when you left the territory, yet your sales have slipped during your absence. As we discussed during this visit and over the phone, don’t panic, focus on your solid behaviors (Most Wanted Lists, Utilizing Resources, Assertiveness and Competitiveness). (See Defendant’s Exhibit H).

However, several months later Surdyk’s comments on Plaintiff’s performance changed noticeably. When the PIP

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issued in October 2005, Surdyk stated that Plaintiff needed improvement in the area of assertiveness/aggressiveness. (See Defendant's Exhibit K). In a November 2005 performance review, Surdyk states that through their monthly field report Plaintiff's overall performance was improving and several areas were in fact "meeting expectations." Surdyk states, however, "your performance is 'Below Expectations' when you are on a P.I.P." (See Defendant's Exhibit N). Using this circular logic, a person on a PIP could never work themselves off since no matter how much they improved their performance they would always be rated as below expectations.

Plaintiff presents numerous reference letters from doctors upon whom she called; all praise her performance as a sales representative. (See Plaintiff's Exhibit M). Plaintiff also presents account call notes, written during her employment and memorializing several conversations with Dr. Tukul, in which he complained about his frustration with the Alcon company for failing to provide funding, study support, and attention from upper-level management. (See Plaintiff's Exhibit G). This evidence tends to rebut Defendant's claims regarding Plaintiff's poor performance and sales ability in relation to Dr. Tukul's office.

*8 In the aggregate, there is a question of fact whether performance was the true reason for Plaintiff's termination.

B. PLAINTIFF RAISES A GENUINE ISSUE OF FACT ON HER ELLIOT LARSEN DISCRIMINATION CLAIMS

The Elliot Larsen Civil Rights Act, M.C.L. § 37.2202(1)(a), prohibits discrimination by an employer on the basis of marital status or sex. This includes pregnancy, childbirth or any medical condition related to pregnancy or childbirth:

An employer shall not ...

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. M.C.L. § 37.2201(d).

Plaintiff asserts claims of marital status and sex discrimination, as well as retaliation under ELCRA. A question of fact exists under all theories.

i. SEX (PREGNANCY) DISCRIMINATION

To state a *prima facie* claim of sex discrimination, a plaintiff must show "(1) that she is a member of a protected class, (2) that she suffered an adverse employment action, (3) that she was qualified for her position, and (4) that she suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination." *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 451 (6th Cir.2005) (citing *Wilcoxon v. Minn. Mining & Mfg. Co.*, 235 Mich.App. 347, 597 N.W.2d 250 (1999)). Where a plaintiff does not present direct evidence of discrimination, Michigan courts apply the *McDonnell Douglas* burden shifting approach to such claims. *Dubey v. Stroh Brewery Co.*, 185 Mich.App. 561, 563, 462 N.W.2d 758 (1990). In order to prevail, a plaintiff must prove that her protected status was a motivating factor in the employer's decision. *Town v. Michigan Bell Telephone Co.*, 455 Mich. 688, 697, 568 N.W.2d 64 (1997). A plaintiff can establish pretext in three ways: (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. *Dubey*, 185 Mich. at 565-566, 152 N.W. 257.

Pregnancy discrimination claims can be based on a theory of disparate treatment or disparate impact. *Smith v. Goodwill Industries of West Michigan, Inc.*, 243 Mich.App. 438, 450, 622 N.W.2d 337 (2000). Disparate impact results from facially neutral employment practices that have a disproportionately negative effect on certain protected groups and which cannot be justified by business necessity. Disparate impact does not require a showing of discriminatory motive. *Hughley v. General Motors*, 52 F.3d 1364, 1370 (6th Cir.1995). To establish a *prima facie* disparate impact claim, a plaintiff must demonstrate "that a specific employment practice or policy caused a significant disparate impact on a protected group." *Hartsel v. Keys*, 87 F.3d 795, 801-02 n. 4 (6th Cir.1996). To demonstrate this, a plaintiff is required to present "statistical evidence of systematic discrimination (i.e., a pattern or practice which results in discrimination)." *Hughley*, 52 F.3d at 1370. By contrast, under the disparate treatment theory, a plaintiff must simply show that the employer treats women less favorably than men because of their sex. "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in

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treatment.” *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

*9 Plaintiff does not say which theory she asserts. However, she presents no statistical evidence to establish a prima facie disparate impact claim. Accordingly, Plaintiff’s claim will be analyzed under the disparate treatment theory. Plaintiff meets the first prong—that she is a member of a protected class—by producing evidence that she was pregnant, took maternity leave and gave birth to a child. Plaintiff also meets the second prong—that she suffered an adverse employment action—by producing evidence that Defendant placed her on a PIP and terminated her employment.

With respect to the third prong, Plaintiff asserts that she was well-qualified for the position. The burden of showing that a plaintiff is qualified can be met by presenting credible evidence that his or her qualifications are at least equivalent to the minimum objective criteria required for employment in the relevant field. *Wexler v. White’s Fine Furniture, Inc.*, 317 F.3d 564, 575-76 (6th Cir.2003). “For purposes of the prima facie case analysis, a plaintiff’s qualifications are to be assessed in terms of whether he or she was meeting the employer’s expectations prior to and independent of the events that led to the adverse action.” *Tysinger v. Zanesville Police Dep’t*, 463 F.3d 569, 573 (6th Cir.2006).

Plaintiff’s tenure at Alcon is telling on this element. She won numerous sales awards, including the top level President’s Club Circle in 2003. She was ranked above the median prior to her leave. (See Plaintiff’s Exhibit B). She was never disciplined until she returned from leave. Thus, contrary to Defendant’s assertions, Plaintiff makes a prima facie showing that she was qualified for the position. A plaintiff satisfies the fourth prong when he or she demonstrates that a “comparable non-protected person was treated better.” *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir.1992). The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered “similarly-situated.” *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir.1994). Plaintiff says there were several male sales representatives who were ranked below the median who were not placed on PIPs or terminated. (Wojan Dep. Tr. 102-103, 117-118; Plaintiff’s Exhibit I). Brian Berrier’s PIP was extended after he failed to meet its terms; he was ranked 71. (Wojan Dep. Tr. 126; Plaintiff’s Exhibit I). Jeff Brinda was ranked 89 and was promoted to management. (Wojan Dep. Tr. 160; Plaintiff’s Exhibit I). Defendant promoted Chad Clatterbaugh and Kemp

Schafer, ranked at 86 and 88 respectively. (Wojan Dep. Tr. 161-163; Plaintiff’s Exhibit I). Plaintiff’s closest competitor, Jeff Dann, with whom she shared a territory, was complimented and promoted despite his 75 ranking. (Plaintiff’s Exhibit I and Q).

Plaintiff presents numerous letters of recommendation from doctors upon whom she called; they rebut criticisms of her performance. (Plaintiff’s Exhibit M).

*10 Plaintiff also produces testimony that other women faced termination under similar circumstances after taking maternity leave. (Wojan Dep. Tr. 105, 158-159; DiLorenzo Dep. Tr. Plaintiff’s 57-58, 81; Exhibit O). As further evidence, Plaintiff presents a sales roster showing that of five women who worked as sales representatives at the district level under Surdyk’s supervision in 2005, only one remained in 2007. (Plaintiff’s Exhibit P). Taking this evidence in the light most favorable to Plaintiff, she establishes a *prima facie* claim of sex discrimination.

Defendant asserts that Plaintiff was terminated for a legitimate, nondiscriminatory reason—her failure to improve her performance pursuant to the terms of her PIP. Defendant says “even when accounting for any impact of her medical leave,” Plaintiff’s termination was justified since she failed to meet her quotas. However, this assertion is not supported by Defendant; there is no evidence that the performance scoring was adjusted to redact the period of Plaintiff’s absence. In fact, DiLorenzo states that quotas are never adjusted or pro-rated. (DiLorenzo Dep. Tr. 119-120, 123).

Plaintiff says Defendant’s reason is a pretext for sex discrimination. Plaintiff produced evidence that at least five similarly situated men, supervised by Surdyk and employed as GSRs or MSRs, retained their employment despite lower scoring/ranking than Plaintiff. Plaintiff also produces evidence that other women were terminated under similar circumstances after taking maternity leave. Thus, even if Defendant’s reason has a basis in fact, Plaintiff produced evidence from which a rational trier of fact could conclude that it was not the actual factor motivating the decision to place her on PIP or to terminate her employment.

Plaintiff’s evidence is sufficient to survive summary judgment. The Court denies Defendant’s Motion with respect to the sex discrimination claim.

ii. MARITAL STATUS DISCRIMINATION

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CLAIM

The ELCRA prohibits discrimination by an employer on the basis of marital status. M.C.L. § 37.2202(1)(d). To state a *prima facie* claim of marital status discrimination, a plaintiff must show (1) that she is a member of a protected class, (2) that she suffered an adverse employment action, (3) that she was qualified for her position, and (4) that she suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination.” *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 451 (6th Cir.2005) (citing *Wilcoxon v. Minn. Mining & Mfg. Co.*, 235 Mich.App. 347, 597 N.W.2d 250 (1999)). While the term “marital status” is not defined in the statute, the Michigan Supreme Court has historically defined the term as “whether a person is married.” *Miller v. C A Muer Corp.*, 420 Mich. 355, 363, 362 N.W.2d 650 (1963).

Michigan courts apply the same *McDonnell Douglas* burden shifting approach to claims of marital status discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Town v. Michigan Bell Telephone Co.*, 455 Mich. 688, 697, 568 N.W.2d 64 (1997).

*11 Plaintiff says she was discriminated against because she was a single mother. She offers both direct and circumstantial evidence of discrimination. As direct evidence, Plaintiff cites her placement on PIP and termination for performance issues occasioned by her absence from the sales territory during her FMLA leave. As circumstantial evidence, Plaintiff cites the following: (1) comments made by her supervisors about her pregnancy/childbirth, childcare arrangements and marital status; (2) several male sales representatives with worse ranking and performance were not placed on PIPs or terminated, or were given an extension after being placed on a PIP; (3) other female employees who took FMLA leave faced similar action, resulting in placement on PIP, termination or both; (4) Defendant failed to discipline Surdyk for his failure to follow the company EEO policy by not documenting Plaintiff’s discrimination complaints; and (5) Defendant promoted Surdyk and other males despite their failure to meet sales quotas. Plaintiff further says even if Plaintiff’s performance issues could be fashioned into a legitimate business reason for her termination, she can establish pretext since many male employees ranked below her were not terminated or even placed on PIPs.

Because Plaintiff belongs to a protected class, her ability to make a *prima facie* showing hinges on her ability to show that similarly situated individuals were treated differently. To be deemed ‘similarly situated,’ the

individuals with whom the plaintiff seeks to compare her treatment must have: (1) dealt with the same supervisor; (2) been subject to the same standards; and (3) engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1998).

Plaintiff alleges disparate treatment in that Defendant: (1) held her to a quota while she was on maternity leave; (2) placed her on a PIP for poor performance; (3) would not extend her PIP; (4) made negative comments regarding her marital status and child care arrangements; and (5) terminated her. Plaintiff produces evidence of men who had sales performance and rankings lower than hers who were not placed on PIP or terminated. Several of the men, in fact, were promoted. These employees worked for the same supervisor, were subject to the same quota system, and performed similar work duties.

Taking this evidence in the light most favorable to Plaintiff, she established a *prima facie* case by showing that she is a member of a protected class and was treated differently from similarly situated workers.

Again, Defendant asserts that Plaintiff was terminated for a legitimate, nondiscriminatory reason—her failure to improve her performance pursuant to the terms of her PIP. The Court outlines above why a finder of fact could find this assertion suspect.

Plaintiff’s evidence is sufficient to survive summary judgment. The Court denies Defendant’s Motion with respect to the marital status discrimination claim.

iii. RETALIATION

*12 In order to establish a *prima facie* claim for wrongful retaliation under ELCRA, a plaintiff must show:

- (1) that the plaintiff engaged in a protected activity,
- (2) that this was known by the defendant,
- (3) that the defendant took an employment action adverse to the plaintiff,
- (4) that there was a causal connection between the protected activity and the adverse employment action.

Meyer v. City of Center Line, 242 Mich.App. 560, 568-69,

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619 N.W.2d 182 (2000).

If the plaintiff establishes this prima facie case, the burden shifts to defendant to produce evidence that a nondiscriminatory reason existed for the adverse employment action. See *Reisman v. Regents of Wayne St. Univ.*, 188 Mich.App. 526, 539, 470 N.W.2d 678 (1991) (per curiam). If the defendant is able to demonstrate such a rationale, the plaintiff must then be afforded an opportunity to show that the reasons offered were a pretext for discrimination. See *Id.* Notably, Michigan courts have found federal precedent interpreting Title VII to be “highly persuasive.” See *Meyer*, 242 Mich.App. at 569, 619 N.W.2d 182; see also *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1311-12 (6th Cir.1989) (stating that “Michigan courts clearly look to Title VII in resolving questions arising under *Elliot-Larsen*”).

Defendant says Plaintiff cannot establish a prima facie case of retaliation, and even if she could she cannot meet her burden to show that the proffered reason was pretextual. Defendant says Plaintiff makes only conclusory allegations that she complained about her sales quota being discriminatory, but she also complained that a male colleague’s sales quota was unfair. Defendant says these complaints, wholly unrelated to her gender or marital status, do not raise the specter of retaliation. Moreover, Defendant says even if Plaintiff could articulate protected complaints, she cannot establish that the complaints played a significant role in her termination, particularly since the decisionmakers were unaware of her complaints.

The first prong of the prima facie claim is whether Plaintiff’s actions invoked the protection of ELCRA. Plaintiff alleges she was retaliated against for these complaints: (1) her quotas were unfair; (2) Defendant targeted her because she took maternity leave; (3) Defendant penalized her for taking maternity leave; and (4) Defendant’s actions were discriminatory. (Plaintiff’s Dep. Tr. p. 59). Defendant says these complaints are not protected activity.

To qualify as opposition activity, the actions of the plaintiff need not formally invoke the protection of ELCRA. See *McLemore v. Detroit Receiving Hosp.*, 196 Mich.App. 391, 396, 493 N.W.2d 441 (1993); see also *Barrett v. Kirtland Cmty. Coll.*, 245 Mich.App. 306, 318-19, 628 N.W.2d 63 (2001) (noting that employees do not have to “specifically cite” ELCRA to be protected). If an adverse employment decision “is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs.” *McLemore*, 196

Mich.App. at 39, 492 N.W.2d 478. The employee “must do more than generally assert unfair treatment.” *Barrett*, 245 Mich.App. At 319. Moreover, to be protected by ELCRA, the employee need not oppose an actual violation; rather, her belief that the opposed practices are unlawful must only be reasonable. See *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir.2000) (an employee is protected against employer retaliation for opposing any practice that the employee reasonably believes to be a violation).

*13 The first complaint regarding Plaintiff’s quota, which is unrelated to her sex or marital status, could be viewed as unprotected inasmuch as Plaintiff also complained about the quotas of a male co-worker. However, it could be viewed as protected because Plaintiff complained that the quota improperly included periods during which she was off on qualifying FMLA leave. The second, third and fourth complaints could also be viewed as protected since they specifically raise the specter of discrimination based on sex/pregnancy. Plaintiff’s complaints, all which could be reasonably viewed as opposing illegal activity, are appropriately left to interpretation by the trier of fact.

As to the second prong, Defendant knew or should have known that Plaintiff was engaging in a protected activity. Surdyk admits Plaintiff complained that her absence from the territory during her maternity leave was the reason for her poor sales and that she thought it was partly discrimination. (Surdyk Dep. Tr. 202, 285). He also recognized she was making a complaint of discrimination. (Surdyk Dep. Tr. 284-285).

As to the third prong, Plaintiff clearly suffered an adverse employment action; Defendant placed her on a PIP and ultimately terminated her. Since Plaintiff establishes the first three prongs, Plaintiff must demonstrate causation to make out her prima facie case.

“To demonstrate causation, Plaintiff must show that her participation in activity protected by ELCRA was a ‘significant factor’ in the employer’s adverse employment action, not just that there was a causal link between the two.” *Barrett v. Kirtland Cmty. Coll.*, 245 Mich.App. 306, 316, 628 N.W.2d 63. In order to show a causal connection, a plaintiff must produce sufficient evidence from which an inference can be drawn that the adverse action would not have been taken had the plaintiff not filed a discrimination action. *Allen v. Mich. Dep’t of Corr.*, 165 F.3d 405, 413 (6th Cir.1999).

While Plaintiff does not present direct evidence establishing a causal link, she does present circumstantial evidence creating a genuine issue of fact. Plaintiff

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testified that Surdyk's demeanor changed after her complaints, leading to the PIP and ultimately to her termination. (Wojan Dep. Tr. 126). Plaintiff presents a number of performance evaluations which demonstrate that prior to her leave Surdyk complemented her assertive style and sales performance. However, after she complained about quotas and discrimination, Surdyk admonished her assertive personality and was critical of her sales abilities. Surdyk never advised the human resources department or upper-level management about Plaintiff's discrimination complaints, contrary to the company policy. (Surdyk Dep. Tr. 279-280, 284-285; Roblow Dep. Tr. 68; Briggs Dep. Tr. 57, 64). Thus, at the time of Plaintiff's termination, Surdyk was the only management level employee who knew of Plaintiff's discrimination complaints. Briggs and Roblow relied on Surdyk's assessment in making the decision to terminate.

*14 Plaintiff also testified and presented evidence that Brian Berrier, who was also placed on a PIP by Surdyk, did not complain about discrimination and his PIP was extended. Berrier was given the opportunity to meet with DiLorenzo to plead his case for extension of his PIP, while Plaintiff says she was not given the same opportunity. (Wojan Dep. Tr. 126).

Under these facts, a rational trier of fact could draw an inference that Surdyk was motivated to terminate Plaintiff because she complained of sex discrimination and FMLA violations. Plaintiff meets her prima facie case.

Because Plaintiff meets her initial burden under the McDonnell Douglas framework, Defendant must produce a legitimate non-discriminatory reason for placing Plaintiff on a PIP and ultimately terminating her. Defendant alleges that Plaintiff suffered from poor performance upon her return from leave and was placed on PIP following repeated warnings. Defendant further says Plaintiff was fired because she failed to improve after 90 days on the PIP. These allegations of poor performance meet Defendant's burden to show legitimate, non-discriminatory reasons.

Plaintiff argues that pretext is established by the temporal element. Plaintiff says once she returned from leave and complained about discrimination and FMLA violations, Surdyk's demeanor towards her soured. Plaintiff also says that pretext is established based on Surdyk failure to advise Human Resources about her discrimination complaints before placing her on a PIP or recommending termination.

An employer's failure to follow a policy that is related to termination or demotion can constitute relevant evidence of pretext. *Skalka v. Fernald Environmental Restoration Management Corp.*, 178 F.3d 414 (6th Cir.1999). Roblow testified that Alcon's managers and supervisors are advised to contact their human resource representative or manager if they get an EEO complaint. (Roblow Dep. Tr. 33). However, at the time of Plaintiff's placement on a PIP, Roblow did not check for FMLA compliance because she was not aware of Plaintiff's FMLA leave or complaints. (Roblow Dep. Tr. 62). Roblow said she did not have any independent knowledge of Plaintiff's performance and relied on Surdyk's assessment. (Roblow Dep. Tr. 68). Briggs testified that Surdyk did not tell him prior to the termination meeting that Plaintiff complained about Defendant applying her quota during her leave. (Briggs Dep. Tr. 64). If he had known, Briggs said he would not have evaluated Plaintiff for that time period and he would have gone to HR. (Briggs Dep. Tr. 62-64). This evidence is particularly compelling, coupled with Surdyk's testimony that he was told he needed to demonstrate courage in order to advance to senior district manager and that placing Plaintiff on PIP was a demonstration of courage. (Surdyk Dep. Tr. 274-275). While this could be exculpatory evidence as Defendant suggests, it could also be evidence of pretext. That is a determination for the trier of fact.

*15 Plaintiff produced evidence from which a rational trier of fact could conclude that Surdyk purposely failed to disclose Plaintiff's complaints to HR to make it easier to terminate her in retaliation for making the complaints. Plaintiff's evidence is sufficient to survive summary judgment. The Court denies Defendant's Motion with respect to the retaliation claim.

VI. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **DENIED** in its entirety.

IT IS ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 4279365, 156 Lab.Cas. P 35,486, 14 Wage & Hour Cas.2d (BNA) 150

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EXHIBIT 6

Caldwell v. Gasper, Not Reported in Fed. Rptr. (2022)
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2022 WL 16629161

Only the Westlaw citation is currently available.
United States Court of Appeals, Sixth Circuit.

Michael A. CALDWELL; Robert M. Hahn,
Plaintiffs-Appellants,

v.

Joseph M. GASPER, in his individual and
representative capacities; Michigan State
Police, an agency of the State of
Michigan, Defendants-Appellees.

22-1031, 22-1032

FILED November 1, 2022

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
MICHIGAN

Attorneys and Law Firms

James K. Fett, Fett & Fields, Ann Arbor, MI, for
Plaintiffs-Appellants.

Kyla L. Barranco, Adam Robert de Bear, Office of the
Attorney General, Lansing, MI, for Defendants-
Appellees.

Before: COLE, CLAY, and MATHIS, Circuit Judges.

OPINION

CLAY, Circuit Judge.

*1 Plaintiffs, Michael Caldwell and Robert Hahn (“Plaintiffs”), appeal the district court’s orders granting Defendants, Joseph Gasper and the Michigan State Police’s (“Defendants,” “Gasper,” or “MSP,” respectively) motions for summary judgment on Plaintiffs’ Title VII and 28 U.S.C. § 1981¹ retaliation claims.² Plaintiffs’ amended complaints allege that Defendants demoted Caldwell and terminated Hahn in

retaliation for their protected opposition to: (1) Defendants’ diversity initiatives; and (2) Defendants’ alleged double standards in meting out discipline. For the reasons set forth below, we **AFFIRM** the district court’s orders granting Defendants’ motions for summary judgment.

I. BACKGROUND

A. Factual Background

This case is about two employees who were disciplined for misconduct and for disobeying certain rules when handling the transfer process for a subordinate. They brought suit alleging that the punishment they received was not justified and was imposed instead in retaliation for their opposition to their employer’s efforts to diversify the police force.

Michael Caldwell and Robert Hahn served as police officers for the Michigan State Police (“MSP”) for over thirty years. Until recently, Caldwell was the captain of the seventh district in northern Michigan. Hahn served as an inspector and reported to Caldwell in the same district. Caldwell and Hahn have been close friends since they attended the state police recruit school together in 1990.

In the fall of 2019, Plaintiffs were involved in a series of events that culminated in Caldwell’s demotion and Hahn’s dismissal. Plaintiffs allege that their dismissal and demotion were due to their voicing concerns over double standards and discriminatory treatment by the MSP towards white males in promotion and hiring. Defendants contend that Plaintiffs were not dismissed for voicing their concerns over discrimination, but rather, because of misconduct relating to the interview and selection process of an employee seeking to transfer to an open position in their district. Before the district court, Plaintiffs alleged that they were discriminated against and retaliated against by the MSP because they are white males and because they opposed MSP’s diversity initiatives. The district court determined that Plaintiffs failed to establish a prima facie case of reverse discrimination because they could not point to any similarly situated nonwhite non-male employees who were treated differently. Plaintiffs have since abandoned and waived their discrimination claims, focusing only on their claim that they were retaliated against for opposing MSP’s diversity initiatives.

*2 The following sections detail the events that took place in the fall of 2019, when Plaintiffs: (1) mishandled the transfer interview process of a subordinate; and (2) expressed their opinions about the MSP's new diversity initiatives.

1. Misconduct in Handling Transfer

On October 9, 2019, an assistant post commander position became available in Gaylord, MI, in the seventh district (then Caldwell and Hahn's district). The position was open only to employees eligible for lateral transfer or demotion. The only officer to apply for the position was a white male, Michael Bush. Bush had worked for the MSP for twenty years and had recently been promoted to detective lieutenant, serving as the Traverse Narcotics Team Commander in the seventh district.

When Bush expressed interest in the position, Hahn, Caldwell, and Bush's direct supervisor, First Lieutenant ("Lt.") Belcher, each spoke with him individually and told him they would not support his transfer because they needed him in the Traverse narcotics unit. Bush was required to obtain a recommendation from his supervisor on a PD-35 form to submit with his application. Belcher completed the PD-35 form for Bush and praised Bush's work in his current position but wrote that he was not recommended for the position because he had not been in his latest position long enough to warrant a promotion to assistant post commander.

The PD-35 was forwarded to human resources ("HR"). Upon receipt of the PD-35, HR Director Stephanie Horton spoke with Lt. Colonel Richard Arnold (Caldwell's supervisor), and they concluded that Belcher's non-recommendation contained in the PD-35 was invalid because it was based solely on Bush's short time in his current position, and not on his performance. Thereafter, Arnold called Caldwell and they discussed Bush's application. Arnold told Caldwell that MSP policy required Bush to be given an interview and that all policies should be followed. Caldwell told Arnold that unless he was overruled, he planned to deny the transfer. Arnold assured Caldwell that he would not overrule the results of the interview panel.³ Caldwell said he left the conversation believing that Arnold told him to go through the motions of the policy.

The hiring manager for the assistant post commander position was First Lt. Jason Nemecek. Caldwell instructed Nemecek to follow policy, convene an interview panel, and interview Bush for the position. Caldwell made clear

to Nemecek, however, that he would not approve the transfer regardless of the results of the interview. On October 28, 2019, Nemecek and a colleague, Connie Swander, interviewed Bush. Nemecek and Swander rated Bush very highly, 52 out of 60 points, on a form known as the PD-11. The PD-11 is required for certain positions, but it was not required for this position and HR did not list it as a required form in the instructions sent to Nemecek. Nemecek and Swander both signed the completed PD-11 form.

Hahn received the signed PD-11 form and a memo indicating that Bush had been recommended for the assistant post commander position. Hahn was surprised to receive this memo and sent it to Caldwell. Caldwell spoke with Nemecek about the scores and the selection memo, and Nemecek explained that he was going through the motions and believed he had done what the process required. After this conversation, Caldwell purportedly believed that Nemecek may have inflated Bush's scores. Caldwell asked Hahn to follow up with Nemecek and ask him if the scores on the PD-11 accurately reflected Bush's performance in the interview, and if they did not, to resubmit it with accurate scores. Hahn did as he was told and spoke with Nemecek. Nemecek, in turn, discussed Hahn's comments with Connie Swander, but she refused to change the scores. Nemecek let Hahn and Caldwell know that Swander did not want to revisit the score.

*3 Caldwell then spoke with HR Director Stephanie Horton about Bush's application and the scores on the PD-11. During their conversation, Horton let Caldwell know that the lateral interview process did not require the use of the PD-11 form or even a full selection memo. On October 30, 2019, Nemecek revised the selection memo to advise that Bush would not be selected and to request that the assistant post commander position be opened to all applicants.

2. Investigation into Misconduct

Two days later, MSP's professional standards committee received a complaint against Hahn alleging that Hahn manipulated the hiring process to prevent Bush from obtaining the assistant post commander position. First Lt. Brody Boucher, who served as commander of the professional standards section, investigated the complaint. As part of the investigation, Boucher monitored Hahn's and Caldwell's emails, reviewed all documents relating to Bush's application, and interviewed all of the individuals involved during the process, including Hahn, Caldwell, Nemecek, Belcher, Swander, Horton, Arnold, and Bush.

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Boucher's 55-page report includes notes from those interviews and detailed Nemecek's discomfort with Hahn's instructions to alter the scores on the PD-11. According to the report, Nemecek "felt sick to his stomach" and "feared retaliation from command." (Boucher Investigation Rep., Hahn R. 142-2, Page ID #1006.)⁴ Nemecek also detailed several instances during the application process where Hahn raised his voice and intimidated him into rewriting the selection memorandum.

Boucher's investigation report was sent to Director Gasper on March 5, 2020. On March 9, 2020, Hahn and Caldwell were given a statement of charges and proposed discipline. The charges against Hahn related to his using his position to "bully and intimidate" employees under his command "to manipulate a selection process to ensure a qualified candidate was not selected." (Statement of Charges, Hahn R. 142-15, Page ID #1053.) The charges against Caldwell indicated that he violated civil service rules during the selection process by directing his employees to score the applicant according to Caldwell's predetermined outcome and not on the basis of merit. (Statement of Charges, Caldwell R. 137-15, Page ID #1017.) The charges recommended that Caldwell be demoted and Hahn be terminated.

3. Complaints About Diversity Initiatives and Double Standards

Caldwell and Hahn allege that they engaged in protected conduct by complaining about diversity initiatives and double standards within the MSP beginning in August 2019 until March 2020, when disciplinary proceedings were initiated against them. They argue that these complaints motivated the MSP to retaliate against them. Their complaints are summarized as follows.

a. Complaint One: Sergeant Gill's Comedy Routines (Hahn only)

Hahn's first complaint was about a Black colleague's comedy routine. In August 2019, Hahn attended a retirement party. The party featured an open-mic segment, during which Sergeant Dwayne Gill, who served in the recruiting and selection department of the office of equity and inclusion, delivered a comedy routine that featured racial jokes. Hahn was upset with the jokes that Gill made during his routine and he reported them to Gill's

supervisor, Inspector Lisa Rish, on September 3, 2019. Rish advised Hahn that she would get back to him about his complaint after the October fall executive forum. Unsatisfied, Hahn also wrote an email to HR complaining about and linking to Gill's standup routines, many of which were available for viewing on YouTube. On September 19, 2019, Hahn ran into HR Director Stephanie Horton, and she mentioned she had received his email and forwarded it up the chain of command. A few weeks later, Gill's supervisor, Rish, informed Hahn that the MSP was launching an internal investigation of his complaint on Sergeant Gill's comedy routine. The investigation into Gill culminated in a finding that he had violated conduct policies and a recommendation that Gill be suspended for two days. The two-day suspension, however, was later waived by Colonel Arnold. Hahn was unsatisfied with how this investigation was handled and appealed the results to HR. He wrote to them:

*4 The actions I took in this matter were "protected activities," taken to remedy a clear double-standard, which has long been condoned by the Michigan State Police, and affords, among other current advantages, a higher level of first amendment protections to certain ethnic and gender classes, than it does others. As the initial primary complainant in this matter, the obstruction I was required to hurdle in order to stir other responsible commanders and division heads to action, and the lack of corrective measures taken to address Sgt. Gill's improper conduct, are wholly unacceptable and appear discriminatory against members of other ethnicities in Michigan state government. I believe an investigation into the criteria cited in dismissing Sgt. Gill's proposed discipline is in order, as well as an investigation into the gross lack of oversight by those who command the offices, divisions, and bureaus charged with assuring equal and consistent adherence to MSP's Discriminatory Harassment Policy. (Robert M. Hahn Decl., Hahn R. 145-12 at Page ID #1263.)

b. Complaint Two: Debriefing the Fall Forum (Caldwell and Hahn)

On October 8, 2019, Director of the MSP, Joseph Gasper held a fall forum meeting. Defendants allege that during this meeting, Gasper released a strategic plan for 2020–2022; reiterated that diversity is the number one priority of the department; said that individuals should not think of themselves but the agency as whole if denied a promotion for the sake of diversity; and stated that the MSP is "way too White [sic] and way too male." (Pet'r's

Br., Caldwell ECF No. 23 at 13; Op. and Order, Caldwell R. 166, Page ID # 1435; Strategic Plan Document, Caldwell R. 137-18, PageID # 1047.) Both Hahn and Caldwell complained about the MSP's diversity push during a debrief of the MSP's fall forum that took place the next day.

The day after the fall forum, Lt. Colonel Arnold chaired a field operation bureau meeting to discuss the diversity initiatives put forth by Gasper. At this meeting, Caldwell and Hahn both criticized Gasper's comments and his proposed initiatives. Caldwell stated that he was concerned about how these diversity initiatives were affecting white males and that the term "white male" had taken on a negative connotation. He stated that white males feel like they are being excluded from promotional opportunities because of their race and gender and asked how the diversity initiative would foster an atmosphere of inclusion for members who are not female or members of a racial or ethnic minority. Hahn stated that recruiting and promotions should be based on merit only and that it was not the MSP's fault that it was a majority white male agency. He also criticized the MSP's "hand-wringing over demographics" as an "unwise response to the false claims of institutional racism by Black advocacy groups in the wake of Retired Colonel Etue's race-neutral Facebook post."⁵ (Robert M. Hahn Decl., Hahn R. 145-12 at Page ID #1259.)

Plaintiffs allege that they became "persona non grata" after they made these statements, and their colleagues avoided them, especially when Director Gasper was present. (Pet'r's Br., Caldwell ECF No. 23 at 18; Pet'r's Br., Hahn ECF No. 23 at 19.) Caldwell recalls that Director Gasper ignored him and turned his back to him at a conference after he came over and rendered a hand salute.

c. Complaint Three: Diversity and Inclusion Presentation (Caldwell only)

Caldwell complained about the diversity initiatives again during a presentation on diversity and inclusion. On December 12, 2019, Caldwell attended a presentation by Inspector Lisa Rish, who served as the Equity and Inclusion Officer for the MSP. At this meeting, Caldwell expressed his concerns about the diversity initiative and expressed his belief that the term white male had taken on a negative connotation within the MSP. Caldwell asked how a series of leadership seminars for women in law enforcement "fostered a feeling of 'inclusion' by male MSP members." (Michael A. Caldwell Decl., Caldwell R.

142-14 at Page ID #1237.)

d. Complaint Four: Email about Double Standard within MSP (Hahn to Caldwell)

*5 At 10:35 a.m. Sunday March 8, 2020, Hahn wrote Caldwell an email expressing his frustration that Sergeant Gill mocked racial minorities during a comedy routine and only received a two-day suspension that was later waived. Hahn wrote, in relevant part:

I feel the double-standford concerns I made known to our EIO, the Office of Professional Standards, the director of our Human Resources Division, and my bureau leadership, continue to be ignored. Because of this, I feel rather foolish for having stepped up to assure EQUAL rights and protections for ALL department members.

(Pet'r's Br., Hahn ECF No. 23 at 20.) Plaintiffs argue that the timing of the discipline reveals retaliation, as it is undisputed that Defendants were monitoring their emails and that their disciplinary processes began the day after the email was sent.

4. Disciplinary Hearing

At 1:15 p.m. on Monday, March 8, 2020, the day after Hahn sent that email to Caldwell, they were served with statements of charges and proposed discipline. The charges related to Hahn and Caldwell's handling of the selection process for the post commander position. Four days later, Lt. Colonel Chris Kelenske and Inspector Lisa Gee-Cram oversaw a disciplinary hearing during which they upheld the discipline recommended by HR: demotion of Caldwell and termination of Hahn.

B. Procedural History

In May 2020, Caldwell and Hahn filed separate lawsuits against the MSP, Governor Gretchen Whitmer, and Director Gasper, alleging that they had suffered unlawful race and gender-based discrimination and retaliation for complaining about discrimination. In July 2020, they each filed amended complaints. The district court dismissed every claim other than the discrimination and retaliation claims against Gasper and the MSP.

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Defendants thereafter moved for summary judgment. The matter was fully briefed, and the district court held a hearing on the motions. At the hearing, Plaintiffs confirmed that they waived the § 1983 discrimination claim against Gasper. The district court thereafter granted Defendants' motions for summary judgment. Plaintiffs timely appealed the order. On appeal, Plaintiffs expressly waive their Title VII discrimination claims, and appeal only the district court's grant of summary judgment on their retaliation claims against Gasper and the MSP.

II. DISCUSSION

A. Standard of Review

This Court reviews a district court's grant of a motion for summary judgment *de novo*. See *Thacker v. Ethicon, Inc.*, 47 F.4th 451, 458 (6th Cir. 2022). Summary judgment is properly granted when the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

When evaluating whether a motion for summary judgment was properly granted, "this Court views the evidence in the light most favorable to the party opposing the motion." *Kirilenko-Ison v. Bd. of Educ. of Danville Indep. Sch.*, 974 F.3d 652, 660 (6th Cir. 2020) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). This means that the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor," since "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. Section 1981 and Title VII Retaliation Claims Against Defendants

*6 Plaintiffs bring retaliation claims against Gasper and the MSP pursuant to 28 U.S.C § 1981 and Title VII. As the district court correctly determined, § 1983 provides "a vehicle to vindicate [plaintiffs'] rights under § 1981." *Boxill v. O'Grady*, 935 F.3d 510, 519–20 (6th Cir. 2019). Claims for retaliation under § 1981 are analyzed under the same framework as claims for retaliation brought pursuant to Title VII. *Id.* at 520.

A claim for retaliation can be proven with either direct or circumstantial evidence. See *Spengler v. Worthington Cylinders*, 615 F.3d 481, 491 (6th Cir. 2010). Direct evidence does not require any inferences to be drawn regarding what motivated the employer's actions. *Id.* Plaintiffs do not dispute that they have not brought forward direct evidence of retaliation, so this Court will apply the *McDonnell-Douglas* burden shifting framework for circumstantial evidence of retaliation. See *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014).

A prima facie case of Title VII retaliation requires a showing that plaintiffs: (1) engaged in protected activity; (2) the defendants knew of this protected activity; (3) the defendants subsequently took an adverse employment action; and (4) that a causal connection exists "between the protected activity and the adverse employment action." *Goller v. Ohio Dep't of Rehab. & Correction*, 285 F. App'x 250, 256 (6th Cir. 2008) (citing *E.E.O.C. v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir. 1997)). If the plaintiff can make out a prima facie case, "the burden of production shifts to the defendant to show that it had a legitimate, non-discriminatory basis for the adverse action." *Kirilenko-Ison v. Bd. of Educ. of Danville Indep. Sch.*, 974 F.3d 652, 661 (6th Cir. 2020). The plaintiff must then show "by a preponderance of the evidence" that defendants' stated reasons were pretext for retaliation. *Id.*

At issue on appeal is whether the district court erred by determining that Plaintiffs failed to (1) make out a prima facie case because they did not engage in protected activity and because Defendants were not aware they engaged in protected activity,⁶ and (2) show that Defendants' non-discriminatory reasons for the adverse actions were pretext.

1. Prima facie case

Here, Plaintiffs cannot make out a prima facie case for discrimination because they did not engage in protected activity. Plaintiffs argue that the following constitutes protected activity: (1) Hahn's complaints about Sergeant Gill's comedy routine; (2) Hahn and Caldwell's concerns about Director Gasper's diversity initiatives expressed in a meeting on October 9, 2019; (3) Caldwell's comments during the December 12, 2019, diversity and inclusion presentation that the term white male had taken on a negative connotation; and (4) Hahn's email to Caldwell on March 8, 2020, decrying double standards in relation to Sergeant Gill's discipline.

*7 Title VII forbids employers from retaliating against employees who oppose employment practices that may be unlawful under Title VII. 42 U.S.C. § 2000e-2(a)(1); *see also Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 646 (6th Cir. 2015). An employee does not need to be correct that the employment practices he opposes are *actually* unlawful. *Yazdian*, 793 F.3d at 646-47. Instead, the employee need only prove that his complaints about the employment practices were based on “a reasonable and good faith belief that the opposed practices were unlawful.” *Johnson v. U. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000) (internal quotation marks omitted); *see also Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009). The requirement that the complaint be based on a reasonable and good faith belief has both an objective and subjective component. The employee who complains “must actually believe[] that the conduct complained of constituted a violation of relevant law, and a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee would believe that the conduct complained of was unlawful.” *Yazdian*, 793 F.3d at 646-47 (internal quotation marks omitted).

A vague charge of discrimination does not constitute protected activity. *See id.* at 645; *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (noting that a vague charge of discrimination is insufficient to constitute protected activity because “every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation simply by an employee inserting a charge of discrimination”). A plaintiff need not lodge a complaint with “absolute formality, clarity, or precision” but must make a specific allegation about unlawful employment discrimination and not merely express concern about “management practices.” *Yazdian*, 793 F.3d at 645, 647. 3d.

Plaintiff Hahn’s complaints about how the investigation into Sergeant Gill’s comedy routines was handled were not protected activity because he did not complain about unlawful activity by the MSP, but rather, about management practices. Hahn did not complain because he felt that specific individuals in the office were being discriminated against or because Gill created a hostile work environment; Hahn was complaining because he felt that the discipline meted out to Gill was insufficient. Even if Hahn’s complaints are to be construed as complaints about unequal treatment in discipline, Hahn’s comments about unequal treatment were still too vague to constitute protected activity. *See Willoughby v. Allstate Ins. Co.*, 104 F. App’x 528, 530-31 (6th Cir. 2004)

(determining that district court properly granted summary judgment because plaintiff’s letter was not protected activity where it contained vague charge of unequal treatment).

*8 The same is true of Hahn’s March 8, 2020, email to Caldwell regarding the alleged double standards in the handling of his complaint about Sergeant Gill. Hahn made only conclusory allegations of double standards without describing how MSP’s actions in responding to his complaint were discriminatory or unlawful. *Fox v. Eagle Distrib. Co., Inc.*, 510 F.3d 587, 591-92 (6th Cir. 2007) (determining that plaintiff’s general complaints of unhappiness with defendants’ actions and about management being “out to get him” was not protected activity where it did not allege acts of discrimination).

Caldwell and Hahn’s criticism of Director Gasper and the MSP’s diversity initiatives are also not protected activity because their criticism was comprised of general complaints about unfairness and dissatisfaction with the MSP’s reactions to public outcry over the lack of diversity within the police force. Plaintiffs’ comments did not indicate that they or another employee were being discriminated against in hiring and promotion. *Balding-Margolis v. Cleveland Arcade*, 352 F. App’x 35, 45 (6th Cir. 2009) (determining that plaintiff’s complaints did not constitute protected activity where the complaints concerned general “work-related issues” and expressed that plaintiff was “simply unhappy with the manner in which [defendant] conducted business.”).

Caldwell’s comments at the diversity and inclusion presentation on December 12, 2019, are similarly vague and nonspecific. At that meeting Caldwell again expressed his concern about a negative connotation associated with the word “white male” and with white males feeling like there was not enough programming specifically targeted towards them. He made no specific allegations of discrimination against him or another employee that would be sufficient to constitute protected activity. *See Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (noting that plaintiff’s complaint was not protected activity and was only a vague charge of discrimination where plaintiff complained that charges against him were a result of “ethnocism.”). Because Plaintiffs’ complaints were vague, nonspecific charges of discrimination and mismanagement, their comments cannot be considered protected activity and Plaintiffs are unable to establish a prima facie case of discrimination.

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2. Pretext

Even if Plaintiffs could demonstrate a prima facie case of retaliation, they have not presented sufficient evidence to show that Defendants' legitimate nondiscriminatory reason for the adverse action was pretextual. Defendants' proffered reason for Caldwell's demotion and Hahn's dismissal was that Plaintiffs showed incompetence and used their positions to manipulate the interview process for the assistant post commander position to suit their own ends, rather than following policy. Unlike the showing at the prima facie stage, the burden at the pretext stage is onerous: Plaintiffs must "demonstrate by a preponderance of the evidence that the proffered reason was a mere pretext for [retaliation]." *Alexander v. Ohio State U. College of Soc. Work*, 429 F. App'x 481, 489 (6th Cir. 2011) (quoting *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003)).

To prove pretext, a plaintiff has the burden to show "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that they were insufficient to motivate the employer's action." *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 530 (6th Cir. 2012) (quoting *Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 839 (6th Cir. 2012)). The ultimate inquiry in using any of these three methods is an assessment of whether the "employer made up its stated reason to conceal intentional [retaliation]." *Id.* at 530 (internal quotation marks omitted).

*9 The district court determined that Defendants had satisfied their burden of showing that they honestly believed their non-discriminatory reason for dismissing Hahn and demoting Caldwell. A plaintiff cannot show pretext when an employer has an honest belief in its nondiscriminatory reason for discharging an employee and relies on "particularized facts that were before it at the time the decision was made." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001); see also *Briggs v. U. of Cincinnati*, 11 F.4th 498, 515 (6th Cir. 2021).

In this case, Plaintiffs argue that Defendants and the district court's reliance on Boucher's report was "misplaced" because "Boucher was not a decisionmaker or participant in the decisionmaking process." (Pet'r's Br., Hahn ECF No. 23 at 45.) Plaintiffs cite to no authority, and we know of none, to support their contention that an employer or a court is not permitted to rely on the testimony of an individual tasked by the employer to investigate the claims of misconduct. Where an employer conducts a thorough investigation and makes an employment decision based on facts uncovered in that

investigation, plaintiffs do not demonstrate pretext simply because they "might have come to a different conclusion if they had conducted the investigation." *Seeger v. Cincinnati Bell Tel. Co., LLC*, 681 F.3d 274, 287 (6th Cir. 2012).

Plaintiffs point to eight other categories of evidence that they argue proves pretext: (1) that the MSP only offers settlements to less serious offenses, meaning that MSP viewed Hahn and Caldwell's offenses as less serious; (2) that the district court considered the discipline levied against Hahn "heavy handed;" (3) that there was no factual basis for Kelenske's assertion that Hahn lied when he denied telling Nemecek to use a PD-11; (4) that there is no factual basis for the proposition that Hahn and Caldwell lied about whether the PD-11 form was required; (5) that Defendants' explanation for the adverse action keeps changing; (6) that Defendants treated a similarly situated employee far better than Hahn even though that employee engaged in egregious conduct; (7) that defendants attempted to conceal the identity of the decisionmaker in this case; and (8) that Defendants' explanations "smack of mendacity." (Pet'r's Br., Hahn ECF No. 23 at 45–46.) None of these categories of evidence proves that Defendants did not honestly believe that Caldwell and Hahn mishandled the interview and selection process for the assistant post commander opening.⁸

*10 Plaintiffs also argue that the honest belief rule does not apply when a cat's paw theory is advanced—where there is evidence that a "biased subordinate intentionally manipulated the decisionmaker"—citing *Marshall v. The Rawlings Co. LLC*, 854 F.3d 368, 380 (6th Cir. 2017). While Plaintiffs are correct, Plaintiffs did not present any evidence that Gasper or Kelenske were manipulated by a subordinate with discriminatory animus towards Hahn or Caldwell. Kelenske's termination decision was based on Boucher's investigation report. Plaintiffs do not point to any evidence that Boucher was influenced by any biased subordinate nor that Boucher himself was biased against Caldwell or Hahn. Furthermore, the honest belief rule can be applied to "the allegedly biased lower-level decisionmaker; that is, the defendant may show that the lower-level subordinate was not actually biased by showing that the lower-level subordinate held an honest belief that justified the adverse action against the plaintiff." *Marshall v. The Rawlings Co. LLC*, 854 F.3d 368, 380 n.3 (6th Cir. 2017). Boucher testified that the report he prepared was based on his interviews with Plaintiffs and all relevant witnesses and he believed that the evidence showed that they had ordered Nemecek to manipulate Bush's scores. Plaintiffs point to no evidence indicating that Boucher did not honestly believe the

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findings contained in his investigation report.

Accordingly, Plaintiffs also fail to establish that Defendants' employment decisions were pretextual.

For the reasons stated above, we **AFFIRM** the district court's order granting the Defendants' motion for summary judgment.

All Citations

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CONCLUSION

Footnotes

- 1 Plaintiffs have brought a § 1983 lawsuit based on violations of § 1981. See *Boxill v. O'Grady*, 935 F.3d 510, 519–20 (6th Cir. 2019).
- 2 Plaintiffs Caldwell and Hahn each filed separate cases at the district court. The district court issued a single opinion posted in each Plaintiff's respective docket. Although Plaintiffs each filed separate appeals, this Court's opinion addresses both of their claims together, as they share the same set of facts.
- 3 During his deposition, Arnold indicated he believed that Caldwell was going to serve on the interview panel.
- 4 For citations to the appeals court docket, "Caldwell ECF No." refers to the docket in Caldwell's case, *Caldwell v. Gasper*, No. 22-1031. The docket in Hahn's case, *Hahn v. Gasper*, No. 22-1032, in turn, is referred to by using "Hahn ECF No." Likewise, for citations to the record before the district court, "Hahn R." refers to the trial court docket in Hahn's case, *Hahn v. Gasper*, No. 1:20-cv-403. The record in Caldwell's case, *Caldwell v. Gasper*, No. 1:20-cv-411, in turn, is referred to by using "Caldwell R."
- 5 Although not mentioned in the record, this Court takes judicial notice, pursuant to [Federal Rule of Evidence 201](#), of a news article indicating that in October 2017, Colonel Kriste Kibbey Etue posted a meme on her Facebook page calling NFL players who kneel during the national anthem "degenerates." See Cheyna Roth, *Activists continue to call for Col. Etue's removal*, WNMU-FM PUBLIC RADIO (Oct. 17, 2017), <https://www.wnmufm.org/law-enforcement/2017-10-23/activists-continue-to-call-for-col-etuesremoval>.
- 6 Because we find that Plaintiffs did not engage in protected activity, we need not analyze whether Defendants were aware of Plaintiffs' protected activity. Even if Plaintiffs' conduct constituted protected activity, however, Plaintiffs presented no circumstantial evidence, beyond their own speculation, that indicated that either Gasper or Kelenske had knowledge of their complaints. See *Proffitt v. Metro. Govt. of Nashville and Davidson County, Tenn.*, 150 F. App'x 439, 443 (6th Cir. 2005) (finding plaintiff's reliance on a string of inferences insufficient to establish defendants' knowledge of protected activity); see also *Mulhall v. Ashcroft*, 287 F.3d 543, 553 (6th Cir. 2002).
- 7 Hahn does not argue that his complaints were an attempt to notify his employers about a hostile work environment, but even if he did, his complaints about Gill do not constitute protected activity because there is no objective basis for believing that Gill's comedy routine created a hostile work environment. See *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 514 (6th Cir. 2009) (noting that to establish that complaint about hostile work environment is protected activity, plaintiff must provide evidence of "an environment that a reasonable person would find hostile or abusive" and show he "subjectively perceive[d] the environment to be abusive"); *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 271 (2001) (determining that plaintiff's complaint about single

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incident where supervisor and colleague made sexual joke was not protected activity because “[n]o reasonable person could have believed that the single incident recounted above violated Title VII’s standard” for a hostile work environment); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (noting that “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment’ ” to constitute a hostile work environment). Moreover, Hahn himself admitted he was not offended by Gill’s routine, thus failing to establish the subjective requirement that he believed he was experiencing a hostile work environment. (Email from Hahn to Lisa Gee-Cram, Hahn R. 145-13, Page ID #1265 (“On a personal note, Sgt Gill’s remarks that people might be ‘as confused as Amish people in a Best Buy store.’ My grandparents were Mennonites, however, I’m not personally offended since I’m not outraged by everything.”)).

- 8 Each of the pieces of evidence they offer is insufficient: (1) the fact the MSP only offers settlements to less serious offenses does not mean that it was not an offense the MSP was entitled to discipline; (2) the district court’s thoughts about the severity of the punishment meted out does not affect the legal analysis relevant to whether Defendants’ invocation of the honest belief rule is proper; as for reasons (3), (4), (5), the fact that Plaintiffs would have conducted the investigation differently or come to a different conclusion is not sufficient to overcome Defendants’ honest belief, and Defendants’ explanation for the discipline has not changed merely because there are gaps in knowledge or slight inconsistencies in the testimony of different employees; (6) Plaintiffs admit that the “similarly situated employee” is not similarly situated because he committed a more egregious offense; (7) none of the evidence cited indicates that Defendants sought to conceal the identity of the decisionmaker, and indicates that Kelenske was the decision maker; and (8) this is a conclusory allegation unsupported by the record.

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EXHIBIT 7



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF CIVIL RIGHTS
EXECUTIVE

JOHN E. JOHNSON, JR.
EXECUTIVE DIRECTOR

May 26, 2023

Dana Nessel, Michigan Attorney General
Department of Attorney General
525 West Ottawa Street
Lansing, Michigan 48906

SENT VIA EMAIL
NesselD34@michigan.gov

RE: Request for Formal Legal Opinion

Dear Attorney General Nessel:

The Michigan Civil Rights Commission ("Commission") hereby officially requests a formal Attorney General opinion related to certain activity that may implicate its enforcement of the Elliott Larsen Civil Rights Act. At its April 2023 meeting the Commission unanimously voted to request an Attorney General Opinion advising whether banning and censorship of content and materials, prohibition of paraphernalia, and prevention of affiliate groups and safe spaces in educational institutions constitutes a violation of the Elliott-Larsen Civil Rights Act. I have attached a copy of the meeting minutes for your convenience and can provide your office any necessary information regarding the Commission's request. The analysis of the requested legal opinion should treat each of the protected classifications in the Elliott-Larsen Civil Right Act. The Commission would like to receive the opinion in advance of its July 24, 2023 Commission meeting.

Thank you in advance for your consideration of this matter.

Sincerely,

Lamont D. Satchel

Lamont D. Satchel, Esq.
General Counsel
Michigan Department of Civil Rights

Enclosure

cc: John E. Johnson Jr., Executive Director, MDCR
Portia Roberson, Chair, MCRC
Fadwa Hammoud, Esq., Department of Attorney General
Heather Meingast, Esq., Department of Attorney General

EXHIBIT 8

2011 WL 2531200

Only the Westlaw citation is currently available.
 United States District Court,
 E.D. Michigan,
 Southern Division.

Lois NEMETH, Plaintiff,
 v.
 CITIZENS FINANCIAL GROUP, INC.
 d/b/a Charter One Bank, Defendant.

No. 2:08-cv-15326.

June 24, 2011.

Attorneys and Law Firms

Mary K. Kator, Southfield, MI, for Plaintiff.

Cardelle B. Spangler, Winston & Strawn, Chicago, IL,
Jason P. Klingensmith, Dickinson Wright, Detroit, MI, for
Defendant.**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

PAUL D. BORMAN, District Judge.

*1 This matter comes before the Court on Defendant Citizens Financial Group d/b/a Charter One Bank's ("Defendant," "Charter One," or the "Bank") motion for summary judgment regarding Plaintiff Lois Nemeth's ("Plaintiff" or "Nemeth") claims that Charter One unlawfully discriminated and retaliated against her on account of her association with and advocacy on behalf of Arab-Americans in violation of Title VII, 42 U.S.C. § 200e-2(a), and Michigan's Elliot-Larsen Civil Rights Act ("ELCRA"), Mich. Comp. Laws. § 37.2202(a). (Dkt. No. 28.) Plaintiff has filed a response (Dkt. No. 34), and Defendant has filed a reply. (Dkt. No. 38.) Oral arguments were heard on April 27, 2011. For the following reasons Defendant's motion for summary judgment is GRANTED IN PART and DENIED IN

PART.

I. Background

Plaintiff began working for Defendant's predecessor First Federal of Michigan in April 1982 as a bank teller. (Pl.'s Resp. 1.) She eventually worked her way up from teller to head teller, to assistant manager, and then to branch manager. (*Id.*) In February 2001, Plaintiff became the branch manager of the Michigan/Schaefer branch (the "Branch") in Dearborn, Michigan. (*Id.*) The Dearborn community has many Arab-American businesses and residents. Plaintiff was promoted to Branch Manager II, and in February 2005, she was promoted again to the position of Assistant Vice President. (*Id.*) As a branch manager, Plaintiff reported to a regional manager. In 2004 and 2005, her regional manager was John Felici ("Felici"). (*Id.* at 1 n. 1.) In 2006, her regional manager was Pamela Larsen ("Larsen"). (*Id.*) Felici returned as Plaintiff's regional manager at the beginning of 2007, and remained in that position through Plaintiff's termination on March 30, 2007. (*Id.*) Felici reported to Karen Minghine ("Minghine"), while Larsen reported to Keith Mazur ("Mazur"), who in turn reported to Minghine. (*Id.*)

In the Fall of 2004, Defendant acquired Charter One. (*Id.* at 1.) Plaintiff claims that Defendant instituted a number of policies that discriminated against the Branch's Arab-American customers. (*Id.* at 1-2.) For example, Defendant did not offer Arabic as a language option for its ATM prompts. Defendant required that business customers making large cash deposits use armored-car services at their own expense and drop the cash off at depositories instead of the Branch. (*Id.* at 2.) Defendant also refused to provide religious customers the option of opening non-interest bearing "Islam" savings accounts, even though some customers refused to open accounts that accrued interest because it was against their religion.¹ Plaintiff further claims that Charter One also prohibited tellers from helping customers fill out their deposit slips, thereby discriminating against Arab Americans who did not speak English and had trouble filling out the slips on their own.

The issue Plaintiff was most concerned about, however, was Defendant's closing of approximately 350 accounts at the Branch that belonged to Arab-American customers. (*Id.*) Plaintiff alleges that her Branch was singled out with respect to such closures due to the fact that the majority of its customers were Arab Americans. (*Id.*) Plaintiff claims that she discussed her concerns regarding the account

closures with a number of employees within Charter One, including her managers Felici and Larsen, Mazur, and Minghine. (*Id.*) Although she only specifically recalled complaining that the closures were discriminatory to Felici and Larsen, she believes she told Minghine in the beginning of 2006 that some in the Dearborn community felt like Charter One was discriminating against Arab Americans. (*Id.* at 2–3.) She also claims she told Mazur that she was having a horrible time with the closures, and that the community was feeling discriminated against. (*Id.* at 3.)

*2 In December 2006, Erika Cartagena (“Cartagena”), a banker at the Branch, who reported to Plaintiff, called Charter One’s CEO Larry Fish to voice her concerns about the discriminatory treatment of Arab–American customers. (*Id.*) Within a few hours, Plaintiff received a call from Deb King, the supervisor of the Anti–Money Laundering (“AML”) division to discuss Cartagena’s call. (*Id.*) Plaintiff was then called by Larsen who Plaintiff alleges said “Lois, you know, we never say the word ‘discriminate’ or ‘red line.’ And Erika [Cartagena] used this several times with Larry [Fish]. And the call came to Karen [Minghine], and I got the call from Keith [Mazur].” (Def.’s App. Ex. A, Deposition of Lois Nemeth 165:6–9, Jan. 21, 2010.) Larsen also scheduled a meeting for the next day. Plaintiff claims that during that meeting Larsen again reiterated to her that “we don’t use the word ‘discriminate,’ we don’t use the word ‘red line.’” (*Id.* at 166:5–7.)

Shortly thereafter in mid-December, Plaintiff claims Akram Turk (“Turk”), another Branch employee, called her and told her “almost every day we’re getting tons of close-outs,” and opined that he thought Defendant was “paying us back for what happened.” (*Id.* at 170:10–12.) After talking to Turk, Plaintiff called Denise Soto (“Soto”), a friend of hers who worked in the AML department, to discuss the account closures. Apparently Soto told Plaintiff “honey, I’m telling you right now ... you need to be very careful” (Nemeth Dep. 172:12–14.) Soto then allegedly said “they have got these accounts marked OFAC and there is no way they’re OFAC.” (*Id.* at 172:14–16.) Plaintiff claims that she became very upset and told Soto “if you call my branch one day and I’m not there, you’ll—you’ll know what happened.” (*Id.* at 172:16–19.)

In late January 2007, Plaintiff and her staff were required to attend a meeting conducted by AML supervisor Deb King about how the AML department functions. (Pl.’s Resp. 4.) Plaintiff felt that the meeting simply told them basic things they already knew about the job duties of the AML division and that it “was like we were being hand

slapped.” (*Id.*) Plaintiff also testified that there was no discussion about complaints that Charter One policies or account closures were discriminatory or the policies’ effect on Arab–American customers. (Nemeth Dep. 244:13–245:23.)

On March 7, 2007 an anonymous letter (the “Anonymous Letter”) was sent to Charter One’s CEO Larry Fish accusing Plaintiff and her staff of improper banking activity. (Def.’s App. Ex. D, Deposition of John Felici, Jan. 25, 2010, Ex. 1.) The Anonymous Letter stated “[t]here is a big fraud going on in Michigan, Dearborn, especially at the branch at Schaefer and Michigan where some of the members that includes the manager Lois [Nemeth], the banker Erica [Cartagena] [sic] and the BBO Mahmoud [Serhane] and I think the regional manager in this area are involved in it.” (*Id.*) The letter went on to accuse those persons of dealing with a “mortgage person whose office is at Nine Mile in Detroit” who the author claimed was charging customers to help them obtain loans.⁴ (*Id.*) The author also alleged that “[t]he manager of this branch has already a gas station with her Iraqi boyfriend!!!” (*Id.*) Plaintiff did in fact have an ownership interest in a gas station with her business partner Maher Ankouni (“Ankouni”), who is Lebanese. (Pl.’s Resp. 4–5.) Plaintiff is married to Zoltan Nemeth.

*3 As a result of the Anonymous Letter’s accusations, Charter One opened a Corporate Security investigation (the “Investigation”). (*Id.* at 4.) Defendant’s Corporate Security Regional Investigations Manger, Candace Gardin (“Gardin”), was in charge of the investigation. Gardin interviewed many of the Branch’s employees.

Plaintiff was interviewed (the “Interview”) on March 14, 2007 at Charter One’s headquarters in Southfield, Michigan by Corporate Security investigators Gardin and Courtney Gilbert⁵ (“Gilbert”). (*Id.*) The Interview allegedly lasted seven and a half hours. (Nemeth Dep. 269:18–21.) Plaintiff claims that during the Interview she was treated unprofessionally and harassed because of her association with Ankouni. (Pl.’s Resp. 4–5.) Plaintiff claims that although the Investigation was supposed to be about alleged loan brokering, the focus of Gardin’s questioning centered on Plaintiff’s personal life, and her relationship with Ankouni. (*Id.* at 4.) Allegedly, Gardin repeatedly accused Plaintiff of sexual improprieties with her “Iraqi boyfriend,” and asked her if Ankouni was a “friend with benefits” or if she was “getting a little bit of something-something on the side.” (*Id.* at 4–5.)

With regard to the loan broker issue, Plaintiff also claims that Gardin repeatedly accused her of knowingly dealing with Sleiman “Sam” Haidar (“Haidar”) who Gardin

believed was a broker. (*Id.* at 5.) Plaintiff admitted that she worked with Haidar, and that she and Cartagena had gone out to a business dinner with him to discuss switching his accounts from National City to Charter One, however, Plaintiff claims that she was emphatic with him that if he charged people for loans he could not open an account with Charter One. (Nemeth Dep. 358:19–359:20.)

At the end of the Interview, Plaintiff claims Gardin coerced her into making a signed statement (the “Statement”) that was untrue.⁶ (*Id.* at 346:18–352:9.) Indeed, Plaintiff claims the first statement she wrote was torn up by Gardin. (*Id.* at 347:2–3.) Further, she alleges that she wrote a second statement that was not accepted and also torn up. (*Id.* at 347:13–20.) Plaintiff claims that she was so exhausted at the end of the Interview that after Gardin rejected her first two statements she finally asked “what do I need to say to get out of here?” (*Id.* at 291:7–9.) Gardin then created the Statement, which Plaintiff contends contains many inaccurate facts, and in which Plaintiff assumed responsibility for knowingly dealing with a loan broker.⁷

After her Interview, Plaintiff was placed on paid suspension due to the fact that the Investigation was ongoing. Plaintiff was instructed not to talk to any colleagues or customers about the Investigation and to make herself available for further questioning. (Def.’s Br. 5–6.) Gardin and Mazur claimed that from March 21–29, 2007 they repeatedly tried to contact Plaintiff about setting up another interview. (*Id.* at 6.) Gardin testified that she tried calling Plaintiff’s home and cell phone three times, on March 21, 27, and 28 and left messages asking Plaintiff to call her back. Mazur stated that he tried calling Plaintiff on March 29, and left a message directing her to meet with him on March 30. (*Id.*)

*4 Mazur, Minghine, and HR Director Kelly Schaefer (“Schaefer,” collectively the “decision-makers”) decided to terminate Plaintiff’s employment on March 30 after Plaintiff failed to show up for a second interview or return any of Gardin or Mazur’s messages. (*Id.* at 6–7.) There was also evidence that the decision-makers relied, in part, on information learned in the Investigation. (*Id.* at 7.) On April 2, 2007, Plaintiff received a letter from Schaefer (the “Termination Letter”) informing her that she had been fired for violating Section 8.3 of Charter One’s Code which requires employees to cooperate with ongoing investigations. (Nemeth Dep. Ex. 16.) The Termination Letter also said that Defendant believed her failure to return Gardin/Mazur’s calls was an indication she had abandoned her job. (*Id.*)

Plaintiff claims that she never received any of the calls or

messages Defendant’s agents left. (Pl.’s Resp. 6.) She claims that her husband had her cell phone and she was not answering her phone because she was depressed and because she had been told not to talk to customers or coworkers. (*Id.*) Plaintiff also testified that she did not check her home answering machine, that it had become full, and that at some point she erased the messages from this time without listening to them. (Nemeth Dep. 294:1–13, 295:17–296:24.) Plaintiff also stated that she sent Felici a text message regarding a performance evaluation for Turk and that her husband had tried to call Felici as well while she was suspended. (Pl.’s Resp. 6.)

Plaintiff claims that the Investigation, her suspension, and her ultimate termination were motivated by unlawful discrimination based on her association with, and advocacy for, Arab Americans. She also contends that during the Interview she was harassed because of her association with Ankouni. Furthermore, she claims that the harassment was so severe that it created a hostile work environment. Finally, she alleges that Defendant retaliated against her in violation of the ELCRA for her complaints against Charter One’s policies which she believes discriminate against Arab–American customers.

II. Standard of Review

Summary judgment is only appropriate if there are no genuine issues of material facts and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). A genuine issue of material fact exists when there is “sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 487 (6th Cir.2006). When applying this standard, courts must view all materials, including all of the pleadings, in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party bears the responsibility of establishing no issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party meets its burden, the non-moving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial. *Id.* at 324. The non-moving party must do more than show that there is some abstract doubt as to the material facts. It must present significant probative evidence the issue exists in order to defeat a

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motion for summary judgment. *See Moore v. Philip Morris Cos.*, 8 F.3d 335, 339–40 (6th Cir.1993).

III. Discussion⁸

A. Discrimination Under Title VII And The ELCRA
^{*5} Plaintiff claims that “Defendant’s actions with respect to the March 2007 investigation, suspension of Plaintiff, and termination of her employment based on her close association with Arab–Americans and Lebanese business associate, constituted unlawful discrimination” in violation of Title VII and the ELCRA. (Compl.¶¶ 28, 36.) Both Title VII and the ELCRA prohibit an employer from discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment based on that individual’s national origin. *See* 42 U.S.C. § 200e–2(a) (1); Mich. Comp. Laws. § 37.2202(a). Courts use the same burden-shifting analysis the United States Supreme Court articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) to analyze claims brought pursuant to the ELCRA, and Title VII. *See, e.g., Curry v. SBC Commc’ns, Inc.*, 669 F.Supp.2d 805, 824 (E.D.Mich.2009); *Hazle v. Ford Motor Co.*, 456 Mich. 456, 462 (2001) (applying *McDonnell Douglas* to discrimination claim under the ELCRA). Accordingly, both of Plaintiff’s discrimination claims will be analyzed in this section.

The ultimate question in every case alleging disparate treatment on the basis of national origin is “whether the plaintiff was the victim of intentional discrimination.” *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). To establish intentional discrimination, the plaintiff must demonstrate direct evidence of discrimination or present sufficient circumstantial evidence to allow an inference of discrimination. *Id.* (quoting *Johnson v. Kroger Co.*, 319 F.3d 858, 864–65 (6th Cir.2003)).

Direct evidence does not require the jury to draw any inferences to determine that the adverse employment action was motivated, at least in part, by racial prejudice. *Id.* at 825 (quoting *In re Rodriguez*, 487 F.3d 1001, 1007 (6th Cir.2007)). “Evidence of discrimination is not considered direct evidence unless [an improper] motivation is explicitly expressed.” *Amini v. Oberlin College*, 440 F.3d 350, 359 (6th Cir.2006). Here, Plaintiff has not presented any evidence of direct discrimination by

Defendant.

Even without direct evidence though, Plaintiff can still prevail if she can establish an inferential case of discrimination under *McDonnell Douglas*. *Curry*, 669 F.Supp.2d at 824–25. Under the *McDonnell Douglas* test, which was clarified by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the plaintiff must first prove a *prima facie* case of discrimination. *Burdine*, 450 U.S. at 252–53; *Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 342 (6th Cir.1998). If the plaintiff makes out a *prima facie* case, the burden shifts to the defendant to articulate a “legitimate, nondiscriminatory reason” for the adverse action. *Burdine*, 450 U.S. at 252–53 (quoting *McDonnell Douglas*, 411 U.S. at 802). If the defendant is able to articulate a legitimate reason, the burden then shifts back to the plaintiff who must prove the given explanation was merely a pretext for unlawful discrimination. *Id.* at 256.

1. The *Prima Facie* Case

^{*6} A plaintiff establishes a *prima facie* case of discrimination by demonstrating that “(1) she is a member of a protected group, (2) she was subject to an adverse employment decision, (3) she was qualified for the position, and (4) she was replaced by a person outside of the protected class.” *Russell v. Univ. of Toledo*, 537 F.3d 596, 604 (6th Cir.2008) (quoting *Carter v. Univ. of Toledo*, 349 F.3d 269, 273 (6th Cir.2003)) (quotation marks omitted). The fourth prong can also be satisfied by showing that the plaintiff was treated differently than similarly situated employees who did not belong to the protected class. *Id.* (quoting *Newman v. Fed. Express Corp.*, 266 F.3d 401, 406 (6th Cir.2001)). For the following reasons, the Court holds that Plaintiff has established a *prima facie* case of discrimination.

i. Member of a Protected Class

Although Plaintiff herself is not an Arab American, she argues that she is a member of this protected class based on her association with Arab Americans and her advocacy on their behalf. (Pl.’s Resp. 9–10.) This is demonstrated, she argues, through her business partnership with Ankouni, her involvement in the Arab–American community in and around Dearborn, and her efforts to protest what she believed to be discriminatory policies at Charter One against Arab Americans. (*Id.*)

The Sixth Circuit has held that such association/advocacy can form the basis for an individual to be considered part of a protected class. *See, e.g., Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 574–75 (6th Cir.2000) (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 231–37, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969)); *Winston v. Lear–Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir.1977) (holding a white plaintiff had standing to sue his former employer under 18 U.S.C. § 1981 for terminating him after he protested the alleged discriminatory firing of a black co-worker). In *Johnson*, the court held that the plaintiff, who was a white affirmative action official at the university, had standing to bring a claim under Title VII against the university for sanctions it allegedly imposed against him in retaliation for his advocacy on behalf of women and minorities. 215 F.3d at 577. The Sixth Circuit found that his complaints were protected activity, and that he was a member of a protected class. *Id.*

Defendant claims Plaintiff cannot meet this criterion because her “association” is what Charter One pays her to do, and therefore cannot form the basis of her Complaint. (Def.’s Br. 18.) Defendant’s argument, however, was explicitly rejected in *Johnson*. *See* 215 F.3d at 577. In fact, the *Johnson* court rejected a much more forceful illustration of Defendant’s argument. The Sixth Circuit stated, “[s]imply because the employer has placed an individual in the position of a highlevel affirmative action officer and contracted with the individual to advocate on behalf of women and minorities ... does not thereby immunize the employer from being held liable for illegally discriminating against that individual for such advocacy.” *Id.* Furthermore, part of Plaintiff’s claim is that she was discriminated against because of her association with Ankouni. Accordingly, the Court finds that Plaintiff has satisfied the first prong of her *prima facie* case.

ii. Adverse Employment Action

*7 An adverse employment action is anything that “constitutes a significant change in employment status,” and can include hiring and firing decisions, failing to promote an employee, reassigning an employee to a position with significantly different responsibilities, or a drastic change in benefits. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 403 (6th Cir.2008) (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)). However, “petty slights, minor annoyances, and simple lack of good manners” cannot constitute an adverse action. *Burlington N. &*

Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). Plaintiff was suspended and eventually terminated. Thus, this requirement is clearly met. *See White*, 533 F.3d at 403.

iii. Plaintiff Was Qualified For Her Position

Plaintiff must also establish that she was qualified for the position she was ultimately fired from in order to make out a *prima facie* case. *See Russell*, 537 F.3d at 604. Plaintiff worked at Charter One for twenty five years, was promoted various times from teller to Assistant Vice President, and consistently received favorable performance reviews which earned her numerous accolades, awards and compensation increases during her tenure. (Pl.’s Resp. 1.) The Court finds that Plaintiff has satisfied this prong.

iv. Replaced By A Non–Protected Individual

Plaintiff can establish this requirement if she demonstrates that Dave Solano, the person Charter One hired to replace her, was not a member of Plaintiff’s protected class. Defendant argues that Plaintiff has presented no evidence regarding this prong. (Def.’s Reply 5.) In support of this contention, Defendant points to the deposition testimony of Felici who stated that Solano has appealed account closures and has advocated for the same types of changes in corporate policy that Plaintiff did, such as having the brochures printed in Arabic, Arabic prompts on the ATMs and Arabic signage. Def.’s App. Ex. D, Deposition of John Felici 109:18–24, 111:6–11, Jan. 25, 2010)

Plaintiff, on the other hand, argues that it is undisputed that he did not have an Arab–American business partner, was not accused of having an “Iraqi boyfriend” (or girlfriend), and never complained that Charter One’s policies were discriminatory toward Arab–American customers. (Pl.’s Resp. 16.) During his deposition, Felici stated that Solano has never complained that any of the Bank’s policies discriminated against Arab Americans. (Felici Dep. 111:21–25.) Because at the very least there is a genuine issue of material fact regarding whether Solano can be considered a member of Plaintiff’s protected class based on his association with or advocacy for Arab–American customers, the Court finds this prong is also satisfied. Thus, the Court holds that Plaintiff has established a *prima facie* case.

2. Legitimate, Non-Discriminatory Reason

Once the plaintiff presents sufficient evidence to make out a *prima facie* case, the burden shifts to the defendants to state a “legitimate, nondiscriminatory reason” for the adverse action. *Burdine*, 450 U.S. at 252–53 (quoting *McDonnell Douglas*, 411 U.S. at 802). Plaintiff’s Complaint alleges that the Investigation, her suspension, and her termination were all the product of unlawful discrimination. (Compl. ¶¶ 28, 36.) Accordingly, the Court will analyze those three adverse employment actions separately.

i. The Investigation

*8 Plaintiff claims that the real reason the Investigation was launched was because of her association with Arab Americans, particularly her business partner Ankouni. (Nemeth Dep. 316:5–24.) Plaintiff suggests that this was the case because the Interview was supposed to be about violations in connection with the alleged mortgage broker but did not focus on that. Instead, Plaintiff argues it focused on her alleged relationship with her “Iraqi boyfriend” and her personal life. (*Id.*)

Defendant contends that any time it is confronted with allegations of fraud at one of its branches it investigates to see whether there is any truth to the claims. Indeed, several employees corroborated that this was Charter One’s policy. (Felici Dep. 77:17–19; Def.’s App. Ex. E, Deposition of Kelly Schaefer Dep. 27:8–16, Feb. 24, 2010.) Plaintiff herself also admitted as much. (Nemeth Dep. 316:21–22.) At her deposition she testified, “alleged wrongdoing was enough that an investigation would be warranted.” (*Id.*) As a result, the Court finds that Defendant has sufficiently articulated a legitimate, non-discriminatory reason for initiating the Investigation against Plaintiff.

ii. The Suspension

Several employees testified that it was Charter One’s common practice to place employees on an investigative suspension during a Corporate Security investigation. (Def.’s App. Ex. C, Deposition of Karen Minghine 63:25–

64:14, Mar. 4, 2010; Ex. B, Deposition of Keith Mazur 45:16–24, Feb. 4, 2010.) Mazur stated that he has been involved in the suspension of at least ten employees while Corporate Security investigations were being conducted against them. (Mazur Dep. 45:16–24.) He said that the suspension was ordered because there were unanswered questions, and that “the fact that there was an investigation pending was the reason she was suspended.” (Mazur Dep. 38:24–39:15.) When the decision to suspend her was made, Mazur claimed he had no opinion as to whether Plaintiff was actually guilty of violating company policy. (*Id.* at 43:13–24.)

Shaefer testified that she supported suspending Plaintiff because the conduct she was accused of in the Letter was a terminable offense and the investigation was still ongoing so “it was important to [Schaefer] to act consistently with the way [she] would treat anyone else.” (Schaefer Dep. 35:3–9.) Also, even though Schaefer originally did not think anything would come of the Investigation, she could not ignore the Statement Plaintiff allegedly voluntarily prepared indicating she knew violations were taking place and that she was responsible for them. (*Id.* at 36:10–13.) When asked whether other portions of the Statement that suggested violations did not occur (like the bottom of the first page where Plaintiff states she talked to the customer allegedly being charged fees who told her he was not) affected her impression about Plaintiff’s guilt, Schaefer stated “[i]t made it unclear to me, which is part of what made me believe that it needed further investigation.” (Schaefer Dep. 37:8–38:2.) In light of this testimony, the Court finds that Defendant has stated a legitimate, non-discriminatory reason for suspending Plaintiff at the conclusion of her Interview on March 14, 2007.

iii. The Termination

*9 Charter One requires its employees to cooperate with investigations. (Def.’s Br. Ex. G, Declaration of Adriana Seaton ¶ 3, July 15, 2010.) Section 8.3 of Charter One’s Code of Business Conduct and Ethics states that “[e]mployees must fully cooperate with all internal investigations conducted by the Company.” (Seaton Decl. Ex. 1, at 4.) It also warns that “[f]ailure or refusal to cooperate with Company-sanctioned investigations ... may result in disciplinary action, up to and including termination of employment.” (*Id.*) At the end of the initial Interview, Plaintiff was suspended and told to make herself available for further questioning. (Nemeth Dep. 292:18–22; Mazur Dep. 55:5–7; Def.’s App. Ex. H, Deposition of Candace Gardin 88:5–25, Feb. 16, 2010.)

This was common practice for corporate security investigations. (Felici Dep. 105:4–9.) Subsequently, Gardin and Mazur tried calling Plaintiff several times to set up another interview, and left multiple messages on Plaintiff's home and cell phone. (Gardin Dep. 95:10–97:7; Mazur Dep. 47:10–17.)

Plaintiff testified that she did not answer her home phone or her cell phone during this time or check her messages. (Nemeth Dep. 294:1–13, 296:3–24.) She also stated that her husband had her cell phone because she had been told not to discuss the Investigation with coworkers or clients and she was in a deep state of depression. (*Id.*) Plaintiff stated that if anyone had called and left a message on either her home or cell phone she would not have known. (*Id.* at 296:19–24.)

Defendant claims that Plaintiff was terminated for failing to adhere to Charter One's policy requiring employees to cooperate with ongoing investigations and job abandonment. (Def.'s Br. 6; Nemeth Dep. Ex. 15.) Minghine testified that Plaintiff was fired because she did not respond to Defendant's attempts to get a hold of her. (Minghine Dep. 69:2–4.) Not only did this violate the policy requiring cooperation with investigations, Defendant also construed it as an indication that Plaintiff had abandoned her job. (Nemeth Dep. Ex. 15.) The Court holds that these proffered reasons are sufficient to satisfy this aspect of the *McDonnell–Douglas* test.

3. Pretext

Despite Defendant's non-discriminatory reason for initiating the Investigation, suspending, and ultimately terminating Plaintiff, she can still successfully recover on her discrimination claims if she can demonstrate that Defendant's reasons were merely a pretext. *Burdine*, 450 U.S. at 256. Generally, pretext can be shown by evidence that: (1) the proffered reason has no basis in fact; (2) the articulated explanation did not actually motivate the adverse action; or (3) the stated reason was insufficient to motivate the action. *Curry*, 669 F.Supp.2d at 828 (quoting *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994)).

The plaintiff will not meet this burden by merely demonstrating that the stated reason was pretextual. Rather, the employee must prove that it was a pretext for unlawful discrimination. *Hazle*, 464 Mich. at 465–66, 628 N.W.2d 515. It is insufficient to simply show that the employer's decision was wrong or mistaken, because the factual dispute is whether discriminatory animus

motivated the employer not whether the employer is "wise, shrewd, prudent, or competent." *Id.* at 476, 628 N.W.2d 515; see also *Comiskey v. Auto. Indus. Action Group*, 40 F.Supp.2d 877, 896 (E.D.Mich.1999) ("[T]he question is not whether the employer's reasons are *right*, but whether the employer's description of its reasons is *honest*.") (quoting *Kariotis v. Navistar Int'l Trans. Corp.*, 131 F.3d 672, 677 (7th Cir.1997)) (emphasis in original). To avoid summary judgment, the plaintiff only needs to establish a genuine issue of material fact as to whether the employer's proffered reason was a pretext. *Hazle*, 464 Mich. at 465 n. 10, 628 N.W.2d 515. "[T]he ultimate question is whether the plaintiff established a question of material fact upon which reasonable minds could differ regarding whether discrimination was a motivating factor, i.e., made a difference, in the employer's decision." *Ahmed v. Visteon Auto. Sys.*, No. 248411, 2004 WL 2601206, at *3 (Mich.App. Nov.16, 2004).

*10 Plaintiff claims she has raised a genuine issue of material fact regarding whether Defendant's legitimate reason was pretext. The Court, however, will first deal with Plaintiff's arguments that do not demonstrate pretext. Plaintiff argues that Defendant's proffered reason for firing her—"job abandonment"—had no basis in fact because she did not, in fact, abandon her job. (Pl.'s Resp. 17.) Plaintiff points out that she texted Felici regarding her assistant's performance review, and her husband called him. (*Id.*) Furthermore, Plaintiff argues that the job abandonment policy does not even apply to a suspended employee. (*Id.*) Schaefer testified that she did not believe that the policy technically applied to Plaintiff's situation. (Schaefer Dep. at 51:1–6.) These arguments, however, ignore the fact that Plaintiff was fired because she did not return Gardin and Mazur's phone calls to set up another interview, which violated Charter One's policy regarding cooperation with ongoing investigations. (Nemeth Dep. Ex. 16.) There is also no evidence that those who decided to terminate Plaintiff were aware that she texted Felici or that her husband called him. Even evaluating the facts in the light most favorable to Plaintiff, no reasonable jury could infer that Mazur, Schaefer, or Minghine had any reason to believe that Plaintiff had not gotten their messages or had contacted Defendant in any way.

Plaintiff also argues that "Defendant's attempt to use Plaintiff's alleged violation of company policy 'after the fact' in an effort to defend the termination decision is further evidence of pretext." (Pl.'s Resp. 19.) The Termination Letter written on March 30, 2007, however, clearly demonstrates that the reason Plaintiff was fired was because she did not cooperate with the ongoing Investigation in violation of company policy. It states,

The terms of your investigative suspension included making yourself available to cooperate and assist with the investigation. Candace Gardin reviewed this expectation with you during your first interview. In addition, our Code of Ethics clearly states that colleagues are expected to cooperate in all investigations. You have repeatedly ignored contact attempts by Candace Gardin on 3/21, 27, and 28 and Keith Mazur on 3/29. We consider this a violation of the terms of your suspension and an indication that you have abandoned your job. Therefore, we are terminating your employment as a Branch Manager with Charter One effective March 31, 2007.

(Nemeth Dep. Ex. 16.) This shows that Defendant has not changed its story at any time.

Many of Plaintiff's other allegations support her contention that the decision to fire her for failing to return calls from Gardin and Mazur was pretext. Plaintiff claims that "Charter One's abject failure to take reasonable steps to confirm whether Plaintiff in fact 'abandoned her job' demonstrates that this purported justification for her termination is 'unworthy of credence,' and thus was a pretext for discrimination." (Pl.'s Resp. 19.) Plaintiff argues that Defendant should have tried calling her parents or sent her a letter by certified mail before concluding that she was not cooperating with the Investigation or had abandoned her job. (Nemeth Dep. 303:13–20.) At oral argument, Defense counsel argued that Charter One was not obligated to try to notify Plaintiff by mail, and that it is improper for the Court to base its decision on how the Bank when about notifying Plaintiff.

*11 Although Defendant did not have a duty to confirm whether Plaintiff actually received the numerous messages it left or in fact abandoned her job, a reasonable juror could infer that the Bank's decision not to send Plaintiff, a 25-year employee, a letter to try to reach her after failing to do so by phone, coupled with the fact that in terminating her it sent her a termination letter, demonstrated that they did not really care whether she got back in touch with them or not because they had already decided to fire her. The Court finds that while Defendant's failure to send Plaintiff a letter is certainly not conclusive on the issue of pretext, it is also not wholly irrelevant.

Plaintiff next claims that the reason Charter One gave for terminating her was insufficient to explain such harsh action. (Pl.'s Resp. 19.) Although Plaintiff attempts to characterize Defendant's reason as "not returning phone messages," the actual reason Defendant gave was that Plaintiff did not cooperate with the Investigation—a clear

violation of company policy. (Nemeth Dep. Ex. 16.) Section 8.3 of the Code explicitly states that failure to cooperate with an ongoing investigation may result in termination. (Seaton Dec. Ex. 1, at 4.) While Plaintiff may find it wrong to fire an employee of nearly 25 years for allegedly causing that code violation, the Court will not dissect whether Charter One's employment decisions were right, only whether they were discriminatory. *See Comisky*, 40 F.Supp.2d at 896. Having said that, while a jury would be unable to find that the allegations contained in the Termination Letter were false or that the decision to terminate Plaintiff was not in accordance with the strict letter of Charter One's written policy, a reasonable juror could infer that terminating a 25-year employee with an otherwise untarnished employment history for that infraction, without sending a letter, setting a second meeting, and further hearing her side of the story, was evidence of pretext for unlawful discrimination in light of Plaintiff's other allegations.

Plaintiff also argues that the results of the Investigation were the real reason for her termination. (Pl.'s Resp. 18.) Plaintiff emphasizes that all of the information the decision-makers (Mazur, Schaefer, and Minghine) had about the Investigation came from Gardin. (*Id.*) Because Plaintiff contends that Gardin harassed her during the Interview because of her association with Arab Americans, she argues that this information was tainted. Therefore, even if the decisionmakers were not discriminating against her, they were relying on discriminatory information which evidences pretext. *See Madden v. Chattanooga City Wide Serv.*, 549 F.3d 666, 678 (6th Cir.2008).⁹

The Court agrees that the evidence, when viewed in the light most favorable to Plaintiff, demonstrates that a genuine issue of material fact exists regarding whether the results of the Investigation were a motivating factor in the decision to terminate Plaintiff. Schaefer stated that it was her understanding that Plaintiff would have been terminated anyways based on the Investigation, (Schaefer Dep. 54:11–14), and stated that when the decision to fire Plaintiff was made, Gardin had told her that she had concluded that Haidar was a broker. (*Id.* at 42:12–19.) Schaefer also testified that Mazur and Minghine expressed an agreement to terminate Plaintiff on the basis of the Investigation. (*Id.* at 53:6–13.) Such testimony, however, only demonstrates that Plaintiff's violation of Section 8.3 of the Code may have served as a pretext to fire her based on the Investigation. To establish pretext of discrimination, Plaintiff must still establish a genuine issue of material fact exists as to whether the results of the Investigation were generated by a discriminatory animus in order to demonstrate that Mazur, Schaefer, and

Minghine relied on “tainted” evidence when deciding to terminate Plaintiff.

*12 Plaintiff points out that the Investigation ultimately turned up nothing to substantiate Gardin’s earlier conclusion that Plaintiff knowingly dealt with a loan broker. (Pl.’s Resp. 18.) Gardin based her assessment that Haidar was a broker in part on six instances where a customer wrote a check to Haidar shortly after obtaining a loan from Charter One. (Gardin Dep. 100:12–102:1.) Gardin admitted that she did not know that those checks were written as brokerage fees, and did nothing to confirm that they were payments for procuring loans. (*Id.*) It is irrelevant, however, whether Gardin did a good job or an incompetent job investigating the allegations contained in the Anonymous Letter as long as her conclusion that Plaintiff dealt with a broker was not driven by a discrimination against Plaintiff based on her association with Arab Americans. Likewise, it is not dispositive that her conclusion ultimately turned out to be incorrect.

Plaintiff argues that because Gardin focused the Interview on Plaintiff’s alleged relationship with Ankouni, the “only reasonable inference” that can be drawn is that Gardin discriminated against and harassed Plaintiff on the basis of her association with Arab Americans. (Pl.’s Resp. 13.) Plaintiff further contends that “given the evidence of Ms. Gardin’s animus toward Plaintiff based on Lois’s association with Mr. Ankouni, the Charter One decisionmakers’ reliance on Ms. Gardin’s biased information raises an issue of fact as to pretext.” (*Id.* at 18.)

While there are many aspects of Plaintiff’s allegations that do not suggest a discriminatory animus, the Court holds that a genuine issue of material fact exists regarding whether Gardin’s conclusions were based on discrimination because of Plaintiff’s association with Arab Americans.

As to Plaintiff’s claims regarding Gardin, Plaintiff testified that at no point did she complain to Gilbert or Gardin that she had been discriminated against or that Arab-American customers were being discriminated against. (Nemeth Dep. 268:19–269:17.) Plaintiff has not put forth any evidence establishing that Gardin or Gilbert were even aware she ever made such complaints.

Certain aspects of the Interview that Plaintiff found unprofessional could be described as neutral with respect to discrimination on the basis of national origin. For example, Gardin reviewed her and her husband’s bank statements and other personal financial materials (*id.* at 275:15–276:25), and questioned Plaintiff about how she

paid for the Mercedes she drove and her daughter’s college tuition. (*Id.* at 277:1–278:6.) Plaintiff testified that she was questioned about her personal finances for approximately two and a half hours. (*Id.* at 353:16–18.)

When asked what her reasoning for asking about Plaintiff’s personal finances was, Gardin stated “[t]o determine whether or not Lois was receiving kickbacks.” (Def.’s App. Ex. H, Deposition of Candace Gardin 62:14–16, Feb. 16, 2010.) She said she wanted to investigate whether Plaintiff was receiving money from Haidar because employees are not supposed to deal with brokers, and receiving money to process a loan would be unethical. (*Id.* at 62:20–63:1.) Gardin testified that she looked through Plaintiff’s and her husband’s personal financial records to see if there was unusual activity that might indicate Plaintiff was receiving kickbacks. (*Id.* at 72:11–73:7.) Even when drawing all reasonable inferences in Plaintiff’s favor, no reasonable jury could infer that Gardin’s questioning into Plaintiff’s financial affairs demonstrates her conclusion that Haidar was a broker was motivated by her prejudice against Plaintiff’s association with Arab Americans.

*13 However, Plaintiff also testified about the following harsh conditions of the interview, which lasted seven and a half hours. Plaintiff stated both Gardin and Gilbert raised their voices a number of times. (Nemeth Dep. 280:16–281:9.) Plaintiff claims she asked for a break and Gardin and Gilbert told her they “would be getting to it” but never did. (*Id.* at 288:16–19.) She alleges that she asked to use the bathroom near the end of the Interview, but was told she was almost finished so she was never able to go before the end of the process. (*Id.* at 288:22–289:3.) She was also never given food or anything to drink. (*Id.* at 289.) According to Plaintiff, Gardin continuously called her stupid. (*Id.* at 271:3–5.) Gardin also allegedly insinuated that Plaintiff, who is married, had an Iraqi boyfriend and was “getting a bit of something-something on the side” from him. (*Id.* at 270:21–271:1.)

The Court holds that Plaintiff’s claims create a triable issue of fact for the jury with respect to the issue of pretext. Plaintiff alleges that at the end of the multi-hour, no bathroom break, no food or drink Interview, Gardin coerced her into signing the Statement, which contained several lies. (Nemeth Dep. 346:18–352:9.) Indeed, Plaintiff claims her first statement was torn up by Gardin. (*Id.* at 347:2–3.) She also alleges that she wrote a second statement that was not accepted and torn up. (*Id.* at 347:13–20.) Plaintiff claims that she was so exhausted at the end of the Interview that after Gardin rejected her first two statements she finally asked “what do I need to say to

get out of here?” (*Id.* at 291:7–9.) She then produced the Statement, which Plaintiff contends contained many inaccurate facts.

In the Statement, Plaintiff allegedly admitted that she and Cartagena went out to dinner with Haidar and afterwards he started referring loans to them via fax. (Nemeth Dep. Ex. 15.) The faxes would include a cover sheet from Haidar’s company, Business Loan Consultants, a “consulted” application, and any supporting documents (i.e. taxes or articles). (*Id.*) The Statement then states that in August of 2006, Plaintiff went to Haidar’s office in Southfield on Nine Mile road. Plaintiff allegedly wrote that when she visited the office it was obvious Haidar was charging because the name was BLC, and consultants charge for loans. (*Id.*) Later in August or September, Mahmoud Serhane came to Plaintiff and told her a customer said Haidar was charging him fees. (*Id.*) When Plaintiff asked the customer if this was true, however, he said it was not. (*Id.*) Finally, the Statement said “as I stated I take full responsibility for this.” (*Id.*) One aspect of the Statement that Plaintiff claims Gardin forced her to include was the part where she claims it was obvious that Haidar was charging customers for loans. (*Id.* at 351:2–5.)

Gardin acknowledged that Plaintiff wrote more than one statement, and that she did not accept Plaintiff’s first version because it left out parts of the Interview that Gardin thought were important. She could not, however, recall what she asked Plaintiff to put back into her statement. (Gardin Dep. 80:18–81:16.) Gardin also recalled Plaintiff asked something to the effect of “what do I need to do to get out of here?” (*Id.* at 81:17–19.)

*14 As stated above, one way a plaintiff can demonstrate an issue of fact exists regarding pretext is to show that the defendant does not really believe its own legitimate, non-discriminatory reason. *See Curry*, 669 F.Supp.2d at 828 (quoting *Manzer*, 29 F.3d at 1084). A reasonable juror could find that the fact that Gardin coerced Plaintiff into making the Statement is evidence that she did not believe the admissions contained in it were actually true and demonstrates pretext because the Statement was ultimately relied heavily upon by both Gardin and the decision-makers when they concluded (incorrectly) that Plaintiff was knowingly dealing with a broker.

The following allegations also touch upon the issue of national origin. Gardin allegedly asked Plaintiff if she and her husband are from the Middle East. (*Id.* at 275:10–14.) She is Caucasian and not from the Middle East, and her husband Zoltan Nemeth is Hungarian. (*Id.*) Additionally, she was questioned about her relationship with Ankouni (her alleged Iraqi boyfriend who is, in fact Lebanese) for

about an hour. (*Id.* at 353:13–15.) Plaintiff claims this demonstrates that the focus of the Interview was on her relationship with Ankouni and his alleged Iraqi origin. (Pl.’s Resp. 13.)

In support of this argument, Plaintiff also points to the deposition testimony of Jeffery Six and Akram Turk, two fellow Charter One employees at the time who were interviewed by Gardin. Six testified that Gardin asked many him many questions about whether Plaintiff was Arabic, and her Iraqi boyfriend. (Def.’s App. Ex. O, Deposition of Jeffery Six 63:18–24, 65:20–66:18, Mar. 2, 2010.) He said that in his interview they talked very little about the Anonymous Letter and focused “more on the whole Arab–American thing and the Iraqi boyfriend.” (*Id.* at 70:12–24.) He estimated that about 15 minutes were spent talking about the accusations in the Anonymous Letter and 2 hours and 45 minutes talking about Arab–Americans, Plaintiff’s Iraqi boyfriend, and her owning a gas station. (*Id.* at 98:1–5.) Similarly, Turk testified that Gardin also asked him questions regarding Plaintiff’s personal life and her alleged Iraqi boyfriend. (Def.’s App. Ex. N, Deposition of Akram Turk 56:1–18, Jan. 27, 2010.) The Court finds that these allegations, particularly the fact that Gardin admitted that she required Plaintiff to make several statements before finally allowing her to leave, demonstrate a genuine issue of material fact regarding pretext.

B. Hostile Work Environment—State of Michigan Claim

Establishing a claim for hostile work environment is the same under Michigan law as it is under Title VII. *Curry*, 669 F.Supp.2d at 833 (citing *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 368–69, 547 N.W.2d 314 (1996)). To prove a claim for hostile work environment, the plaintiff must show: (1) she belongs to a protected group; (2) she was subject to harassment; (3) that was based on her protected status; (4) that affected a term, condition, or privilege of employment; and (5) the defendant knew, or should have known, about the harassment and did not take appropriate action. *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1078–79 (6th Cir.1999). This test includes both an objective and subjective component. *Randolph v. Ohio Dep’t of Youth Servs.*, 453 F.3d 724, 733 (6th Cir.2006). The conduct must be so severe or pervasive such that it creates a hostile environment both to the reasonable person and the victim. *Id.*

*15 The court must consider the “totality of the circumstances” when analyzing whether the harassment

was sufficiently pervasive or severe. *Id.*; see also *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 561 (6th Cir.1999). Some factors courts should consider include “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.” *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 351 (6th Cir.2005) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). The very nature of hostile environment claims implies repeated conduct. *Curry*, 669 F.Supp.2d at 832 (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002)). “Isolated incidents, however, unless extremely serious, will not amount to discriminatory changes in the terms or conditions of employment.” *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 463 (6th Cir.2000).

Plaintiff’s hostile work environment claims are based on the March 14, 2007 “interrogation” only. (Compl.¶¶ 26, 34.)¹⁰ The Court has already concluded that Plaintiff has demonstrated that at the very least a question of fact exists regarding whether she is a member of a protected class based on her association with and advocacy for Arab Americans. Furthermore, the Court finds that Plaintiff has alleged sufficient facts to indicate she was subjected to harassment (ie: prolonged interview over several hours without breaks, food, or water; being coerced into making the Statement; and being taunted repeatedly that she was stupid). For the reasons stated above, the Court also finds that Plaintiff has produced sufficient evidence from which a reasonable jury could find that the harassment was based, at least in part, on Plaintiff’s association with Arab Americans.

However, Plaintiff’s hostile work environment claim must fail because she cannot prove the harassment affected a term or condition of her employment. The fact is Plaintiff was suspended immediately following the Interview and was terminated before she returned to work. As a result, there was no time for (a) Defendant to become aware of the harassment, (b) Defendant to fail to remedy it, or (c) the harassment to affect Plaintiff’s work performance. Although Plaintiff claims that “[g]iven that Ms. Gardin’s treatment of Lois caused her to go into a deep depression and to cut off contact with everyone, Ms. Gardin’s harassing conduct substantially interfered with Plaintiff’s employment,” (Pl.’s Resp. 13), the fact remains that Plaintiff did not have any employment opportunities for the harassment to interfere with because she was fired before coming back from her paid suspension. Accordingly, Defendant is entitled to summary judgment on Plaintiff’s hostile work environment claims.

C. Retaliation Under The ELCRA

Both the ELCRA and Title VII prohibit retaliation against an employee for complaining about discrimination. *Curry*, 669 F.Supp.2d at 831; see also Mich. Comp. Laws § 37.2701. In order to make out a *prima facie* case for retaliation, the plaintiff must demonstrate that: (1) she engaged in protected activity; (2) the defendant was aware the plaintiff engaged in that activity; (3) the defendant took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse action. *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir.2000). If the plaintiff establishes a *prima facie* case for retaliation, the analysis follows the same burden-shifting framework as disparate treatment claims. *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 545 (6th Cir.2008). Defendant, however, argues that the National Bank Act, 12 U.S.C. § 21 *et. seq.* (the “NBA”), preempts Plaintiff’s state-law retaliation claim. (Def.’s Br. 10.) In turn, Plaintiff contends that Defendant is barred from raising this defense because it failed to plead preemption as an affirmative defense in its Answer. (Pl.’s Resp. 8.)

1. The National Bank Act

*16 The NBA grants federally chartered banks many powers including “all such incidental powers as shall be necessary to carry on the business of banking ...” 12 U.S.C. § 24 (Seventh). Such incidental powers include negotiating promissory notes, bills of exchange, receiving deposits, buying and selling exchange, loaning money on personal security, and issuing and circulating notes. *Id.* The NBA also states that national banks shall have the power “[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties ... dismiss such officers or any of them at pleasure, and appoint others to fill their places.” § 24 (Fifth). For the following reasons, the Court holds that neither provision of the NBA preempts Plaintiff’s retaliation claim.

a. Plaintiff is Not an Officer Covered by § 24 (Seventh)

While state laws that seek to regulate national banks or that substantially interfere with rights granted by the NBA are preempted, the United States Supreme Court has stated that “[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA.” *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11, 127 S.Ct. 1559, 167 L.Ed.2d 389 (2007). Additionally, implementing regulations have explained that state tort laws “are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks’ deposit-taking powers.” 12 C.F.R. § 7.4007(c)(2). Although Defendant argues that the underlying complaints Plaintiff made, and which she claims Defendant retaliated against her for, concern Charter One policies related to their deposit-taking powers (ie: not having Arabic prompts, requiring cash deposits be made via armored car at an off-site depository, etc), that is not the critical inquiry. The question is whether compliance with the ELCRA, and specifically its prohibition against retaliating against employees who engage in protected conduct, more than incidentally affects Charter One’s powers under the NBA. The Court fails to see how being prohibited from discriminating or retaliating against employees from complaining about possible discrimination interferes with any function “necessary to carry on the business of banking.” See § 24 (Seventh). As a result, the Court holds that section 24 (Seventh) does not preempt Plaintiff’s claim.

b. ELCRA Does Not Interfere With Defendant’s Rights Under § 24 (Fifth)

The NBA affords Defendant the right “[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties ... dismiss such officers or any of them at pleasure, and appoint others to fill their places.” § 24 (Fifth). The Sixth Circuit has interpreted this section of the NBA as applying only to officers appointed and dismissed by the bank’s board of directors. See *Wiskotoni v. Mich. Nat’l Bank–West*, 716 F.2d 378, 387 (6th Cir.1983) (“The terms of § 24 (Fifth) require[] that officers be appointed and dismissed by a national bank’s board of directors.”). In *Wiskotoni*, the court held that the plaintiff’s wrongful termination claim was not preempted by the NBA because he was neither appointed nor dismissed by the bank’s board. *Id.* Both federal and state lower courts follow *Wiskotoni* and analyze whether the plaintiff was hired and/or fired by the defendant’s board

of directors when determining whether § 24 (Fifth) preempts state anti-discrimination laws. See, e.g., *Farmer v. Nat’l City Corp.*, No. C–2–94–966, 1995 WL 918311, at *5 (S.D. Ohio Sept. 12, 1995); *Boesch v. Champaign Nat’l Bank*, No. 24014, 2008 WL 2582979, at *4–5 (Ohio App. June 30, 2008).

*17 In the instant case, it is clear that Plaintiff was not fired by Charter One’s board of directors. The evidence demonstrates that the decision-makers were Mazur, Minghine, and Schaefer—none of whom are board members. Additionally, there is nothing in the record indicating that they simply recommended that Plaintiff be terminated and that Defendant’s board ultimately made the decision. Accordingly, the Court finds that § 24 (Fifth) is inapplicable and that the NBA does not preempt Plaintiff’s retaliation claim. As a result, it is unnecessary for the Court to determine whether Defendant waived its right to assert this affirmative defense.

2. The Prima Facie Case For Retaliation

In order to make out a *prima facie* case for retaliation, the plaintiff must demonstrate that: (1) she engaged in protected activity; (2) the defendant was aware the plaintiff engaged in that activity; (3) the defendant took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse action. *Nguyen*, 229 F.3d at 563. Because there is no dispute that Plaintiff’s suspension and termination constitute an adverse employment action the Court need only address the first, second, and fourth prongs of this test. For the following reasons, the Court holds that Plaintiff has presented evidence sufficient to make out a *prima facie* case.

a. Protected Activity

Complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices is protected conduct. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 721 (6th Cir.2008) (quoting *Johnson v. Univ. of Cincinnati*, 215 F.3d 551, 578 (6th Cir.2000)) (quotation marks omitted). Defendant claims that Plaintiff’s retaliation claim must fail because she has no evidence that any of the policies she complained about in fact discriminated against Arab–Americans in violation of ELCRA. (Def.’s Br. 12.) Plaintiff argues that her belief that violations were taking place only needed to be

reasonable, and that her claim does not fail simply because she did not specifically use the word discrimination. (Pl.'s Resp. 10.)

The Court agrees with Plaintiff. The Michigan Court of Appeals clearly indicated that a plaintiff's complaints will be considered protected activity under the ELCRA simply by raising the specter of discrimination. *McLemore v. Detroit Receiving Hosp. & Univ. Med. Ctr.*, 196 Mich.App. 391, 396, 493 N.W.2d 441 (1993) (disagreeing strongly with the Sixth Circuit's interpretation of the ELCRA in *Booker v. Brown & Williamson Tobacco Company*, 879 F.2d 1304, 1312–14 (6th Cir.1989), which held that the act “did not protect from retaliation an employee who had merely expressed concern to his employer about possible discrimination”); see also *Welch v. W.R. Grace & Co.-Conn., Dearborn Div.*, No. 94–cv–75198, 1995 WL 871196, at *5 (E.D.Mich. Apr.27, 1995). “The plaintiff need not show that a violation actually occurred. It is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case.” *David v. ANA Television Network, Inc.*, Nos. 98–2288 & 98–2289, 2000 WL 222575, at *5 (6th Cir. Feb.16, 2000) (quoting *Rocker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir.1982)) (quotation marks and brackets omitted). The Court finds that Plaintiff has raised a genuine issue of material fact as to whether her many complaints raised the specter of discrimination.

b. Defendant Was Aware Of Plaintiff's Protected Activity

*18 Defendant claims that “[n]ot one of the individuals involved in the investigation or the decision to discharge Nemeth knew that she had complained that Charter One policies were discriminatory toward Arab–American customers.” (Def.'s Br. 13.) The Court finds that Plaintiff has provided sufficient evidence to make out a *prima facie* case that Minghine and Mazur were aware that Plaintiff had raised the specter of discrimination.

Plaintiff testified that she spoke to approximately fifteen people above her at Charter One regarding the account closures between 2003–07. (Nemeth Dep. 155:14–17.) Although she admitted that she did not tell all of them that she thought the policy was discriminatory (*id.* at 156:11–15), Plaintiff claimed she told Felici that the account closures were discriminatory in 2005 on multiple occasions. (*Id.* at 229:21–230:9.) She also said that she would discuss the issue with Larsen every time one of her accounts was closed in 2006, which occurred many times

in December 2006, and that she remembered using the word discriminate during those conversations. (*Id.* at 159:1–7, 234:13–14.) Plaintiff also claimed that she had several conversations with Larsen about her concern that the policy requiring customers to use an armored car service was discriminatory. (Nemeth Dep. 128:11–20.) Minghine testified that she had weekly staff meetings with her regional managers (Larsen being one of them) where she received lots of “updating.” (Minghine Dep. 31:7–13.)

Plaintiff also testified about a conversation with Minghine regarding the account closures. (Nemeth Dep. 234:22–236:18.) She did not recall saying that the closures were discriminatory, but thought she mentioned that people in the community were saying that Charter One was discriminating against Arab Americans. (*Id.*) Additionally, Plaintiff stated that she had a conversation at the end of 2006 regarding the account closures with Mazur, during which she told him “we are having just a horrible time with the account closures.” (*Id.* at 237:6–7.) She did not recall using the word discriminate ever, but again felt like she relayed to him that the community was feeling discriminated against. (*Id.* at 237:13–23.) These allegations taken together demonstrate that, at the very least, Plaintiff raised the specter of discrimination to Mazur and Minghine.

c. Causation

Where an adverse action occurs shortly after protected activity, the close temporal connection raises an inference that satisfies the causal connection for purposes of making out a *prima facie* case. *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525–26 (6th Cir.2008); *Smith v. City of Salem*, 378 F.3d 566, 571 (6th Cir.2004). Furthermore, the burden of proof at this stage is “minimal.” *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 588 (6th Cir.2009). “[A]ll the plaintiff must do is put forth some credible evidence that enables the court to deduce that there is a causal connection between the protected activity and the retaliatory action. *Id.*

*19 Plaintiff argues that while she voiced her complaints at various times from 2005 to early 2007, the close temporal proximity between Cartagena's phone call to CEO Larry Fish, the resulting fallout in January 2007, and her termination in March 2007 after 25 years of otherwise exemplary service to Defendant creates an inference of causation. (Pl.'s Resp. 11.) Additionally, Plaintiff argues that her multiple complaints about discrimination, and the policies generally, to Felici, Larsen, Minghine, and Mazur

would allow a reasonable juror to infer that Plaintiff's complaints were a factor in making the decision to fire her. (*Id.*) The Court agrees that Plaintiff has met the "minimum" burden necessary to establish a *prima facie* case for retaliation under the ELCRA. The evidence demonstrates that Plaintiff raised the specter of discrimination to Mazur and Minghine on multiple occasions and explicitly complained that Defendant's policies were discriminatory to Felici and Larsen, who reported directly to Mazur and Minghine.

Additionally, even though Plaintiff played no role in Cartagena's phone call to Fish, it seems Defendant attributed some responsibility for it to her. She received multiple phone calls about the incident, and the entire branch was required to attend a meeting with AML to go over their procedures as a result of the call. Thus, a jury could infer that Defendant blamed Plaintiff for Cartagena's call and believed she and the rest of her branch harbored similar views.

Because the rest of the analysis for retaliation claims under the ELCRA follows the same burden-shifting framework under *McDonnell Douglas*, the Court need not reiterate the reasons why Defendant has put forth a

legitimate, non-discriminatory reason for the adverse actions or why Plaintiff has sufficiently demonstrated a genuine issue of material fact with respect to pretext. Accordingly, the Court holds that summary judgment is improper, and DENIES Defendant's motion with respect to Plaintiff's retaliation claim under the ELCRA.

IV. Conclusion

For the reasons stated above, Defendant's motion for summary judgment is GRANTED IN PART and DENIED IN PART. The Court GRANTS the motion regarding Plaintiff's hostile work environment claim, but DENIES it in all other respects.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2531200

Footnotes

- 1 Customers could open non-interest bearing checking accounts.
- 2 During his deposition, however, when asked if the number of account closures increased after the phone call Turk testified "I don't know. I have no answer for that, I don't know. I don't remember how much accounts were, if it raised or reduced, no." (Def.'s App. Ex. N, Deposition of Akram Turk 30:16–24, Jan. 27, 2010.)
- 3 OFAC is apparently a designation AML uses to flag accounts suspected of laundering money.
- 4 These claims actually describe what are known as loan brokers. All agree that it is against Charter One policy to deal with brokers. (Pl.'s Resp. 5 n. 6.)
- 5 Courtney Gilbert has since changed her name to Courtney Peck; in this case, the parties and the Court refer to her as Gilbert.
- 6 The Statement can be found as Exhibit 15 to Plaintiff's deposition.
- 7 Fuller details of the Statement are in the Discussion section, *infra*.

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- 8 The Court notes at the onset that Defendant has asked that the Court dismiss Plaintiff's case because Defendant claims she perjured herself during her deposition. (Def.'s Br. 20.) The Court holds that even assuming, without deciding, that Plaintiff perjured herself during her deposition dismissal would be inappropriate in this instance and the Court declines to exercise its discretion to throw out Plaintiff's Complaint.
- 9 The United States Supreme Court recently held that an employer may be held liable for unlawful discrimination if the ultimate employment decision was based on the "discriminatory animus" or bias of another employee, even if that employee is not the ultimate decision-maker. *Staub v. Proctor Hosp.*, — U.S. —, —, 131 S.Ct. 1186, 1194, 179 L.Ed.2d 144 (2011).
- 10 In her deposition, Plaintiff claims that she thinks the harassment started in July of 2006 when she was "pulled into a meeting with Laura Jordan and Keith Mazur and talked to about the contents of the customers with the armored car service," however, the only allegations under Counts I and II regarding harassment revolve around the Interview. (Compl. ¶¶ 26, 34.) Furthermore, the earliest date of discrimination Plaintiff notes on her EEOC filing is March 14, 2007. (Nemeth Dep. 308:2–12.) Furthermore, at oral argument, Plaintiff's counsel clarified that she was not arguing that Defendant had created/permitted a pervasively hostile work environment, but rather that the Interview constituted one isolated incident of severe harassment.

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EXHIBIT 9

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KeyCite Yellow Flag - Negative Treatment
Distinguished by DeWeese-Boyd v. Gordon College, Mass., March 5, 2021

2010 WL 2803077

Only the Westlaw citation is currently available.
United States District Court,
N.D. Indiana,
South Bend Division.

Janice B. ADAMS, Plaintiff,
v.
INDIANA WESLEYAN UNIVERSITY,
Defendant.

Cause No. 3:09-CV-468.
|
July 15, 2010.

Attorneys and Law Firms

Adam Lenkowsky, Kenneth T. Roberts, Roberts and Bishop, Indianapolis, IN, for Plaintiff.

Andrew B. Murphy, Edward E. Hollis, Baker & Daniels, South Bend, IN, for Defendant.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) “requires a court to dismiss an action when it lacks subject matter jurisdiction.” *Durst v. Ill. Farmers Ins. Co.*, 2005 WL 2007221, at *1 (N.D.Ill. Aug.16, 2005) (citing *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 945 (7th Cir.2003)). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *United States v. Tittjung*, 235 F.3d 330, 339 (7th Cir.2000). If there is no statutory basis for its subject matter jurisdiction, “a district court, which is a court of limited jurisdiction, should proceed no further than determining whether to dismiss or transfer the case.” *Baker v. Kingsley*, 387 F.3d 649, 656 (7th Cir.2004). In considering a motion to dismiss for lack of subject matter jurisdiction, a court “must accept the complaint’s well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff’s favor.” *United Transportation Union v. Gateway Western Railway Co.*, 78 F.3d 1208, 1210 (7th Cir.1996). See also, *Indiana ex rel. Naylor v. Indiana State Teachers Ass’n*, 2010 WL 1737914 (S.D.Ind. April 28, 2010).

OPINION AND ORDER

WILLIAM C. LEE, District Judge.

*1 This matter is before the court on the motion to dismiss filed by the defendant, Indiana Wesleyan University (“the University”) on February 18, 2010 (docket at 18). On that same date, the University filed a Brief in Support of its Motion to Dismiss (docket at 19) as well as an Index of Exhibits (docket at 20). After moving for and receiving an extension of time in which to do so, plaintiff Janice B. Adams (“Adams”) filed a Response in Opposition to Defendant’s Motion to Dismiss on April 5, 2010 (docket at 23) and the University filed a reply brief on May 4, 2010 (docket at 24). For the reasons discussed herein, the motion to dismiss is GRANTED.

DISCUSSION

Adams filed this lawsuit on October 5, 2009, alleging that the University, her former employer, discriminated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. Complaint, docket at 1. After obtaining leave of court to do so, Adams filed an Amended Complaint on February 10, 2010 (docket at 16) and it is this Amended Complaint that now controls this case. Adams, who worked for the University from 1992 until 2009 as a professor and Chair of the Social Work Department, claims that she “was repeatedly exposed to discriminatory acts and harassed on account of her race by the defendant.” Amended Complaint, p. 2. Adams claims that the discrimination she was subjected to was “severe and pervasive” and that as a result she “resigned on June 20,

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2009.” *Id.* By way of her lawsuit, Adams seeks declaratory and injunctive relief, damages, and attorneys’ fees from the University.

*2 In its motion to dismiss, the University contends that this court lacks subject matter jurisdiction over this case and that it should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1). Motion to Dismiss, p. 1. Alternatively, the University seeks dismissal pursuant to Fed.R.Civ.P. 12(c) based on “the ministerial exception and, with respect to several of Adams’ Title VII claims, because Adams failed to properly exhaust her administrative remedies.” *Id.*¹

The ministerial exception is an important but very narrow doctrine, and turns on the specific facts of a case. More specifically, its application is dependent on the duties of the employee or former employee who is bringing a lawsuit against a church or other ecclesiastical body. In this case, the University contends that Adams was much more than a teacher and that “the spiritual significance of Adams’ position divests this Court of subject matter jurisdiction over her claims under the ‘ministerial exception’ to federal employment laws.” Defendant’s Memorandum, p. 1. The University explains that it “is one of the largest evangelical Christian universities in the United States[.]”; that it “operate[s] under the auspices of the Wesleyan Church’s governing body, the General Conference[.]”; that “its Board of Trustees ... is charged with operating the University in accordance with the Church’s policies and educational mission[.]”; and that the University is “an ‘arm’ of the Church’s ministry to Christ.” *Id.*, p. 2. Adams does not dispute that Indiana Wesleyan is an institution of higher learning operated by the Wesleyan Church.

The University argues that Adams’ duties as a professor were much different than those of a professor at a secular institution. The University claims that “[t]he central mission of the Church’s educational ministry is to redeem all persons by revealing God as ‘the source and center of all truth[.]’ ”; that “[t]he Church’s educational institutions use the Bible to ‘relate learning to God and His plan for the universe.’ ” *Id.* (quoting Defendant’s Exhibit B, docket at 20–1, Standards of the Wesleyan Church for Educational Institutions, § GB–1112). In keeping with that mission, the University states, its “faculty members are, as a matter of necessity and belief, stewards of the Wesleyan faith ...” and they are required to “ ‘affirm their adherence to the doctrine of the entire sanctification and other doctrines of The Wesleyan Church .’ ” *Id.*, p. 3 (*Id.* at GB–1342). Applying this doctrine directly to Adams, the University contends that “Adams’ principal responsibility was to apply Wesleyan doctrine and integrate the truths of the Bible with the Social Work

curriculum.” *Id.*, p. 5. The University dedicates many pages of its memorandum in support of its motion to dismiss discussing the details of Adams’ employment history in an attempt to demonstrate that her job duties were rooted firmly in Church doctrine, meaning in turn that her claims fall within the parameters of the ministerial exception to this court’s subject matter jurisdiction. *Id.*, generally. For example, the University claims that at times during the 1990s, Dr. Glenn Martin, “who was Chair of the University’s Division of Social sciences and Adams’ supervisor ...” counseled her on ways she could incorporate Church doctrine into her classroom activities and, at that time, praised her efforts to do just that. *Id.*, pp. 6–7. This involved Adams “ ‘frequently us[ing] scriptural principles to reinforce or to illustrate an idea.’ ” *Id.*, p. 7 (quoting Defendant’s Exhibit G).

*3 In 2001, Adams was promoted from Assistant to Associate professor (effective at the beginning of the 2002–2003 academic year). *Id.*, p. 8. Prior to that, in a 1999 employment evaluation, Dr. Martin noted that Adams was “ ‘a spiritual leader in the classroom and in the local community and is very active in the church.’ ” *Id.* (quoting Defendant’s Exhibit J, Faculty Evaluation). The University also points out that many of Adams’ student, in evaluations they filled out concerning their classroom experiences with Adams, stated that she had “ ‘amazing passion for the topics discussed and also for Christ ...’ ”; that Adams’ in-class “ ‘devotions were uplifting ...’ ”; and that Adams was “ ‘very influential in my spiritual life.’ ” *Id.*, pp. 8–9 (citations to record omitted). The University claims that “[t]he Social Work Program that Adams directed has only two stated goals. The first is to prepare students to complete entry-level social work.... The second is to “ ‘provide opportunities for the integration of Christian principles within the context of professional social work and ethics.’ ” *Id.*, p. 9 (citations to record omitted). All of this factual presentation and argument is the University’s attempt to demonstrate that Adams’ employment was ministerial in nature to such an extent that the ministerial exception precludes her from pursuing this employment discrimination case in federal court.

The University contends that shortly after her promotion to Associate Professor, “Adams began to clash with Dr. Betty Fratzke, who remained Adams’ supervisor, and other members of the Social Work Department ... over a variety of issues related to the Department’s management.” *Id.*, p. 10. These alleged issues included, according to the University, Adams’ insistence on asking prospective students during admissions interviews “whether they had ever been involved in a romantic

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relationship with an African-American.” *Id.* (Adams is African-American.) The University contends that “questions of such an intimate nature were contrary to the University’s Christian mission.” *Id.* Another issue arose regarding a Department secretary named Michelle Gerig. According to the University, “Adams shared Gerig as a secretary with several other faculty members.” The University states as follows:

Throughout the first half of 2009, Adams complained to Dr. Fratzke that, among other things, Gerig was not completing the work Adams assigned to her in a timely manner, was following other Department members’ instructions, but not Adams’ instructions, and was not effectively managing her time. The situation between Adams and Gerig became so intense that in spring 2009 Adams told Dr. Fratzke that she was going to resign if Gerig was not removed as her secretary.

Id., p. 11. The University states that Dr. Fratzke arranged a meeting with Adams and “several other Department members to resolve the situation.... Dr. Fratzke arranged for this meeting specifically to fulfill the directive of Matthew 18:15, upon which the University’s conflict resolution practices are based, to reconcile conflict by meeting with the disputing parties.” *Id.* The University states that “Dr. Fratzke explicitly stated that she was directing Adams and the others to engage in this [reconciliation] conduct based on Christian principles.” *Id.* Several days after the meeting, according to the University, Adams challenged Dr. Fratzke by writing a responsive e-mail “in which she rejected Dr. Fratzke’s assertion that her recommended course of action was justified by the scriptures” and taking “aim at Dr. Fratzke’s interpretation of the Book of Matthew ...” *Id.*, p. 12. Then, “[o]n June 24, 2009, just over a week after sending this email, Adams resigned her position as Director of the Social Work Program, citing a ‘lack of Administrative and staff support.’ ... Six days later, on June 30, 2009, she resigned her position as Associate Professor and ended her employment with the University.” *Id.* (citations to the record omitted).

*4 Because of all this, the University contends that “Adams’ Amended Complaint should be dismissed because the Court does not have subject matter jurisdiction over her claims.... Adams worked for the University in a ministerial capacity, and the ministerial exception to federal employment claims created by the First Amendment operates as a jurisdictional bar to this action.” *Id.*, pp. 13–14. The University summarizes its argument as follows:

Courts derived the “ministerial exception,” which bars ministerial employees from asserting claims against religious institutions under federal employment

discrimination laws” from [the establishment clause and the free-exercise clause of the First Amendment]. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039–40 (7th Cir.2006) ... The ministerial exception is “founded upon the principle that ‘perpetuation of a church’s existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.’” *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir.2003) (quoting *Rayburn v. Gen. ’1 Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir.1985)).... Because court review of a religious institution’s employment decisions respecting its ministers is an “inherently coercive” intrusion into a matter of religious governance, the ministerial exception operates as a complete bar to employment claims based on federal law. *Tomic*, 442 F.3d at 1039.

Id., pp. 14–15.

The University’s statement of the law concerning the ministerial exception is correct. The issue in this case is whether Adams, in her capacity as a department head and professor, fits into that exception. Obviously, the University argues that she does. Adams, however, disagrees.³ In her response brief, Adams states that “the designated material shows that Adams’ position was not functionally equivalent to a minister and adjudicating her claims would not require the court to engage in an analysis of church doctrine, as prohibited by the ‘Ministerial Exception’ to anti-discrimination laws. Moreover, Adams’ Amended Complaint cites [42 U.S.C.] Section 1981 as a basis for jurisdiction. This allows her to allege claims outside of the EEOC Charge of Discrimination.” Plaintiff’s Response, p. 1. While Adams does not contest the fact that Indiana Wesleyan is an arm of the Church and is governed according to Church doctrine, she argues that the “social work program is designed to integrate students’ pre-existing faiths into ‘one’s ability to be of service to fellow human beings.’” *Id.*, p. 2 (citing Defendant’s Exhibit O, Indiana Wesleyan Social Work Student Handbook, p. 3). She also points out that the program “is not designed to ‘spread the faith’ but has eight identified secular purposes:

a. Applying knowledge and skills of *generalist* social work practice;

*5 b. Evaluating the practice of social work as it exists;

c. Professional development and growth;

d. Applying critical thinking skills within a *diverse* population;

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e. Understanding the past and present of social work;

f. Understanding the conditions and strategies to advance socio-economic justice; [and]

g. Understanding how certain variables effect interpretation among individuals and social systems.” *Id.*, p. 2 (quoting Defendant’s Exhibit O).³ Adams argues that the University is attempting to mischaracterize her employment position as ministerial in nature, thereby fitting it into the ministerial exception. *Id.*, generally. In response, she argues that “the University has many distinct disciplines, most of which are not directly related to religion. Adams’ position as a professor of social work did not require her to ‘spread the faith.’ Instead, she was simply integrating faith into a curriculum containing students who already believed the faith. The program had stated secular purposes. Moreover, [Adams] was allowed to discuss competing truths as well as whether church doctrine was correct.” *Id.*, pp. 3–4. Finally, Adams contends that the cases cited by the University in support of its argument that the ministerial exception bars her lawsuit are not on point. *Id.*, p. 4. For these reasons, Adams argues that her suit should not be dismissed.⁴

The Seventh Circuit Court of Appeals provided a thorough discussion of the ministerial exception in the *Tomic* case, cited by both parties in this case. In *Tomic*, the court of appeals explained as follows:

A suit to remove a priest on the ground that he is a heretic, or to reinstate a parishioner who has been excommunicated, thus has never been justiciable in the federal courts. E.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, *supra*, 426 U.S. at 698, 96 S.Ct. 2372, 49 L.Ed.2d 151; *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139–40, 21 L.Ed. 69 (1872); cf. *Montano v. Hedgepeth*, 120 F.3d 844, 850–51 (8th Cir.1997). Even if the suit does not involve an issue of religious doctrine, but concerns merely the governance structure of the church, the courts will not assume jurisdiction if doing so would interfere with the church’s management. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir.1994); *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 350 (5th Cir.1999); *EEOC v. Catholic University of America*, 83 F.3d 455, 462–63 (D.C.Cir.1996). These cases “affirm the fundamental right of churches to ‘decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” *Id.* at 462, citing *Kedroff*; see also *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir.2000). Also pertinent is *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533

(1979). The issue in that case was whether the National Labor Relations Act applied to lay teachers in Catholic schools. The Court held not, because “the resolution of [unfair labor] charges by the [National Labor Relations Board], in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *Id.* at 502, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533.

*6 Thus “the First Amendment concerns [with assuming jurisdiction in ecclesiastical cases] are two-fold. The first concern is that secular authorities would be involved in evaluating or interpreting religious doctrine. The second quite independent concern is that in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal.” *Combs v. Central Texas Annual Conference of United Methodist Church*, *supra*, 173 F.3d at 350 (citations omitted). This second aspect of the internal-affairs doctrine is called the “ministerial exception” to the exercise of federal jurisdiction. E.g., *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 702–03 (7th Cir.2003).

Both aspects govern decision even when-in fact most commonly when-the complaint is not based on and does not refer to religious doctrine or church management (as in most Title VII and other employment-discrimination suits) but it is apparent that a controversy over either may erupt in the course of adjudication. E.g., *id.*; *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir.2000). *Tomic v. Catholic Diocese of Peoria*, 442 F.3d at 1038–1039. In light of this discussion, the issues in the present case are whether Adams’ job as a Department head and professor truly was ministerial in nature and whether the exercise of jurisdiction over her claims by this court would “intrude into church governance.” The University contends that the nature of Adams’ teaching duties, and the very fact of her employment in a church operated school, bring her claims within the parameters of the ministerial exception to this court’s subject-matter jurisdiction, while she contends that the University is simply “spinning” the facts for the purpose of pigeonholing her into the exception. This court must also be mindful of the fact that this matter is before it on a motion to dismiss. As stated above, when ruling on a

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motion to dismiss for lack of subject matter jurisdiction, the court “must accept the complaint’s well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff’s favor.” *United Transportation Union v. Gateway Western Railway Co.*, 78 F.3d 1208, 1210 (7th Cir.1996). In this case, Adams has asserted claims against the University pursuant to Title VII and § 1981. Docket at 16. Her Amended Complaint reveals that her allegations of discriminatory treatment are not rooted in the doctrine of the Wesleyan Church. Instead, she has set forth claims of discriminatory treatment on the basis of her race, notwithstanding any church doctrine, philosophy or system of governance. *Id.* But this does not save her case. The applicable case law discussing and analyzing the ministerial exception to federal court jurisdiction makes this clear.

*7 In *Alicea–Hernandez*, the plaintiff brought a Title VII action against her employer, the Catholic Bishop of Chicago. Plaintiff was a press secretary whose duties included dissemination of the Church’s message. The Seventh Circuit held that the ministerial exception applied to bar plaintiff’s claims. The court wrote that “the rationale for the ministerial exception is founded upon the principle that ‘perpetuation of a church’s existence may depend upon whom it selects to preach its values, *teach its message*, and interpret its doctrines *both to its own membership* and to the world at large.’ ” *Alicea–Hernandez*, 320 F.3d at 704 (italics added). In that case, plaintiff argued that her claims of gender and national origin discrimination were wholly unrelated to church doctrine or to her job duties and, therefore, the exception should not apply. The court rejected this argument, found that the ministerial exception applied, and offered the following detailed analysis of the exception:

We turn next to the argument that *Alicea–Hernandez*’s particular position bars the federal courts from deciding her Title VII claims. Here the Church has the stronger argument. As the Fifth Circuit first articulated in *McClure v. The Salvation Army*, 460 F.2d 553, 560 (5th Cir.1972), “application of the provisions of Title VII to the employment relationship existing between ... a church and its minister would result in an encroachment by the state into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.” This rule, often referred to as “the ministerial exception,” was further developed by the Fourth Circuit in *Rayburn v. General Conference of Seventh–Day Adventists*, 772 F.2d 1164 (4th Cir.1985), and adopted by this circuit in *Young v. The Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir.1994). The court in *Rayburn*, recognizing tensions between freedom of religion on the one hand

and the attempt to eradicate discrimination on the other, concluded that in the context of Title VII claims brought against a church by its ministers the “balance weighs in favor of free exercise of religion.” 772 F.2d at 1168. The court explained that the “right to choose ministers without government restriction underlies the well-being of religious community.” *Id.* at 1167. While this ruling may seem in tension with Title VII, we concur with the Fourth Circuit when it stated: “While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to free exercise of religious beliefs.” *Id.* at 1169.

In determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the position. *Young*, 21 F.3d at 186; *see also EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir.2000) (“Our inquiry thus focuses on ‘the function of the position’ at issue and not on categorical notions of who is or is not a ‘minister.’ ”). The question for us to answer therefore is whether *AliceaHernandez*’s position as Hispanic Communications Manager can functionally be classified as ministerial. *Alicea–Hernandez* suggests that we also need to look to the nature of her claims and whether the discrimination in question was exclusively secular. Here she is mistaken. The “ministerial exception” applies without regard to the type of claims being brought. This was explained by the Fourth Circuit in *EEOC v. Roman Catholic Diocese*:

*8 [T]he ministerial exception to Title VII is robust where it applies.... The exception precludes any inquiry whatsoever into the reasons behind a church’s ministerial employment decision. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause “protects the act of a decision rather than a motivation behind it.”

213 F.3d at 802 (quoting *Rayburn*, 772 F.2d at 1169). To rule otherwise would enmesh the court in endless inquiries as to whether each discriminatory act was based in Church doctrine or simply secular animus. The Fifth Circuit has provided the following rationale for this rule:

[A]n investigation and review of such matters of church administration and government as a minister’s salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of

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church and State contemplated by the First Amendment.

McClure, 460 F.2d at 560.

It is therefore not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment of Alicea–Hernandez. The only question is that of the appropriate characterization of her position.

Id. at 702–703. The court determined that Alicea–Hernandez’s duties “included composing media releases and correspondence as well as developing a working relationship with various constituencies of the Hispanic community and composing articles to be published in the Church media.... The role of the press secretary is critical in message dissemination, a church’s message, of course, is of singular importance.” *Id.* at 703–704. Based on these facts, the court held that the ministerial exception applied.

In the present case, Adams argues that as a professor she was not charged with the responsibility of disseminating the message or doctrine of the Wesleyan Church. Instead, she claims that her “job responsibilities were closer to those of a lay employee.... Adams took her students as she found them. She worked [their] beliefs into her curriculum, yet she did not teach the faith, nor was she prevented from discussing the nature and correctness of certain truths.” Plaintiff’s Memorandum, p. 5. Adams also argues that “adjudicating Adams’ claims does not risk excessive entanglement. This case involves Adams’ allegation that she was forced to resign as a result of racial harassment.” *Id.* In short, Adams contends that she was not responsible for “spreading the word” of the Wesleyan Church and that her claims are secular and in no way related to any principles or doctrine of the Wesleyan Church.

Adams’ argument ignores the fact that the ministerial exception is “robust where it applies” and “precludes any inquiry whatsoever into the reasons behind a church’s ministerial employment decision.” *Alicea–Hernandez*, 320 F.3d at 703. It is not the court’s duty “to determine whether the Church had a secular or religious reason for the alleged mistreatment of [the plaintiff]. The only question is that of the appropriate characterization of her position.” *Id.* In the present case, while Adams may very well have been free to present and discuss secular topics and issues in her classroom, it is also true that she was charged with incorporating the doctrine of the Wesleyan Church into her curriculum. Eventually, Adams clashed with certain members of the University administration. Meetings were held to address the issues between the parties and resolve them. In the end, Adams concluded that she could no longer bear to work at the University

and resigned her position. The fact that she claims she was forced to resign as a result of pervasive racial harassment as opposed to any sort of doctrinal or theological dispute does not take this case outside the parameters of the ministerial exception.

*9 The ministerial exception to federal court jurisdiction is a crucially important legal doctrine, designed to prevent the federal courts from becoming entangled in the internal affairs of a church. The ministerial exception serves a vitally important purpose by protecting a church’s ability to establish its own doctrinal foundation, to communicate its theology to its members and the public at large, and to manage its internal affairs, all free from any intervention from the federal courts. Furthermore, case law makes it clear that the ministerial exception can, and often does, apply to teachers who instruct students in church-run and operated schools. As the University points out, “courts in both the Seventh Circuit and elsewhere have found that the ministerial exception applies where teachers, like Adams, are required to integrate church doctrine into their teaching.” Defendant’s Reply, p. 7 (citing *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F.Supp.2d 858, 870 (E.D.Wisc.2004)) (applying ministerial exception where school required teachers to incorporate religion into classes). *See also, Clapper v. Chesapeake Conference of Seventh–Day Adventists*, 1998 WL 904528 (4th Cir. Dec.29, 1998) (applying ministerial exception to bar former church elementary teacher from bringing claims of discrimination against church where his duties included incorporating church doctrine into his classroom activities and acting as a spiritual mentor to students).⁵ This court concludes that the nature and character of Adams’ duties as a department head and professor at Indiana Wesleyan University were ministerial in nature so as to invoke the ministerial exception to this court’s subject matter jurisdiction.

CONCLUSION

For the reasons discussed above, the motion to dismiss filed by defendant, Indiana Wesleyan University is GRANTED.

All Citations

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Footnotes

- 1 Because the court finds that this case must be dismissed for lack of subject matter jurisdiction, and because the ministerial exception applies with equal force to all of Adams' claims—whether they are brought under Title VII or § 1981—the University's alternate theory that some of Adams' claims are barred due to her failure to exhaust administrative remedies need not be addressed in this Opinion and Order.
- 2 The fact that Adams was a professor, as opposed to an ordained minister, is not dispositive. As the University points out, "[b]ecause the analysis focuses on the duties performed, the ministerial exception applies even if the employee is not ordained or otherwise labeled a 'minister.'" *Id.*, p. 15 (citing *Alicea-Hernandez*, 320 F.3d at 704, n. 4).
- 3 It is true that the Indiana Wesleyan Social Work Student Handbook contains this listing. However, Adams neglects to point out that the Handbook also clearly states that one of the objectives of the University's Social Work Program is "[t]o provide opportunities for the integration of Christian principles within the context of professional social work values and ethics." This is significant, as will become clearer later in this Opinion.
- 4 In its reply brief, the University essentially restates the arguments presented in its supporting memorandum. Defendant's Reply, generally. The University does, however, add a few arguments, including a claim that "teaching is spiritually significant to Wesleyans and that teachers in schools run by the Church "participate in [its] ministry and extol God's design [and therefore] exercise a divinely authorized stewardship over the natural world." *Id.*, p. 4. The University also states that "[i]n revealing God's truth, Adams and other faculty members must understand secular topics and relate them to Wesleyan doctrine. But the fact that Adams had to instruct her students on secular topics does not undermine the spiritual significance of her position." *Id.*
- 5 The ministerial exception to federal court subject matter jurisdiction also has been extended to other, more seemingly peripheral employees of religious based institutions. See, e.g., *Nat'l Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 501, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) (NLRB could not exercise jurisdiction over non-ordained teachers charged with spreading the church's message to students in church-run schools); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir.2006) (non-ordained musical director performed "ministerial function" by selecting what music to play during mass); *Schleicher v. The Salvation Army*, 518 F.3d 472 (7th Cir.2008) (employees who helped run adult rehabilitation center, led prayer and worship singing, and sold goods in thrift shop were considered ministers since their duties had a "spiritual dimension" under the Salvation Army's religious tenets).

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EXHIBIT 10

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2022 WL 1702355
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Timothy BOGLE and Chevelle Brown,
Plaintiffs-Appellees,
and
Evangel Ministries Church Membership,
Plaintiff,
v.
Lorenzo SEWELL and Evangel Echos
Church of the Air, Defendants-
Appellants.

No. 357910
|
May 26, 2022

Wayne Circuit Court, LC No. 20-000866-CZ

Before: Murray, P.J., and Sawyer and M. J. Kelly, JJ.

Opinion

Per Curiam.

*1 Defendants, Lorenzo Sewell and Evangel Echos Church of the Air (the Church), appeal as of right the trial court's order denying their motion for summary disposition, granting summary disposition in favor of plaintiffs, Timothy Bogle and Chevelle Brown, and entering a declaratory judgment in favor of plaintiffs. On appeal, defendants argue that, under the ecclesiastical abstention doctrine, the trial court was required to abstain from adjudicating plaintiffs' claim. By not abstaining, defendants argue, the trial court violated the Free Exercise Clauses and Establishment Clauses of the United States Constitution and the Michigan Constitution. We disagree and affirm.

I. FACTS

This case arises from a dispute between plaintiffs and defendants over the Church's form of corporate governance. The Church is a nonprofit ecclesiastical corporation.¹ It was incorporated in 1968, after "Articles of Association"² were filed with the Michigan Corporation and Securities Commission. Plaintiffs are members of the Church. Since around the end of 2018, Sewell has served as the Church's senior pastor and president.

The same year the Church was incorporated it executed a constitution and bylaws. The 1968 constitution stated that governance of the Church would be vested in the Church's members, and that the Church's leadership would be charged with carrying out the will of the members. Collectively, these documents gave members of the Church the right to elect who was to serve as the Church's pastor and who was to serve on the Church's governing board. These documents gave them the right to remove the pastor or members of the governing board as well, along with the right to amend or repeal the constitution or bylaws by a majority vote.

In 2011, the constitution and bylaws (collectively the 2011 amendments) were amended. On the whole, the 2011 amendments eliminated the voting rights of the Church's membership. Under the 2011 amendments, the Church's governing board—now referred to as the board of elders—would select who was to serve as senior pastor of the Church. In turn, the senior pastor would nominate members to the board of elders, and the sitting board of elders would then confirm or deny the nomination by majority vote. Likewise, only the board of elders would be able to remove either the senior pastor or a member of the board of elders. Lastly, only the board of elders could amend the bylaws.

*2 Years after the 2011 amendments purportedly took effect, the Church offered Sewell the position of senior pastor. Within a year after that, the Church's constitution and bylaws were amended in 2019.³ The 2019 amendments went a step further than the 2011 amendments by explicitly stating that the Church's members had no voting power; any vote of the membership would only be advisory.

Alleging that Sewell and the board of elders had adopted the 2019 amendments without the consent of the Church's members, plaintiff Evangel Ministries Church Membership⁴ sued Sewell in January 2020. Sewell moved

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for summary disposition under MCR 2.116(C)(8), and the trial court granted this motion, dismissing Evangel Ministries' claim. On Evangel Ministries' motion, however, the trial court granted Evangel Ministries leave to file an amended complaint.

Plaintiffs Bogle and Brown then filed an amended complaint containing three counts. In Count 1 plaintiffs asked the trial court for a declaratory judgment that, under the Michigan Nonprofit Corporation Act (MNCA), MCL 450.2101 *et seq.*, the Church was organized on a membership basis rather than a directorship basis and that the 2019 amendments were invalid. They also moved the trial court to enter an order directing the Church to adopt a new set of bylaws. In Count 2 plaintiffs alleged that Sewell had breached his fiduciary duties of loyalty and care, while in Count 3 plaintiffs alleged that Sewell had engaged in illegal, fraudulent, or oppressive conduct in violation of MCL 450.2489. After defendants again moved for summary disposition under MCR 2.116(C)(8), the trial court dismissed Counts 2 and 3 of the amended complaint.

A few weeks later, defendants moved for summary disposition under MCR 2.116(C)(10), as to Count 1 of plaintiffs' amended complaint. Defendants argued that, through the 2011 and 2019 amendments, the Church had declared itself to be directorship based. If the trial court were to declare otherwise, the trial court would be substituting its judgment for that of the Church's leadership. In effect, the trial court would entangle itself in purely ecclesiastical questions. So, defendants argued, the trial court should abstain from deciding this question under the ecclesiastical abstention doctrine.⁵

In response, plaintiffs argued that there was no genuine issue of material fact that the Church was organized on a membership basis. Plaintiffs argued that this was plain from the following provision from the Articles of Association:

The doctrine, rules and discipline shall generally be based upon those of the Evangel Church as modified and agreed upon, however, by the members of this church, and in no event shall the doctrine and business of this church be subject to or controlled by any higher church authority than the membership of this church.

Contending that the 2011 and 2019 amendments conflicted with the Church's membership-based structure, plaintiffs argued that they were invalid. Not only did the 2011 and 2019 amendments conflict with the Church's membership-based structure, plaintiffs continued, the Church's members had never voted to approve them. So, the 2011 and 2019 amendments were invalid for this reason as well.

*3 After a hearing on defendants' motion, the trial court denied the motion and granted summary disposition under MCR 2.116(I)(2) in favor of plaintiffs. To begin, the trial court concluded that it could consider plaintiffs' claim, reasoning that applying the MNCA to resolve an issue involving corporate governance was not an ecclesiastical matter. Next, interpreting the Articles of Association, the trial court concluded that the Church was organized on a membership basis under the MNCA. Accordingly, the trial court concluded that the Church could not adopt bylaw provisions depriving members of their voting power, for such provisions would conflict with the Church's Articles of Association. As a result, the trial court entered a final order denying defendants' motion for summary disposition under MCR 2.116(C)(10), granting summary disposition in favor of plaintiffs under MCR 2.116(I)(2), and entering a declaratory judgment in favor of plaintiffs. In the declaratory judgment, the trial court declared that the Church was organized on a membership basis and that the 2011 and 2019 amendments were null and void as a result. Defendants moved for reconsideration, but the trial court denied this motion. This appeal followed.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 242; 964 NW2d 50 (2020) (citation omitted).

A motion under MCR 2.116(C)(10) ... tests the factual sufficiency of a claim. When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*EI-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 160; 934 NW2d 665 (2019) (internal quotation marks and citation omitted)].

"If, after careful review of the evidence, it appears to the trial court that there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law, then summary disposition is properly granted under MCR 2.116(I)(2)." *Cadillac Rubber & Plastics, Inc v Tubular Metal Sys, LLC*, 331 Mich App 416, 422; 952 NW2d 576 (2020), quoting *Lockwood v Ellington Twp*,

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323 Mich App 392, 400-401; 917 NW2d 413 (2018) (internal quotation marks omitted).

Any underlying issue of statutory interpretation is a question of law subject to de novo review. *In re MCI Telecom Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999). Likewise, this Court reviews de novo questions of constitutional law. *Winkler by Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017) (citations omitted). This Court also reviews de novo a trial court's decision on a motion concerning a request for declaratory judgment. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 542; 904 NW2d 192 (2017) (citation omitted).

III. ANALYSIS

On appeal, defendants do not explicitly challenge the trial court's interpretation of the Articles of Association or its interpretation of the MNCA. Instead, defendants argue that, by involving itself in this dispute at all, the trial court violated the First Amendment of the United States Constitution and Article 1, § 4, of Michigan's 1963 Constitution. By involving itself in this dispute, defendants explain, the trial court inserted itself into a purely ecclesiastical affair, when it should have abstained.⁶

In relevant part, the First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" US Const, Am I. "The First Amendment applies to the states through the Fourteenth Amendment." *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 156; 756 NW2d 483 (2008), citing US Const, Am XIV. Like its federal counterpart, the Michigan Constitution also contains a guarantee of religious freedom. See Const 1963, art. 1, § 4. The Michigan Constitution "is at least as protective of religious liberty as the United States Constitution." *Winkler*, 500 Mich at 337 n 4 (internal quotation marks and citation omitted).

*4 The ecclesiastical abstention doctrine "arises from the Religion Clauses of the First Amendment of the United States Constitution." *Winkler*, 500 Mich at 337.⁷ The purpose of the ecclesiastical abstention doctrine is "to ensure that, in adjudicating a particular case, a civil court does not infringe the religious freedoms and protections guaranteed under the First Amendment." *Id.* at 339. Although the ecclesiastical abstention doctrine informs how civil courts must adjudicate claims involving

ecclesiastical questions, it does not deprive civil courts of subject-matter jurisdiction over such claims. *Id.* at 339-341. "[A]pplication of the ecclesiastical abstention doctrine is not determined by reference to the category or class of case the plaintiff has stated," and "[w]hether a claim sounds in property, tort, or tax, for instance, is not dispositive." *Id.* at 341. Further, whether a claim "is brought against a religious entity, or simply appears to be the sort that 'likely involves ecclesiastical policies' " is not dispositive. *Id.*, quoting *Dlaikan v Roodbeen*, 206 Mich App 591, 593; 522 NW2d 719 (1994), overruled by *Winkler*, 500 Mich at 330, 336. "What matters instead is whether the actual adjudication of a particular legal claim would require the resolution of ecclesiastical questions; if so, the court must abstain from resolving those questions itself, defer to the religious entity's resolution of such questions, and adjudicate the claim accordingly." *Id.* at 341.

Whether the Church was organized on a membership basis or a directorship basis was not an ecclesiastical question—it was a corporate law question. To answer this question, the trial court needed to look no further than the Church's Articles of Association and the MNCA. Resolving the parties' dispute did not require the trial court to interpret any of the Church's religious doctrine or to pass judgment on what it believed to be the form of corporate governance most in line with the Church's discipline or values. It simply required the trial court to apply Michigan statutory law against the language of the Articles of Association. See *id.* at 339, citing *Borgman v Bultema*, 213 Mich 684, 703; 182 NW 91 (1921) ("Where ... a church controversy involves rights growing out of a contract recognized by the civil law, or the right to the possession of property, civil tribunals cannot avoid adjudicating these rights under the law of the land, having in view, nevertheless, the implied obligations imputed to those parties to the controversy who have voluntarily submitted themselves to the authority of the church by connecting themselves with it.").

If there were any doubt, our Supreme Court has intimated that a question about a church's corporate structure is not an ecclesiastical question. See *Borgman*, 213 Mich at 704-705. *Borgman* also concerned two groups within a church that disagreed about the church's corporate governance structure. *Id.* at 686-687, 690. The defendants attempted to amend the church's articles of association to change the church's government structure from one presbyterial in form to one congregational in form. *Id.* at 690, 704-705. The Supreme Court did not abstain from resolving whether the defendants' attempted amendment was valid, but instead adopted the trial court's conclusion that the church constitution called for a presbyterial form

of government, and that the defendants' attempted amendment was void, for it conflicted with the church's constitution. *Id.* at 690-691, 703-705.

In short, resolving whether the Church was organized on a membership or directorship basis did not require the trial court to entangle itself in any ecclesiastical or religious matter. The trial court therefore did not err by adjudicating plaintiffs' claim. For the same reason, neither the trial court's May 18, 2021 order nor its order denying defendants' motion for reconsideration interfered with defendants' free exercise of religion under either the First Amendment or Article 1, § 4, of Michigan's 1963 Constitution. Nor did these orders constitute "excessive entanglement between government and religion" in violation of the Establishment Clause in the United States Constitution or the Establishment Clause in the Michigan Constitution. *Lemon v Kurtzman*, 403 US 602, 613-614; 91 S Ct 2105; 29 L Ed 2d 745 (1971); see also *Scalise v Boy Scouts of America*, 265 Mich App 1, 11; 692 NW2d 858 (2005) (noting that Michigan's Establishment Clause analysis is governed by *Lemon*).

*5 In addition to their constitutional arguments, defendants raise arguments concerning MCL 450.181 and MCL 450.185. Because defendants raised these arguments for the first time in what was functionally a motion for reconsideration, defendants failed to properly preserve these arguments for appeal.⁸ See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Defendants have therefore waived review of these arguments. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). At any rate, defendants' arguments lack merit.

With regard to MCL 450.185, defendants suggest that this statute exempts an ecclesiastical corporation from having to comply with the MNCA. However, MCL 450.185 appears in the Michigan general corporation statute, not the MNCA. More importantly, MCL 450.185 does not exempt all ecclesiastical corporations from having to comply with that statute. If an exemption at all, MCL 450.185 is an exemption only for ecclesiastical corporations in existence before the enactment of the Michigan general corporation statute:

Nothing in this act contained shall be construed as limiting or restricting the rights, powers, privileges, immunities or the practices of any church heretofore established or incorporated under any law of this state; nor as requiring any such church to alter or change any rule of discipline, custom or usage in respect of its church policy or government; nor as interfering with the lawful acquisition, use or disposition of any property now owned or held by any such church

corporation. The provisions of this act relating to ecclesiastical corporations shall be liberally construed in the interests of religion and morality. [Emphasis added.]

"Heretofore" is an adverb meaning "up to this time." *Merriam Webster's Collegiate Dictionary* (11th ed.). Hence, MCL 450.185 refers to any church established up until the point that MCL 450.185 came into effect. MCL 450.185 went into effect on September 18, 1931. 1931 PA 327. The Church was incorporated several decades later on May 22, 1968. MCL 450.185 does not apply to the Church.

Next, defendants argue that the trial court erred by failing to consider MCL 450.181, which states:

Every such ecclesiastical corporation shall have authority to adopt by-laws prescribing the qualifications of members; the manner in which they shall be admitted, suspended or expelled; the number and official titles of the person or persons who control the temporal affairs of such corporation; their terms of office; the manner of their selection and removal from office; their respective official duties; the time and manner of calling and holding church business meetings and the number of members constituting a quorum; how far such corporation shall be subject to the approval or control of any other corporation or higher church body which corporation or body shall be named; the manner and condition under which property, both real and personal, may be acquired, held and disposed of; and such other by-laws as may be deemed necessary for the management of the affairs of such corporation. The by-laws may also prescribe how the same may be altered, amended or repealed.

*6 Citing the foregoing language, defendants argue that "churches are free to amend their own Bylaws in any way, at any time." Assuming for the sake of argument that defendants' interpretation of MCL 450.181 is correct, it is unclear how this advances defendants' argument. The trial court's ruling rested on its interpretation of the Church's Articles of Association—not on whether the Church had the ability to amend its bylaws. The trial court never suggested that an ecclesiastical corporation could not adopt bylaws or prescribe how those bylaws may be amended. The trial court concluded only that, under the MNCA, an ecclesiastical corporation could not adopt bylaws inconsistent with the ecclesiastical corporation's articles of incorporation. Defendants do not challenge that conclusion, and they do not otherwise explain how MCL 450.181 undermines it.

Affirmed.

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All Citations

Not Reported in N.W. Rptr., 2022 WL 1702355

Footnotes

- 1 Although the Articles of Association do not explicitly describe the Church as a nonprofit corporation, the Michigan general corporation statute provides that all ecclesiastical corporations “shall be a non-profit corporation and subject to the provisions of this act relating to non-profit corporations generally except as specifically otherwise provided.” MCL 450.178.
- 2 Though the Church did not specifically describe these as articles of incorporation, under the Michigan Nonprofit Corporation Act, MCL 450.2101 *et seq.*, the Articles of Association would be considered articles of incorporation. MCL 450.2105 defines articles of incorporation as “[t]he original articles of incorporation or any other instrument filed or issued under any statute to organize a domestic or foreign corporation, as amended, supplemented, or restated by certificates of amendment, merger, conversion, or consolidation, or other certificates or instruments filed or issued under any statute.” MCL 450.2105(2)(a).
- 3 The 2019 constitution indicates that the Church’s name had been changed to “Evangel Ministries” at this time.
- 4 Plaintiffs Bogle and Brown were not named in this complaint. Also, Evangel Ministries appears to be the same entity as Evangel Echos Church of the Air.
- 5 Defendants claimed that summary disposition would be proper under the ministerial exception as well, but provided no substantive argument on this point.
- 6 Even though defendants mention the ministerial exception in their statement of the questions presented in their brief on appeal, defendants do not actually argue that the ministerial exception applies. And in any event, the ministerial exception applies to cases concerning the employment relationship between a religious institution and its ministers, *Winkler*, 500 Mich at 340 n 5; *Hosanna-Tabor Evangelical Lutheran Church & Sch v EEOC*, 565 US 171, 188; 132 S Ct 694; 181 L Ed 2d 650 (2012), which is not at issue here.
- 7 In *Winkler*, the Supreme Court noted that the religious liberty provision under the Michigan Constitution does not add to or alter the ecclesiastical abstention doctrine. *Id.* at n 4.
- 8 Defendants raised these arguments in their objection to plaintiffs’ proposed order, after the trial court had issued its March 4, 2021 ruling from the bench. While defendants styled their filing as an objection to plaintiffs’ proposed order, in substance, it was an attack on the merits of the trial court’s decision. Cf. *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1, 9; 807 NW2d 343 (2011), particularly because objections to the form of an order cannot challenge the substance of the ruling. MCR 2.602(B)(3)(b). As a result, defendants’ objection was in essence a motion for reconsideration.

Bogle v. Sewell, Not Reported in N.W. Rptr. (2022)

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EXHIBIT 11

Hullibarger v. Archdiocese of Detroit, Not Reported in N.W. Rptr. (2021)

2021 WL 2877973

2021 WL 2877973

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Linda HULLIBARGER, Plaintiff-
Appellant,
v.
ARCHDIOCESE OF DETROIT, Our Lady
of Mount Carmel Parish, and Fr. Don
LaCuesta, Defendants-Appellees.

No. 354439
|
July 8, 2021

Monroe Circuit Court, LC No. 20-142805-NO

Before: Redford, P.J., and Borrello and Tukel, JJ.

Opinion

Per Curiam.

*1 Plaintiff's son committed suicide in early December 2018, but his family kept the manner of his death from the public. Plaintiff's pastor, defendant Father Don LaCuesta, officiated at the funeral and during his homily revealed the suicide of plaintiff's son to the public. He then proceeded to preach about suicide as a grave sin and specifically about how it endangered the immortal soul of plaintiff's son. The trial court concluded that Father LaCuesta's conduct was protected by the ecclesiastical abstention doctrine, and the negligent hiring, supervision and retention allegation, Count Three, was barred for other reasons as well, and thus granted summary disposition to defendants as to all claims. Finding no error in the circuit court's reasoning, we affirm its order.

I. UNDERLYING FACTS

In early December 2018, plaintiff's son committed

suicide. This fact was not publicly disclosed or known to anyone but close family and friends. The day after her son's death, plaintiff and her husband, Jeff Hullibarger (a nonparty), went to their church, defendant Our Lady of Mount Carmel Parish, and spoke with the pastor, Father LaCuesta, to plan for their son's funeral. Father LaCuesta informed the Hullibargers he could conduct a funeral service just a few days later and discussed the format of the service with them. The Hullibargers advised Father LaCuesta they wanted to celebrate their son's life and asked that the homily be positive, uplifting, and focused on the importance of kindness. Father LaCuesta agreed to conduct the service in the manner the Hullibargers requested. At no point did the Hullibargers inform Father LaCuesta that their son had committed suicide, nor did Father LaCuesta state he was aware of their son's cause of death.

On the day of the funeral, "numerous family [members], friends, classmates, and community members" were in attendance. Once the service began, it "progressed as expected" until Father LaCuesta gave his homily. At that point, Father LaCuesta informed those in attendance that plaintiff's son had committed suicide. According to plaintiff's allegations, "[m]any in attendance ... immediately became upset and burst out crying." Father LaCuesta's discussion of suicide stated that it was "condemned by the Church," a "secular crime," and "a sin against God with dire eternal consequences." As Father LaCuesta's sermon progressed, Jeff approached the pulpit and "pleaded" with Father LaCuesta to stop his discussion of suicide. But Father LaCuesta did not relent and "openly question[ed] the eternal fate" of the Hullibargers' son. After Father LaCuesta ended the funeral service, without allowing the family to say their final words, Jeff intervened once more. The funeral ended, and the Hullibargers informed Father LaCuesta he was not welcome at the gravesite service.

After the funeral, plaintiff learned that Father LaCuesta "had a prior history of such conduct." Thereafter, plaintiff requested an appointment with Archbishop Allen Vigneron of defendant Archdiocese of Detroit. Archbishop Vigneron agreed to meet with the Hullibargers, but when the Hullibargers met with Archbishop Vigneron and plaintiff brought up Father LaCuesta, Archbishop Vigneron "ended the meeting, telling her he wasn't there to discuss Father LaCuesta."

*2 Plaintiff then sued defendants, alleging five counts: (1) intentional infliction of emotional distress; (2) misrepresentation; (3) invasion of privacy; (4) vicarious liability; and (5) negligent hiring, supervision, or

retention. In lieu of an answer, defendants moved for summary disposition under MCR 2.116(C)(8). Defendants, relying on our Supreme Court's decision in *Winkler by Winkler v. Marist Fathers of Detroit, Inc.*, 500 Mich. 327; 901 N.W.2d 566 (2017), argued plaintiff's claims were barred by the ecclesiastical abstention doctrine because they involved questions of ecclesiastical polity. Defendants also argued that Father LaCuesta's homily constituted protected speech and, even if plaintiff's claims could be adjudicated, they failed as a matter of law. Defendants also argued that the invasion of privacy claim failed for other reasons as well, which we discuss further.

After a change of venue from Wayne Circuit Court to Monroe Circuit Court, plaintiff responded to defendants' motion for summary disposition. Plaintiff argued the ecclesiastical abstention doctrine did not apply because this case concerned Father LaCuesta's conduct, "not the Church's creed," his speech was not protected, and she sufficiently stated valid claims against each defendant. At the hearing on defendants' motion for summary disposition, the trial court concluded the ecclesiastical abstention doctrine "clearly" applied to Father LaCuesta's sermon and granted summary disposition to defendants. This appeal followed.

II. ECCLESIASTICAL ABSTENTION DOCTRINE

A. STANDARD OF REVIEW

MCR 2.116(C)(8) mandates summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." *Harbor Watch Condo. Ass'n v. Emmet Co. Treasurer*, 308 Mich. App. 380, 384; 863 N.W.2d 745 (2014).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v. Rozwood*, 461 Mich. 109, 119-120; 597 N.W.2d 817 (1999) (quotation marks and citations omitted).]

Thus, "[a] party may not support a motion under subrule

(C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Dalley v. Dykema Gossett*, 287 Mich. App. 296, 305; 788 N.W.2d 679 (2010). "Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v. Pioneer State Mut. Ins. Co.*, 258 Mich. App. 260, 272; 671 N.W.2d 125 (2003). Furthermore, because a motion under MCR 2.116(C)(8) is based on the pleadings, discovery is not a consideration when a court determines whether to grant the motion. See *Maiden*, 461 Mich. at 119-120. Finally, "[w]e likewise review de novo questions of subject matter jurisdiction and constitutional law." *Winkler*, 500 Mich. at 333 (citation omitted).

B. ANALYSIS

The ecclesiastical abstention doctrine "arises from the Religion Clauses of the First Amendment of the United States Constitution." *Winkler*, 500 Mich. at 337. These clauses provide, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., Am. I. The religion clauses of the First Amendment apply to the states through the Fourteenth Amendment. *Winkler*, 500 Mich. at 337 n. 4. Courts are "severely circumscribed by the First and Fourteenth Amendments to the United States Constitution and art. I, § 4 of the Michigan Constitution of 1963 in resolution of disputes between a church and its members." *Pilgrim's Rest Baptist Church v. Pearson*, 310 Mich. App. 318, 323; 872 N.W.2d 16 (2015), overruled in part in *Winkler*, 500 Mich. at 337-340. Our Supreme Court has stated that the applicability of the ecclesiastical abstention doctrine in Michigan

*3 reflects [the] Court's longstanding recognition that it would be "inconsistent with complete and untrammelled religious liberty" for civil courts to "enter into a consideration of church doctrine or church discipline," to "inquire into the regularity of the proceedings of church tribunals having cognizance of such matters," or "to determine whether a resolution was passed in accordance with the canon law of the church, except insofar as it may be necessary to do so, in determining whether or not it was the church that acted therein." [*Winkler*, 500 Mich. at 337-338, quoting *Van Vliet v. Vander Naald*, 290 Mich. 365, 370-371; 287 N.W. 564 (1939).]

Under the ecclesiastical abstention doctrine, a civil court cannot "substitute its opinion in lieu of that of the authorized tribunals of the church in ecclesiastical matters." *First Protestant Reformed Church v. DeWolf*,

344 Mich. 624, 631; 75 N.W.2d 19 (1956). Therefore, the ecclesiastical abstention doctrine “operates to ensure that, in adjudicating a particular case, a civil court does not infringe the religious freedoms and protections guaranteed under the First Amendment.” *Winkler*, 500 Mich. at 339. But the doctrine does not “purport to deprive civil courts of the right to exercise judicial power over any given class of cases.” *Id.* (quotation marks, ellipsis, and citation omitted). Indeed, “application of the ecclesiastical abstention doctrine is not determined by reference to the category or class of case the plaintiff has stated,” and “[w]hether a claim sounds in property, tort, or tax, for instance, is not dispositive.” *Id.* at 341. Further, whether a claim “is brought against a religious entity, or simply appears to be the sort that ‘likely involves ecclesiastical policies’ ” is not dispositive. *Id.*, quoting *Dlaikan v. Roodbeen*, 206 Mich. App. 591, 593; 522 N.W.2d 719 (1994), overruled by *Winkler*, 500 Mich. at 330, 336. “What matters instead is whether the actual adjudication of a particular legal claim would require the resolution of ecclesiastical questions; if so, the court must abstain from resolving those questions itself, defer to the religious entity’s resolution of such questions, and adjudicate the claim accordingly.” *Winkler*, 500 Mich. at 341. Thus, the ecclesiastical abstention doctrine “requires a case-specific inquiry that informs how a court must adjudicate certain claims within its subject matter jurisdiction; it does not determine whether the court has such jurisdiction in the first place.” *Id.*

The trial court did not err by concluding that resolution of plaintiff’s claims would require a decision regarding matters of church doctrine and polity and, therefore, the ecclesiastical abstention doctrine applied to bar plaintiff’s claims. Plaintiff argues her complaint does not seek resolution of religious issues. Rather, plaintiff asserts her claims concern an agreement by Father LaCuesta to preside over the funeral service for her son—for which Father LaCuesta was compensated through a donation—in accordance with requests from the Hullibarger family regarding the content of the funeral service. But the actual adjudication of each of plaintiff’s claims would require an inquiry into religious doctrine and practices regarding sermons and funeral services, suicide, as well as why Father LaCuesta chose the words that he did, and personnel issues regarding hiring practices of the Catholic Church. “Religious doctrine refers to ritual, liturgy of worship and tenets of the faith.” *Maciejewski v. Breitenbeck*, 162 Mich. App. 410, 414; 413 N.W.2d 65 (1987), citing *Jones v. Wolf*, 443 U.S. 595; 99 S. Ct. 3020; 61 L. Ed. 2d 775 (1979).¹

1. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

*4 The trial court properly applied the ecclesiastical abstention doctrine to bar plaintiff’s claim for intentional infliction of emotional distress. Plaintiff alleged that Father LaCuesta “disclosed to everyone in attendance that her son had committed suicide” and that he had, therefore, committed “a mortal sin, bringing his eternal salvation into jeopardy.” Plaintiff further alleged that despite requests to stop, Father LaCuesta “proceeded to *preach* about” suicide. (Emphasis added). Additionally, plaintiff alleged Father LaCuesta caused her to lose religious faith and made it difficult for her to “practice[e] religion through the church.” But to find that the content of Father LaCuesta’s homily at the funeral regarding the suicide of plaintiff’s son was “extreme” or “outrageous” would require the trial court to evaluate Catholic philosophy and doctrine regarding suicide, and whether Father LaCuesta complied with it. See *Lucas v. Awaad*, 299 Mich. App. 345, 359; 830 N.W.2d 141 (2013) (explaining that to establish a prima facie case of intentional infliction of emotional distress, a plaintiff must establish, in relevant part, that the defendant’s conduct was “extreme and outrageous,” meaning it was “so outrageous in character, and so extreme in degree,” that it “go[es] beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community”). It would also require evaluation of procedures for developing and providing religious sermons, which are unequivocally ecclesiastical in nature. See *Fowler v. State of Rhode Island*, 345 U.S. 67, 70; 73 S. Ct. 526; 97 L. Ed. 828 (1953) (stating that it is not “in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers.”). Under *Winkler*, such an inquiry would be inappropriate; the trial court properly refused to make such an inquiry, by applying the ecclesiastical abstention doctrine with respect to plaintiff’s claim for intentional infliction of emotional distress.

2. MISREPRESENTATION AND INVASION OF PRIVACY

The trial court similarly did not err when it concluded the ecclesiastical abstention doctrine barred plaintiff’s claims of misrepresentation and invasion of privacy. Plaintiff’s misrepresentation claim alleged, in part, that Father LaCuesta agreed to deliver a positive, uplifting sermon but, instead, spoke about “the nature of her son’s death,”

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and how it constituted a sinful act that brought into question “her son’s eternal salvation.” Plaintiff’s invasion of privacy claim alleged that Father LaCuesta disclosed the cause of her son’s death, Father LaCuesta should have known the cause of death “was a personal matter and not of public concern,” and disclosure of the cause of death “was not consistent with any legitimate pastoral duty and/or concern to the public.” But, as with plaintiff’s claim of intentional infliction of emotional distress, evaluation of her misrepresentation and invasion-of-privacy claims requires an inquiry into the decision-making process behind drafting and giving religious sermons, as well as into Catholic doctrine and teachings regarding suicide, and, once again, the reasons Father LaCuesta chose to deliver the words he did. As stated earlier, courts should not evaluate sermons delivered at religious services. *Fowler*, 345 U.S. at 70. Accordingly, the trial court properly concluded that resolution of these claims would require evaluating religious doctrines and, by extension, trigger the ecclesiastical abstention doctrine.

In addition, as to the invasion of privacy of claim, the trial court also relied on *Swickard v. Wayne County Medical Examiner*, 438 Mich. 536; 475 N.W.2d 304 (1991), to find that there was no privacy interest at issue which could have been violated. *Swickard* was a Freedom of Information Act (FOIA) case, involving an exemption for “[i]nformation of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” MCL 15.243(1)(a). In that case, the plaintiffs sought autopsy records of a deceased judge; the judge’s family intervened and asserted privacy rights in the autopsy results. *Swickard*, 438 Mich. at 540-542.

As a FOIA, case, *Swickard* is not strictly controlling. However, *Swickard* noted that because the Legislature had not defined the right of privacy, “We are left to apply the principles of privacy developed under the common law and our constitution.” *Id.* at 546. Thus, *Swickard*’s interpretation of the common law is relevant to plaintiff’s common law invasion of privacy claim.² The Court cited and adopted the Restatement of Torts for the proposition that “ ‘Except for the appropriation of one’s name or likeness, an action for invasion of privacy can be maintained only by a *living* individual whose privacy is invaded.’ ” *Id.* at 548, quoting 3 *Restatement Torts*, 2d, § 652I, p. 403. As *Swickard* noted, the comments to the Restatement of Torts explain that

² “The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual’s family,

unless their own privacy is invaded along with his.” [*Swickard*, 438 Mich. at 549-550, quoting 3 *Restatement Torts*, 2d, § 652I, comment a, p. 403.]

Again relying on comments to the Restatement of Torts, *Swickard* also noted that “an action for invasion of privacy cannot be maintained by a relative of the person concerned, unless that relative is brought into unjustifiable publicity,” *id.* at 551, or in other words, if the subjects involved were “not ... of legitimate public concern,” *id.* at 550. The Court provided a list of subjects which constitute authorized publicity, which includes suicide “and many other similar matters of genuine, even if more or less deplorable, popular appeal.” *Id.* at 551 (quotation marks and citation omitted). Consequently, the trial court was correct in concluding that plaintiff had no cognizable privacy interest in the fact that her son committed suicide.

3. VICARIOUS LIABILITY AND NEGLIGENT HIRING, SUPERVISION, OR RETENTION

Finally, the trial court also correctly concluded that the ecclesiastical abstention doctrine barred plaintiff’s claims for vicarious liability and negligent hiring, supervision, or retention. Under her claim of vicarious liability, plaintiff alleged, in part, that Father LaCuesta was under the supervision and control of the Archdiocese of Detroit and he “act[ed] in his special role of priest and adviser, using the premises of the Archdiocese’s parish,” and the “trust, power and the authority his position granted him.” And, under her claim for negligent hiring, supervision, and retention, plaintiff alleged that Father LaCuesta was “unfit and/or incompetent to perform” his pastoral duties and that the Archdiocese of Detroit knew, or should have known, that Father LaCuesta previously engaged in similar conduct as that alleged in plaintiff’s complaint. Additionally, plaintiff alleged that despite the Archdiocese of Detroit’s knowledge of Father LaCuesta’s incompetence, it still hired, supervised, and retained him as the pastor of Our Lady of Mount Carmel Parish.

As defendants point out, however, “[t]he Roman Catholic Church is an hierarchical organization and the Bishop’s power to make assignments of ministers to a parish is certainly a matter of ecclesiastical polity in which the courts may not interfere.” *Maciejewski*, 162 Mich. App. at 414. This point has been repeatedly reaffirmed by other Courts. See *Winkler*, 500 Mich. at 342-343, citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184; 132 S. Ct. 694; 181 L. Ed. 2d 650 (2012) (“[t]he Establishment Clause prevents the Government from appointing ministers, and the Free

Exercise Clause prevents it from interfering with the freedom of religious groups to select their own”); *Hosanna-Tabor* 565 U.S. at 188 (noting that the “authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church’s alone.”). Michigan courts have uniformly reached the same conclusion. See *Borgman v. Bultema*, 213 Mich. 684, 703; 182 N.W. 91 (1921); *Assemany v. Archdiocese of Detroit*, 173 Mich. App. 752, 762-763; 434 N.W.2d 233 (1998); *Maciejewski*, 162 Mich. App. at 414. The trial court thus properly dismissed plaintiff’s claim involving the hiring, supervision and retention of Father LaCuesta, as those decisions by the Church are constitutionally protected.

*6 Accordingly, the trial court did not err when it concluded the ecclesiastical abstention doctrine barred plaintiff’s claims of vicarious liability and negligent hiring, supervision, and retention against the Archdiocese of Detroit. Furthermore, plaintiff’s claims of vicarious liability and negligent hiring, supervision, and retention fail because Father LaCuesta’s actions were constitutionally protected, and there can be no liability for a principal if the agent has committed no actionable wrong. See, e.g., *Rogers v. J.B. Hunt Transp., Inc.*, 466 Mich. 645, 652; 649 N.W.2d 23 (2002) (holding that “a master’s liability is derivative of the servant’s”). In

addition, plaintiff’s complaint failed to state specific allegations against Our Lady of Mount Carmel Parish. Consequently, the trial court did not err in dismissing plaintiff’s claims against the Parish.³

III. CONCLUSION

Father LaCuesta’s conduct was protected by the ecclesiastical abstention doctrine. As such, we cannot pass judgment on the content of his sermon. Consequently, all of plaintiff’s claims necessarily fail. Count Three fails for the additional reason that plaintiff alleges no cognizable privacy interest which was invaded. We therefore affirm the trial court’s order granting summary disposition to defendants. “In light of the public question involved, the parties may not tax costs.” *Temine Corp. v. Boardwalk Commercial, LLC*, 315 Mich. App. 1, 22; 888 N.W.2d 267 (2016).

All Citations

Not Reported in N.W. Rptr., 2021 WL 2877973

Footnotes

- 1 “Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority.” *In re Stillwell Trust*, 299 Mich. App. 289, 299 n. 1; 829 N.W.2d 353 (2012) (citation omitted).
- 2 *Swickard* “recognize[d] that the common law and constitutional law may not be coextensive with the scope of privacy under the FOIA.” *Swickard*, 438 Mich. at 547. That limitation of course is inapplicable to plaintiff’s common law claim.
- 3 Given our conclusion that the trial court properly concluded the ecclesiastical abstention doctrine barred plaintiff’s claims, we need not address plaintiff’s other arguments on appeal. We note, however, that while summary disposition is often premature if discovery is not closed, *Peterson Novelties, Inc. v. City of Berkley*, 259 Mich. App. 1, 24-25; 672 N.W.2d 351 (2003), discovery is not a factor here because defendants moved for summary disposition under MCR 2.116(C)(8) and such motions are based on the pleadings, see *Maiden*, 461 Mich. at 119-120.

STATE OF MICHIGAN
IN THE KENT COUNTY CIRCUIT COURT

JOSEPH KUILEMA,

Plaintiff,

v

CALVIN UNIVERSITY,

Defendant.

Case No. 23-03561-CZ

Hon. Christina Elmore

Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, NW
Grand Rapids, MI 49503
616.774.8000
chaung@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant
45 Ottawa Avenue, SW - Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

Reply in Support of Calvin University's Motion to Dismiss

Introduction

Mr. Kuilema does not identify any statutory text that supports his discrimination claim. ELCRA prohibits discrimination “because of sex,” not “because of association” or “because of advocacy.” Nor does Mr. Kuilema identify any conduct giving rise to a retaliation claim. ELCRA does not give him grounds to sue over his colleagues’ decision to show to their students a film of which Mr. Kuilema did not approve, nor can he mount a claim on the basis of Calvin’s attempt to investigate whether allegations involving Mr. Kuilema were true.

With respect to the ministerial exception and the church autonomy doctrine, Mr. Kuilema actively tries to ignore the allegations in his own complaint. His complaint pleads that his non-renewal was caused by his disagreement with the religious doctrine adopted and implemented by Calvin and its governing religious denomination, the Christian Reformed Church. The First Amendment protects Calvin’s ability to part ways with a professor who intends to embrace the opposite of the religious beliefs that Calvin entrusted him to abide by and teach.

Argument

I. The complaint fails to state a claim for discrimination.

A. ELCRA prohibits discrimination “because of sex,” not “because of association.”

The statutory text is unambiguous: ELCRA prohibits discrimination “because of . . . sex,” not because of “advocacy or “association.” MCL 37.2202(1)(a).

That omission is intentional. Attached as **Exhibit 1** is a list of statutes from 32 jurisdictions across the United States that explicitly prohibit discrimination on the basis of “association.” If the Michigan legislature had wanted ELCRA to prohibit discrimination against those who are “associated with” someone who has a protected characteristic, then it could have easily done so simply by including those words in the statute, just like these other jurisdictions.

In fact, Michigan *has* done so—just not in ELCRA. The Persons With Disabilities Civil Rights Act prohibits housing discrimination “on the basis of a disability of a buyer or renter, . . . or of any person associated with that buyer or renter.” MCL 37.1502(1). ELCRA has been amended several times since MCL 37.1502’s enactment, and no association-based language has been added. This dooms Mr. Kuilema’s argument. “Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.” *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Instead, courts “should assume that an omission was intentional.” *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 135; 662 NW2d 758 (2003). Mr. Kuilema is trying to add into ELCRA words that are not there. “[T]he essence of a sex discrimination civil rights suit is that similarly situated people have been treated differently because of their sex,” not because of what their viewpoints are. *Radtke v Everett*, 442 Mich 368, 379; 501 NW2d 155 (1993). See also *Matamoros v Broward Sheriff’s Off*, 2 F4th 1329, 1335 (CA 11, 2021) (rejecting associational discrimination claim where, unlike the ADA, a state statute did not specifically prohibit associational discrimination).

B. Under *Rouch World*, Mr. Kuilema fails to state a claim for sex discrimination because his sex made no difference to how he was treated.

To evade the statutory text, Mr. Kuilema relies on *Graham v Ford*, 237 Mich App 670; 604 NW2d 713 (1999), which he erroneously identifies as a decision from the Michigan Supreme Court, when in fact it is a decision from the Court of Appeals. This is an important error because, at the same time, Mr. Kuilema ignores the relevant portion of *Rouch World*, which is an actual Supreme Court decision. *Rouch World* holds that ELCRA’s prohibition of discrimination “because of . . . sex” requires a demonstration that “the discriminatory action would not have

occurred *but for the sex of the complainant.*” *Rouch World, LLC v Dept of Civil Rights*, 510 Mich 398, 420 (2022) (emphasis added). Mr. Kuilema makes no allegations based on his own sex.

In any event, *Graham* does not help Mr. Kuilema. Unlike Mr. Kuilema, the plaintiffs in *Graham* did not claim to have suffered discrimination on the basis of their advocacy for others. Instead, the plaintiffs alleged that their own race was a but-for cause of the discrimination; they were called “Uncle Tom” and were told that they could do a “far better job portraying their race.” *Id.* at 678-80. Moreover, *Graham* cannot supersede *Rouch World’s* interpretation of ELCRA, just as the Sixth Circuit cases upon which Mr. Kuilema relies cannot supersede *Bostock’s* interpretation of Title VII. The court in *Frith* made this clear: “Title VII’s language, as discussed in *Bostock*, forecloses [the Sixth Circuit’s approach], which essentially replaces the textual ‘because of such individual’s race’ with the atextual ‘because of such individual’s advocacy for protected individuals.’” *Frith v Whole Foods Mkt, Inc*, 38 F4th 263, 272 (CA1, 2022). No Michigan case approves of the advocacy-based claim that Mr. Kuilema proposes, and *Rouch World* disposes of the argument that ELCRA or *Graham* are broad enough to do so.

II. Mr. Kuilema failed to plead a claim for retaliation.

ELCRA does not give Mr. Kuilema a remedy for disagreeing with his colleagues’ decision to show a documentary to their students. Mr. Kuilema does not claim that he was responding to any illegal effect on any particular student, as is required. Nor did he “clearly convey to an objective employer” that he was “raising the specter of a claim of unlawful discrimination pursuant to [ELCRA].” *Barrett v Kirtland Cmty Coll*, 245 Mich App 306, 318–19; 628 NW2d 63 (2001). Instead, he argued with his colleagues about whether students should be shown a particular film. Anti-discrimination statutes cannot be used to police curriculum debates. *Monteiro v Tempe Union High Sch Dist*, 158 F3d 1022, 1032 (CA9, 1998) (dismissing claim for being forced to read *Huckleberry Finn*).

Nor can Mr. Kuilema assert a retaliation claim based on Calvin’s decision to question his coworker in an attempt to determine whether allegations pertaining to Mr. Kuilema were true. Not only does this type of investigation fail to create an objectively hostile work environment, but Mr. Kuilema alleges that he notified Calvin of his concerns about the questioning of his coworker “in his appeal.” (Complaint ¶ 135). Because Calvin had already made the non-renewal decision by the time that he appealed it, this alleged incident cannot support a retaliation claim. *Montell v Diversified Clinical Servs, Inc*, 757 F3d 497, 507 (CA6, 2014).

III. The ministerial exception bars Mr. Kuilema’s claims.

The ministerial exception applies “[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith.” *Our Lady of Guadalupe Sch v Morrissey-Berru*, 140 S Ct 2049, 2069 (2020). Mr. Kuilema’s complaint alleges that Calvin expected and entrusted its professors to teach all of their courses “from a Reformed Christian perspective” and “entirely in accord with the doctrinal standards of the Christian Reformed Church in North America.” (Complaint, ¶¶ 10, 17; see also *id.*, ¶¶ 20, 29, 54, 105-107).

Mr. Kuilema attempts to avoid the implications of his own complaint by arguing that the court should rigidly apply the factors outlined in *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 177; 756 NW2d 483 (2008). But *Weishuhn* predates *Our Lady* by more than a decade, and *Our Lady* specifically rejected the notion that any particular list of factors “must be met—or even that they are necessarily important—in all . . . cases.” *Our Lady*, 140 S Ct at 2063. Instead, a school’s “explanation of the role of [its] employees in the life of the religion in question is important.” *Id.* at 2066. And even in *Weishuhn*, the court recognized that a teacher was ministerial where she integrated her religious beliefs in her mathematics lessons. *Weishuhn v Lansing Cath Diocese (“Weishuhn II”)*, 287 Mich App 211, 218–19; 787 NW2d 513 (2010) (concluding that teacher was ministerial). The same allegations are present here.

The exhibits attached to Mr. Kuilema’s complaint demonstrate far more religious activity by Mr. Kuilema than was identified in *DeWeese-Boyd v Gordon College*, 163 NE3d 1000 (Mass, 2021). Moreover, *DeWeese-Boyd* is unpersuasive. The Supreme Court denied review of that court’s “troubling and narrow view of religious education” only because of a procedural hurdle. *Gordon College v DeWeese-Boyd*, 142 S Ct 952, 955 (2022) (Alito, J., statement respecting denial of certiorari). See also *Palmer v Liberty University*, ___ F4th ___, 2023 WL 4281845, at *23 (CA4, 2023) (Richardson, J., concurring) (opining that ministerial exception applied to professors who were required “to integrate a Biblical worldview into all of their classes”).

IV. The church autonomy doctrine applies to this dispute.

The church autonomy doctrine is not limited to questions involving rituals, liturgy, and tenets of the faith; it applies whenever resolution of the plaintiff’s claims “would require the resolution of ecclesiastical questions.” *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 343; 901 NW2d 566 (2017). Mr. Kuilema argues that he is entitled to retain his job despite acknowledging that he actively taught against Calvin’s religious beliefs. (Complaint, ¶¶ 29, 31). He asks the Court to decide whether he or Calvin is correct about various doctrinal questions. (Complaint, ¶¶ 49, 88, 93, 100-101, 112-113). *Curay-Cramer v Ursuline Acad of Wilmington*, 450 F3d 130, 139 (CA3, 2006) (inappropriate to weigh relative severity of violations of religious doctrine). And Count I asserts that Calvin’s “basis” for non-renewal was unlawful—which will necessarily require this Court to weigh Calvin’s religious basis for its decision. (Complaint, ¶ 124).

This dispute is fundamentally a religious one. And for Mr. Kuilema to prevail, this Court would need to conclude that Calvin may not part ways with a professor who has adopted beliefs that Calvin believes are contrary to the tenets of its governing religious denomination. (Complaint, ¶¶ 29, 31, 48, 54, 88, 100, 107, 113). The First Amendment does not permit this dispute to be adjudicated in this forum.

Conclusion

The complaint should be dismissed with prejudice.

MILLER JOHNSON
Attorneys for Defendant

Dated: July 10, 2023

By



Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

EXHIBIT 1

Express Associational Discrimination Statutes by Jurisdiction

Federal

42 USC 3604(f)(1)(C)-(2)(C)

“[I]t shall be unlawful . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . **any person associated with that buyer or renter**” or “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of . . . **any person associated with that person.**”

42 USC 12112(b)(4)

“[T]he term ‘discriminate against a qualified individual on the basis of disability’ includes . . . excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a **relationship or association.**”

State

Alabama—Ala Code 24-8-4(6)(c)-(7)(c)

“It shall be unlawful . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . **[a]ny person associated with that buyer or renter**” or “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of . . . **[a]ny person associated with that person.**”

Alaska—Alaska Stat 18.80.240(5)

“It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property . . . to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the race, religion, physical or mental disability, color, national origin, age, sex, marital status, change in marital status, or pregnancy of that person **or of any person associated with that person.**”

Arizona—Ariz Rev Stat 41-1492.02(F)

“It is discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations or other opportunities to an individual or entity because of the known disability **of an individual with whom the individual or entity is known to have a relationship or association.**”

California—Cal Gov't Code 12926(o)

“Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decisionmaking, or veteran or military status’ includes a perception that the person has any of those characteristics **or that the person is associated with a person who has, or is perceived to have, any of those characteristics.**”

Colorado—Colo Rev Stat 24-34-502.2(1)(a)-(b)

“It is an unfair or discriminatory housing practice and therefore unlawful and prohibited . . . [f]or a person to discriminate in the sale or rental of, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a disability of a buyer or renter, an individual who will reside in the dwelling after it is sold, rented, or made available, **or of any individual associated with the buyer or renter**” or “for a person to discriminate against an individual in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with such dwelling because of a disability of that individual, of any individual residing in or intending to reside in that dwelling after it is so sold, rented, or made available, **or of any individual associated with the individual.**”

Delaware—Del Code Ann tit 6, § 4603(a)(3)

“[T]he unlawful discrimination against a person on the basis of a specified protected status refers to the protected status of . . . **[a]ny person associated with that buyer or renter.**”

District of Columbia—DC Code 2-1402.21(d)(1)(B)-(2)(B)

“It shall be an unlawful discriminatory practice in the sale or rental of real estate to deny a dwelling to a buyer or renter or to otherwise make a dwelling unavailable to a buyer or renter because of a disability of . . . [a]ny person residing in or intending to reside in that dwelling after it is sold, rented or made available; or **any person associated with that buyer or renter**” or “to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability of . . . [a]ny person residing in or intending to reside in that dwelling after it is sold, rented or made available; or **any person associated with that buyer or renter.**”

Florida—Fla Stat 760.25(1)

“It is unlawful for any bank, building and loan association, insurance company, or other corporation, association, firm, or enterprise the business of which consists in whole or in part of the making of commercial real estate loans to deny a loan or other financial assistance to a person applying for the loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him or her in the fixing of the amount, interest rate, duration, or other term or condition of such loan or other financial assistance, because of the race, color, national origin, sex, disability, familial status, or religion of such person **or of any person associated with him or her** in connection with such loan or other financial assistance or

the purposes of such loan or other financial assistance, or because of the race, color, national origin, sex, disability, familial status, or religion of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given.”

Georgia—Ga Code Ann 8-3-202(a)(6)(C)

“[I]t shall be unlawful . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a disability of: **[a]ny person associated with that buyer or renter**” or “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a disability of . . . [a]ny person associated with that person.”

Guam—Guam Code 70.230(o)

“[I]t shall be unlawful within the Territory for a person, owner, financial institution, real estate broker or real estate salesman, or any representative of the above . . . for any bank, savings and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part, in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration or other terms or conditions of such loans or other financial assistance, because of the race, color, religion, sex or national origin of such person **or of any person associated with him** in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance or of the present or prospective owners, lessees, tenants or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given.”

Hawaii—Haw Rev Stat 378-2(a)(6)

“It shall be an unlawful discriminatory practice . . . [f]or any employer, labor organization, or employment agency to exclude or otherwise deny equal jobs or benefits to a qualified individual because of the known disability **of an individual with whom the qualified individual is known to have a relationship or association.**”

Idaho—Idaho Code 67-5909

“The prohibition to discriminate shall also apply to those individuals without **disabilities who are associated with a person with a disability.**”

Illinois—775 Ill Comp Stat 5/1-103(I)(2)

“Discrimination based on disability includes unlawful discrimination against an **individual because of the individual’s association with a person with a disability.**”

Indiana—Ind Code 22-9-5-7(4)

“‘[D]iscriminate’ includes the following: . . . [e]xcluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability **of an individual with whom the qualified individual is known to have a relationship or an association.**”

Kansas—Kan Stat 44-1009(a)(8)

“It shall be an unlawful employment practice . . . [f]or an employer, labor organization, employment agency or joint labor-management committee to . . . [] exclude or otherwise deny equal jobs or benefits to a qualified individual because of the known disability of an individual **with whom the qualified individual is known to have a relationship or association.**”

Kansas—Kan Stat 44-1016(h)(1)-(2)

“[I]t shall be unlawful for any person . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, residential real property to any buyer or renter because of a disability of . . . **any person associated with that buyer or renter**” or “[t]o discriminate against any person in the terms, conditions or privileges of sale or rental of residential real property or in the provision of services or facilities in connection with such real property because of a disability of . . . **any person associated with that person.**”

Kentucky—Ky Rev Stat Ann 344.360(9)-(10)

“It is an unlawful housing practice . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a housing accommodation to any buyer or renter because of a disability of . . . **[a]ny person associated with that buyer or renter**; or . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such housing accommodation, because of a disability of . . . **[a]ny person associated with that person.**”

Louisiana—La Stat Ann 2606(6)(a)-(b)

“It is unlawful . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a disability of . . . **[a]ny person associated with that buyer or renter**” or “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a disability of . . . **[a]ny person associated with that person.**”

Maine—Me Stat tit 5, § 4553(1-D)

“‘[D]iscriminate’ also includes . . . [e]xcluding or otherwise denying equal jobs or benefits to a qualified individual because of the known protected class status of an individual **with whom the qualified individual is known to have a relationship or association.**”

Michigan—MCL 37.1502(1)

“An owner or any other person engaging in a real estate transaction, or a real estate broker or salesman shall not, on the basis of a disability of a buyer or renter, of a person residing in or intending to reside in a dwelling after it is sold, rented, or made available, **or of any person associated with that buyer or renter**, that is unrelated to the individual’s ability to acquire, rent, or maintain property or use by an individual of adaptive devices or aids . . . discriminate.”

Minnesota—Minn Stat 363A.15(2)

“It is an unfair discriminatory practice for any individual who participated in the alleged discrimination as a perpetrator, employer, labor organization, employment agency, public accommodation, public service, educational institution, or owner, lessor, lessee, sublessee, assignee or managing agent of any real property, or any real estate broker, real estate salesperson, or employee or agent thereof to intentionally engage in any reprisal against any person because that person . . . **associated with a person or group of persons** who are disabled or who are of different race, color, creed, religion, gender identity, sexual orientation, or national origin.”

Missouri—Mo Stat 213.045

“It shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance because of race, color, religion, national origin, ancestry, sex, disability or familial status to a person applying therefor for the purpose of purchasing, construction, improving, repairing, or maintaining a dwelling, or to discriminate against him in fixing of the amount, interest rate, duration or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, national origin, ancestry, sex, disability, or familial status of such person **or of any person associated with him** in connection with such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants, of the dwellings in relation to which such loan or other financial assistance is to be made or given.”

Missouri—Mo Stat 213.040(6)(c)-(7)(c)

“It shall be an unlawful housing practice . . . [t]o discriminate in the sale or rental of, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a disability of . . . **[a]ny person associated with that buyer or renter**” or “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a disability of . . . **[a]ny person associated with that person.**”

Nebraska—Neb Rev Stat 48-1107.02(1)(d)

“[D]iscrimination shall include . . . [e]xcluding or otherwise denying equal jobs or benefits to a qualified individual with a disability because of the known disability of an individual with whom the qualified individual with a disability is **known to have a relationship or association.**”

New Hampshire—NH Rev Stat Ann 354-A:11(I)-(II)

“It is a civil rights violation to refuse to sell or rent or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a disability of that buyer or renter, a disability of a person residing or intending to reside in that dwelling after it is sold, rented, or made available, **or a disability of any person associated with the buyer or renter**” or “to alter the terms, conditions, or privileges of sale or rental of a dwelling or the provision of services or facilities in connection with such dwelling because of a disability of a person with a disability or a disability of any person residing or intending to reside in that dwelling after it is sold, rented, or made available, **or a disability of any person associated with that person.**”

North Dakota—ND Cent Code 14-02.5-06(1)-(2)

“A person may not discriminate in the sale or rental of, or make unavailable or deny, a dwelling to any buyer or renter because of a disability of the buyer or renter; of an individual residing in or intending to reside in that dwelling after it is sold, rented, or made available; **or of any individual associated with the buyer or renter.**”

A person may not discriminate against an individual in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability of that individual; of an individual residing in or intending to reside in that dwelling after it is sold, rented, or made available; **or of any individual associated with that individual.**”

Ohio—Ohio Rev Code 4112.02(H)(15)(c)-(H)(16)(c)

“It shall be an unlawful discriminatory practice . . . for any person to do any of the following: Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a disability of any of . . . [a]ny individual **associated with** the person described in division (H)(15)(b) of this section” or “[d]iscriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a disability of any of the following . . . (c) Any individual **associated with** the person described in division (H)(16)(b) of this section.”

Oklahoma—Okla Stat tit 25, § 1452(15)(a)(3)-(b)(3)

“It shall be an unlawful discriminatory housing practice for any person, or any agent or employee of such person . . . to discriminate in the sale or rental or otherwise make available or deny a dwelling to any buyer or renter because of a disability of . . . **any person associated with that buyer or renter**, or to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability of . . . **any person associated with that person.**”

Oregon—Or Rev Stat 659A.030(1)(a), (b), (e)

“It is an unlawful employment practice . . . [f]or an employer, because of an individual’s race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, **or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates** . . . to refuse to hire or employ the individual or to bar or discharge the individual from employment” or “[f]or an employer, because of an individual’s race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, **or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates** . . . to discriminate against the individual in compensation or in terms, conditions or privileges of employment” or “[f]or an employment agency, because of an individual’s race, color, religion, sex, sexual orientation, gender identity, national origin, marital status or age if the individual is 18 years of age or older, **or because of the race, color, religion, sex, sexual orientation, gender identity, national origin, marital status or age of any other person with whom the individual associates**, . . . to classify or refer for employment, or to fail or refuse to refer for employment, or otherwise to discriminate against the individual.”

Pennsylvania—43 Pa Cons Stat § 955 (h)(1)-(6)

“It shall be an unlawful discriminatory practice . . . [f]or any person to: (1) Refuse to sell, lease, finance or otherwise to deny or withhold any housing accommodation or commercial property from any person because of the race, color, familial status, age, religious creed, ancestry, sex, national origin or handicap or disability of any person, prospective owner, occupant or user of such housing accommodation or commercial property, or to refuse to lease any housing accommodation or commercial property to any person due to use of a guide animal because of the blindness or deafness of the user, use of a support animal because of a physical handicap of the user or because the user is a handler or trainer of support or guide animals or because of the handicap or disability of an individual with whom the person is known to have a **relationship or association**. (2) Refuse to lend money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or commercial property or otherwise withhold financing of any housing accommodation or commercial property from any person . . . because of the handicap or disability of an individual with whom the person is known to have a **relationship or association**. (3) Discriminate against any person in the terms or conditions of selling or leasing any housing accommodation or commercial property or in furnishing facilities, services or privileges in connection with the ownership, occupancy or use of any housing accommodation or commercial property . . . because of the handicap or disability of an individual with whom the person is known to have a **relationship or association**. (4) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of housing accommodation or commercial property . . . because of the handicap or disability of an individual with whom the person is known to have a **relationship or association**. (5) Print, publish or circulate any statement or advertisement: (i) relating to the sale, lease or acquisition of any housing accommodation or commercial property or the loan of money, whether or not secured by mortgage, or otherwise for the acquisition, construction, rehabilitation, repair or

maintenance of any housing accommodation or commercial property which indicates any preference, limitation, specification . . . because of the handicap or disability of an individual with whom the person is known to have a **relationship or association**. (6) Make any inquiry, elicit any information, make or keep any record or use any form of application, containing questions or entries concerning race, color, familial status, age, religious creed, ancestry, sex, national origin, handicap or disability or because of the handicap or disability of an individual with whom the person is known to have a **relationship or association** in connection with the sale or lease of any housing accommodation or commercial property or loan of any money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or commercial property, or to make any inquiry, elicit any information, make or keep any record or use any form of application, containing questions or entries concerning the use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals, in connection with the lease of any housing accommodation or commercial property.”

South Carolina—SC Code 1-13-80(D)(1)

“It is an unlawful employment practice for a covered entity . . . to exclude or otherwise deny equal jobs or benefits to a qualified individual because of a known disability of an **individual with whom the qualified individual is known to have a relationship or association**.”

South Carolina—SC Code 31-21-40(6)(c)-(7)(c)

“[I]t shall be unlawful . . . to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . **any person associated with that buyer or renter**” or “to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of . . . **any person associated with that person**.”

Vermont—Vt Stat tit 9, § 4502(c)(3)

“A public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability **of an individual with whom the individual or entity is known to have a relationship or association**.”

Virginia—Va Code Ann 36-96.3(A)(9)

“It shall be an unlawful discriminatory housing practice for any person to . . . [d]iscriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith because of a disability of . . . **any person associated with that buyer or renter**.”

S T A T E O F M I C H I G A N

17TH JUDICIAL CIRCUIT COURT - (KENT COUNTY)

JOSEPH KUILEMA

Plaintiff

Case No. 23-03561-CZ

V

CALVIN UNIVERSITY
Defendant

MOTION TO DISMISS

BEFORE THE HONORABLE CHRISTINA ELMORE, CIRCUIT COURT JUDGE

Grand Rapids, Michigan - Friday, July 14, 2023

APPEARANCES:

Attorney for Plaintiff: MS. CHARISSA HUANG (P75501)
MR. KEVIN COWAN (P85674)
Smith Haughey Rice and Roegge
100 Monroe Center Street Northwest
Grand Rapids, Michigan 49503
616-458-0222

Attorney for Defendant: MR. STEPHEN VAN STEMPVOORT (P79828)
MR. JACOB CARLTON (P84859)
Miller Johnson
45 Ottawa Avenue Northwest
Suite 1100
Grand Rapids, Michigan 49503
616-831-1850

RECORDED BY: FTR.Gold

TRANSCRIBED BY: MS. KRISTEN J. BRINK, CER 7740
Certified Electronic Recorder
616-632-5203

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1 Grand Rapids, Michigan

2 Friday, July 14, 2023 at 8:56 a.m.

3 THE COURT: And next I'm going to do Kuilema
4 versus Calvin. It's 23-03561-CZ. And if you can state
5 your appearances for the record on behalf of the plaintiff.

6 MS. HUANG: On behalf of the plaintiff, Charissa
7 Huang and my colleague, Kevin Cowan.

8 THE COURT: Okay. And on behalf of the defense?

9 MR. VAN STEMPVOORT: Good morning, your Honor.
10 Steve Van Stempvoort for Calvin University. With me I have
11 my colleague, Jake Carlton and we have Calvin's Director of
12 Human Resources, Andy George in the back as well.

13 THE COURT: Okay.

14 MS. HUANG: And I do have my client, Joseph
15 Kuilema up here with me today.

16 THE COURT: Okay. Good morning. And we're here
17 on -- there's two separate motions. One not the most
18 timely, which is a motion for leave to file a brief in
19 excess of 20 pages but that was filed along with a brief in
20 excess of 20 pages. So, I -- I don't know -- I think
21 that's probably a moot motion that I'm not going to rule
22 on. But I am prepared to move forward with the motion to
23 dismiss.

24 And this motion was filed on behalf of the
25 defendant. And I did review the motion. Did you have any

1 additional statements that are not contained within the
2 motion?

3 MR. VAN STEMPVOORT: Yes I do, your Honor.

4 THE COURT: Okay.

5 MR. VAN STEMPVOORT: Thank you, your Honor. So
6 with respect to the motion for leave to file excess pages,
7 its unopposed. And I'm hoping the Court will grant that.

8 With respect to the motion to dismiss, I do have
9 a couple of additional comments. Happy to answer questions
10 the Court has. But they kind of -- and I kind of got two
11 separate strains to the argument, right? The first strand
12 is this notion about whether there's actual a claim that's
13 been stated under the statute, under the elements required
14 for a retaliation claim.

15 And then the second strand is the First Amendment
16 issues that are raised by this case, right? This complaint
17 feeds right into the First Amendment and so it's barred by
18 the First Amendment.

19 So with respect to the first bucket of -- of
20 arguments, count one fails to state a claim for
21 discrimination under the ELCRA. ELCRA prohibits -- if you
22 look at the plain text of the statute, ELCRA prohibits
23 discrimination because of sex. It does not prohibit
24 discrimination because of advocacy. It does not prohibit
25 discrimination because of association.

1 The -- the allegation here, of course Mr. Kuilema
2 has, is that he was subject to discrimination based on his
3 advocacy for another individual. And ELCRA simply doesn't
4 extend that far. We know that because we'd have other
5 statutes from other jurisdictions, and also from Michigan
6 that expressly do prohibit discrimination based on
7 association with other folks. So the Persons with
8 Disability and Civil Rights Act, this is MCL 37.1502, it
9 does prohibit discrimination based on somebody's
10 association with somebody who has a disability.

11 So we know that the Michigan Legislature knows
12 how to include that language in the statute. But if we
13 look ELCRA, 37.2202, it simply doesn't include that
14 language. All it says is there's been no discrimination
15 against an individual because of sex. Right? It doesn't
16 have anything to do about -- it doesn't have anything to
17 say about an associational discrimination.

18 And we know from the *Farrington* case, that when
19 the Legislature does not include language in one statute,
20 that it could have included and does include in other
21 statute, that that omission was intentional. We have to
22 presume that -- that omission was intentional. So for that
23 reason alone, right, just look at the plain text of the
24 statute, count one doesn't state the claim.

25 Now they rely on this *Graham versus Ford* case, a

1 couple Title VII cases from the Federal Circuits to say
2 that, well, you know, we can stretch the statutory language
3 far enough to reach this.

4 But I will say, there -- there aren't actually
5 any Michigan cases that approve of an advocacy-based sex
6 discrimination claim. So we know from the *Rouch World*
7 case, which is a Michigan Supreme Court case, page 420 of
8 that, the Court says, in order to show a claim or in order
9 to state a claim for sex based discrimination, the
10 plaintiff would have to show that there's no
11 discrimination, quote "... but for the sex of the
12 complainant." So it turns on the sex of the plaintiff
13 before the Court, if -- if -- if -- if the analysis doesn't
14 change, if you flip the sex of the plaintiff, then there's
15 no claim.

16 And Mr. Kuilema admits, his own sex has -- it
17 makes no difference to the outcome of this case.

18 So under *Rouch World*, we not only do have a plain
19 text of the statute, but we also have Michigan Supreme
20 Court case under which this theory is prohibited. Now
21 *Graham, Graham* did not actually involve this type of
22 advocacy-based claim that is alleged here. That was --

23 THE COURT: You keep saying advocacy. Who -- how
24 did he advocate for anything?

25 MR. VAN STEMPVOORT: Well, I -- I think the

1 theory is that he -- he advocated in favor of LGBTQ+
2 rights.

3 THE COURT: I thought it was that he associated
4 by participating in some type of a ceremony, not at -- I
5 mean, he wasn't carrying a sign or picketing or anything.
6 He was associating by participating in this ceremony.

7 MR. VAN STEMPVOORT: In the ceremony? So yes, I
8 think there are twoish(sic) components of it. So the
9 advocacy is, I think, related to his decision to officiate
10 a -- a wedding. Right? I think it refers to it as a queer
11 wedding, but it's a LGBTQ+ wedding.

12 THE COURT: Right.

13 MR. VAN STEMPVOORT: And so -- so the -- so --
14 and that's -- that's much different of course, because he's
15 not alleging that he suffered in -- indiscrimination
16 because of his own protected ground.

17 THE COURT: Right. He's saying that he was
18 discriminated because he associated with people.

19 MR. VAN STEMPVOORT: Exactly.

20 THE COURT: And --

21 MR. VAN STEMPVOORT: Exactly.

22 THE COURT: -- and that that is the sex that was
23 discriminatory because of the sex of the people that he --

24 MR. VAN STEMPVOORT: Right. The -- the other --

25 THE COURT: -- associated --

1 MR. VAN STEMPVOORT: Yes. The other individuals.

2 THE COURT: -- with.

3 MR. VAN STEMPVOORT: Yes.

4 THE COURT: Okay.

5 MR. VAN STEMPVOORT: Not -- not himself.

6 THE COURT: Right.

7 MR. VAN STEMPVOORT: And that's what

8 distinguishes this from the interracial marriages case like
9 in *Bryant* for instance, right? Where the -- that's an
10 association of discrimination claim but when you really
11 boil it down, the dif -- the -- the important part of that
12 -- of those cases, is that it depends on the plaintiff's
13 own race. Right? Because the discriminatory conduct is
14 that, for instance a -- African American individual marries
15 a white individual, the reason that the employer doesn't
16 like that, is because of the race of the plaintiff. Right?

17 So -- so in other words, that is consistent with
18 *Bostock*, that's consistent with *Rouch World* in a way that
19 Mr. Kuilema claim is not.

20 The *Graham* case is the same way. So in *Graham*,
21 that was a case there were two different sets of
22 plaintiffs. There was a son of white plaintiffs and there
23 was a son of black plaintiffs. They were all -- worked for
24 a America -- an African American supervisor. And the
25 associational based claim that the court approved of there,

1 was the -- the -- the black plaintiffs alleged that they
2 were discriminated against because of their own race.
3 Because the supervisor basically said, look you shouldn't
4 be hanging out and associating with white people because
5 you guys aren't appropriately living out the
6 characteristics of your own race.

7 And so, the plaintiff's race, the plaintiff's own
8 race in *Graham* made a difference to the claim. Right? And
9 to the --

10 THE COURT: Right but --

11 MR. VAN STEMPVOORT: -- outcome of the
12 discrimination.

13 THE COURT: -- I'm sorry to interrupt but --

14 MR. VAN STEMPVOORT: Yup.

15 THE COURT: -- here, that's not -- obviously he's
16 not saying that he's being discriminated against because
17 he's a man. So it's not because of his sex that he's
18 alleging any --

19 MR. VAN STEMPVOORT: Exactly.

20 THE COURT: -- discrimination.

21 MR. VAN STEMPVOORT: Exactly.

22 THE COURT: It clearly, the entire basis of the
23 claim is associational discrimination. Right?

24 MR. VAN STEMPVOORT: That's right.

25 THE COURT: And I'm not hearing anything because

1 if he officiated, according to his theory, if he had
2 officiated a wedding between a man and a woman, we wouldn't
3 be here.

4 So he's saying because of the sex of the
5 individuals that he officiated the wedding for --

6 MR. VAN STEMPVOORT: Right.

7 THE COURT: -- that is why he was retaliated
8 against, that is why he was discriminated against. And had
9 those individuals been of -- been a man and a woman, we
10 wouldn't -- he -- he would have just gone along with his --

11 MR. VAN STEMPVOORT: That's exactly --

12 THE COURT: -- job.

13 MR. VAN STEMPVOORT: -- exactly right.

14 THE COURT: So that's the theory. So, I'm not
15 really -- and I -- I think the -- the case law is pretty
16 clear that associational discrimination is -- he can have a
17 claim in that regard. So he's stating a claim, I'm not
18 hearing how, oh this doesn't apply here.

19 MR. VAN STEMPVOORT: Yeah, so the reason it
20 doesn't state a claim is because under *Bostock* and *Rouch*
21 *World*, right, *Bostock* said, okay how -- *Bostock* had to do
22 with Title VII, right? And *Bostock* said, okay well when
23 does the claim arise under Title VII? And they said, okay
24 and that -- that was with the sexual orientation case.
25 Right? The question about whether Title VII covers

1 discrimination on the basis of sexual orientation.

2 And the court said, well just look at the words,
3 look at the word sex. And if -- if -- if it's a but for
4 test, which is the same test that you apply under *Rouch*
5 *World*. And if you -- if -- if you flip the split -- if --
6 if you do the swap test, right, if you flip the sex of the
7 plaintiff and it makes a difference, then you stated the
8 claim under Title VII.

9 So in other words, if you -- if -- if there's a
10 man who marries a man and does -- and suffers
11 discrimination because of that, whereas a woman would not
12 have suffered discrimination because she married a man,
13 then the plaintiff's sex made a difference to the outcome,
14 right? Because the -- if the plaintiff had been a woman,
15 it would have been discriminated against, whereas if --
16 because he was a man, he was discriminated against.

17 So in other words, the outcome changes depending
18 on the sex of the plaintiff. Now --

19 THE COURT: But then that wouldn't be assoc --
20 that would -- there -- that's not an associational
21 discrimination.

22 MR. VAN STEMPVOORT: That -- that's right.
23 That's right.

24 THE COURT: Right.

25 MR. VAN STEMPVOORT: And so -- so --

1 THE COURT: So --

2 MR. VAN STEMPVOORT: -- so under -- so under
3 *Bostock* it says, look that's the way Title VII works. You
4 have to -- there's -- there's only a claim if you switch
5 the -- if you switch the sex of the plaintiff.

6 And then the *Frith* which is from the 1st Circuit,
7 it says that -- that was a case where individuals,
8 employees wore masks, right, in which they advocated for
9 the Black Lives Matter movement. And they asserted
10 associational discrimination claim saying look, we
11 advocated on behalf of folks because of their race. And
12 they said, look that's -- that is encompassed in this kind
13 of associational discrimination theory.

14 And the Court -- the 1st Circuit Court said, well
15 no it's not because if you look at *Bostock*, it has to --
16 you -- you can't state a claim unless your own, the
17 plaintiff's own sex makes a difference.

18 And so, in here is -- and they said look, you --
19 you can advocate but ELCRA -- but Title VII isn't a
20 viewpoint discrimination statute. It's a -- it's a -- it's
21 a -- it only protects against discrimination on -- that you
22 suffered on behalf of a protected ground.

23 So -- so if the plaintiff's sex makes no
24 difference to the claim, then it just -- it -- it doesn't
25 fall under Title VII.

1 THE COURT: Right.

2 MR. VAN STEMPVOORT: And -- and the same -- and
3 -- and that -- and the 1st Circuit explained that that's
4 what happens under *Bostock*. The same -- precisely the same
5 analysis is true in *Rouch World*. And *Rouch World* does say
6 at page 420, that an ELCRA discrimination claim, a sex
7 discrimination claim, there's -- it -- it doesn't lie if
8 there's no discrimination but for the sex of the
9 complainant.

10 And here again, Mr. Kuilema never argues and
11 doesn't allege that there would have been a different
12 claim, a -- a different outcome here if he had been male or
13 if he had been female. His -- his -- his own sex made no
14 difference.

15 THE COURT: So under what scenario would
16 associational discrimination exist?

17 MR. VAN STEMPVOORT: Well where -- where the --
18 where the plaintiff's own protected characteristics
19 actually made a difference. So --

20 THE COURT: Where what?

21 MR. VAN STEMPVOORT: -- the -- the interracial
22 marriage example, right? Because those -- the *Bryant* --
23 the *Bryant* case, that case involved discrimination against
24 the plaintiff who, you know, because of -- because of --
25 for example, there's a -- there's a white plaintiff who

1 marries a black spouse. And then the employer says, look I
2 don't like interracial marriage because you're white and
3 you married somebody of a different race --

4 THE COURT: Right. But that's --

5 MR. VAN STEMPVOORT: -- then --

6 THE COURT: But that's not associational. That's
7 flat-out because that person was white.

8 MR. VAN STEMPVOORT: Exactly. But that -- but
9 that's what the -- that -- that's what associational
10 discrimination means.

11 THE COURT: Okay.

12 MR. VAN STEMPVOORT: Right? Because -- because
13 it turns on the sex of the plaintiff, right? Because if
14 that plaintiff in that scenario had been black --

15 THE COURT: But then that's associational, that's
16 just -- they just have a claim in and of themselves. It's
17 not because they're associating with --

18 MR. VAN STEMPVOORT: That's fair.

19 THE COURT: -- this person or that person.

20 MR. VAN STEMPVOORT: That's fair.

21 THE COURT: It's because of their own race and
22 their own sex which is clearly under -- under the statute.

23 MR. VAN STEMPVOORT: That -- that's exactly
24 right.

25 THE COURT: However, the associational that *Rouch*

1 World mentions isn't -- isn't the same. I mean, is -- if
2 this is -- if this an associated, it can't be a direct, you
3 know, direct discrimination, right?

4 MR. VAN STEMPVOORT: Well, so -- so -- and this
5 may be just a labeling problem, right? Because you see
6 that in the *Frith* case for example, they talk about
7 associational discrimination in -- in just the way that I
8 just did, right? With the interracial -- inter --
9 interracial marriage case, and they said look, that's still
10 a thing but it's a thing only because of what you explained
11 that it actually does turn on the -- on the plaintiff's own
12 protected characteristic.

13 THE COURT: Right.

14 MR. VAN STEMPVOORT: And -- and that's what I
15 mean when you still have an associational discrimination,
16 of course, you start a claim when you yourself, the
17 plaintiff have suffered discrimination based on your own
18 protected characteristics. Of course, that's -- of course
19 that's true.

20 And in -- in all those -- so all the interracial
21 marriage cases, *Graham*, *Bryant*, those are still -- those
22 are still the way the law work. It's just that ELCRA
23 doesn't prohibit discrimination based on somebody else's
24 characteristics, right? Because that's -- that's what
25 really happening here, right? There's a -- there's a claim

1 that somebody else --

2 THE COURT: Right but it's like in --

3 MR. VAN STEMPVOORT: -- maybe suffered
4 discrimination.

5 THE COURT: -- *Rouch World*. *Rouch World* wasn't
6 -- *Rouch World* involved the plaintiff that was associating
7 with same sex couples or weddings, right?

8 MR. VAN STEMPVOORT: Well, *Rouch* was a little bit
9 funny because it was actually a -- like a declaratory
10 judgment kind of posture. So -- so the -- but -- but in
11 *Rouch World* the -- the basically what -- what the -- the
12 assertion was ,is that this particular company wouldn't
13 serve particular same sex couples because of their sex,
14 right?

15 Because if -- if the -- if the couples who they
16 served would have -- if they've been -- if it had been a
17 man marrying a woman, then it would be fine. But --

18 THE COURT: Right.

19 MR. VAN STEMPVOORT: -- because it was a woman
20 marrying woman, then it wasn't fine. So that was -- that's
21 exactly the same scenario that you have in *Graham*, or
22 *Bryant*, or *Bostock*. It's not a scenario that we have here.

23 THE COURT: Okay.

24 MR. VAN STEMPVOORT: So -- and the other -- you
25 know, I do think, you know, if you go back to the plain

1 language of the statute, right, if you compare that with a
2 Persons with Disability Civil Rights Act, clearly the words
3 that are in the preg -- or Persons with Disability Civil
4 Rights Act, that prohibits discrimination on the basis
5 association are not in ELCRA. And that -- that has to mean
6 something. So that's -- that's count one.

7 And then we got the relation claim in count two.
8 Now in order to state a retaliation claim, you need to
9 clearly convey to an objective employer that plaintiff's
10 raising a specter of a claim of unlawful discrimination
11 pursuant to ELCRA. And so in other words, that they
12 engaged in protective activity under the opposition clause.

13 Now I do, you know, there are two potential bases
14 here that I think Mr. Kuilema relies on. First of all,
15 this dispute over whether to show this particular film.
16 And -- and the problem here for the allegations is that
17 there has to be an objectively reasonable belief that there
18 was a violation of ELCRA. You know, plaintiff, you know,
19 has to -- he can't just say anything you want, right? It
20 has to actually be an objectively reasonable belief that --
21 that there was discrimination. And there's -- there's no
22 objectively reasonable belief that showing a film to
23 college students constitutes unlawful discrimination.

24 You know, the statute that they rely on is -- is
25 the educational part of ELCRA. It's MCL 37.2402. That

1 prohibits educational or discrimination in the ed --
2 educational context against quote, "an individual" because
3 of these various characteristics. And the allegations here
4 are that, you know, this film kind of would be -- would be
5 generally harmful to a group of people. That is not --
6 that's not a -- that's not an allegation of unlawful
7 discrimination under -- under that section of ELCRA.

8 And so -- and -- and we cited the *Montero* case
9 from the 9th Circuit about the *Huckleberry Finn* book.
10 There's no -- and that -- that's an educational
11 discrimination case too that's under Title VI, the Federal
12 Statute. And the court there said, look, you know we're
13 not going to get into curriculum debates. If you could --
14 if you could mount a retaliation claim or -- or a
15 discrimination claim based on your disagreement with
16 curriculum, then the courts would be wading to all sorts of
17 things. So -- so that -- that particular basis, I just
18 think doesn't support a retaliation claim objectively.

19 The -- the next -- the other basis for a
20 potential retaliation claim, excuse me, is the -- the
21 alleged opposition to the questioning of this individual
22 who was involved in a wedding.

23 So -- and I would say, first of all, I think
24 there's like a little bit of a timing issue just based on
25 the allegations of the complaint. There's some question,

1 looks like -- looks like he alleged that this happened in
2 -- or he asserted his opposition in his appeal of his
3 tenure which was back in 2018. So that's time barred. I
4 -- I think maybe what he means to say is that he -- he
5 raised this in his appeal of the non-renewal decision. But
6 if that's the allegation, then it's too late because the
7 adverse employment decision had already been made. And so
8 under the *Montel* case, there's no causality as a matter of
9 law. So there's a timing issue there.

10 But I -- I think one of the larger potential
11 problems here is that the assertion is that Mr. Kuilema
12 opposed Calvin's attempt to investigate whether the
13 allegations about his conduct were true.

14 So, this is paragraph 131 of the case -- of the
15 complaint. Basically, the allegation is, you know, Calvin
16 learned that this wedding potentially took place. There's
17 a photograph I think that was sent to the Provost. And
18 Calvin then said, well let's see if this actually happened.
19 And so they decided to ask questions of Mr. Kuilema and
20 they decided to ask questions of -- of -- one of the
21 individuals who's involved in the wedding.

22 Now he says, well I opposed Calvin's attempt to
23 investigate whether these allegations were true. And he's
24 trying (inaudible) to retaliation claim based on that
25 oppositional conduct. But that -- I -- I haven't seen any

1 case in which that gives re -- gives grounds for a
2 retaliation claim.

3 And I think there's a good reason for that
4 because if -- if an employee could say, look I opposed your
5 attempts to figure out whether I violated workplace policy
6 or something. And in my opposition itself, I'm trying to
7 prevent you from investigating my conduct. My position
8 itself is protected activity, well then employers would
9 never be able to investigate potential wrongdoing. Because
10 if they did, and the employee opposed it, then that would
11 give rise to retaliation liability.

12 And like I said, I haven't seen any case where
13 that has been accepted by a court. So, I think that's a
14 problem right there.

15 And finally, I would also notice that it's pretty
16 clear under the *Radtke* case, right, the allegation here is
17 that the -- that the questioning amounted to a hostile work
18 environment. And it's very clear that one single episode,
19 unless it's incredibly extreme cannot give rise to a
20 hostile work environment.

21 Again, retaliation claim needs to be objectively
22 reasonable or before -- before -- before it can -- before
23 it can support a retaliation claim. And so we assume that
24 that doesn't arise to the level.

25 So that's -- that's kind of the front half. The

1 second half is the -- the -- the second -- the First
2 Amendment issues.

3 And it's very clear from the complaint that this
4 involves a religious dispute. This all stems from Calvin
5 College, it's -- it's -- it's -- it's position within the
6 Christian Reformed Church. There's a significant, as
7 alleged in the complaint, there's a significant dispute
8 over the boundaries of the particular religious community
9 and their decisions that were made in this case that relate
10 precisely to that religious dispute. And the First
11 Amendment bars courts from interrogating that.

12 So -- so there are two sort of subsets of this
13 argument. There's the church economy doctrines called the
14 ecclesiastical abstention or religious autonomy doctrine.
15 And then there's the sub-set of that called a ministerial
16 exception.

17 And so -- I'm going to start with the -- the
18 church, the religious autonomy doctrine. That essentially
19 boiled down, right, that that doctrine provides that a
20 court can't resolve a dispute if doing so would require
21 resolving a religious issue.

22 So when that -- when that happens in employment
23 decisions, right, religious institutions have the ability
24 to demarcate the boundaries of their particular
25 institution, of their particular faith community.

1 And so if they determine, for religious reasons,
2 that somebody steps outside of the boundaries of that faith
3 community, then the religious institution has the First
4 Amendment right to part ways with that individual.

5 So, now Mr. Kuilema's brief says, well you know,
6 this is really limited doctrine, it really only applies to,
7 you know, particular rituals and stuff like that. I will
8 say, you know, weddings are -- are religious rituals. But
9 the -- but -- but the larger point is that no, it actually
10 does apply to termination decisions in employment context,
11 right, for exactly this reason, right. This is the
12 question of how can the religious institution demarcate its
13 own boundaries.

14 So the *Bryce* case from the 10th Circuit is
15 helpful to kind of -- kind of walk through some of this, we
16 cited this in our brief. There the plaintiff alleged that
17 she was harassed and terminated because she entered into a
18 same-sex marriage. But that all happened in the context of
19 a significant religious doctrinal dispute in the
20 Episcopalian Church. And the court said, look this is --
21 this is getting into religious matters, you know, that's --
22 that doesn't, you know, we're not going to get in
23 to that.

24 The *Curry Kramer* case, that's from the 1st
25 Circuit, there the plaintiff alleged sex discrimination

1 after she was fired for her pro-choice views and -- which
2 is contrary to church doctrine. And she said, look, you
3 know, maybe I violated church doctrine on this but there
4 were comparators, male comparators, you know my colleagues
5 who are men, they violated church doctrine, other -- other
6 forms of church doctrine and -- and yet they weren't fired.
7 And so that's a sex discrimination claim.

8 And the court said, no we -- we can't get into
9 that issue. We can't get into the issue of whether your
10 violation of the church doctrine was less serious or more
11 serious than somebody else's violation of church doctrine.
12 That's -- that's something for the religious institution.
13 They got a First Amendment right to decide that. So the
14 court dismissed or affirmed the dismissal of the claim
15 there.

16 Now, how does that relate to this particular
17 complaint, and I think it's pretty clear from the complaint
18 that this is alleged, all this is alleged to have happened
19 within this religious dispute. So paragraph 49 of the
20 complaint says there's a denial of tenure back in 2018 was
21 quote, "based on the CRC's interpretation of scripture."

22 And so that's an allegation of exactly what we
23 just describe here, right? It was -- if that -- if that
24 was based on the interpretation of scripture, then the
25 First Amendment takes care of this claim, right? It -- it

1 bars the claim.

2 Paragraph 100 says Calvin was quote, "mistaken in
3 believing that officiating the wedding violated CRC
4 doctrine." Right? So that's an invitation for this Court
5 to say well, Calvin, as a religious institution was
6 mistaken about its own religious beliefs and about who --
7 about -- about where the CRC's emphasis, where its -- where
8 its actual beliefs were.

9 And for the court to answer that question, the
10 Court would have say, well here's what I believe what the
11 -- here's what I think the CRC really believes and it's
12 different than what Calvin believes. And the court, it's
13 very clear, the court -- that's not the province for the
14 court. It's -- that's a First Amendment issue that -- that
15 can only be resolved by the -- by the religious
16 institution.

17 In paragraph 113 is similar. It says the
18 officiating this marriage was not actually contrary to
19 Synod's decision. And again, that's an invitation for a
20 court to say, well you know, Synod and Calvin may have
21 fought that their religious belief was something, but it
22 actually wasn't. So again, adjudication of this claim --
23 of this claim is going to necessarily involve, you know,
24 weighing into these religious questions.

25 Paragraph 105 and 107, same thing. Talks about

1 Synods' decision. Says that this decision actually binds
2 professors and must be upheld by professors. Paragraph 104
3 and then paragraphs 110 to 111, that's an allegation that
4 says, look some professors who disagreed with the CRC's
5 official stance on these issues were allowed to stay. Some
6 pastors were allowed to stay but he said, I wasn't. Well
7 that's exactly the situation that we just talked about in
8 *Curry Kramer*, right? Where there's, you know, multiple
9 people who allegedly, you know, violated church doctrine
10 and he's saying well some of them got to stay and I didn't
11 and that's unfair.

12 And *Curry Kramer* is very clear, the courts can't
13 adjudicate that dispute, right? We can't say well, your
14 position is the same as theirs because we have to defer to
15 the church's judgment on that.

16 So they cite this unpublished case in -- in *Bogle*
17 which was this -- which is a very different case, right?
18 That was a case where there was a church that had articles
19 of incorporation. And they said X and they adopted
20 articles -- bylaws which said Y. So they were -- they were
21 simply incompatible on the face of the documents. And the
22 court said, well we can reach that, right? Because it was
23 just -- those are just corporate documents. Those are
24 facially incompatible. We don't have to get into religious
25 doctrine to resolve that dispute and so it did.

1 This case, of course, is much different than that
2 because adjudicating these claims will require the Court to
3 wade into this significant religious dispute.

4 And I would also note that in paragraph 29 and in
5 paragraph 54 of the complaint, Mr. Kuilema, he does allege
6 that he taught about the CRC's position on certain issues
7 and then he also alleges that he told students that he
8 opposed the CRC's position on certain issues.

9 Now he certainly can do that, right? But Calvin
10 has a First Amendment right to say, look if there's
11 somebody who is opposing -- if somebody in our community
12 who's opposing our -- where we believe that the -- the
13 boundaries of this faith community are, Calvin is not
14 required to retain that professor. It might be a bad idea
15 for them to let him go, maybe a good idea. But they
16 certainly have the First Amendment right to do that, no
17 matter what we think about the -- the merits of that
18 particular decision.

19 Now, so that's the religious autonomy doctrine
20 kind of writ large. The ministerial exception is a sub-set
21 of the religious autonomy doctrine. The *Our Lady of*
22 *Guadalupe* case is really helpful on this because it
23 explains the genesis of the ministerial exception and where
24 it comes from.

25 So the -- the basic rule -- the basic gist of it

1 though, is that there are special rules for the message
2 bearers of the faith within a particular committee.

3 THE COURT: Right. But he was a professor of
4 social work. So we can skip that argument.

5 MR. VAN STEMPVOORT: Well --

6 THE COURT: Because I don't think it applies to
7 plaintiff.

8 MR. VAN STEMPVOORT: Well, that -- that's --
9 that's -- that's fair. I mean, I -- you know, obviously
10 the *Gordon College* case I think is -- is -- is -- is -- is
11 -- is on there. I would just -- I would just mention that,
12 you know, certainly, you know, we think that this
13 (inaudible) is met on the -- on the face of the complaint.

14 However, you know, we admit yes this is typically
15 a fact -- a fact issue. And so to the extent that we need
16 to go forward and get additional facts on this, we're happy
17 to do that because we do think it's very clear that once
18 you look at the requirements that Calvin had for -- for its
19 professors, and that's really the test, right? The test is
20 really what does this institution entrust and expect of its
21 professors regardless of kind of what they actually did.
22 What do they expect as professor to do --

23 THE COURT: Right.

24 MR. VAN STEMPVOORT: -- and that's -- that's what
25 drives the analysis.

1 And so -- but you -- I mean, your Honor, I'm not
2 going to -- I'm not going to waste time on that argument.
3 We do think very frankly that this is a case where the
4 ministerial exception applies hands down. But to the
5 extent that we need to go get more facts on that, we -- we
6 can -- we can do that.

7 Unless you want to hear more argument on that,
8 I'm -- I'm happy to -- happy --

9 THE COURT: Okay.

10 MR. VAN STEMPVOORT: -- to sit down.

11 THE COURT: Okay. No, I'm good. Thank you.

12 MR. VAN STEMPVOORT: All right. Thank you so
13 much.

14 THE COURT: And Ms. Huang, if you could just
15 respond to --

16 MS. HUANG: Sure.

17 THE COURT: -- briefly because you guys filed a
18 very long brief and a reply to the brief and --

19 MS. HUANG: Yes, we did, your Honor. On
20 associational discrimination claim, it's -- you're correct
21 in that it is based on his association --

22 THE COURT: Right.

23 MS. HUANG: -- with the couple that was in this
24 civil wedding ceremony. Not a religious ceremony, not
25 based on his own sex. Not based on the plaintiff's own

1 sex.

2 THE COURT: Right.

3 MS. HUANG: And if we want to look at the text of
4 ELCRA, because we're -- both sides are making textual
5 arguments we can do that. And the text of ELCRA says that
6 it prohibits discrimination of an individual because of
7 sex. Not because of such individuals' sex, not because of
8 that particular individuals' sex, but just because of sex,
9 that enumerated protected category broadly and with no
10 expressed limitation on whose sex that is.

11 Defendant in their reply brief cites to a case
12 from the 11th Circuit, *Matamoros* which interpreted the
13 Florida Civil Rights Act to not cover associational
14 discrimination, but importantly that act forbids employers
15 from discriminating against an individual explicitly
16 because of in quotes, "such individuals protected class" it
17 includes that language which is not included here in the
18 ELCRA.

19 The ELCRA does not specifically indicate that it
20 must be the individual bringing the claim who belongs to
21 the protected class in order to give rise to a claim.

22 More importantly, in that *Matamoros* case that
23 they cited in the reply, the -- the court after analyzing
24 the statutory text, specifically pointed out that of course
25 state courts are the ultimate expositors of state law. And

1 that if the Florida courts in that case had interpreted
2 their act to cover associational discrimination, we would
3 be bound by that interpretation. But the plaintiff in the
4 -- in the Florida case, they did not cite to any such state
5 court decision.

6 So the 11th Circuit acknowledged that even aside
7 from the statutory text, where a state court has already
8 interpreted the act to cover associational discrimination,
9 that is indeed binding.

10 Now in our case, we have a state court decision,
11 *Graham* which interprets the ELCRA to cover associational
12 discrimination. And defendant is correct in their -- in
13 their reply brief that it is a Michigan Court of Appeals
14 case. It's not a Supreme Court case, that was our error.

15 But what's important is that the Court of Appeals
16 held in *Graham* that discrimination on the basis of
17 association is a form of discrimination and that is
18 binding. *Rouch World* does not change that. *Rouch World*
19 said nothing about associational discrimination nor did
20 *Bostock*.

21 So what's important is in *Graham*, there were four
22 plaintiffs, two were white, two were black. And the
23 supervisor that they were claiming was discriminating was
24 also black. In defendant's reply, they claim that unlike
25 *Kuilema*, the plaintiffs in *Graham* did not claim to have

1 suffered discrimination on the basis of their advocacy for
2 other. Instead the plaintiffs alleged that their own race
3 was a but for cause of discrimination.

4 That is wrong because in *Graham* actually the two
5 black plaintiffs, Maxum Graham and Tony Branden, they made
6 their claims on the basis of their association with
7 employees of the Department of Corrections. And the Court
8 literally wrote in the opinion that the *Graham* defendant
9 regarded the black plaintiffs unfavorably because of their
10 working relationships with white correctional employees.

11 So Professor Kuilema's allegations center around
12 not advocacy for count one, it's more association. It's
13 his association as an officiant of this civil wedding
14 ceremony of his friends, one of which was also a Calvin
15 employee. And the associational claim has to deal with the
16 animus that was directed toward that other employee because
17 of that other employee's sex not conforming to the notions
18 that Calvin, I guess, believed that they shouldn't be
19 marrying a person of what they believe was the same sex at
20 that time.

21 Furthermore, in *Rouch World*, the court also
22 recognized that in terms of statutory interpretation, while
23 you know, the principle evil motivating a legislature to
24 make a prohibitive statute, you know, that -- that needs to
25 be read broadly. It's not, you know, statutory pro --

1 prohibitions often go beyond the principle evil to cover
2 reasonable comparable evils. And that was held by the
3 Supreme Court, U.S. Supreme Court in *Ocale versus Sundown*
4 *Offshore Services* as well. And that's -- that's the
5 decision where they acknowledged that male on male same sex
6 sexual harassment was protected under Title VI, even though
7 the same sex harassment was not the principle evil that
8 Congress was originally concerned with when it enacted
9 Title VII.

10 So according to the plain language of ELCRA which
11 doesn't say it needs to be such individuals sex, under
12 *Graham* which is binding authority on this Court and looking
13 at the fact that *Rouch World* and *Bostock* did not address
14 associational claims, we would ask that he Court deny
15 defendant's motion on count one, the associational
16 discrimination claim.

17 On the retaliation claim, I think it's important
18 for the Court to know that we aren't bringing a claim
19 asking for the Court's decision on whether or not the film
20 should have been showed or shouldn't have been shown or,
21 you know, it's -- it's -- we're not asking for the Court's
22 opinion on whether showing the film itself would have given
23 a rise to a claim.

24 The crux of our retaliation claim is that after
25 he complained that the film -- that showing the film would

1 cause a hostile environment for students of color, Calvin
2 then retaliated against him by going against its own
3 policies and placing the two individuals involved in this
4 whole dustup about discrimination as decision makers about
5 his termination. So these two individuals were in the
6 panel to effectively terminate him.

7 And also importantly which is not noted in our
8 response brief, but I'd like to bring to the Court's
9 attention to Exhibit 5 of our complaint, page three it
10 explains that Professor Kuilema was not only serving as
11 social work professor, he was serving Calvin as a court
12 diversity fellow. And so he was helping Calvin to develop
13 diversity curriculum. And it was in that joint role that
14 he raised the opposition and his concerns for students of
15 color in terms of, you know, how they would feel in an
16 environment where they were being shown this film that he,
17 in good faith, in reasonable belief, believed that it
18 perpetuated racist -- racist stereotypes.

19 And his -- his belief, whether it was reasonable
20 or not, whether, you know, a fact finder, a reasonable
21 juror could find that it's reasonable, I believe that that
22 raises a dispute of fact that isn't appropriate to be
23 adjudicated upon in a (C)(8) motion.

24 So the other part is the retaliation claim is
25 based on his opposition to the questioning of his friend in

1 the wedding that he officiated on his own time and off
2 campus. So the friend was brought in for questioning about
3 their marriage. Inherently, they were brought in for
4 question about their protected class, about whether their
5 sex -- it -- it was about their sex and whether they were
6 acting in accordance with what Calvin believes their sex
7 should act like with other sexes, okay?

8 So he pleads in his complaint that he engaged in
9 this protected activity of opposing this interrogation of
10 this other employee and that they effectively terminated
11 him because of his opposition and that there was a causal
12 connection between the protected activity and that
13 termination.

14 Now, defendants arguing that there's timing
15 issues with the claim. That's not the case because he
16 first opposed the questioning of his friend about the
17 marriage before the non-renewal decision was made in April
18 2022. They appear to rely on paragraph 135 of the
19 complaint in arguing that he opposed the questioning either
20 to early or to late. But the -- the paragraph that they're
21 pointing to isn't -- it's not about the questioning of his
22 friend at all. It's -- it doesn't say anything about
23 questioning his friend. It's about his general pattern of
24 opposition about un -- unlawful practices in the
25 organization.

1 And the complaint states that after the
2 questioning of the individual, he advised Calvin that it
3 was discriminatory, and it created a hostile work
4 environment without providing a specific date. For the
5 Court's knowledge, the -- the first time that he opposed
6 this questioning was in January of 2022 which was months
7 before they made any kind of re-appointment decision.

8 But the important thing is Calvin can't prevail
9 on its (C) (7) motion based on an un -- unidentified date in
10 the complaint. And the discovery in this case will support
11 that the questioning of the friend, the first time he
12 opposed the questioning of the friend, happened well before
13 any decision was made on his re-appointment.

14 And so their motion under (C) (7) as well as their
15 motion under (C) (8) should be -- should be denied.

16 Moving on to the ecclesiastical abstention
17 doctrine, first of all, the wedding was not a religious
18 ritual. The wedding was a civil wedding and that is made
19 clear in the exhibits to the complaint, that it was a civil
20 wedding. But regardless of whether it was a civil wedding
21 or religious wedding, Calvin had a major issue with him
22 officiating this wedding.

23 So this abstention doctrine, it does not provide
24 religious institutions with broad immunity or a broad
25 reason for this Court to not have jurisdiction over

1 disputes involving them, which is essentially what -- what
2 the argument is. They brought it under (C)(8) but it
3 should have been brought under (C)(4) because it's
4 inherently a question of subject matter jurisdiction.

5 But importantly whether an employee has
6 terminated someone because they officiated a wedding
7 between LGBTQ people does not require any way of religious
8 bases. The ELCRA doesn't provide a broad exception for
9 discrimination just because of religious beliefs.

10 And while the ministerial exception does provide
11 an exemption from antidiscrimination claims, you know, that
12 exemption doesn't apply here, and we can talk about that
13 later one. But, you know, whether or not this applicable
14 religion condones same-sex marriage is not a question that
15 we're asking the Court to determine here.

16 So further more, even if the associational
17 discrimination claim required determination of
18 ecclesiastical questions which we -- which we take the
19 position that they do not, with respect to the retaliation
20 claims, they certainly don't require this Court to
21 determine any ecclesiastical questions.

22 Now whether the -- whether they retaliated
23 against him for his opposition to showing this film, by
24 having these two people who he opposed showing the film
25 decide that he should be terminated, that doesn't require

1 any determination of religious questions. Whether they
2 retaliated against him because he opposed the questioning
3 of an employee about their protected class, that does not
4 require any determination of religious questions.

5 In their reply, they claim the Court would need
6 to conclude whether Calvin may or may not part ways with a
7 professor who has different religious beliefs than Calvin.
8 But importantly, this is not a religious discrimination
9 case. We have not brought any kind of claim based on
10 religion here.

11 If Calvin wants to dispute why they terminated
12 him and they really want to say that it was a religious
13 dispute and not because he officiated same-sex wedding and
14 all that, that -- that's a factual dispute. That's not
15 appropriately before the Court on a (C) (8) motion. It's
16 only appropriate that we proceed in discovery then about
17 this disputed issue of why they terminated him. It's a
18 factual issue.

19 So the reasons that I pled in the complaint
20 though, must be taken as true for purposes of their (C) (8)
21 motion which is because he officiated the wedding and in --
22 in retaliation for these two -- the two oppositions that
23 we've already discussed.

24 Now, none of the legal elements for either
25 discrimination or retaliation in this case require the

1 Court's determination of ecclesiastical matters. They
2 point to, I think six or seven paragraphs of the complaint
3 that they claim present that (inaudible) questions out of
4 148 paragraphs in the complaint.

5 But the bottom line is whether or not, you know,
6 any of these doctrinal -- no matter how you fall in terms
7 of how you decide a religious doctrinal question, those are
8 not required in this case. It's not required such that the
9 abstention doctrine should so be broadly applied to the
10 entire case. Now some of the facts mention religion,
11 that's true. They add context to the requisite facts to
12 support the legal elements. But that doesn't mean that the
13 termination of those six paragraphs out of 149 paragraphs
14 is required or necessary for adjudication of plaintiff's
15 claims.

16 So we would ask that the Court deny their motion
17 on the ecclesiastical abstention doctrine. It's -- they're
18 asking for too broad of an application there and it would
19 have far reaching affects that -- that wouldn't be good.

20 On the ministerial exception argument --

21 THE COURT: He wasn't a minister, so.

22 MS. HUANG: Okay. I -- I won't waste the Court's
23 time on that. Thank you, your Honor.

24 THE COURT: Okay. So this is a (C)(8) motion.
25 Summary disposition under (C)(8) is proper if and only if

1 the opposing party has failed to state a claim on which
2 relief can be granted. And considering the motion, the
3 Court is only considering the pleading and all of the
4 pleaded factual allegations are accepted as true. And then
5 also in this case would be construed in a light most
6 favorable to the plaintiff.

7 These motions based on (C) (8) should only be
8 granted when a claim is so clearly unenforceable as a
9 matter of law that no factual development could possibly
10 justify a right of recovery which obviously is a very high
11 burden or very high, I guess, wall to get over on the part
12 of the defense in this case.

13 In this case, the defendant argues that the ELCRA
14 or Elliot Larson Civil Rights Act, the claims based on
15 those fail as a matter of law and that the claims are also
16 -- claims of plaintiff are also barred because of the First
17 Amendment.

18 As far as the ELCRA claims, I don't find the
19 timing is an issue because essentially the statute of
20 limitations for these claims is three years and the
21 plaintiff is claiming that after he officiated this wedding
22 which occurred not -- not even two years ago, that
23 following that, he was told that they decided not to
24 recommend him for re-appointment, which essentially
25 amounted to a termination of his employment in this case.

1 Since that all of that occurred within the three years, his
2 claims are not time barred.

3 As far as the ELCRA claim itself, we've -- I've
4 heard a lot of argument from both sides. However, I -- I
5 did not hear a -- a reason why the claims should be thrown
6 out based on associational discrimination. Clearly the
7 plaintiff was not and does not claim to have been
8 discriminated because he's a man. And I do agree with the
9 defendant that were he a woman, he would have potentially
10 probably been treated the same way.

11 The issue is whether or not there was
12 discrimination because of sex. The plaintiff, of course,
13 is arguing that the reason that his employment was affected
14 was because he was being discriminating against because of
15 sex, albeit not his own sex which is associational
16 discrimination which is a cognizable claim under ELCRA.

17 So I -- I don't believe summary disposition based
18 on that claim is appropriate. I believe that he -- it --
19 taking the pleadings as they are, all the factual
20 allegations is true, that there is a claim stated as far as
21 an associational discrimination because he's claiming that
22 he was discriminated against because of his association
23 with the -- with the members that he officiated the wedding
24 for. So I don't -- I don't believe that the (C) (8) motion
25 can -- can be granted for that.

1 That similarly with retaliation, again the claim
2 is that he was retaliated against because of his
3 association with this particular class of people. Which
4 again, if they had been a man and a woman versus, I think
5 it was two men, that were -- that were wed, because of sex,
6 he's claiming that he was retaliated against. And because
7 of his viewpoints and statements that potentially I believe
8 that also have to do with the film that he was talking
9 about. In any event the retaliation claim, I -- I don't
10 believe that would be appropriate to dismiss under (C) (8)
11 either.

12 As far as the First Amendment claims are
13 concerned, the ministerial exception applies or certain
14 factors that are considered. And those are outlined in, I
15 believe it's -- can't -- I don't know if that's *Weis* --
16 *Weishuhn versus the Catholic Diocese of Lansing*.

17 In any event, the prongs are listed as far as
18 what factors the Court would consider. One of those
19 factors is whether the position was inherently, primarily,
20 or exclusively religious and whether the employee was
21 intimately involved in the propagation of the defendant's
22 doctrine and observants and conduct of their liturgy which
23 he, as a -- as a prof -- professor of social work, it was
24 not his position or -- I'm sorry -- his position was not
25 inherently, primarily, or exclusively religious he -- in --

1 in teaching social work.

2 So because it was not his job to spread the --
3 the ideologies of the defendant, I don't believe that he --
4 he doesn't fall under the min -- ministerial exception.

5 As far as the ecclesiastical abstention doctrine,
6 I agree with plaintiff in that regard as well because at
7 this juncture, I'm not seeing where the plaintiff is asking
8 the Court to decide whether or not defendants' religious
9 viewpoints are right or wrong. I'm not deciding about
10 that.

11 The -- the only determination is whether or not
12 the plaintiff was discriminated against. Was he
13 discriminated -- was he terminated because of his
14 affiliation or his association with the people with which
15 he was associated with, is that why he was terminated? Or
16 is it because of a general disagreement with the -- the
17 University's position or religious positions, or religious
18 views.

19 That maybe kind of, you know, a gray area or a
20 little tight rope to walk, but I don't find that a (C) (8)
21 motion would be appropriate to grant at this time because I
22 don't find that the -- the plaintiff has failed to state a
23 claim on which a -- he could potentially be successful on
24 -- in a trial.

25 So I am denying the (C) (8) motion for summary

1 disposition. And I will ask, because I found a --
2 Ms. Huang if you could submit an order under the seven-day
3 rule. It could simply say that the motion is denied for
4 the reasons stated on the record. It doesn't have to be
5 extensive. So.

6 MS. HUANG: Yes, your Honor. I'll do that.

7 THE COURT: All right.

8 MR. VAN STEMPVOORT: Your Honor, could I have one
9 quick clarification?

10 THE COURT: Sure.

11 MR. VAN STEMPVOORT: So on the ministerial
12 exception, obviously I understand your ruling, I do -- I --
13 would -- I would request -- I mean, this is a (C)(8)
14 motion. I assume that your decision on this (inaudible)
15 minister relies to the fact that it's a (C)(8) motion. If
16 there's additional discovery later on, there -- that may be
17 an entirely --

18 THE COURT: Right.

19 MR. VAN STEMPVOORT: -- different --

20 THE COURT: This is only on the pleadings.

21 MR. VAN STEMPVOORT: Okay. Thank you, your
22 Honor. I just wanted to clarify.

23 THE COURT: The (C)(8) motion, if there's a
24 (C)(10) motion in the works or in the future, if -- as long
25 as it complies with the scheduling order, I can address

1 that at that time.

2 MR. VAN STEMPVOORT: Okay.

3 THE COURT: But under (C) (8) I'm denying the
4 motion.

5 MR. VAN STEMPVOORT: Thank you, your Honor.
6 Thank you. I appreciate that confirmation.

7 THE COURT: Thank you.

8 MS. HUANG: Thank you, your Honor.

9 THE COURT: Thank you. Enjoy your weekend.

10

11 (At 9:49 a.m. court adjourned as to this matter)

12

13

14

15

STATE OF MICHIGAN)

COUNTY OF KENT)

I certify that this transcript, consisting of 45 pages, is a complete, true and correct transcript to the best of my ability of the hearing on the record held in this case on July 14 2023.

July 21, 2023

Kristen J. Brink, CER 7740

Kent County Courthouse

180 Ottawa Avenue N.W. Suite 6500

Grand Rapids, Michigan 49503

616-632-5203

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF KENT

JOSEPH KULEMA,

Plaintiff,

CASE NO. 23-03561-CZ

v

CALVIN UNIVERSITY,

HON. CHRISTINA ELMORE

Defendant.

Charissa C. Huang (P75501)
Kevin J. Cowan (P85674)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, N.W.
Grand Rapids, MI 49503
(616) 774-8000
chuang@shrr.com
kcowan@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant
45 Ottawa Avenue, SW, Ste. 1100
Grand Rapids, MI 49503
(616) 831-1765
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

ORDER

At a session of the 17th Circuit Court in the City of
Grand Rapids, County of Kent, State of Michigan,
on July 14, 2023.

PRESENT: HON. CHRISTINA ELMORE
Circuit Court Judge

This matter having been brought for hearing by Defendant in connection with its Motion for Summary Disposition pursuant to MCR 2.116(C)(8), the Court having read the relevant written submissions and attachments, oral argument having been conducted on July 14, 2023, and the Court being otherwise fully advised in the premises:

IT IS ORDERED that Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is **DENIED** for the reasons stated on the record.

This is not a final order and does not close the case.

IT IS ORDERED.

Date: JUL 24 2023, 2023

CHRISTINA ELMORE

Judge Christina Elmore
Circuit Court Judge

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH KUILEMA,

Plaintiff-Appellee,

v

CALVIN UNIVERSITY,

Defendant-Appellant.

UNPUBLISHED

July 11, 2025

2:27 PM

No. 367310

Kent Circuit Court

LC No. 23-003561-CZ

Before: M. J. KELLY, P.J., and BORRELLO and RICK, JJ.

PER CURIAM.

Plaintiff, Joseph Kuilema, filed this suit against defendant, Calvin University, alleging that he was wrongfully terminated from his employment at Calvin University in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.* Calvin University moved for summary disposition under MCR 2.116(C)(8), but its motion was denied by the trial court. Calvin University appeals that order by leave granted.¹ For the reasons stated in this opinion, we affirm the court’s denial of summary disposition of Kuilema’s retaliation claim, but we reverse the court’s order denying summary disposition on Kuilema’s associational discrimination claim and remand for entry of an award summarily dismissing that claim.

I. BASIC FACTS

According to the complaint, Kuilema began working for Calvin University as a social work professor in 2008, and his term of employment was extended multiple times. He was expected to teach his courses from the Christian Reformed Church’s (CRC) perspective, but he did not teach religion and was not otherwise expected to incorporate religious teachings into his courses. Kuilema asserted that he “did not teach the CRC’s perspective in a way which furthered its influence on students. Rather he was bluntly honest and vocal with his students, fellow faculty, and fellow Calvin University community members whenever he disagreed with the CRC’s

¹ *Kuilema v Calvin Univ*, unpublished order of the Court of Appeals, entered March 21, 2024 (Docket No. 367310).

position, particularly in regard to its positions regarding LGBTQ+ persons.” Throughout his career at Calvin University, Kuilema expressed several times to members of the administration his belief that the university was “wronging” LGBTQ+ persons.

In 2017, Kuilema began preparing for tenure consideration; however, the Calvin University Board of Trustees denied him tenure and instead renewed his contract for an additional two years. In 2019, Kuilema’s contract was renewed for two more years, but he was again not considered for tenure. The same occurred in 2021. Kuilema’s beliefs regarding LGBTQ+ persons, which were contrary to the CRC’s positions, was a factor in the decision to not move forward with tenure consideration.

In October 2021, Kuilema officiated a same-sex wedding for a former student and a former Calvin University employee. Before doing so, he consulted with his pastor, department chairperson, and colleagues to ensure that officiating such a wedding was not counter to CRC teachings or Calvin University’s values. Kuilema asserted that his officiating the marriage ceremony was not contrary to the CRC’s position because the CRC had only declared opposition to same-sex sexual relations, not marriage. He claimed that Calvin University also only opposed same-sex sexual relations, but that it had no official policy position regarding same-sex marriage.

In December 2021, Calvin University became aware that Kuilema may have officiated a same-sex marriage. Following an investigation that confirmed that fact, Calvin University declined to reappoint Kuilema to his teaching position and terminated his employment. According to Kuilema’s complaint, during the deliberations of the Professional Status Committee, members addressed (1) Kuilema’s officiating of a same-sex marriage, (2) his opposition to showing what Kuilema believed to be a “racist” film, and (3) his opposition to Calvin University questioning the Calvin University employee whose same-sex marriage Kuilema had officiated during its investigation of him.

In April 2023, Kuilema filed a lawsuit against Calvin University, asserting claims of associational discrimination in violation of ELCRA and retaliation in violation of ELCRA. In lieu of filing an answer, Calvin University moved for summary disposition under MCR 2.116(C)(8). Following a hearing on the motion, the trial court denied summary disposition. This appeal by leave granted follows.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Calvin University argues that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(8). We review de novo a trial court’s decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Motions brought under MCR 2.116(C)(8) test the complaint’s legal sufficiency. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). “When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone.” *Id.* Summary disposition may be granted only “when a claim is so clearly unenforceable that no factual development could possibly justify recovery.” *Id.* at 159-160.

B. ANALYSIS

1. ASSOCIATIONAL DISCRIMINATION

Calvin University argues that the trial court erred by denying summary disposition of Kuilema's claim that he was terminated in violation of ELCRA based upon his decision to officiate a same-sex marriage. We agree.

As relevant to this case, ELCRA prohibits employers from discharging or otherwise discriminating "against an individual with respect to employment . . . because of . . . sex" MCL 37.2202(1)(a). There is no language prohibiting discrimination against an individual because of *association* with others persons based upon the sex of the other persons. If the Legislature had wanted to include such language, it would have added it to the statute as it has done in other statutes prohibiting discrimination. See MCL 37.1502(1) (prohibiting housing discrimination "on the basis of a disability of a buyer or renter, . . . or of any person associated with that buyer or renter). We cannot "assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993). Rather, we must "assume that an omission was intentional." *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 135; 662 NW2d 758 (2003).

Notwithstanding that there is no express language providing a claim for associational discrimination in MCL 37.2202, Kuilema contends that caselaw supports such a claim. Although there are no cases in Michigan addressing associational discrimination based upon the sex of persons that the plaintiff has associated with, the parties have identified two cases addressing racial discrimination on the basis of the plaintiff's association with a member of a different race. Both are distinguishable from the present matter.

First, in *Bryant v Automobile Data Processing, Inc.*, 151 Mich App 424, 429-431; 390 NW2d 732 (1986), the plaintiff raised a claim of associational discrimination, arguing that she was discriminated against because she was a white female married to a black male. *Id.* at 428. The defendant employer contended that because her claim was grounded upon the racial identity of her spouse, she had not brought a cognizable claim under § 202 of ELCRA. *Id.* This Court disagreed, noting that the purpose of ELCRA "is to prevent discrimination against persons based on *their* membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Id.* at 430 (emphasis added). The court reasoned that:

Discrimination against interracial couples is certainly based on racial stereotypes and is derived from notions that the blood of the races should not mix. We believe that both the broad language of the civil rights act and the policies behind the act should be read to provide protection from discrimination for interracial couples. If an employer discriminates against a white (or black) employee because of the latter's marriage to a black (or white) spouse, the race of both the employee and the spouse is a motivating factor. Thus, it must be concluded that the employee in such a case is discriminated against "because of race" and the civil rights act is applicable. [*Id.*]

Next, in *Graham v Ford*, 237 Mich App 670, 672; 604 NW2d 713 (1999), the plaintiffs, who were black, alleged discrimination in violation of ELCRA on the basis of their race and their association with their white coworkers. Applying the reasoning from *Bryant*, the *Graham* Court concluded that the defendant had a “discriminatory predisposition and animus toward plaintiffs based on race and race association.” *Id.* at 678. As it related to the associational discrimination portion of the claim, the *Graham* Court explained that the plaintiffs had presented evidence that their employee “regarded the black plaintiffs unfavorably because of their working relationships with white . . . employees.” *Id.*

Notably, in both *Bryant* and *Graham*, the plaintiffs claims were based upon members of one race associating with members of a different race. Therefore, in both cases, the race of the plaintiff was a key factor in the discrimination. The employer in *Bryant* was discriminating against the plaintiff because she was a white woman married to a black man, and the employer in *Graham* was discriminating against its black employees because they were associating with its white employees. If the plaintiff in *Bryant* had been a black woman married to a black man and if the employees in *Graham* were white employees associating with other white employees, there would have been no claim for racial discrimination on the basis of their association with others because it was only when *their* race was considered in relation to the race of the persons that they were associating with that there was racial discrimination.

In contrast, Kuilema’s sex is irrelevant to Calvin University’s decision to terminate his employment. The university’s decision to terminate his employment was based upon his decision to officiate a same-sex wedding. That decision would not have been different if Kuilema were a female instead of a male. Accordingly, neither *Bryant* nor *Graham*, both of which addressed discrimination against the individual plaintiffs based in part upon their race, are not applicable in this case because there is no allegation whatsoever that Kuilema’s sex had any impact on the termination decision.

Our Supreme Court’s decision in *Rouch World, Inc v Dep’t of Civil Rights*, 510 Mich 398; 987 NW2d 501 (2022) supports our analysis of the associational discrimination claims *Bryant* and *Graham*. As relevant to this case, the Court held that “[t]he ELCRA’s prohibition of sex discrimination requires a determination whether a specific individual was treated worse than a member of the opposite sex would have been; it does not ask how one sex-based group is treated compared to another sex-based group.” *Id.* at 428. “In other words, causation is established where the discriminatory action would not have occurred but for the sex of the complainant.” *Id.* at 420. The question that must be answered in a sex-discrimination claim, therefore, is whether the plaintiff was discriminated against “because of” their sex. *Id.*

The but-for causation test from *Rouch* was satisfied by the plaintiffs in *Bryant* and *Graham* because the discriminatory action would not have occurred but for the fact that the plaintiffs had a different race from the persons with whom they were associating with. Here, however, based upon the allegations in the complaint, the discriminatory action would have occurred *regardless* of Kuilema’s sex. As a result, he cannot establish causation under § 202 because *his* sex had no bearing upon the allegedly discriminatory action.

In sum, because Kuilema did not allege a legally sufficient claim for discrimination because of sex under ELCRA, the trial court erred by denying summary disposition under MCR 2.116(C)(8).

2. RETALIATORY DISCRIMINATION

Next, Calvin University argues that the trial court erred by denying summary disposition of Kuilema's claim for retaliation under ELCRA. We disagree.

ELCRA also prohibits persons from retaliating or discriminating "against a person because the person has opposed a violation" of ELCRA. MCL 37.2701(a). "To establish a prima facie case of retaliation under the ELCRA, a plaintiff must show (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action." *Meyer v City of Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000). "Protected activity" under the ELCRA is defined to include opposition to a violation of" ELCRA. MCL 37.2701(a).

Here, Kuilema first alleged that he was retaliated against for his opposition to a colleague showing an allegedly racist film. He suggests that his opposition to the film "raised the specter of a discrimination complaint under" MCL 37.2402. He also alleged that he was retaliated against in violation of ELCRA for opposing Calvin University's decision to question the employee whose same-sex wedding he had officiated. He alleged that such questioning created a hostile and discriminatory work environment in violation of ELCRA. In both instances, he alleged that Calvin University was aware of his opposition and that there was a causal connection between the decision to fire him and his opposition to the alleged violations of ELCRA.

On appeal, Calvin University argues that the allegations in Kuilema's complaint are legally insufficient because he has not shown that his opposition to either action amounted to opposing a violation of ELCA. However, although "the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot." *El-Khalil*, 504 Mich at 162. Here, regardless of whether Kuilema will be able to prove that he engaged in a protected activity by opposing the allegedly racist film and the questioning of an employee regarding his own actions in officiating that employee's wedding, he alleged that each element of a retaliatory discrimination claim occurred. That is sufficient to survive summary disposition under MCR 2.116(C)(8).²

² Calvin University argues that Kuilema's complaint is barred by the ecclesiastical abstention doctrine. See *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327; 901 NW2d 566 (2017). However, only Kuilema's claim for associational discrimination implicates the ecclesiastical abstention doctrine. Given that our conclusion that Kuilema failed to state a claim upon which relief could be granted with relation to that claim, we decline to address whether dismissal would also be warranted under the ecclesiastical abstention doctrine.

We affirm the trial court's denial of summary disposition of Kuilema's retaliation claim under MCL 37.2701(a), but reverse the court's denial of summary disposition of Kuilema's associational discrimination claim under MCL 37.2202(1)(a). On remand, the trial court shall enter an order summarily dismissing Kuilema's associational discrimination claim. We do not retain jurisdiction. No taxable costs are awarded, neither party having prevailed in full. MCR 7.219(A).

/s/ Michael J. Kelly

/s/ Stephen L. Borrello

2025 WL 2331844

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United States District Court, M.D.
Alabama, Northern Division.

Ernest N. FINLEY, Jr., Plaintiff,

v.

CITY OF MONTGOMERY, and
Steven L. Reed, Mayor, Defendants.

Civil Action No. 2:23-00146-KKD-PBM

I

Signed June 9, 2025

Attorneys and Law Firms

[Kenneth Drew Haynes](#), [Alicia Kay Haynes](#), Haynes & Haynes, PC, Birmingham, AL, [Heather Newsom Leonard](#), Heather Leonard, PC, Birmingham, AL, for Plaintiff.

Alex Lauren Sandlin, Webster Henry Bradwell Cohan Speagle DeShazo, PC, Birmingham, AL, [Allison Alford Ingram](#), [Hope Curtis Hicks](#), [John Warren Marsh](#), Ball, Ball, Matthews & Novak, P.A., Montgomery, AL, Orin Clayton Odom, III, Walker Nicholas Kowalchyk, [Scott Michael Speagle](#), Webster, Henry, Bradwell, Cohan, Speagle, & DeShazo, P.C., Montgomery, AL, Stacy Lott Bellinger, City of Montgomery, Montgomery, AL, for Defendant City of Montgomery.

[Terry Glenn Davis](#), Terry G. Davis, PC, Montgomery, AL, [Ronald Benjamin Hatcher](#), Law Office of Ronald B. Hatcher, Atlanta, GA, for Defendant Steven L. Reed.

ORDER


KRISTI K. DuBOSE, UNITED STATES DISTRICT JUDGE

*1 This action is before the Court on the motion for summary judgment, the brief in support, and the evidentiary submissions, filed by Defendant Steven L. Reed (“Reed”). (Docs. 104, 116, 121-1–15).¹ Plaintiff Ernest N. Finley, Jr. (“Finley”) alleges that Mayor Reed violated federal and state laws while Finley was serving as the City’s Chief of Police. Reed moved for summary judgment “as to all of the remaining claims” against Reed. (Doc. 104). Upon consideration, and for the reasons below, Reed’s motion for summary judgment is **GRANTED**.

¹ Finley failed to file a response to Reed’s motion for summary judgment.

I. Findings of Fact²

² The “facts,” as accepted at the summary judgment stage, “may not be the actual facts of the case.”

 [Feliciano v. City of Miami Beach](#), 707 F.3d 1244, 1247 (11th Cir. 2013).

A number of undisputed facts are found in the City’s evidentiary materials in support of its motion for summary judgment. (Doc. 115-1–28). “The court need consider only the cited materials, but it may consider other materials in the record.” *Fed. R. Civ. P. 56(c)(3)*. “If the court knows of materials in the record that show that a fact is disputed or undisputed, it would make little sense to require the court to ignore those materials when making its ruling.” 2 Steven F. Gensler, *Federal Rules of Civil Procedure, Rules and Commentary Rule 56* (2024).

Finley was hired as the Chief of Police of the Montgomery Police Department (“MPD”) in 2014. The mayor is the only person with authority to hire, fire, or discipline the Chief of Police. But the Chief of Police may appeal his termination to the city council and the personnel board. Finley is a Black male.

In October 2019, Steven L. Reed (“Reed”) was elected Mayor of the City of Montgomery. Reed wanted to get crime under control and make the city safer. (Doc. 121-6 at 58). Reed is a Black male.

Reed and Finley held regular meetings to discuss updates on issues like public safety and crime. (Doc. 121-6 at 19). Reed usually provided Finley with crime statistics in a written report. (*Id.*). During Reed’s first nine months as mayor, Finley “felt really comfortable with [their] communications.” (Doc. 121-13 at 17). After the first nine months, Finley recalls their communications regressing to Finley giving Reed snapshot synopses of homicides and Finley “acknowledge[ing] receipt.” (*Id.*). According to Finley, homicides were Reed’s “priority,” and it was Finley’s “priority to address those issues.” (*Id.*).

In his discretion as Chief of Police, Finley appointed Jennifer Reaves (“Reaves”) to Chief of Operations. (Doc. 121-2 at 42).

Reed approved the appointment of Reaves. (Doc. 121-2 at 46). Reaves is a white female.

1. The investigation into officers' off-duty work

On October 1, 2020, Reaves sent Finley a memo requesting an investigation of five Black police officers, including Marcus Webster (“Webster”), for possible ethics and policy violations regarding off-duty employment. (Doc. 121-2 at 32–33). The investigation resulted from a complaint forwarded to Reaves about crime levels in a Montgomery area that also mentioned the employment of off-duty officers working security. See [Webster v. City of Montgomery](#), 710 F. Supp. 3d 1116, 1121 (M.D. Ala. 2023).³

*2 City Investigations (“CI”) investigated the officers, and the investigation grew from five officers to around thirteen officers—twelve of whom were Black. (Doc. 121-2 at 32); [Webster](#), 710 F. Supp. 3d at 1121. Ultimately, CI charged some officers, including Webster, “with violating MPD’s off-duty employment policy by presenting themselves as courtesy officers without living on the properties they served.” [Webster](#), 710 F. Supp. 3d at 1121. “The officers were charged under the old version of the policy, which had not stated outright that courtesy officers could accept in-kind payment only. According to [CI], the rules governing courtesy officers and their compensation may have been unwritten, but they were well-known and well-established throughout MPD.” *Id.*

³ The officers that were cited ultimately filed claims of discriminatory punishment based on their race. These claims were dismissed on summary judgment. [Webster v. City of Montgomery](#), 710 F. Supp. 3d 1116, 1119 (M.D. Ala. 2023).

Finley received a final report from CI, which did not include a recommendation for discipline. (Doc. 121-7 at 10). Before submitting a recommendation for discipline, Finley met with Mayor Reed, City Attorney Stacy Bellinger (“Bellinger”), Reed’s Chief of Staff Chip Hill (“Hill”), City Investigations Chief Bill Barousse (“Barousse”), and Retired Montgomery Circuit Court Judge Charles Price. (Doc. 121-13 at 14–15). They discussed charges on “the main five officers that were up for serious disciplinary violation.” (*Id.* at 15). According to Finley, “[e]verybody agreed” that the recommendation for these officers would be termination. (*Id.*). Finley then recalls directing Reaves to (1) prepare charges for termination and to (2) forward the file to the Ethics Commission for investigation. (*Id.*).

After this, Finley recalls being told by Reed’s Chief Administrative Officer (Jamyla Philyaw) that “a little birdie”—not Mayor Reed—wanted Finley to recommend suspension rather than termination. (Doc. 121-13 at 15). Finley then directed Reaves to (1) redo the complaint and instead recommend a twenty-day suspension, demotion, and a year of suspension from off-duty work and to (2) forward the complaint to the Ethics Commission for investigation. (*Id.*). Finley admits that Reed had the discretion to disagree with Finley’s recommendation. (*Id.*). But Finley attributes changing his recommendation to his loyalty and to his belief that if he would not have followed those orders, Reed would “come after [him].” (*Id.*).

Some of the disciplined officers—including Webster—were upset with the outcome. (Doc. 121-3 at 34). Webster believed that Reaves disciplined a white officer less harshly than she did black officers because of their race. (Doc. 121-8 at 32).

2. The firearms qualifications in October 2020 and the change in policy

During the week of October 19, 2020, MPD held its annual Firearms Qualifications. (Doc. 121-2 at 2). On October 20, 2020, MPD Chief of Staff Zederick Dean (“Dean”) emailed the Command Staff about the implications of failed qualifications: “Please remind any of your personnel who failed qualifications will not be able to work off-duty jobs until they clear remedial.” (Doc. 115-10). Despite Dean’s email, there was confusion regarding the policies on Firearms Qualifications.

MPD Policy 2.311 “Firearms Qualifications”—effective September 11, 2012—required an officer to score no less than 76 in handgun qualifications held twice a year. (Doc. 115-11). An officer who failed to qualify in the initial attempt would be given a second opportunity to pass. (*Id.*). If the officer failed to score at least a 76 in one of the two attempts, the officer would be given an official failure. (*Id.*). This policy contained penalties for each official failure, including the loss of off-duty employment opportunities until the officer successfully passed the eight hour or 40-hour remedial class. (Doc. 115-11 at 1).

*3 MPD Policy 3.2.4 “Annual-Biennial Proficiency Training”—effective June 25, 2018—purportedly rescinded Policy 2.311. (Doc. 115-12). This policy still required an officer to score no less than 76 in handgun qualifications. (Doc. 115-12 at 2). And this policy still allowed a second

opportunity to pass if the officer failed to score a 76 or higher on the first attempt. (*Id.*). It removed most of the penalties, but it left in place the fact that officers failing to qualify “must successfully complete remedial training prior to resuming official duties.” (Doc. 115-12 at 1).

On January 15, 2020, Policy 3.2.4 was amended but carried the same requirement of receiving a qualification score of no less than 76 in handgun qualifications. (Doc. 115-13). This policy still allowed a second attempt if the officer did not receive a 76 or higher in the first attempt, and it still required a failing officer to successfully complete remedial training before resuming official duties. (*Id.*).

“PowerDMS” is an online portal—available to MPD officers—where these policies were stored. (Doc. 121-4 at 61). If a policy is replaced, updated, or amended, the old policy should not be on PowerDMS. (*Id.*). Despite the amendments and replacements to the MPD firearms qualifications policies, Policy 2.311 was still in PowerDMS in October of 2020. (Doc. 121-7 at 64). Because of this, Dean emailed the Command Staff to remind that an official failure would result in the loss of off-duty work until the completion of remedial training. (Doc. 121-4 at 75).

On October 20, 2020, Finley was told that a high number of officers failed to qualify their handguns, so Finley decided that any officer who failed to qualify in two attempts should be given a third attempt. (Doc. 121-2 at 3, 4). The same day, Reaves failed to qualify with her firearm in two attempts, and Finley told her to take a third attempt. (*Id.*). Finley's son also failed to qualify in two attempts. (Doc. 115-14 at 1).

On October 21, 2020, Finley contacted Captain Milner to discuss a complaint about Reaves being allowed a third attempt to qualify. (Doc. 115-14 at 2). Finley instructed Captain Milner to put out a memo to the entire police department advising that every officer who failed to qualify would be given a third attempt. (*Id.*). Finley's firearms qualifications change resulted in a “chaotic” situation at the MPD because some officers had already been written up for failing to qualify in two attempts. (Doc. 121-5 at 71).

After learning of Finley's policy change, the City Attorney (Bellinger) directed Finley to send out a memo requiring all officers who failed to qualify in two attempts to do an eight-hour remedial training. (Doc. 121-2 at 23; Doc. 121-7 at 38). Bellinger's instruction was based on her concern that the

controlling policy required remedial training for two failed attempts. (Doc. 121-7 at 38).

On November 3, 2020, Finley officially amended Policy 3.2.4 by lowering the required handgun qualification score from 76 to 70 and providing all officers with three attempts instead of two. (Doc. 115-17).

3. Webster files an ethics complaint against Finley and Reaves

On October 23, 2020, Webster—the same officer charged with violating the MPD off-duty work policy—filed two internal complaints. (Doc. 121-2 at 26). One complaint was made through the chain of command to Major Denise Barnes, and the other was made through City Investigations to Bill Barousse. (*Id.*). Webster's complaints alleged that Finley abused his authority by allowing third attempts to qualify when Reaves and Finley's son had failed in two attempts. (*Id.*). CI ultimately concluded that no evidence supported a violation of policy, and that the allegation was unfounded. (Doc. 121-2 at 26).

*4 On November 3, 2020, Webster filed a complaint against Reaves and Finley with the Alabama Ethics Commission (“AEC”). (Doc. 115-8). Webster's complaint alleged that Finley changed the firearm qualification policy to protect Reaves from discipline for failing in two attempts. (*Id.* at 2). His complaint also alleged that Finley and Reaves had “handed down punishments and recommended several investigations of officers for policy violation.” (*Id.* at 4). Webster had not talked to anyone at the AEC prior to filing his complaint. (Doc. 115-6 at 4).

Bellinger handled matters involving the AEC as part of her official job duties as the City Attorney. (Doc. 121-7 at 6). Once Bellinger realized that there were multiple firearm policies, she spoke with AEC investigator Byron Butler (“Butler”) and advised him that there were firearm policies that should have been archived but were not. (*Id.* at 46). Bellinger raised this issue to Butler to make clear that there was confusion at MPD concerning the firearm qualification policy. (*Id.*). Bellinger followed up this conversation by sending AEC the policies with a letter about the changes. (*Id.* at 50). Bellinger also advised Butler that neither Finley nor Reaves had any financial gain from Finley's change in the handgun qualification policy. (*Id.* at 47). And Bellinger told Butler that based on everything the City had seen, it was the City's opinion that there were no ethics violations. (*Id.*).

Finley admits that Bellinger provided “the fair and correct information” to the AEC. (Doc. 121-13 at 23–24).

The City also approved legal representation for Finley and Reaves and paid to defend against the ethics complaint. (Doc. 121-3 at 46). Mayor Reed did not oppose the decision. (Doc. 121-6 at 41). Mayor Reed does not recall knowing what the ethics complaint was about until discovery was conducted in this lawsuit. (Doc. 121-6 at 50, 53–54).

4. Finley requests an investigation into Major Denise Barnes that CI deems unfounded

On January 19, 2021, Finley sent CI Chief Bill Barousse a request for an investigation into Major Denise Barnes for possible City and MPD policy violations. (Doc. 115-18). Finley's request explained that he received “reliable and confidential information from an employee,” which showed that a “hostile work environment” existed in the MPD. (*Id.* at 1). According to Finley, the confidential source stated that a member of his staff complained about Barnes inciting division. (*Id.*) “The staff member stated that Major Barnes told him/her that Chief Reaves is against all black women in the department.” (*Id.*) “The staff member further stated that he/she was told by Major Barnes that Barnes and other black female staff members were going to make trouble for Chief Reaves by being defiant and making complaints to the Office of [CI].” (*Id.*) “The staff member felt that he/she was being pressured to join in this plot against Chief Reaves.” (*Id.*)

Finley learned the name of the “confidential source” from MPD's Peer Support. (Doc. 115-2 at 41–42). Finley submitted his request for an investigation to CI the day after he learned the identity of the confidential source. (*Id.* at 42). Finley later testified that Peer Support is confidential or “need to know,” but he was told the name of the confidential source because the Peer Support officer “felt for the betterment of the department that it was something ... that [Finley] needed to know.” (*Id.*)

On February 16, 2021, CI addressed Finley's request for an investigation with a memo. (Doc. 115-18 at 2). The memo explained that CI completed the investigation and was unable to corroborate any information. (*Id.*) Therefore, CI deemed the allegations “unfounded.” (*Id.*)

5. MPD officer files a complaint with CI against Finley

*5 On January 13, 2021, MPD Officer Sergeant J.D. Thagard filed a complaint with CI against Finley. (Doc.

115-19). The complaint alleged that Finley violated City policy on Protected Communications and Anti-Retaliation when he denied Thagard's request to meet with Mayor Reed concerning a hostile work environment complaint against Lieutenant A.C. Carlisle (Thagard's supervisor). (*Id.*) CI investigated the complaint and substantiated the allegations that Finley violated the Protected Communications and Anti-Retaliation policies. (*Id.*)

Because Thagard's complaint included general allegations against CI Chief Bill Barousse, the City also hired an independent HR Consultant to investigate the complaint. (Doc. 115-19 at 1). On April 29, 2021, the consulting firm issued its findings, which concluded that Finley violated the Protected Communications and Anti-Retaliation policies. (*Id.* at 27). The consulting firm also gave recommendations, which stated in part:

Chief Finley does not apologize for his strong leadership style. In his words, “He doesn't play.” His confident, authoritative, and military style of leadership has had an impact on the department, both positively and negatively. In speaking with his Chief of Staff Dean, there is a degree of trepidation of speaking truth to the Chief. Care should be taken in handling personal relationships, because the possibility of that “clouding judgment” is a real concern. It could be costly down the road to the Department.

(*Id.* at 28). City Attorney Bellinger sent the investigative report to Mayor Reed through Chip Hill that same day. (*Id.* at 1).

6. The April 6, 2021, Montgomery City Council Work Session

On April 6, 2021, the Montgomery City Council met for a Work Session before its regularly scheduled meeting. Finley recalls that prior to the meeting, Mayor Reed told him not to respond to any allegations that would be made about the police department during the meeting. (Doc. 121-13 at 48).

Finley recalls Reed telling him that it would blow over and not to worry about it. (*Id.* at 50).

Reed does not recall meeting with Finley or any of the officers before the Work Session. (Doc. 121-6 at 31). According to Reed's affidavit, Reed did not encourage anyone to speak at the Work Session about their complaints with Finley, Reaves, or anyone at MPD; Reed did not prohibit Finley or Reaves from speaking at the Work Session; and Reed did not forbid Finley and Reaves from having representation at the Work Session. (Doc. 121-15 at 1–2). Reed did not have the authority to put anyone on the agenda because the agenda is set by the City Council. (Doc. 121-6 at 31).

At the City Council Work Session, seven officers, one attorney, and one preacher aired grievances against the City's police department. Montgomery City Council Work Session – 4/06/2021, YouTube, <https://www.youtube.com/watch?v=0pjahrGU7k> (last visited April 24, 2025). The grievances centered around officers' concerns that the Command Staff—including Finley and Reaves—retaliated against officers for speaking up about perceived injustices. See *id.* Webster and Thagard both spoke at this Work Session. *Id.*

7. The Montgomery Advertiser article about the April 6, 2021, Work Session

On April 6, 2021, the Montgomery Advertiser published an article about the officers' allegations from the April 6, 2021, City Council Work Session. Kristen Fiscus, Mongomery police officers claim retaliation, fudged reports by department leadership, Montgomery Advertiser, <https://www.montgomeryadvertiser.com/story/news/2021/04/07/montgomery-police-retaliation-complaints/7091443002/> (Apr. 6, 2021, 8:36 P.M.). The article explained that “current and former Montgomery police officers ... laid out claims that upper leadership has unethically changed department policies and retaliated against officers who lodged complaints against others.” *Id.* Finley and Reaves were both implicated in the article, but “Finley declined to comment on the allegations.” *Id.* Reed was not mentioned or quoted in the article, but “a spokesman with the Mayor's Office” provided the following statement: “Tonight we heard allegations made by individuals. There is a legal process for personnel issues, and that process is ongoing.” *Id.*

8. Finley resigns

*6 On June 8, 2021, Finley resigned as Chief of MPD, to be effective on July 8, 2021. (Doc. 115-21). Immediately before the resignation meeting, Chip Hill met with Finley and told him that Mayor Reed was about to ask for his resignation. (Doc. 121-10 at 30). At the resignation meeting, Finley recalls Mayor Reed telling him that his services were no longer needed, and that crime was going in the wrong direction. (Doc. 121-13 at 31). Finley recalls initially refusing to resign, but ultimately deciding to resign after Mayor Reed said that the resignation could be done “the easy way or the hard way.” (*Id.* at 4). Finley knew that Mayor Reed had the authority to terminate him. (*Id.* at 57). Finley also knew that he could have chosen not to resign and could have appealed his termination to the City Council and Personnel Board. (*Id.*).

9. Articles about Finley's resignation and nationwide search for new Chief of Police

On the day Finley resigned, WFSA posted an article about Finley's resignation. (Doc. 115-23 at 1). The article contained a statement from Reed expressing gratitude to Finley but explaining that the City can do more to combat violent crime. (*Id.*). The article noted that there was not an exact reason for the resignation, but “the announcement [came] amid a rise in violent crimes in the city, something Finley has addressed multiple times.” (*Id.* at 2). The article also highlighted “complaints about leadership and allegations of bullying and cover-ups within the department,” including the April City Council Work Session. (*Id.*).

A week after Finley resigned, the Montgomery Advertiser published an article about Finley's resignation. (Doc. 115-24). The article quoted Reed's reasons for the resignation: a lack of improvement in crime data and questions about the working environment at the MPD. (*Id.* at 1). The article explained that homicides in Montgomery in 2020 “hit their highest rate since at least the early 1970s,” and that homicides outpaced the 2020 count by the end of the first quarter of 2021. (*Id.* at 1). The article also explained that multiple officers claimed a culture of unethical policies and retaliation at the department. (*Id.*).

After Finley's resignation, the City sent an internal request for interim Chief candidates and selected Major Ramona Harris (“Harris”) as interim Chief of Police. (Doc. 42 at 46; Doc. 115-25). The City then conducted a nationwide search for a new Chief of Police. (Doc. 115-1 at 22).

10. The Alabama Ethics Commission proceedings and articles

On August 4, 2021, the AEC met and heard allegations stemming from Webster's complaint against Finley and Reaves. (Doc. 42 at 14; Doc. 115 at 27). The AEC found that probable cause existed to hold that Finley had committed an unspecified "minor violation" of the Alabama Ethics Act. (Doc. 42 at 14; Doc. 116 at 24).

Also on August 4, 2021, WFSA published a news article about the AEC findings. (Doc. 115-26). The article explained that the AEC found that Finley and Reaves each "committed a minor violation of the Alabama Ethics Act." (*Id.*). The article also included the following statement from the City:

The City of Montgomery is grateful to the Alabama Ethics Commission for its diligence in this matter. Mayor Steven L. Reed remains assured in Interim Chief Ramona Harris' ability to restore confidence among the department's ranks. As we continue to search for a permanent police chief, Mayor Reed will continue the ongoing assessment to ensure the Montgomery Police Department is accountable not only to our residents but also to those officers who are sworn to protect and serve the public.

(*Id.*).

On September 1, 2021, WFSA published another article entitled "Interim Montgomery police chief: Department moral is 'coming back around.'" (Doc. 115-27 at 1). Included in this article is a statement about Finley and Reaves's AEC violation with a link to the August 4, 2021 article. (*Id.* at 2). This statement is not a quote from the City, Reed, or then-Interim Chief Harris.

*7 In November 2021, the Alabama Attorney General exonerated Finley of the ethics violation and declined to take further action against him. (Doc. 42 at 16; Doc. 115 at 29). The City and Reed did not issue any type of press release or media release stating that Finley had been cleared of any violations,

and the City did not retract its initial public statements. (Doc. 42 at 16; Doc. 115 at 35).

11. Finley files claims against City and Reed

On January 31, 2022, Finley filed an EEOC charge alleging discrimination against the City and Reed. (Doc. 42-1). On March 16, 2023, Finley sued the City and Mayor Reed. (Doc. 1). Finley's complaint alleges, in part, that Reed discriminated against him because Finley appointed a white female as his deputy and because Finley wanted to punish Black officers. But Finley admits that no one with the City—including Reed—ever told Finley to appoint (or not appoint), to promote, or to demote someone because of their race or because they were female. (Doc. 121-2 at 46).

Finley recalls expressing to Chip Hill—on one unspecified occasion—that Reaves was being discriminated against because she is White. (Doc. 121-13 at 33–34). Finley also recalls receiving the City and County of Montgomery Personnel Board's Rules and Regulations and the Handbook when he was first hired. (Doc. 121-2 at 31; Doc. 115-20). Finley understands that both prohibit discrimination or harassment based on race, national origin, sex or gender. (Doc. 121-2 at 31; Doc. 115-20). And Finley admits that he did not ask the City or the personnel board to rehire him after he resigned. (Doc. 121-13 at 19).

Finley claims that the City and Reed conspired to violate his civil rights. But when Finley was asked whether he knew of any communications between Reed and the AEC, he replied that he did not have "anything concrete." (Doc. 121-13 at 36). When asked specifically whether Reed, AEC Investigator Butler, and AEC Counsel Raulston recruited Webster to file the ethics complaint with the AEC, Finley responded:

So I don't have anything concrete to put these three together in terms of recruiting those officers to file a complaint, to give statements, and submit false evidence. But I do believe and it's my opinion, I can't substantiate it, that there was some conversation between the three in terms of solidifying his position to separate me from the department. I

can't prove it, but there [were] some communications.

(Doc. 121-13 at 56). And Finley said that it was “safe to say” that none of the City Council members had any kind of interaction or conversation with Bulter. (Doc. 121-13 at 24).

II. Standard of Review

1. Summary judgment generally

Summary judgment shall be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Fed. R. Civ. P. 56(a)*. A fact is “material” if it “might affect the outcome” of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If “the evidence is such that a reasonable jury could return a verdict for the nonmoving party,” a genuine dispute of material fact exists. *Id.*

The party moving for summary judgment “bears the initial burden of demonstrating the absence of a genuine dispute of material fact.” *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011). The movant meets this burden by identifying affirmative evidence (pleadings, depositions, answers to interrogatories, admissions on file, etc.) to support its claim that no genuine dispute of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Fed. R. Civ. P. 56(c)(1)(A)*. If the nonmovant bears the burden of persuasion at trial, the movant may also make a prima facie showing of summary judgment by demonstrating that the nonmovant's evidence is insufficient to establish an essential element of its claim. *Grange Mut. Cas. Co. v. Slaughter*, 958 F.3d 1050, 1057 (11th Cir. 2020); *Fed. R. Civ. P. 56(c)(1)(B)*.

*8 If the movant meets its burden under *Rule 56(c)*, summary judgment will be granted unless the nonmovant offers some competent evidence that could be presented at trial showing that there is a genuine dispute of material fact. *Celotex*, 477 U.S. at 324. If the movant met its burden by pointing “to specific portions of the record ... to demonstrate that the nonmoving party cannot meet its burden of proof at trial,” the nonmovant must “go beyond the pleadings” to designate specific facts showing a genuine issue for trial. *Id.*; *Fed. R. Civ. P. 56(e)*.

When assessing a summary judgment motion, the court's function is not to make “credibility determinations” and “weigh the evidence.” *Anderson*, 477 U.S. at 248. Instead, the court must “view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor.” *FindWhat*, 658 F.3d at 1307. Thus, summary judgment is only proper when a movant shows that no reasonable jury could find for the nonmovant—even when the evidence and inferences are drawn in the nonmovant's favor.

2. Summary judgment where the nonmovant fails to file a response

When a party against whom summary judgment is sought makes no response to the motion, the court may “grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it.” *Fed. R. Civ. P. 56(e)(3)*. But “summary judgment cannot be granted by default even if there is a complete failure to respond to the motion.” *Fed. R. Civ. P. 56(e)* advisory committee notes to 2010 amendment.

“Thus, the district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion.” *United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1101 (11th Cir. 2004). “The district court need not sua sponte review all of the evidentiary materials on file at the time the motion is granted, but must ensure that the motion itself is supported by evidentiary materials.” *Id.* “At the least, the district court must review all of the evidentiary materials submitted in support of the motion for summary judgment.” *Id.* 1101–02.

III. Analysis

Finley's complaint alleges fifteen causes of action—eleven of which implicate Reed. (Doc. 42). Eight causes of action remain against Reed after the order on Reed's motion to dismiss (“the Order”): (1) Count I: violation of the Equal Protection Clause under *42 U.S.C. § 1983*; (2) Count II: race discrimination and hostile work environment in violation of the Equal Protection Clause under *42 U.S.C. § 1983*; (3) Count V: race discrimination and hostile work environment in violation of the Equal Protection Clause under *42 U.S.C. § 1983*; and (4) Count X: conspiracy to violate

Finley's First Amendment rights in violation of [42 U.S.C. § 1985](#); (5) Count XI: conspiracy to violate Finley's Fourteenth Amendment rights in violation of [42 U.S.C. § 1985](#); (6) Count XII: civil conspiracy to deprive Finley of his state civil rights; (7) Count XIII: defamation, libel, and slander; and (8) Count XV: invasion of privacy. (Doc. 60).

The Order granted Reed's motion to dismiss the claims against him in his official capacity. (Doc. 60 at 3). Thus, the claims in Counts I, II, and V only remain against Reed in his individual capacity. Reed moves for summary judgment as to all remaining claims against him. (Doc. 104).

A. Violation of the Equal Protection Clause under [42 U.S.C. § 1983](#): Counts I, II, and V

*9 Although Reed moves for summary judgment as to all remaining claims, Reed's brief in support of his motion for summary judgment overlooks the fact that Counts I and II were not dismissed in the Order on Reed's motion to dismiss. (Compare Doc. 60 with Doc. 121). In his motion to dismiss, Reed argued that to the extent Counts I and II assert claims under Title VII, the claims should be dismissed because Finley failed to meet conditions precedent to filing a Title VII action. (Doc. 60 at 4). The Order explained that the motion to dismiss Counts I and II was moot because “neither Count contains a claim or cause of action pursuant to Title VII against Reed.” (Doc. 60 at 4). Therefore, Counts I and II remain pending against Reed in his individual capacity as to Equal Protection Clause violations under [42 U.S.C. § 1983](#).

Despite Reed's failure to directly address Counts I and II, these Counts allege the same claim against Reed as Count V—that Reed violated the Equal Protection Clause under [42 U.S.C. § 1983](#). And Reed addresses this claim in his brief. Ultimately, if the facts, viewed in the light most favorable to Finley, show that no reasonable juror could find in favor of Finley on these Counts, summary judgment is proper as to Counts I, II, and V. See [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 250 (1986).

The Equal Protection Clause forbids a State from denying a person “equal protection of its laws.” [U.S. Const. amend. XIV § 1](#). Consequently, the Equal Protection Clause establishes the right “to be free from intentional race discrimination.” [Brown v. City of Fort Lauderdale](#), 923 F.2d 1474, 1478

(11th Cir. 1991). The Equal Protection Clause also establishes the right to be free from a hostile work environment based on race. See [Bryant v. Jones](#), 575 F.3d 1281, 1296 (11th Cir. 2009). A person who violates another's right to equal protection while acting under color of law can be liable under [42 U.S.C. § 1983](#).

Finley alleges that Reed violated his equal protection rights by engaging in race discrimination against Finley and creating a hostile work environment. (Doc. 42 at 16–21, 28–29). In support, Finley argues that Reed brought and encouraged false complaints against Finley, that Reed frustrated Finley's ability to act effectively as Chief of Police, and that Reed forced Finley to resign. (Doc. 42 at 16–21, 28–29). These allegations are premised on Finley's contention that Reed violated Finley's equal protection rights because Finley would not follow Reed's alleged race-based employment preferences for Black officers. (*Id.*).


1. Finley fails to present evidence of a hostile work environment sufficient to survive summary judgment






To establish a hostile work environment claim under the Equal Protection Clause, a plaintiff “must show harassing behavior ‘sufficiently severe or pervasive to alter the conditions of [his or her] employment.’ ” [Bryant v. Jones](#), 575 F.3d 1281, 1296 (11th Cir. 2009) (alterations in original) (quoting [Pa. State Police v. Suders](#), 542 U.S. 129, 133 (2004)). To do this, the plaintiff must prove:




- (1) that he [or she] belongs to a protected group;
- (2) that he [or she] has been subject to unwelcome harassment;
- (3) that the harassment [was] based on a protected characteristic of the employee ... ;
- (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and
- (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability.

 [Miller v. Kenworth of Dothan, Inc.](#), 277 F.3d 1269, 1275 (11th Cir. 2002).


Reed does not dispute that Finley could establish the first two elements. (Doc. 116 at 32). However, Reed argues that Finley cannot establish elements three through five. (*Id.*). Regarding the third element, Reed explains that Finley admits that his complaints were based on Finley's treatment of Black officers—not Finley's status as a Black man. (Doc. 116 at 32). Concerning the fourth element, Reed argues that the alleged harassment was not sufficiently severe or pervasive because Finley admitted that being targeted comes with the territory of being the Chief of Police. (*Id.* at 34). On the fifth element, Reed contends that he was not responsible for “orchestrating and encouraging the harassment” alleged by Finley. (*Id.*).

*10 Here, the allegations of harassment are insufficient to survive summary judgment. To start, the third element requires proof that the harassment was based on a protected characteristic of the employee.  [Jones v. UPS Ground Freight](#), 683 F.3d 1283, 1297 (11th Cir. 2012) (“[O]nly conduct that is ‘based on’ a protected category, such as race, may be considered in a hostile work environment analysis.”). The harassment alleged by Finley appears to be based on Finley's unwillingness to grant preferential treatment to Black officer—not Finley's race.

Even if the Court considered this harassment to be based on Finley's race, Finley has not established that the alleged harassment “was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment.”  [Miller](#), 277 F.3d at 1275. Actionable harassment “must result in in both an environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceive[s] to be abusive.”  *Id.* at 1276. To determine whether an environment is objectively hostile or abusive, courts “look to factors such as ‘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.’ ”  [Bryant](#), 575 F.3d at 1297 (quoting  [Harris v. Forklift Sys., Inc.](#), 510 U.S. 17, 23 (1993)). Ultimately, courts “can infer that an environment is ‘hostile’ or ‘abusive’ from the circumstantial facts viewed in their proper context.” *Id.* (quoting  [Harris](#), 510 U.S. at 23).

For example, in [Bryant v. Jones](#), the Eleventh Circuit found that the facts in the record established a hostile work environment claim.  [Bryant v. Jones](#), 575 F.3d 1281, 1298 (11th Cir. 2009). There, the plaintiffs presented evidence that their CEO “boldly implemented a plan to create a ‘darker administration’ by refusing to hire whites for open managerial positions, demoting or transferring already employed white managers, and filling the positions they had been occupying with blacks.”  *Id.* at 1297. “The record contain[ed] several examples of the tactics [the CEO] and his subordinates used.” *Id.* This included several occasions where the CEO “angrily confronted” a plaintiff, and one occasion where the CEO approached that plaintiff “in a physically threatening manner.” *Id.* The CEO also forbid that plaintiff from speaking to the press, even though this was part of her job, and the CEO stripped that plaintiff of her hiring authority. *Id.* When the plaintiff complained about the way she was being treated, she was told that she “could not understand or relate to ‘powerful black men.’ ” *Id.* Eventually, that plaintiff was demoted. *Id.* Another plaintiff showed evidence that he was openly treated differently from black employees. *Id.* Among other things, this included evidence that he was excluded from meetings.  *Id.* at 1298.

Here, Finley fails to show that the alleged conduct created an objectively hostile or abusive environment. To begin, the record does not show a frequency of discriminatory conduct against Finley. Finley alleges that false complaints were made against him at the City Council Work Session and that an allegedly false complaint was filed against Finley with the AEC. (Doc. 42 at 26). These alleged instances are infrequent, and there is no evidence showing that this was discriminatory harassment (*i.e.*, that the harassment was based on Finley's race). There is also insufficient evidence to connect Reed to the filing of the complaints or to the airing of grievances.

*11 Moreover, distinguishing this case from [Bryant](#) is the fact that the record does not show that Finley was ever physically threatened or humiliated. In his amended complaint, Finley claims that he “became fearful for his physical well-being and his reputation as Chief of Police.” (Doc. 42 at 26). But Finley has not provided sufficient evidence to support these claims. *Cf.*  [Bryant v. Jones](#), 575 F.3d 1281, 1297 (11th Cir. 2009) (explaining that supervisor angrily confronted a plaintiff on several occasions and approached her in a physically threatening manner on one occasion).

Finally, the record does not show that the alleged harassment unreasonably interfered with Finley's work performance. In context, the alleged false complaints against Finley resulted from officers' dissatisfaction with Finley's job performance as Chief of Police. The complaints at the City Council Work Session stemmed from the belief that Finley and others at the MPD retaliated against officers for speaking up about perceived injustices. The ethics complaint against Finley resulted from an officer's belief that Finley abused his authority by allowing third attempts to qualify firearms when Reaves and Finley's son had failed in two attempts. Another complaint filed against Finley—which was substantiated by CI and an independent consulting firm—alleged that Finley violated City policy on Protected Communications and Anti-Retaliation. Given his role as the Chief of Police, these complaints cannot be considered hostile or abusive for purposes of establishing his claim of a constitutional violation.

In sum, Finley fails to show a necessary element for his hostile work environment claims—that the harassing behavior was sufficiently severe or pervasive to alter his work conditions. Therefore, Finley fails to establish his equal protection claim against Reed based on a hostile work environment.

2. Finley fails to present evidence of race discrimination sufficient to survive summary judgment

A plaintiff asserting race discrimination in violation of the Equal Protection Clause under [42 U.S.C. § 1983](#) must prove intentional discrimination. See, e.g., [Stallworth v. Shuler](#), 777 F.2d 1431, 1433 (11th Cir. 1985); see also [Lewis v. City of Union City, Georgia](#), 934 F.3d 1169, 1185 (11th Cir. 2019) (“The legal elements under [Title VII, the Equal Protection Clause, and [42 U.S.C. § 1981](#)] are identical.”). To survive summary judgment, “a plaintiff alleging intentional discrimination must present sufficient facts to permit a jury to rule in her favor.” [Lewis v. City of Union City, Ga.](#), 918 F.3d 1213, 1220 (11th Cir. 2019) (*en banc*). A plaintiff can do this by presenting direct or circumstantial evidence of discriminatory intent. [Tynes v. Fla. Dep't of Juv. Just.](#), 88 F.4th 939, 941 (11th Cir. 2023), cert. denied sub nom. No. 23-1235, 2024 WL 4426607 (U.S. Oct. 7, 2024). “[T]he ultimate question in a discrimination case is whether there is enough evidence to show that the reason

for an adverse employment action was illegal discrimination.”

[Id.](#) at 941.⁴

4 Mixed-motive discrimination is an alternative theory of causation for proving discrimination. [McCreight v. AuburnBank](#), 117 F.4th 1322, 1331 (11th Cir. 2024). It “allows for liability when an employment decision motivated by a *legitimate* reason—usually poor work performance—is also infected by an *illegitimate* reason—illegal discrimination.” [Id.](#) at 1326. A plaintiff only needs to show that an illegal reason played a part in the decision—not that it was dispositive. [Id.](#) at 1331. Still, a plaintiff alleging mixed-motive discrimination must provide “sufficient evidence for a reasonable jury to infer intentional discrimination”. [Id.](#) Because Finley has not provided sufficient evidence for a reasonable jury to infer intentional discrimination by Reed, any allegations of mix-motive discrimination cannot survive summary judgment.

*12 Here, Finley alleges that Reed, while acting under color of state law, intentionally discriminated against Finley by encouraging Black officers to file complaints against him and by forcing him to resign. (Doc. 42 at 20). Finley alleges that Reed's discrimination was because of Finley's race and because Finley refused to grant preferential treatment to Black officers and promoted a White officer. (Doc. 42 at 19, 26). Although it is unclear, Finley's allegations appear to advance a claim on the theory of associational or advocacy discrimination. However, neither theory salvages Finley's claims of race discrimination.

The Eleventh Circuit defined the scope of associational discrimination claims in [Parr v. Woodmen of the World Life Insurance Co.](#), 791 F.2d 888 (11th Cir. 1986). There, a White man alleged that an employer discriminated against him because he was married to a Black woman. [Parr](#), 791 F.2d at 889. The Eleventh Circuit held that “[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.” [791 F.2d at 892](#). “In other words, claims based on interracial association necessarily implicate the race of both the complainant and the associate. So, any discrimination based on that association is based on the race (or sex or religion or national origin) of

both parties.” [Joseph v. Bd. of Regents of the Univ. Sys. of Georgia](#), 121 F.4th 855, 871 (11th Cir. 2024).

Here, Finley claims he was forced to resign because he refused to grant special treatment to Black officers and because he promoted a White officer. Unlike the interracial marriage in [Parr](#), Finley's alleged associational relationships do not implicate Finley's race. Thus, Finley does not have an associational discrimination claim.

The Eleventh Circuit has not expressly recognized “advocacy discrimination” claims. In theory, these claims involve discrimination against an individual based on his “advocacy on behalf of protected class members.” [Barrett v. Whirlpool Corp.](#), 556 F.3d 502, 513 (6th Cir. 2009). For example, in [Johnson v. University of Cincinnati](#), the Sixth Circuit explained that a plaintiff can state a viable claim under [§ 1981](#) by alleging discrimination based on the plaintiff's advocacy on behalf of minorities. [Johnson v. Univ. of Cincinnati](#), 215 F.3d 561, 575 (6th Cir. 2000). There, the plaintiff was a university's vice president, and he was primarily responsible for the affirmative action program. [Id.](#) at 568. The Sixth Circuit considered the fact that the plaintiff did not allege discrimination because of *his* race irrelevant because he alleged that he was discriminated against because of his efforts to ensure compliance with affirmative action policies and because of his advocacy on behalf of women and minorities. [Id.](#) at 575.

It is doubtful that advocacy discrimination is viable in general. “Title VII's language, as discussed in [Bostock](#), forecloses such a theory, which essentially replaces the textual ‘because of such individual's race’ with the atextual ‘because of such individual's advocacy for protected individuals.’ ” [Frith v. Whole Foods Mkt., Inc.](#), 38 F.4th 263, 272 (1st Cir. 2022). Regardless, advocacy discrimination is not viable here. The Eleventh Circuit has not recognized this theory, and any alleged advocacy discrimination against Finley is vastly different than the alleged advocacy discrimination in [Johnson](#). The context in [Johnson](#) was a plaintiff advocating for minorities as part of his role with the affirmative action program at his university. Here, Finley is not in a similar position. And Finley is not alleging that he was discriminated against for advocating on behalf of minorities. He alleges that he was discriminated against for *refusing* to grant preferential treatment to minority police officers and for promoting a

White police officer instead of a Black police officer. (Doc. 42 at 19, 26). Thus, Finley's claim is outside of the theory's scope.

*13 Ultimately, the alleged intentional discrimination at issue is that Finley was constructively terminated or forced to retire because he is Black. “Constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job.” [Bryant v. Jones](#), 575 F.3d 1281, 1298 (11th Cir. 2009) (quoting [Munday v. Waste Mgmt. of North America, Inc.](#), 126 F.3d 239, 244 (4th Cir. 1997)). “A plaintiff must show ‘the work environment and conditions of employment were so unbearable that a reasonable person in that person's position would be compelled to resign.’ ” [Id.](#) (quoting [Virgo v. Riviera Beach Assoc., Ltd.](#), 30 F.3d 1350, 1363 (11th Cir. 1994)). But “[e]stablishing a constructive discharge claim is a more onerous task than establishing a hostile work environment claim.” [Id.](#)

Here, Finley fails to show—through direct or indirect evidence—that he was constructively discharged based on his race. Finley alleges that he was forced to resign because he wanted certain black police officers terminated and because he promoted a white candidate. Yet this does not lead to any inference that Finley was forced to resign because he is black.

Next, Finley alleges that Defendants filed false claims against him and had investigations filed against him. But Finley has no evidence that the City or Reed filed or initiated false claims against him. (Doc. 121-13 at 56). Moreover, there is no indication that any investigations were conducted, or claims were asserted, because of Finley's race. Finley also claims he was subject to racial harassment in the last two years of his career. However, Finley does not show any evidence of actual harassment based on his race, much less what is required to establish a constructive discharge claim. See [Bryant](#), 575 F.3d at 1298 (“Establishing a constructive discharge claim is a more onerous task than establishing a hostile work environment claim.”).

In sum, Finley fails to establish his claim that Reed violated his equal protection rights. Viewed in the light most favorable to Finley, the record does not show a hostile work environment or racial discrimination. Therefore, Reed is entitled to summary judgment as to Counts I, II, and V.

B. Conspiracy to violate federal civil rights: Counts X and XI

Finley's tenth and eleventh causes of action allege that the City and Mayor Reed conspired to violate his civil rights in violation of [42 U.S.C. § 1985](#). (Doc. 42 at 38–41). Specifically, Finley alleges the Defendants conspired to violate his First Amendment rights (Count X) and his Fourteenth Amendment rights (Count XI). To be liable under this civil conspiracy statute, a defendant must have:

(1) conspired ... (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) taken or caused an action to be taken in furtherance of the conspiracy's object, and (4) injured an individual's person or property or deprived her of exercising any right or privilege of a United States citizen.

[Dean v. Warren](#), 12 F.4th 1248, 1255 (11th Cir. 2021) (citing [Griffin v. Breckenridge](#), 403 U.S. 88 (1971)). Here, Reed is entitled to summary judgment on these claims for the same reason that the City was entitled to summary judgment on these claims. (Doc. 144).

To begin, under the intracorporate conspiracy doctrine, a city cannot conspire with its personnel when the personnel is acting in the scope of their employment. [Denney v. City of Albany](#), 247 F.3d 1172, 1190 (11th Cir. 2001). Therefore, Finley's conspiracy claim depends on the allegation that Byron Butler and Cynthia Raulston (as outsiders) were part of the conspiracy to remove him as Chief of Police. (Doc. 60 at 11). Yet, Finley admits that he does not have “anything concrete” concerning whether “there may have been a conversation with the Mayor, Butler, [and] Cynthia Raulston ... in terms of the direction of the ethics complaint.” (Doc. 121-13 at 36).

*14 Here, Butler and Raulston's involvement in the alleged conspiracy centers around the ethics complaint submitted to the AEC against Finley and Reaves. But nothing in the

record indicates that any City actor conspired with the AEC to deprive Finley of his rights. Rather, the evidence shows that Marcus Webster did not speak with the AEC before filing his complaint against Finley and Reaves on November 3, 2020. (Doc. 115-6 at 4; Doc. 115-8). After the AEC investigation began, the City Attorney—as a part of her official job duties—advised the AEC of the City's position regarding the complaint. (Doc. 115-5 at 2). The City Attorney advised the AEC that neither Finley nor Reaves had any financial gain from the change in the firearm qualification process and that the City believed there were no ethics violations. (Doc. 115-5 at 16–17). The City provided legal representation for Finley and Reaves and paid to defend them. (Doc. 121-3 at 46). Mayor Reed did not oppose the decision. (Doc. 121-6 at 41).

Again, Finley has no evidence that Reed conspired with Butler or Raulston regarding the AEC ethics complaint. (Doc. 115-2 at 63). When asked whether he knew of any communications between Reed and the AEC, Finley replied that he did not have “anything concrete.” (Doc. 115-3 at 34). From a review of the record of Finley and Reaves's case against the AEC, the Court is aware of an email indicating that the City Attorney attempted to schedule a meeting with Reed, Hill, Philyaw, and Butler regarding the ethics investigation. (2:23-464-KKD-PBM; Doc. 144-19). Another email in that record shows that a meeting was accepted about a week before the AEC met and heard the allegations of the complaint. (2:23-464-KKD-PBM; Doc. 144-39). Reed is listed as one of the “Required Attendees,” but Reed is not listed as one of the “Attendees.” (*Id.*). Reed testified that he does not know Raulston or Butler, that he would not recognize them if he saw them, and that he has no recollection of participating in a meeting with them. (Doc. 121-6 at 17).

The record is—at best—unclear whether Reed participated in this meeting. But even if he did, the only evidence about that meeting is that Butler asked for the meeting “so he [could] provide information on what will be presented and discuss some matters he believe[d] the City may need to address to avoid similar situations in the future.” (2:23-464-KKD-PBM; Doc. 144-39). This evidence, viewed in the light most favorable to Finley, is insufficient to establish the conspiracy that is alleged.

The same is true as to Finley's claim that Reed conspired to violate Finley's First Amendment rights. Even taking Finley's claim that Reed told him not to speak at the City Council Work Session as true, the evidence simply does not show a

conspiracy between Reed and a non-City employee against Finley.

In short, Finley has not shown evidence of a federal civil rights conspiracy against him. Webster filed an ethics complaint against Finley and Reaves. There is no evidence indicating that Webster's complaint involved a conspiracy with the AEC. There is also no evidence that Reed conspired with the AEC regarding the complaint. In fact, the City Attorney told the AEC that the City believed there were no ethics violations, and the City paid for legal representation to defend Finley and Reaves. Moreover, the evidence does not show that Reed conspired to violate Finley's First Amendment rights. Therefore, no reasonable jury could find that Reed conspired against Finley to violate his federal civil rights.⁵

⁵ Apart from the merits of Finley's federal claims, Reed is entitled to qualified immunity. The “doctrine of qualified immunity shelters government officials performing discretionary functions ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” [Bryant v. Jones](#), 575 F.3d 1281, 1295 (11th Cir. 2009) (quoting [Harlow v. Fitzgerald](#), 457 U.S. 800, 818 (1982)). Here, Reed was performing discretionary functions as Mayor, and Reed did not violate Finley's statutory or constitutional rights.

C. Civil conspiracy under Alabama law: Count XII

*15 Finley's twelfth cause of action alleges that Reed violated Alabama's civil conspiracy law by conspiring (1) to illegally deprive Finley of his property interest as Chief of Police; (2) to illegally retaliate against Finley for engaging in federally-protected speech; (3) to deprive Finley of his civil rights; and (4) to damage Finley's reputation by removing him from his visible and prestigious position as Chief of Police. (Doc. 42 at 42). In Alabama, the elements of civil conspiracy are “(1) [a] concerted action by two or more persons (2) to achieve an unlawful purpose or a lawful purpose by unlawful means.” [Ex parte Maintenance Group, Inc.](#), 261 So. 3d 337, 347 (Ala. 2017). However, the intracorporate conspiracy doctrine applies to Alabama law. [M & F Bank v. First Am. Title Ins. Co.](#), 144 So. 3d 222, 234 (Ala. 2013). This means that Finley's state law conspiracy claim requires evidence that Reed conspired with outsiders not employed by the City (e.g., Raulston and Butler).

The first element of a civil conspiracy under Alabama law requires a concerted action by two or more persons. [Ex parte Maintenance Group, Inc.](#), 261 So. 3d 337, 347 (Ala. 2017). Reed argues that this element is not met because there is no evidence that Reed had an agreement with any other person. (Doc. 116 at 41). The record supports Reed's position. Regarding the ethics complaint, Finley has presented no evidence that Reed conspired with Butler or Raulston. (Doc. 115-2 at 63). Regarding the allegation that Reed told Finley to remain silent at the City Council Work Session, Finley has no evidence that Reed conspired with any of the individuals who spoke about alleged corruption in the MPD.

Even if Finley established the first element, Finley would still need to show that Reed conspired to achieve an unlawful purpose or a lawful purpose by unlawful means. [Ex parte Maintenance Group, Inc.](#), 261 So. 3d 337, 347 (Ala. 2017). Reed argues that the removal of Finley as Chief of Police was not unlawful because Finley was an “at will” employee. (Doc. 116 at 41). The law and the record support this argument as well. “In Alabama, an employment relationship is ordinarily ‘at will,’ and the fundamental principle of employment at will is that the employment relationship is terminable by either party at any time and for any reason.” [Ex parte Michelin N. Am., Inc.](#), 795 So. 2d 674, 677 (Ala. 2001). Finley admits that he was an “at will” employee and that Reed had the right to terminate him. (Doc. 121-13 at 58, 57). The evidence, viewed in the light most favorable to Finley, does not show that Reed conspired to achieve an unlawful purpose or a lawful purpose by unlawful means.


No reasonable juror could find that Finley has established the elements for a conspiracy under Alabama law. Therefore, Reed is entitled to summary judgment on Count XII.


D. Defamation, libel, and slander: Count XIII

Finley's thirteenth cause of action alleges that Reed violated Alabama laws prohibiting defamation, libel, and slander. (Doc. 42 at 43). The elements of a defamation claim are:

- 1) a false *and* defamatory statement concerning the plaintiff;
- 2) an unprivileged communication of that statement to a third party;
- 3) fault amounting at least to negligence on the part of the defendant; and
- 4)

either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication of the statement.

 [McCaig v. Talladega Publ'g Co.](#), 544 So. 2d 875, 877 (Ala. 1989). Libel is written defamation, and slander is oral defamation. [Hambrick v. Spire Alabama, Inc.](#), 367 So. 3d 1102, 1107 (Ala. Civ. App. 2022). To support his claim, Finley alleges generally that Reed encouraged false complaints against him and made statements concerning him that led to injury. (Doc. 42 at 43–44).

“A decision whether a statement is reasonably capable of a defamatory meaning is a question of law.” [Bell v. Smith](#), 281 So. 3d 1247, 1254 (Ala. 2019) (quoting  [Cottrell v. National Collegiate Athletic Ass'n](#), 975 So. 2d 306, 346 (Ala. 2007)). This means that “if the communication is not reasonably capable of a defamatory meaning, there is no issue of fact, and summary judgment is proper.” [Harris v. Sch. Ann. Pub. Co.](#), 466 So. 2d 963, 965 (Ala. 1985).

*16 Here, Finley's defamation claim fails because Finley has no evidence that Reed encouraged false complaints against him. (Doc. 121-13 at 56). Moreover, nothing in the record shows a statement by Reed concerning Finley that was false and defamatory. For example, the Montgomery Advertiser published an article about the April 6, 2021, City Council Work Session. Fiscus, [Montgomery police officers claim retaliation, fudged reports by department leadership](#), *supra*. But Reed was not mentioned or quoted in the article. The only statement from the Mayor's Office was: “Tonight we heard allegations made by individuals. There is a legal process for personnel issues, and that process is ongoing.” *Id.* Nothing in the article shows a false or defamatory statement from Reed.

On the day Finley resigned, WFSA posted an article about Finley's resignation. (Doc. 115-23 at 1). The article contained a statement from Reed expressing gratitude to Finley but explaining that the City can do more to combat violent crime. (*Id.*). This is not a false statement. This is an opinion. “One cannot recover in a defamation action because of another's expression of an opinion based upon disclosed, nondefamatory facts, no matter how derogatory the expression may be.” [Sanders v. Smitherman](#), 776 So. 2d 68, 74 (Ala. 2000) (citing [Restatement \(Second\) of Torts § 566](#) (1977)).

A week after Finley resigned, the Montgomery Advertiser published an article about Finley's resignation. (Doc. 115-24). The article quoted Reed's reasons for the resignation: a lack of improvement in crime data and questions about the working environment at the MPD. (*Id.* at 1). This, too, is not a false statement. The article included crime data backing up Reed's statement, and there were clearly questions about the working environment at the MPD.

After Finley's AEC proceeding, WFSA published a news article explaining that the AEC found that Finley and Reaves each “committed a minor violation of the Alabama Ethics Act.” (Doc. 115-26). This is not a false statement from Reed. The article also included a statement from the City expressing gratitude to the AEC and confidence in the Interim Chief while a national search for Chief is conducted. (*Id.*). But these are not false statements.

On September 1, 2021, WFSA published another article entitled “Interim Montgomery police chief: Department moral is ‘coming back around.’” (Doc. 115-27 at 1). Included in this article is a statement about Finley and Reaves's AEC violation with a link to the August 4, 2021, article. (*Id.* at 2). Again, this is not a false statement from Reed. The article also contains a past statement from Reed that Finley's resignation was in “the best interest of the men and women of the [MPD], as well as the residents of Montgomery.” *Id.* Again, this is Reed's opinion. It is not a false and defamatory statement.

Even if there were false and defamatory statements from Reed concerning Finley, Finley would have another burden to meet to survive summary judgment—the public figure exception. Because Finley admits that he was a public figure, he would have to provide “clear and convincing evidence” that Reed published the statements “with actual malice” to avoid summary judgment. [Smith v. Huntsville Times Co.](#), 888 So. 2d 492, 499 (Ala. 2004). The record fails to show false statements from Reed, much less that Reed acted with actual malice toward Finley.

In sum, Reed is entitled to summary judgment on Finley's defamation claim. The record, viewed in the light most favorable to Finley, does not show that Reed made or encouraged false and defamatory statements concerning Finley.

E. Invasion of privacy: Count XV

“Alabama has long recognized that a wrongful intrusion into one's private activities constitutes the tort of invasion of privacy.” [Butler v. Town of Argo](#), 871 So. 2d 1, 12 (Ala. 2003). Invasion of privacy consists of four distinct wrongs: (1) intrusion on seclusion; (2) public disclosure of private information; (3) false light; and (4) appropriation for commercial use. *Id.* Finley alleges that Reed has committed the first three wrongs. (Doc. 42 at 46–48). However, Finley fails to establish that a reasonable jury could find in favor of him on any of these claims.

1. Finley fails to establish a claim for intrusion on seclusion

*17 Intrusion on seclusion occurs when one intentionally intrudes on another or his private affairs. [Reg'l Prime Television v. South](#), 399 So. 3d 220, 241 (Ala. 2024). Examples include a “physical intrusion into a place where the plaintiff has secluded himself, ... discovering the plaintiff's private affairs through wiretapping or eavesdropping, or ... [an] investigation into the plaintiff's private concerns, such as opening private mail or examining a private bank account.” [Johnston v. Fuller](#), 706 So. 2d 700, 702 (Ala. 1997) (citing Restatement (Second) of Torts § 652B cmt. b (1977)).

Here, Finley argues that Reed “invaded on his personal and emotional sanctum by harassing and retaliating against him” and by “requiring hi[m] to defend his employment history during Defendants' investigation based on false charges and fabricated evidence.” (Doc. 42 at 47). But Finley has no evidence that Reed conspired to bring false charges against him. (Doc. 121-13 at 56). Moreover, no reasonable jury could find that Finley could establish a claim for harassment or retaliation. *See supra* Part III.A.; *see also* (Doc. 144) (granting summary judgment on Finley's retaliation claim). And there is not even a sufficient allegation, much less evidence, that there was an investigation into Finley's “private concerns.” Thus, Finley fails to establish a claim for intrusion on seclusion.

2. Finley fails to establish a claim for public disclosure of private information

Public disclosure of private information occurs when one gives publicity to a matter concerning the private life of another that is (1) highly offense to a reasonable person and (2) not of legitimate public concern. [Reg'l Prime Television v. South](#), 399 So. 3d 220, 241 (Ala. 2024). This claim cannot be established, however, if the information disclosed was already public. *Id.* at 242.

Here, Finley argues that Reed gave publicity to private information about Finley that violated ordinary decency. (Doc. 42 at 47). But nothing in the record shows that Reed disclosed private information concerning Finley. Reed did not publicize evidence surrounding Finley's ethics violation. WFSA did. (Doc. 115-26). Further, the information that WFSA publicized about Finley—that the AEC found that he committed a minor violation—was public and was “of public concern.” (*Id.*). Therefore, the record does not support a claim for public disclosure of private information.

3. Finley fails to establish a claim for false light

A false light claim requires that the defendant give publicity to a matter concerning another that places the other before the public in a false light if (1) the false light would be highly offensive and (2) the actor had knowledge or acted in reckless disregard to the falsity of the matter and the false light in which the other would be placed. [Flickinger v. King](#), 385 So. 3d 504, 517 (Ala. 2023). Here, Finley alleges that Reed put Finley in false light to the public based on false evidence and fabricated complaints. (Doc. 42 at 47). However, Finley has presented no evidence that Reed conspired to bring false charges against him. (Doc. 121-13 at 56). And Reed did not publicize the AEC's determination on Finley's ethics violation.

Even considering that Finley was cleared of his ethics violation, Finley fails to establish a claim for false light. The record does not show that Reed had knowledge or acted in reckless disregard to the falsity of this matter. Therefore, Finley fails to establish a claim for invasion of privacy.

IV. Conclusion

*18 Reed moved for summary judgment on all of the remaining claims against it. Finley failed to respond to the motion. Because Reed's motion and evidentiary materials show that no reasonable jury could find for Finley on any of the claims against him, Reed's motion for summary judgment is **GRANTED**.

DONE and **ORDERED** this the **9th** day of **June 2025**.

All Citations

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39 Fed.Appx. 748

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7. United States Court of Appeals, Third Circuit.

Mary LAMB-BOWMAN, Appellant,

v.

DELAWARE STATE UNIVERSITY; Dr. William B. Delauder, individually and in his official capacity as President; John C. Martin, individually and in his official capacity as Former Athletic Director; William Collick, individually and in his official capacity as Athletic Director.

No. 01–2045.

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Submitted Under Third Circuit
LAR 34.1(a) Feb. 28, 2002.

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Filed June 28, 2002.

Synopsis

Former women's basketball coach at state university brought suit claiming wrongful termination and retaliation under Titles VII and IX, § 1983, and Delaware public policy exception to employment at will doctrine. The District Court, Schwartz, Senior District Judge, dismissed all claims other than those under Title VII, 1999 WL 1250889. Thereafter, university moved for summary judgment. The District Court, Sue L. Robinson, Chief Judge, 152 F.Supp.2d 553, entered judgment for university. Former coach appealed. The Court of Appeals, Roth, J., held that: (1) coach's allegations of sex discrimination based on her opposition to university's funding and resource disparities between the women's and men's athletic programs and to university's discrimination toward all persons associated with women's athletics failed to establish that she was discriminated against because of her sex, and thus, coach failed to establish a prima facie case of sex discrimination under Title VII, and (2) coach also failed to state retaliation claim under Title VII.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

*749 Appeal from the United States District Court for the District of Delaware (D.C. Civil Action No. 98–cv–00658). District Judge: Honorable Sue L. Robinson.

Before ROTH and FUENTES, Circuit Judges KATZ *, District Judge.

* Honorable Marvin Katz, District Court Judge for the Eastern District of Pennsylvania, sitting by designation.



*750 OPINION

ROTH, Circuit Judge.



**1 Mary Lamb–Bowman appeals a final order of the United States District Court for the District of Delaware granting Delaware State University's motion for summary judgment. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over a grant of a motion for summary judgment. See Metro Transp. Co. v. North Star Reinsurance Co., 912 F.2d 672, 678 (3d Cir.1990). In our review of the grant of summary judgment, we view all reasonable inferences in a light most favorable to the nonmoving party. Hamilton v. Leavy, 117 F.3d 742, 746 (3d Cir.1997). Summary judgment may be granted where there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c).

Lamb–Bowman raises two issues for appeal: (1) that the District Court erred in denying her sex discrimination claims under Title VII of 42 U.S.C. § 1983, and (2) that the District Court erred in denying her retaliation claims under Title VII of 42 U.S.C. § 1983. For the reasons below, we will affirm the judgment of the District Court.

The first issue is whether the District Court erroneously found that Lamb–Bowman did not have a sex discrimination claim under Title VII of 42 U.S.C. § 2000e(a)(1). To have a

prima facie claim of Title VII discrimination, a plaintiff must show: (1) that she is a member of a protected class, (2) that she suffered some form of adverse employment action, and (3) that this action occurred under circumstances that give rise to an inference of unlawful discrimination such as might occur when a similarly situated person not of the protected class is treated differently.  *Boykins v. Lucent Technologies, Inc.*, 78 F.Supp.2d 402, 409 (E.D.Pa.2000) (citing  *Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 410 (3d Cir.1999)).

The District Court found that Lamb–Bowman did not establish a prima facie case of sex discrimination under Title VII. She did not demonstrate that she suffered discrimination based on her sex. Her allegations of sex discrimination were based, by her own account, on her opposition to DSU's funding and resource disparities between the women's and men's athletic programs and to DSU's discrimination toward all persons associated with women's athletics. These allegations fail to establish that she was discriminated against because of her sex. Although Lamb–Bowman alleges that she was subjected to adverse employment actions, these actions were aimed at persons involved in women's athletics; those persons included men. While such allegations might be relevant to a Title IX claim, they do not satisfy the third element of a prima facie case of sex discrimination under Title VII. Therefore, Lamb–Bowman's sex discrimination claims fail.

The second issue is whether the District Court erroneously found that Lamb–Bowman did not have a retaliation claim under Title VII of  42 U.S.C. § 2000e–3. To have a prima facie claim of Title VII discrimination, a plaintiff must show: (1) that she engaged in a protected activity, (2) that the defendants took adverse employment action against her, and (3) that there is a causal link between the protected activity and the adverse action.  *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir.1999).

***751 **2** The District Court found that Lamb–Bowman's retaliation claims potentially violate Title IX, but not Title VII, therefore barring her claims under Title VII. Her Title IX claims were time-barred and thus dismissed. Once more, her allegations involve retaliation against her for her opposition to disparities between the women's and men's athletic programs at DSU. Again, we conclude that the District Court properly awarded summary judgement to DSU because such an adverse employment action would be potentially protected under Title IX and not Title VII.

For the foregoing reasons, we will affirm the judgment of the District Court.

All Citations

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United States Court of Appeals, Fifth Circuit.

Will MCRANEY, Plaintiff—Appellant,

v.

The NORTH AMERICAN MISSION BOARD
OF THE SOUTHERN BAPTIST CONVENTION,
INCORPORATED, Defendant—Appellee.

No. 23-60494

I

FILED September 9, 2025

Synopsis

Background: Former executive director of organization of autonomous churches' mission board brought action in state court alleging tortious interference with business relationships, defamation, and intentional infliction of emotional distress. Following removal, the United States District Court for the Northern District of Mississippi, [Glen H. Davidson](#), Senior District Judge, [2019 WL 1810991](#), denied board's motion to dismiss, and it appealed. The Court of Appeals, [966 F.3d 346](#), reversed and remanded. On remand, the District Court, [Davidson](#), Senior District Judge, [2023 WL 5266356](#), entered summary judgment in board's favor, and director appealed.

Holdings: The Court of Appeals, [Oldham](#), Circuit Judge, held that:

fact that organization and its mission board were not hierarchical entities did not preclude application of church autonomy doctrine;

general church autonomy principles and First Amendment's ministerial exception barred director's claims challenging his removal;

general church autonomy principles and First Amendment's ministerial exception barred director's claims based on other religious organizations' decisions not to hire him and to disinvite him from speaking engagements;

general church autonomy principles and First Amendment's ministerial exception barred director's claim for intentional

infliction of emotional distress based on posting of no-entry photograph of him behind board's reception desk; and

district court had subject matter jurisdiction to enter judgment on merits.

Affirmed in part and vacated in part.

[Ramirez](#), Circuit Judge, dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Appeal from the United States District Court for the Northern District of Mississippi, USDC No. 1:17-CV-80, [Glen H. Davidson](#), U.S. District Judge

Attorneys and Law Firms

[Scott E. Gant](#) (argued), Boies, William Harvey Barton, II, Trial Attorney, Schiller & Flexner, L.L.P., Washington, DC, for Plaintiff—Appellant.

[Matthew T. Martens](#), Esq., Attorney (argued), Wilmer Cutler Pickering Hale & Dorr, L.L.P., Washington, DC, [Kathleen Ingram Carrington](#), Burr & Forman, L.L.P., Nashville, TN, [Carly H. Chinn](#), Esq., [Kyle Vernon Miller](#), Esq., Butler Snow, L.L.P., Ridgeland, MS, [David J. Hacker](#), [Hiram Stanley Sasser, III](#), First Liberty Institute, Plano, TX, [Timothy Jeffrey Perla](#), Senior Associate, Wilmer Cutler Pickering Hale & Dorr, L.L.P., Boston, MA, [Joshua A. Vittor](#), Wilmer Cutler Pickering Hale & Dorr, L.L.P., Los Angeles, CA, [Joshua Jerome Wiener](#), Esq., Butler Snow, L.L.P., Ridgeland, MS, for Defendant—Appellee.

[Michelle Shamblin Stratton](#), Murphy Ball Stratton, L.L.P., Houston, TX, for Amicus Curiae Current and Former Baptist Leaders.

[Daniel Howard Blomberg](#), Amanda Gray Dixon, Adele Keim, Becket Fund for Religious Liberty, Washington, DC, for Amicus Curiae Becket Fund for Religious Liberty.

[R. Shawn Gunnarson](#), Kirton McConkie, Salt Lake City, UT, for Amici Curiae Church of Jesus Christ of Latter-Day Saints, National Association of Evangelicals, Lutheran Church Missouri Synod, General Conference of Seventh-day Adventists, Catholic Diocese of Biloxi, Catholic Diocese of Jackson MS, Jewish Coalition for Religious Liberty,

Islam and Religious Freedom Action Team of the Religious Freedom Institute.

Before [Richman](#), [Oldham](#), and [Ramirez](#), Circuit Judges.

Opinion

[Andrew S. Oldham](#), Circuit Judge:

*1 Pastor Will McRaney brought employment-related claims against the North American Mission Board. But the church autonomy doctrine prohibits any court from adjudicating McRaney's claims. Therefore, the district court was correct to enter summary judgment for the Board.

I

We begin with background on (A) the religious institutions involved and (B) the procedural posture of this suit.

A

Baptist ecclesiology is non-hierarchical, and each Baptist church is autonomous. Nevertheless, Baptist churches have long voluntarily cooperated in fellowship with one another and pooled resources for missions, evangelism, and church planting. It is common for cooperating Baptist organizations to have a shared confession of faith and doctrinal commitments. Each Baptist association and convention is itself autonomous and exercises no control over cooperating congregations.

The Southern Baptist Convention (“SBC”) is one such national organization. The SBC's confession of faith is the *Baptist Faith & Message* (2000). Defendant–Appellee, the North American Mission Board (“NAMB”), is one of 12 different constituent boards or agencies of the SBC. Its ministry priorities include assisting churches with evangelism and church planting, “providing missions education,” “coordinating volunteer missions,” and helping with “relief ministries to victims of disaster and other people in need.” ROA.1701. NAMB pursues these ministry priorities through cooperative partnerships with 42 different state or regional conventions of Baptist churches. One of these cooperative partners is the Baptist Convention of Maryland/Delaware (“BCMD”), an organization of more than 500 autonomous Baptist churches in Maryland and Delaware.

In 2012, NAMB and BCMD entered into a Strategic Partnership Agreement (“SPA”). The SPA was a joint ministry agreement that memorialized “the relationships and responsibilities” of the two entities “in areas where the two partners jointly develop, administer and evaluate a strategic plan for” reaching nonbelievers “through church planting and evangelism.” ROA.1702. As the district court recognized, the SPA is “steeped in religious doctrine,” see [McRaney v. N. Am. Mission Bd. of S. Baptist Convention](#), No. 17-CV-00080, 2023 WL 5266356, at *3 (N.D. Miss. Aug. 15, 2023), and it is “inexorably tied to Baptist faith,” Red Br. at 4. The ultimate purpose of the partnership was to “accomplish the Great Commission as given to us by our Lord in Matthew 28:19–20 and Acts 1:8.” ROA.1702; see *Matthew* 28:19–20 (ESV) (“Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all that I have commanded you.”). The partnership was “driven by shared values” including “Biblical Authority,” “Kingdom Advancement,” “Evangelism and Missions,” and “Autonomy of Individual Baptist Entities.” ROA.1702. And the agreement was designed to “be consistent with the most recently adopted version of the Southern Baptist Convention Baptist Faith and Message.” ROA.1703.

*2 Plaintiff Will McRaney is an ordained minister who was employed as BCMD's Executive Director and Executive Missional Strategist from September 2012 to June 2015. The position was a ministerial role in which McRaney sought to implement the SPA's evangelical objectives. His responsibilities included overseeing and directing efforts to reach nonbelievers through church planting and evangelism.

A schism developed between McRaney and NAMB about how best to carry out the SPA. NAMB was not satisfied with McRaney's “performance of the cooperative evangelistic mission,” ROA.1835, and was concerned about his “serious and persistent disregard” of the SPA's principles, ROA.2232. Specifically, they disagreed about “missionary selection and funding, associational giving, and missionary work requirements.” [McRaney](#), 2023 WL 5266356, at *1. In December 2014, “[a]fter careful and prayerful consideration,” NAMB tendered to BCMD its one-year notice of intent to terminate the SPA. ROA.2232.

In June 2015, BCMD's board unanimously voted, 37–0, to terminate McRaney as the Executive Director. In an email to another pastor, BCMD's president explained that “we fired

Will because of his wretched leadership.” ROA.2239. At his deposition, he explained that McRaney “betrayed a spirit of unwillingness to make the changes from his heart that needed to be made in his leadership” and “lack[ed] the humble spirit necessary” for his evangelical mission. ROA.1814. Board members complained that McRaney was “just not Joshua or Jeremiah”; that he was not “a good captain that can navigate tumultuous waters in a storm”; that “HE has to do Matthew 18”; that under McRaney’s leadership “8 times to 2 it’s [S]atan discussed over God”; and that “[i]f we pray, we check it off the list.” ROA.4096–97.

Since then, McRaney has publicly campaigned against NAMB and its president for their perceived role in his termination from BCMD. In February 2016, he circulated a “Letter of Concern” accusing NAMB’s president of “vindictive tactics.” ROA.2270. That June, he sent another letter calling for “restoration and restitution for the damages caused by [NAMB’s president] acting on behalf of NAMB.” ROA.2274. And he made numerous posts on Facebook and Twitter to criticize NAMB and its president. *See* ROA.2322–26.

In October 2016, a pastor saw McRaney’s posts on Facebook “declaring war on the [NAMB].” ROA.2298. In response to those posts, the pastor disinvited McRaney from speaking at a conference in Mississippi because “significant numbers of our ministry partners were [NAMB] ministers.” ROA.2298–99. In response to McRaney’s public campaign, NAMB hired private security personnel and purchased a home security system for its president due to fear for his physical safety. NAMB also posted a no-entry photograph of McRaney behind the reception desk at its headquarters.

B

In 2017, McRaney sued NAMB in Mississippi state court. He alleged tortious interference with business relationships, defamation, and intentional infliction of emotional distress.

NAMB removed the case to federal district court under [28 U.S.C. §§ 1332](#), [1441\(a\)](#)–[\(b\)](#).

NAMB then moved to dismiss for failure to state a claim under Rule 12(b)(6). [McRaney v. N. Am. Mission Bd. of S. Baptist Convention](#), No. 17-CV-00080, 2019 WL 1810991, at *1 (N.D. Miss. Apr. 24, 2019). In that motion, NAMB argued that McRaney’s claims were barred by the church

autonomy doctrine. *See* [ibid.](#) The district court denied the motion in material part. [Ibid.](#) NAMB reasserted its church autonomy defense at summary judgment. [Ibid.](#) The district court concluded that “under the First Amendment it lack[ed] subject matter jurisdiction to adjudicate McRaney’s disputes” and dismissed the case. [Id.](#) at *3–4.

*3 On appeal, a panel of our court reversed. *See* [McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.](#), 966 F.3d 346, 351 (5th Cir. 2020). The panel reasoned that the early stage of the litigation made it “premature” to conclude that the church autonomy doctrine barred McRaney’s claims, [ibid.](#), but clarified that the district court was “free to reconsider” dismissing “some or all of McRaney’s claims” on remand, [id.](#) at 350. Our court denied rehearing en banc in a 9–8 vote. *See* [McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.](#), 980 F.3d 1066 (5th Cir. 2020); *see also id.* at 1075 (Oldham, J., dissenting from the denial of rehearing en banc).

On remand, the parties continued discovery. The parties deposed multiple pastors and many sensitive internal ministry records were produced. NAMB again moved for summary judgment on church autonomy grounds, among others.

[McRaney](#), 2023 WL 5266356, at *1. The district court granted the motion for summary judgment, concluding that adjudicating McRaney’s claims would “impermissibly delv[e] into church matters in violation of” the church autonomy doctrine. [Id.](#) at *3. Somewhat confusingly, however, the district court also concluded that it lacked subject matter jurisdiction and purported to dismiss the case.

[Id.](#) at *5. McRaney timely appealed.

II

Civil courts cannot adjudicate ecclesiastical matters. That august principle has a “rich historical pedigree” stretching well past the Founding. [McRaney](#), 980 F.3d at 1076 (Oldham, J., dissenting from the denial of rehearing en banc). The First Amendment’s Religion Clause¹ enshrines that principle within the church autonomy doctrine, which shields religious institutions from interference by state and federal courts. *See* [Our Lady of Guadalupe Sch. v. Morrissey-Berru](#), 591 U.S. 732, 746, 140 S.Ct. 2049, 207 L.Ed.2d 870 (2020). We (A) briefly explain the relevant history, (B) clarify its modern

doctrinal reception, and (C) explain how the doctrine robustly protects religious institutions.

¹ While most courts and scholars refer to the Establishment Clause and the Free Exercise Clauses as the First Amendment's "Religion Clauses" (plural), they are in fact a singular clause. The First Amendment provides: "[1] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; [2] or abridging the freedom of speech, or of the press; [3] or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Thus, the First Amendment has three clauses separated by semicolons. The Religion Clause (singular) is the first of them, and it has two halves separated by commas. See Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment's Religion Clauses*, 42 U. KAN. L. REV. 285, 296 (1994). Understanding the Religion Clause as a unitary provision of the First Amendment has important doctrinal implications because it ensures that courts interpret its two halves to "have complementary purposes, not warring ones." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 510, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022) (quotation omitted).

A

The independence of religious institutions to govern their own affairs free from government intrusion has "ancient roots" in Anglo-American legal history. *McRaney*, 980 F.3d at 1076 n.1 (Oldham, J., dissenting from the denial of rehearing en banc). That principle was already centuries old by the time of the Norman Conquest: Under the Saxon kings of the seventh to the tenth centuries, civil courts categorically lacked jurisdiction over clergymen unless the bishop "secularize[d]" them first. *Id.* at 1076 (quoting Alfred c. 21 (892); and citing, *inter alia*, FELIX MAKOWER, *THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND* 384–94 (London, 1895)). Between 1072 and 1076, William the Conqueror stripped the civil courts of jurisdiction over "any case which pertain[ed] to the rule of souls" and established new ecclesiastical courts with exclusive jurisdiction over matters of religious law and doctrine. *Ibid.* (quoting Ordinance of William I Separating the

Spiritual and Temporal Courts). In the Middle Ages, then, it was "natural and inevitable to have church courts and state courts, each with their own field of action and each, perhaps, tending to encroach on the other's domain, but each having their own province in which they were paramount." Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 6 (1933).

*4 The autonomy of churches to adjudicate their own affairs was therefore "hardly new" when King John assented to Magna Carta in 1215. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). And it was so important that the Great Charter's "very first clause," *ibid.*, ensured that "the English church shall be free, and shall have its rights undiminished, and its liberties unimpaired," MAGNA CARTA, ch. 1 (1215). Unfortunately, that decree may have been more aspirational than effective. It "did not survive the reign of Henry VIII," who brought the Church of England under the Crown's control. *Hosanna-Tabor*, 565 U.S. at 182, 132 S.Ct. 694; see also Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110–15 (2003) (recounting more of this history).

Puritans and Quakers fled to New England, Pennsylvania, and Delaware "[s]eeking to escape the control of the national church" in England. *Id.* at 182, 132 S.Ct. 694. Even the Anglicans who had colonized Virginia "sometimes chafed at the control exercised by the Crown and its representatives over religious offices" in the New World. *Id.* at 183, 132 S.Ct. 694. The budding American colonies became mired in conflict between colonial governments and minority faiths too. For example, "minority Protestant sects" such as Presbyterians faced "legislative interference with their form of church governance." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1445 (1990). And infamously, Baptist preachers were jailed in Culpeper, Virginia, for dissenting from Anglicanism—a persecution that James Madison called a "diabolical Hell conceived principle." *Id.* at 1452 (quoting Letter from James Madison to William Bradford (Sept. 25, 1773), in 1 THE PAPERS OF JAMES MADISON 104, 106 (R. Rutland & C. Hobson eds., 1977)); see also *Our Lady of Guadalupe*, 591 U.S. at 749, 140 S.Ct. 2049 (providing the history of other

conflicts); [Shurtleff v. City of Boston](#), 596 U.S. 243, 286, 142 S.Ct. 1583, 212 L.Ed.2d 621 (2022) (Gorsuch, J., concurring) (describing the “traditional hallmarks” of religious establishments).

These episodes framed many Christians’ arguments for disestablishment and free exercise at the Founding. *See, e.g., Declaration of the Virginia Association of Baptists* (Dec. 25, 1776), *reprinted in* 1 THE PAPERS OF THOMAS JEFFERSON 660, 660–61 (Julian P. Boyd ed., 1950). For example, Baptist preacher John Leland argued that “religious opinions [are] not the objects of civil government, nor any way under its jurisdiction.” John Leland, *The Yankee Spy: Calculated for the Religious Meridian of Massachusetts, but Will Answer for New Hampshire, Connecticut, and Vermont, Without Any Material Alterations* (1794), *reprinted in* THE WRITINGS OF THE LATE ELDER JOHN LELAND 213, 228 (L.F. Greene ed., 1845). That proposition would have been familiar to King Edgar the Peaceful, who said basically the same thing while reigning over England nearly a millennium earlier. *See McRaney*, 980 F.3d at 1076 (Oldham, J., dissenting from the denial of rehearing en banc).

Ultimately, our Framers adopted the First Amendment and its Religion Clause “against this background.” [Hosanna-Tabor](#), 565 U.S. at 183, 132 S.Ct. 694.

B

Today, the Supreme Court has reified this principle in the First Amendment’s church autonomy doctrine. [U.S. CONST. amend. I](#). The “general principle of church autonomy” guarantees to religious institutions “independence in matters of faith and doctrine and in closely linked matters of internal government.” [Our Lady of Guadalupe](#), 591 U.S. at 747, 140 S.Ct. 2049. We (1) briefly describe the “broad principle” of “church autonomy.” [Ibid.](#) Then we (2) discuss some of its various strands.

1

*5 In general, the church autonomy doctrine “protect[s] the right of churches and other religious institutions to decide matters of faith and doctrine” without the “intrusion” of secular courts. [Id.](#) at 746, 140 S.Ct. 2049

(quotation omitted).² The doctrine does not grant “religious institutions ... a general immunity from secular laws.” [Ibid.](#) Its purpose includes safeguarding religious institutions’ “autonomy with respect to internal management decisions that are essential to the institution’s central mission.” [Ibid.](#); *see also* [Hosanna-Tabor](#), 565 U.S. at 199, 132 S.Ct. 694 (Alito, J., concurring) (“To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.”); [Cath. Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm’n](#), 605 U.S. 238, 257, 145 S.Ct. 1583, 221 L.Ed.2d 881 (2025) (Thomas, J., concurring) (grounding the church autonomy doctrine in “the reality that matters of religious faith and doctrine are closely linked to ... matters of church government” and the background “understanding that church and state are ... each supreme in its own sphere” (quotation omitted)). Even the “very process of inquiry” into a church’s internal affairs can “impinge on rights guaranteed by the [First Amendment]” [NLRB v. Cath. Bishop of Chi.](#), 440 U.S. 490, 502, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979).

2

Though the doctrine is called the *church* autonomy doctrine, its protections extend to religious institutions of all faiths. *See* [Our Lady](#), 591 U.S. at 754–56, 140 S.Ct. 2049 (discussing Catholicism, various Protestant denominations, Judaism, Islam, the Church of Jesus Christ of Latter-day Saints, and Seventh-day Adventism). And while we use the term church autonomy doctrine, other courts and commentators have used the term “ecclesiastical abstention” to describe the same principle. *See, e.g., Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 795 (9th Cir. 2025) (Bress J., concurring); *Belya v. Kapral*, 45 F.4th 621, 628 (2d Cir. 2022); *Ogle v. Hocker*, 279 F. App’x 391, 395 (6th Cir. 2008); *see also* Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431, 448 (2011) (“[T]he Supreme Court has consistently and with little controversy prohibited civil court involvement in ‘purely ecclesiastical’ matters to ensure that government does not encroach on the sacred precincts of religion. Scholars have dubbed this line

of jurisprudence the ‘church autonomy doctrine’ or the ‘ecclesiastical abstention doctrine.’”).

First and foremost, the First Amendment does not allow civil litigation “to turn on the resolution by civil courts of controversies over religious doctrine and practice.”

▮ *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969). That is because judicial “interference in that sphere would obviously violate the free exercise of religion, and any attempt by [courts] to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.” ▮ *Our Lady of Guadalupe*, 591 U.S. at 746, 140 S.Ct. 2049.

2

But the church autonomy doctrine prohibits far more than civil judges telling religious institutions what to believe or how to worship. To help clarify the wide-ranging scope of the doctrine, we identify some areas where church autonomy has barred judicial interference. These include (a) the selection and dismissal of clergy and faith leaders (the so-called “ministerial exception”); (b) the meaning of religious beliefs and doctrines; (c) the determination of religious polity, such as membership, matters of discipline and good standing, and the identification of the “true church” amidst internecine disputes; and (d) internal church communications regarding any of the aforementioned activities. *See, e.g.*, Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definition to Church Autonomy Doctrine*, 108 MARQUETTE L. REV. 705, 710–12 (2025). Of course, these categories are not meant to be exclusive. And many cases will cut across them. Still, they help illustrate both the breadth and the importance of the church autonomy doctrine.

a

*6 Start with the ministerial exception, which is one “component” of the church autonomy doctrine. ▮ *Our Lady of Guadalupe*, 591 U.S. at 746, 140 S.Ct. 2049. That rule commands courts “to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.” ▮ *Ibid.* The name is misleading in two respects. The ministerial exception is

not a mere “exception” from statutes or torts. It recognizes a sphere of independence that courts cannot pierce. That is why the ministerial exception does not “safeguard a church's decision to fire a minister only when it is made for a religious reason,” but “instead ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church's alone.” ▮ *Hosanna-Tabor*, 565 U.S. at 194–95, 132 S.Ct. 694 (citation omitted) (quoting ▮ *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119, 73 S.Ct. 143, 97 L.Ed. 120 (1952)). And the ministerial exception is not limited to leaders with the title “minister.” Rather, it “include[s] any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or *teacher of its faith*.” ▮ *Our Lady of Guadalupe*, 591 U.S. at 754, 140 S.Ct. 2049 (quotation omitted).

The ministerial exception bars the application of even neutral, generally applicable employment discrimination statutes—such as the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967 (“ADEA”), and Title VII of the Civil Rights Act of 1964. *See* ▮ *Hosanna-Tabor*, 565 U.S. at 180, 132 S.Ct. 694; *see also* ▮ *Our Lady of Guadalupe*, 591 U.S. at 760, 140 S.Ct. 2049. The ministerial exception also bars common law claims that “litigate the employment relationship between the religious organization and the employee.” ▮ *Starkey v. Roman Cath. Archdiocese of Indianapolis*, 41 F.4th 931, 945 (7th Cir. 2022). Courts have rejected a wide variety of torts that attack ministry staffing decisions, including wrongful termination, breach of contract, tortious interference, intentional infliction of emotional distress, defamation, conspiracy to commit defamation, negligent supervision and detention, and retaliation—to name a few. *See* ▮ *id.* at 942 (tortious interference); ▮ *Cha v. Korean Presbyterian Church of Wash.*, 262 Va. 604, 553 S.E.2d 511, 512 (2001) (wrongful termination, tortious interference, and defamation); ▮ *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 330 (4th Cir. 1997) (wrongful termination, tortious interference, intentional infliction of emotional distress, and breach of contract); ▮ *Hutchison v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986) (defamation, intentional infliction of emotional distress, and breach of contract); ▮ *In re Diocese of Lubbock*, 624 S.W.3d 506, 511 (Tex. 2021) (same), *cert. denied sub nom. Guerrero v.*

Diocese of Lubbock, — U.S. —, 142 S. Ct. 434, 211 L.Ed.2d 255 (2021); [Erdman v. Chapel Hill Presbyterian Church](#), 175 Wash.2d 659, 286 P.3d 357, 368–71 (2012) (negligent supervision and retention); [Black v. Snyder](#), 471 N.W.2d 715, 717 (Minn. Ct. App. 1991) (breach of contract, retaliation, and defamation); see also [Puri v. Khalsa](#), 844 F.3d 1152, 1158 (9th Cir. 2017) (explaining that the ministerial exception bars “any state law cause of action that would otherwise impinge on the church's prerogative to choose its ministers” (quotation omitted)).

For example, in [Our Lady of Guadalupe School v. Morrissey-Berru](#), the ministerial exception barred a schoolteacher's ADEA suit against the Catholic school that previously employed her. [591 U.S. at 756–57](#), 140 S.Ct. 2049. Morrissey-Berru was not a priest or minister, but that did not matter because “she was her students’ religion teacher.” [Id. at 739](#), 140 S.Ct. 2049. The Catholic school first moved Morrissey-Berru to a part-time teaching position and then “declined to renew her contract” the next year. [Id. at 742](#), 140 S.Ct. 2049. The Catholic school's reasons for dismissing her were secular: It cited her “difficulty in administering a new reading and writing program.” [Ibid.](#) But that also did not matter because once a religious school “entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.” [Id. at 762](#), 140 S.Ct. 2049. So, as a threshold matter, the Court held it could not constitutionally apply the ADEA in Morrissey-Berru's suit.

*7 Our sister circuit's recent decision in [Starkey](#) is also illustrative. In that case, a former schoolteacher brought state law claims for tortious interference with employment against the Archdiocese, which, she alleged, caused her termination from a [Catholic school](#). [41 F.4th at 938](#). The court reasoned that adjudicating the schoolteacher's claims “would result in excessive judicial entanglement in ecclesiastical matters” because elements of those claims would “litigate the employment relationship between” her and the school. [Id. at 945](#). No less than a Title VII claim, a state tort suit would “operate as a penalty on the Church for terminating an unwanted minister.” [Hosanna-Tabor](#), 565 U.S. at 194,

132 S.Ct. 694. So the ministerial exception barred Starkey's claims. [Starkey](#), 41 F.4th at 945.

b

Another strand of the church autonomy doctrine forbids civil courts from deciding religious questions. This ancient rule recognizes that a civil court cannot decide questions that are “strictly and purely ecclesiastical in [their] character.” [Watson v. Jones](#), 80 U.S. (13 Wall.) 679, 733, 20 L.Ed. 666 (1871). It means that religious institutions and people have the “power to decide for themselves, free from state interference, matters ... of faith and doctrine.” [Kedroff](#), 344 U.S. at 116, 73 S.Ct. 143. “[L]egal tribunals must” defer the resolution of such questions to “the highest of [the] church judicatories to which the matter has been carried.” [Hosanna-Tabor](#), 565 U.S. at 185–86, 132 S.Ct. 694 (quoting [Watson](#), 80 U.S. (13 Wall.) at 727). The result is the “nonreviewability of questions of faith” and “religious doctrine.” [Kedroff](#), 344 U.S. at 115 n.20, 73 S.Ct. 143. Accordingly, “courts must take care to avoid ‘resolving underlying controversies over religious doctrine.’ ” [Our Lady of Guadalupe](#), 591 U.S. at 751 n.10, 140 S.Ct. 2049 (quoting [Blue Hull Mem'l Presbyterian Church](#), 393 U.S. at 449, 89 S.Ct. 601).

[Harris v. Matthews](#), 361 N.C. 265, 643 S.E.2d 566 (2007), presents a good illustration of how “[c]ourts are not arbiters of scriptural interpretation.” [Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.](#), 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). In [Harris](#), members of Saint Luke Missionary Baptist Church sued the church's pastor, secretary, and chairman. [643 S.E.2d at 568](#). They argued that leadership's transfer of Saint Luke's assets to a North Carolina nonprofit was a misappropriation of church funds and a breach of fiduciary duty. [Ibid.](#) But the Supreme Court of North Carolina held it could not adjudicate the claims. [Id. at 571](#). Why? Resolving the claims would require the court to determine whether the “expenditures” by the church's leaders “were proper,” which would turn on the “church's view of the role of the ... church leaders.” [Ibid.](#) It did not matter that the underlying claims—misappropriation of funds and breach of fiduciary duty—were the types of claims that civil courts

adjudicate all the time. What mattered was that the plaintiffs wanted North Carolina's courts to apply those civil legal rules to a matter of “religious doctrine.” [Ibid.](#) The court reasoned that such an inquiry would be “no different than asking a court to determine whether a particular church's” policies were “doctrinally correct” or “accord[ed] with the congregation's beliefs.” [Ibid.](#) The claims were therefore nonreviewable, so the court deferred to Saint Luke's highest authority—the Council for Ministry—which “declared the matter closed.” [Ibid.](#)

For similar reasons, it is not “in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings.” [Fowler v. Rhode Island](#), 345 U.S. 67, 70, 73 S.Ct. 526, 97 L.Ed. 828 (1953). So in [Lippard v. Holleman](#), 271 N.C.App. 401, 844 S.E.2d 591 (2020), a North Carolina court rejected a church musician's claim that a pastor's sermon, which described the musician as unwilling to commit to the church's reconciliation process, was defamatory because adjudicating it “would necessarily involve interpretation of Matthew 18 and Ephesians 4.” [Id.](#) at 602. In [Schoenhals v. Mains](#), 504 N.W.2d 233 (Minn. Ct. App. 1993), members of the Faith Tabernacle of Truth Church sued its pastor for defaming them in a letter he read to the congregation accusing them of “some of the most serious sins found in the Bible.” [Id.](#) at 234. But the Minnesota court rejected the claims since evaluating the truth of the sermon “would require an impermissible inquiry into Church doctrine.” [Id.](#) at 236. And in [McNair v. Worldwide Church of God](#), 197 Cal.App.3d 363, 242 Cal. Rptr. 823 (1987), a California court rejected a defamation claim premised on a pastor's statements about the plaintiff's divorce in a speech to 1,000 other ministers at a Pastoral Conference. [Id.](#) at 827. The court reasoned that it could not resolve the defamation claim because the pastor's “remarks were made while explaining the Church's newly developed and misunderstood doctrine on divorce and remarriage.” [Id.](#) at 833.

*8 In all of these cases, the plaintiff's underlying claims sounded in traditional civil law—breach of fiduciary duty, defamation, &c. And in all of these cases, that was precisely the problem: Civil courts cannot apply civil rules to religious organizations when doing so necessarily implicates questions of faith, scripture, and religious doctrine.

c

The church autonomy doctrine also forbids courts from adjudicating matters of church governance, including church discipline and the church's understanding of its own membership. See [Bouldin v. Alexander](#), 82 U.S. (15 Wall.) 131, 139–40, 21 L.Ed. 69 (1872) (“It may be conceded that we have no power to revise or question ordinary acts of church discipline.... [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off.”). For the same reason, a court cannot identify the “true” church. [Watson](#), 80 U.S. (13 Wall.) at 703.

The Supreme Court clarified this rule in [Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich](#), 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). In that case, the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church—*i.e.*, the “Mother Church”—defrocked Dionisije Milivojevich as bishop of the church's American-Canadian Diocese. [Id.](#) at 697–98, 96 S.Ct. 2372. The Mother Church also split the American-Canadian Diocese into three new Dioceses. [Id.](#) at 698, 96 S.Ct. 2372. Milivojevich sued in Illinois state court, arguing that the Mother Church did not follow its own internal regulations when it took both actions, and he sought “to have himself declared the true Diocesan Bishop.” [Id.](#) at 707, 96 S.Ct. 2372. The Supreme Court of Illinois held that Milivojevich's “defrockment had to be set aside as ‘arbitrary’ ... and that the Diocesan reorganization was invalid.” [Id.](#) at 708, 96 S.Ct. 2372. The court reached those results based on its own “interpretation of the Church's constitution and penal code,” finding “it was beyond the scope of the Mother Church's authority to effectuate such changes without Diocesan approval.” [Ibid.](#)

The Supreme Court reversed. It held that the Illinois Supreme Court's conclusion that the Mother Church acted arbitrarily when it defrocked Milivojevich necessarily “entail[ed] inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow.” [Id.](#) at 713, 96 S.Ct. 2372. But that “is exactly the inquiry that the First Amendment prohibits” because “it is the essence of religious faith that ecclesiastical decisions are reached

and are to be accepted as matters of faith whether or not rational or measurable by” secular concepts. [Id.](#) at 713–14, 96 S.Ct. 2372. Similarly, the Supreme Court held that the Illinois Supreme Court “engag[ed] in a searching and therefore impermissible inquiry into church polity” when it stopped the Mother Church from reorganizing the dioceses. [Id.](#) at 723, 96 S.Ct. 2372. The teaching of [Milivojevic](#) is therefore clear: When “ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.” [Id.](#) at 724–25, 96 S.Ct. 2372.³

³ The Supreme Court has recognized one narrow exception to this rule: Civil courts can apply “objective, well-established concepts of trust and property law” to resolve certain disputes over church property. [Jones v. Wolf](#), 443 U.S. 595, 603, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979). Even then, however, a civil court must be careful. In examining, say, “a church constitution [] for language of trust,” a “civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust.” [Id.](#) at 604, 99 S.Ct. 3020. If interpreting the document ends up “requir[ing] the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.” [Ibid.](#) (citing [Milivojevic](#), 426 U.S. at 709, 96 S.Ct. 2372). See also [Watson](#), 80 U.S. (13 Wall.) at 733 (noting churches cannot avoid civil courts’ jurisdiction by adjudicating property disputes any more than churches can avoid secular courts by “undertak[ing] to try one of its members for murder”).

d

*9 Finally, the church autonomy doctrine protects a church’s internal communications relating to church governance or matters of faith or doctrine. See [Cath. Bishop of Chi.](#),

440 U.S. at 502, 99 S.Ct. 1313 (explaining that the “very process of inquiry” into a church’s internal affairs can “impinge on rights guaranteed by the Religion Clauses”); [Hosanna-Tabor](#), 565 U.S. at 205–06, 132 S.Ct. 694 (Alito, J., concurring) (explaining that even the process involved in the “mere adjudication” of a church’s sincerity “would pose grave problems for religious autonomy”).

A few cases flesh out this principle. For example, in [Whole Woman’s Health v. Smith](#), 896 F.3d 362 (5th Cir. 2018), abortionists challenged Texas’s fetal remains regulations. The district court issued a third-party subpoena against the Texas Conference of Catholic Bishops (“TCCB”), a religious organization that “teaches that the dignity of all human life demands respect and that abortion is gravely sinful.” [Id.](#) at 364. We quashed it. See [ibid.](#) Why? Because compelling discovery would undermine “TCCB’s ability to conduct frank internal dialogue and deliberations” and chill its advocacy by “forc[ing] TCCB to turn over to a public policy opponent its internal communications.” [Id.](#) at 373 (emphasis in original). Accordingly, we refused to “empower[] certain interest groups to harass, impose disastrous costs on, and uniquely burden religious organizations.” [Id.](#) at 373–74.

Similarly, in [Bryce v. Episcopal Church in the Diocese of Colorado](#), 289 F.3d 648 (10th Cir. 2002), the Tenth Circuit held the church autonomy doctrine barred a sexual harassment suit against a minister for his “offensive” statements about homosexuality at church meetings that “facilitated religious communication and religious dialogue between a minister and his parishioners.” [Id.](#) at 658. Because these meetings constituted “the church’s internal ecclesiastical dialogue,” the statements were “not actionable” and fell “squarely within the areas of church governance and doctrine protected by the First Amendment.” [Ibid.](#)

And in [Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession of Worthington](#), 877 N.W.2d 528 (Minn. 2016), the church autonomy doctrine protected “statements made in the context of a religious disciplinary proceeding when those statements are disseminated only to members of the church congregation or the organization’s membership or hierarchy.” [Id.](#) at 542. The Minnesota Supreme Court accepted the argument that “exposing these proceedings and their participants to civil

litigation w[ould] lead to a chilling effect” if they “are not shielded from the scrutiny of civil courts.” [Id.](#) at 539.

C

Where the church autonomy doctrine applies, its protection is total. That is because the doctrine is a constitutional immunity from suit. Like other immunities from suit, church autonomy must be resolved at the threshold of litigation. Like other immunities, church autonomy can be raised at any stage of litigation. Abridgement of the church autonomy immunity imposes irreparable injury on the religious organization, so its denial is subject to an immediate interlocutory appeal. It applies equally in state and federal courts. And in federal court, it generally produces a judgment on the merits with prejudice—entitled to *res judicata* in state courts, preventing repetitive litigation. The church autonomy defense is therefore more protective than a jurisdictional bar. That should not be surprising, “since ‘the text of the First Amendment ... gives special solicitude to the rights of religious organizations.’” [Cath. Charities](#), 605 U.S. at 257, 145 S.Ct. 1583 (Thomas, J., concurring) (quoting [Hosanna-Tabor](#), 565 U.S. at 189, 132 S.Ct. 694).

*10 We (1) explain the jurisdictional-versus-nonjurisdictional debate over the church autonomy doctrine. Then we (2) explain why the church autonomy doctrine requires us to reach the merits and render judgment in this case.

1

The Supreme Court has sometimes described the church autonomy doctrine as nonjurisdictional. In [Hosanna-Tabor](#), for example, the Court held the ministerial exception “operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.” [565 U.S. at 195 n.4, 132 S.Ct. 694](#). Thus, the Court said, the question presented is “‘whether the allegations the plaintiff makes entitle him to relief,’ not whether the court has ‘power to hear [the] case.’” [Id.](#) (quoting [Morrison v. Nat’l Austl. Bank Ltd.](#), 561 U.S. 247, 254, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010)). See *supra* Part II.B.2.a (discussing this portion of the doctrine).

The Supreme Court has elsewhere described the church autonomy doctrine as jurisdictional. In [Watson](#), for example, the Court noted “[t]here is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application.” [80 U.S. \(13 Wall.\) at 732](#). The Court then said that, “where a subject-matter of dispute [is] strictly and purely ecclesiastical in its character, ... the civil courts exercise no jurisdiction.” [Id.](#) at 733. Such purely ecclesiastical disputes include matters of “theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.” [Ibid.](#); see also *supra* Part II.B.2.b (discussing this portion of the doctrine).

These dueling instructions have created confusion across courts and the academy. Compare, e.g., [Rutland v. Nelson](#), 857 F. App’x 627, 628 (11th Cir. 2021) (“Civil courts lack jurisdiction to entertain disputes involving church doctrine and polity.”), with [O’Connell v. U.S. Conf. of Cath. Bishops](#), 134 F.4th 1243, 1258 (D.C. Cir. 2025) (“[I]t seems clear that the Court confirmed the church autonomy doctrine is not jurisdictional; it is an affirmative defense.”).⁴ In the first appeal in this case, for example, the panel “note[d] that it is somewhat unclear whether the ecclesiastical abstention doctrine” is jurisdictional or a merits defense. [McRaney](#), 966 F.3d at 348 n.1; see also [McRaney](#), 980 F.3d at 1082 (Oldham, J., dissenting from the denial of rehearing en banc) (noting widespread “confusion” in this area and pondering whether “the [Hosanna-Tabor](#) footnote necessitates a reexamination of the jurisdictional consequences of ecclesiastical autonomy”).

⁴ For recent scholarship, compare, e.g., Branton J. Nestor, *Judicial Power and Church Autonomy*, NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 2), <https://perma.cc/T797-667S> (arguing that the “church autonomy doctrine limits judicial power”), with Lael Weinberger, *Is Church Autonomy Jurisdictional?*, 54 LOY. U. CHI. L.J. 471, 510 (2022) (“Weinberger, *Jurisdictional*”) (answering the titular question no, “in the technical, procedural sense of jurisdiction”), and Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV.

1847, 1848 (2018) (concluding that [Hosanna-Tabor](#) “resolved this debate”). One scholar has even suggested that federal courts have been “flagrantly ignor[ing] the Supreme Court’s view” by treating the doctrine as jurisdictional in the civil procedure sense. Weinberger, *Jurisdictional*, *supra*, at 483. Perhaps more likely is that inferior courts are “struggling to define the contours of the church autonomy doctrine in the wake of [Hosanna-Tabor](#).” *Belya v. Kapral*, 59 F.4th 570, 582 (2d Cir. 2023) (Park, J., dissenting from denial of rehearing en banc).

*11 One way to reconcile that confusion is to say that some parts of the church autonomy doctrine are jurisdictional (like the ecclesiastical questions posited in [Watson](#)) and other parts are nonjurisdictional (like the ministerial exception discussed in [Hosanna-Tabor](#) and [Our Lady of Guadalupe](#)). That approach has some appeal given the breadth of the church autonomy doctrine: The doctrine covers many different things, *see supra* Part II.B.2, so perhaps there is no one-size-fits-all answer to the jurisdiction-versus-nonjurisdiction debate. And the Supreme Court has never overruled [Watson](#), so perhaps its discussion of jurisdiction continues to bind inferior courts.

On the other hand, many of the courts that have described church autonomy as a jurisdictional barrier have “often used ‘jurisdiction’ ” in a “broad, conceptual sense” to describe the “different spheres of authority” between civil courts and religious institutions. Lael Weinberger, *Is Church Autonomy Jurisdictional?*, 54 LOY. U. CHI. L.J. 471, 488 (2022) (“Weinberger, *Jurisdictional*”). And that does not necessarily mean that the doctrine must always and everywhere be vindicated, say, under Rule 12(b)(1) instead of Rule 12(b)(6). Moreover, [Our Lady of Guadalupe](#) says the ministerial exception is a “component” of church autonomy—not a separate doctrine—and [Hosanna-Tabor](#) says it is an affirmative defense on the merits. [591 U.S. at 746, 140 S.Ct. 2049](#); [565 U.S. at 195 n.4, 132 S.Ct. 694](#). [Hosanna-Tabor](#) likewise grounded the ministerial exception in other applications of the church autonomy doctrine. *See id.* at 185, 132 S.Ct. 694 (drawing on cases dealing with “disputes over church property”). All of that seems to suggest the doctrine is best understood—like the

Religion Clause upon which it rests, *see supra* note 1—as a singular, unitary whole. And that the entire doctrine operates as a defense on the merits, notwithstanding some language in earlier Supreme Court cases. *Cf.* [Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment, Cent. Region](#), 558 U.S. 67, 84, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009) (noting an earlier decision’s “unrefined use[] of the word ‘jurisdiction’ [is] entitled to no precedential effect” (quotation omitted)); [Arbaugh v. Y&H Corp.](#), 546 U.S. 500, 511, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (noting the Court’s precedents have “been less than meticulous” in their jurisdictional verbiage).

Also on the nonjurisdictional side of the ledger is that [Watson](#)—the source of the autonomy-as-jurisdiction argument—was not a First Amendment case at all. Rather, [Watson](#) was a diversity case—handed down in the pre-[Erie](#) world—whose “holding was based on general law.” [Kedroff](#), 344 U.S. at 116, 73 S.Ct. 143 (citing [Erie R.R. Co. v. Tompkins](#), 304 U.S. 64, 69, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). Thus [Watson](#) “was decided without depending upon” the First Amendment’s “prohibition of state interference with the free exercise of religion,” which had not yet been incorporated against the States. [Id.](#) at 115, 73 S.Ct. 143. “[A]pplying not the Constitution,” [Watson](#) instead relied upon a “broad and sound view of the relations of church and state under our system of laws.” [Hosanna-Tabor](#), 565 U.S. at 185, 132 S.Ct. 694 (quoting [Watson](#), 80 U.S. (13 Wall.) at 727).

So, as [Hosanna-Tabor](#) explained, [Watson](#)’s main contribution was atmospheric, not doctrinal: “[O]ur opinion in [Watson](#) ‘radiates ... a spirit of freedom for religious organizations [and] an independence from secular control or manipulation.’ ” [Id.](#) at 186, 132 S.Ct. 694 (quoting [Kedroff](#), 344 U.S. at 116, 73 S.Ct. 143); *see also* [Blue Hull Mem’l Presbyterian Church](#), 393 U.S. at 446, 89 S.Ct. 601 (describing [Watson](#) as having a “clear constitutional ring”). It was not until [Kedroff](#) itself, decided 80 years after [Watson](#), that the Court faced church autonomy “under the Constitution for the first time.” [Hosanna-](#)

Tabor, 565 U.S. at 186, 132 S.Ct. 694 (citing [Kedroff](#), 344 U.S. at 116, 73 S.Ct. 143). There, the Court grounded church autonomy in the First Amendment, not Article III, a proposition that [Milivojevic](#) “reaffirmed.” [Id.](#) at 187, 132 S.Ct. 694. The church autonomy doctrine has remained rooted in the First Amendment ever since. See [id.](#) at 185–87, 132 S.Ct. 694 (walking through [Watson](#), [Kedroff](#), and [Milivojevic](#) without mentioning jurisdiction).

2

*12 In our view, this doctrinal confusion arises from the fact that church autonomy is jurisdictional in some senses but not in others. As [Watson](#) itself noted, the word jurisdiction is a word of many meanings. [80 U.S. \(13 Wall.\) at 732](#); accord [Steel Co. v. Citizens for a Better Env't](#), 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). And it is possible for the church autonomy doctrine to be jurisdictional in some senses and not others. See Weinberger, *Jurisdictional*, *supra*, at 487. So we must be precise in what we mean by it.

a

The church autonomy doctrine is “jurisdictional” in at least three senses.

First, it is jurisdictional in the sense that matters falling within its ambit are beyond the power and cognizance of civil courts. Jurisdiction is, at its core, a question of judicial power: “Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” [Ex parte McCardle](#), 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868). We have no power to resolve questions covered by the church autonomy doctrine. So in that broad, colloquial sense, the doctrine is jurisdictional. See [Watson](#), 80 U.S. (13 Wall.) at 733.

Second, the church autonomy doctrine is jurisdictional in the sense that it rests on structural, constitutional limitations in the First Amendment. In that sense, the church autonomy doctrine is analogous to the jurisdictional doctrine of state

sovereign immunity. See [Green Valley Special Util. Dist. v. City of Schertz](#), 969 F.3d 460, 495 n.2 (5th Cir. 2020) (Oldham, J., concurring) (distinguishing state sovereign immunity, which is implicit in the Constitution, from the immunity afforded by the Eleventh Amendment). The most obvious parallel between them is that both church autonomy and sovereign immunity afford immunities from suit that must be resolved at the earliest conceivable point in litigation. Cf. [Tucker v. Faith Bible Chapel Int'l](#), 36 F.4th 1021, 1050–52 (10th Cir. 2022) (Bacharach, J., dissenting) (comparing church autonomy to qualified immunity, absolute immunity, and state sovereign immunity); [Garrick v. Moody Bible Inst.](#), 95 F.4th 1104, 1123 (7th Cir. 2024) (Brennan, J., dissenting) (similar); [Belya v. Kapral](#), 59 F.4th 570, 579 (2d Cir. 2023) (Park, J., dissenting from denial of rehearing en banc) (similar); [Palmer v. Liberty Univ., Inc.](#), 72 F.4th 52, 79 (4th Cir. 2023) (Richardson, J., concurring in the judgment) (arguing church autonomy is a “threshold question”).

Treating church autonomy as a structural, threshold immunity from suit accords with Supreme Court precedent. For example, [Hosanna-Tabor](#) was clear that the First Amendment “prohibits government involvement in ... ecclesiastical decisions,” makes it “impermissible” for a court “to contradict a church’s determination of who can act as its ministers,” and accordingly “bars” covered suits. [565 U.S. at 189, 185, 196, 132 S.Ct. 694](#) (emphases added); see also [Our Lady of Guadalupe](#), 591 U.S. at 746, 140 S.Ct. 2049 (telling courts they are “bound to stay out of employment disputes” implicating the doctrine). This language is best read to embrace a structural constitutional protection implicating the separation of powers and the competence of courts. See [Billard v. Charlotte Cath. High Sch.](#), 101 F.4th 316, 326 (4th Cir. 2024) (noting the doctrine’s “structural nature”); [Lee v. Sixth Mount Zion Baptist Church of Pittsburgh](#), 903 F.3d 113, 118 n.4 (3d Cir. 2018) (noting the doctrine “is rooted in constitutional limits on judicial authority”); [Conlon v. InterVarsity Christian Fellowship/USA](#), 777 F.3d 829, 836 (6th Cir. 2015) (calling the doctrine “structural”).

*13 Third, the church autonomy doctrine is jurisdictional in that breaches of it impose irreparable injuries on religious organizations that require immediate appellate review. The church is constitutionally protected against *all* judicial intrusion into its ecclesiastical affairs—even brief and

momentary ones. And, as with any other immunity *from suit* (including sovereign immunity and qualified immunity), such intrusions cannot be remedied after the district court renders final judgment. For example, if the district court orders discovery into a pastor's sermon notes to adjudicate a plaintiff's claim, the pastor cannot be made whole by a take-nothing judgment months or years later. See [Whole Woman's Health](#), 896 F.3d at 373–74.⁵ Thus, if a district court denies the invocation of church autonomy, that denial is subject to immediate appellate review—under the collateral order doctrine (as with sovereign and qualified immunity), under [28 U.S.C. § 1292\(a\)](#) (if the church loses a motion for injunctive relief), under [28 U.S.C. § 1292\(b\)](#) (if the district court certifies the question), or other authorities.

⁵ This is not meant as a criticism of the very able and careful district court judge in this case. The discovery that unconstitutionally burdened the ecclesiastical defendants between our court's first decision and this one is attributable wholly to our first panel decision and the en banc court's denial of rehearing.




This approach protects religious institutions from the burdens and “prejudicial effects of incremental litigation.” [Demkovich v. St. Andrew the Apostle Par.](#), 3 F.4th 968, 982 (7th Cir. 2021). Even the “very process of inquiry” into the internal affairs of a church could itself “impinge on rights guaranteed by the Religion Clauses.” [Cath. Bishop of Chi.](#), 440 U.S. at 502, 99 S.Ct. 1313; see also [Hosanna-Tabor](#), 565 U.S. at 205–06, 132 S.Ct. 694 (Alito, J., concurring) (noting the process involved in “the mere adjudication” of a church's sincerity “would pose grave problems for religious autonomy”); [Combs v. Cent. Tex. Ann. Conf. of United Methodist Church](#), 173 F.3d 343, 350 (5th Cir. 1999) (holding that even “investigating ... claims by ministers against their church” “would necessarily intrude into church governance in a manner that would be inherently coercive” which is “enough to bar the involvement of the civil courts”). An immediate appeal thus protects ecclesiastical organizations from unconstitutional deprivations of the First Amendment's structural limits. See [Garrick](#), 95 F.4th at 1118–25 (Brennan, J., dissenting) (making the case); [Belya](#), 59 F.4th at 577–80 (Park, J., dissenting from denial of rehearing en banc) (same); [Tucker](#), 36 F.4th at 1057–59 (Bacharach, J., dissenting) (same).



b

But that does not mean church autonomy is jurisdictional in the narrow Rule 12(b)(1) sense. Rule 12(b)(1) is used to raise a defense of lack of subject matter jurisdiction. That means the court lacks jurisdiction over the case as a whole. And that precludes the federal courts from entering judgment on the merits. See, e.g., [Steel Co.](#), 523 U.S. at 101, 118 S.Ct. 1003.

In our view, the church autonomy doctrine generally is not jurisdictional in this narrower Rule 12(b)(1) sense. That is for three reasons.






First, whether a defense is raisable under Rule 12(b)(1) reveals little about the jurisdictional nature of the defense itself. For example, some Rule 12(b)(1) jurisdictional defenses—including some immunities from suit—are waivable. See, e.g., [Alden v. Maine](#), 527 U.S. 706, 737, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (state sovereign immunity is waivable). Others are not. See, e.g., [Giannakos v. M/V Bravo Trader](#), 762 F.2d 1295, 1297 (5th Cir. 1985) (per curiam) (“The question of subject matter jurisdiction can never be waived.”). Some courts have taken the view that the church autonomy doctrine is unwaivable and should be addressed *sua sponte*. See, e.g., [Lee](#), 903 F.3d at 118 n.4 (not allowing church to waive ministerial exception because it “is rooted in constitutional limits on judicial authority”); [Conlon](#), 777 F.3d at 836 (not allowing waiver because the doctrine's protection is “structural”); [Tomic v. Cath. Diocese of Peoria](#), 442 F.3d 1036, 1042 (7th Cir. 2006) (similar), *abrogated on other grounds by Hosanna-Tabor*, 565 U.S. at 194–95, 132 S.Ct. 694; cf. [Billard](#), 101 F.4th at 326 (addressing ministerial exception *sua sponte* because of its “structural basis” and “importance in partitioning civil authorities from religious ones”). But that view is not free from doubt.⁶ Either way, the waivability *vel non* of the church autonomy doctrine cannot be resolved by saying it can or cannot be raised as “jurisdictional” in the narrow Rule 12(b)(1) sense—just as other Rule 12(b)(1) jurisdictional defenses sometimes can and sometimes cannot be waived. And in any event, we need not resolve the waivability question here because NAMB ardently pressed the point from the outset of litigation. See Red Br. at 18 n.10.

6 Scholars have split on the waivability question. Compare, e.g., Weinberger, *Jurisdictional*, *supra*, at 506–09 (arguing that “church autonomy should not be subject to forfeiture,” *id.* at 506, but that a “church should be able to waive church autonomy protections,” *id.* at 508–09), and Christopher C. Lund, *Church Autonomy in the United States*, in FREEDOM OF RELIGION AND RELIGIOUS PLURALISM 192, 205 & n.47 (Md Jahid Hossain Bhuiyan & Carla M. Zoethout eds., 2023) (reading  *Hosanna-Tabor* to allow waiver of church autonomy), with Smith & Tuttle, *supra*, at 1882–86 (arguing for nonwaivability). The latter view has much to commend it. Unwaivability more neatly reconciles church autonomy's two pillars—respect for religious self-determination and restraint of civil courts from answering religious questions. The church autonomy doctrine reflects an independent limitation on courts sticking their noses in the church door, even when / if asked to do so. To borrow an analogy from  *Watson*, an ecclesiastical court could not “undertake to try one of its members for murder,”  80 U.S. (13 Wall.) at 733, even if the congregant agreed to waive any objection to it. It is unclear why the principle would change if an ecclesiastical organization asked us to adjudicate theology or doctrine by purporting to waive church autonomy.

*14 *Second*, when a court grants a Rule 12(b)(1) motion, that leaves the plaintiff free to refile elsewhere. But if our dismissal allowed McRaney to refile in Mississippi state court, that would undermine rather than protect the ecclesiastical organizations’ autonomy. Mississippi's courts are not bound by what we say—even when we're interpreting the First Amendment. See  *Lockhart v. Fretwell*, 506 U.S. 364, 376, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (Thomas, J., concurring). So if we treated church autonomy as a jurisdictional defense in the Rule 12(b)(1) sense, McRaney could refile in state court, get discovery, and perhaps even proceed to judgment. By contrast, treating church autonomy as an immunity from suit akin to qualified immunity—which is raiseable under Rule 12(b)(6), not 12(b)(1)—means our judgment *is* binding in all courts under *res judicata*. See  *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). The latter approach

is dramatically more consistent with the tenets of church autonomy. The former approach would make churches worse off than secular institutions: “[I]f religiosity automatically defeated subject-matter jurisdiction, religious organizations would have *fewer* rights than everyone else.” *SMU v. S. Cent. Jurisdictional Conf. of United Methodist Church*, 716 S.W.3d 475, 500 (Tex. 2025) (Young, J., concurring).


Third, we are unaware of any Supreme Court authority that supports treating the church autonomy doctrine as jurisdictional in the narrow Rule 12(b)(1) sense.

Take  *Milivojevic* for example. That case bears many similarities to this one because both turn on the propriety of a church's decision to reorganize its ministry and to remove the plaintiff minister. And in  *Milivojevic*, the Supreme Court did not order dismissal of the cause. To the contrary, it reversed on the merits. See  426 U.S. at 724–25, 96 S.Ct. 2372. And on remand, the Illinois courts entered judgment on the merits. See *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevic*, 66 Ill.2d 469, 6 Ill.Dec. 792, 363 N.E.2d 606, 606 (1977) (per curiam), *aff'd*, 74 Ill.2d 574, 25 Ill.Dec. 629, 387 N.E.2d 285 (1979). And the Supreme Court denied certiorari. See *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Serbian E. Orthodox Diocese for U.S. of Am. & Can.*, 443 U.S. 904, 99 S.Ct. 3096, 61 L.Ed.2d 872 (1979) (mem.) We obviously do not read that unexplained treatment of the jurisdiction-versus-nonjurisdiction debate to be conclusive. But it is consistent with  *Hosanna-Tabor* and  *Our Lady of Guadalupe*, which *did* consider the debate and held the church autonomy doctrine is raiseable under Rule 12(b)(6), not 12(b)(1).



*

In sum, the church autonomy doctrine has numerous features of a jurisdictional bar. It limits the powers of federal courts. It immunizes ecclesiastical organizations from suit, not just liability. And, when it is denied, it gives rise to an immediate appeal. But “[t]he jurisdictional question ... is not binary.” *SMU*, 716 S.W.3d at 501 (Young, J., concurring). And the fact that some religious questions are beyond our judicial power does not mean that all church-autonomy disputes are properly dismissed under Rule 12(b)(1). Nor does it preclude federal courts from rendering judgment on the merits in cases like this one.


III

On the merits, the church autonomy doctrine bars all of McRaney's claims against NAMB. Although his claims are facially secular, their resolution would require secular courts to opine on “matters of faith and doctrine” and intrude on NAMB's “internal management decisions that are essential to [its] central mission.”  *Our Lady of Guadalupe*, 591 U.S. at 746, 140 S.Ct. 2049 (quotation omitted). That we cannot do. We address (A) McRaney's threshold argument that Baptists cannot invoke the church autonomy doctrine, (B) McRaney's claims leading up to his termination, and (C) his post-termination claims.







A











At the outset, McRaney argues that the church autonomy doctrine cannot apply in this case because “NAMB is not a church,” “BCMD is not a church,” and “[t]here is no Baptist church; only Baptist churches.” Blue Br. at 13, 23. He argues his case “does not involve an intra-church dispute in any respect, nor is it about church governance.” *Id.* at 24. Our dissenting colleague agrees and would hold that “[b]ecause there is no unified ‘Baptist Church,’ there can be no ‘intra-church dispute’ or dispute about ‘church government’ in this case.” *Post*, at — (Ramirez, J., dissenting). On the dissent's view, the church autonomy doctrine only protects religious entities “in which there are superior ecclesiastical tribunals,”  *Watson*, 80 U.S. (13 Wall.) at 722, thus subjecting the non-hierarchical Baptists to “ordinary principles which govern voluntary associations,”  *id.* at 725. Having branded Baptists ecclesial anarchists, the dissent subjects the NAMB and BCMD's actions to searching judicial scrutiny—as if this were just an ordinary employment dispute.

*15 We respectfully disagree for five reasons.

First, we decline to be the first court ever to hold the church autonomy doctrine protects only hierarchically organized religious entities. The single “clearest command of the Establishment Clause” is the “principle of denominational neutrality.”  *Cath. Charities*, 605 U.S. at 247, 145 S.Ct. 1583 (Thomas, J., concurring) (quotation omitted). But the dissent and McRaney would reach diametrically opposite results for different denominations. If an Episcopalian priest

defamed a congregant from the pulpit, or if an Episcopalian congregation fired its priest, those disputes would be barred by the church autonomy doctrine. *See, e.g.*, Blue Br. at 12 (Episcopalians protected by the doctrine). But the same disputes by Baptists are purely “secular”? *Post*, at — (Ramirez, J., dissenting). That is denominational discrimination, not denominational neutrality.

Second, the dissent and McRaney both underread and overread  *Watson*. As the Supreme Court has repeatedly emphasized,  *Watson* “radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government *as well as those of faith and doctrine.*”  *Kedroff*, 344 U.S. at 116, 73 S.Ct. 143 (emphasis added); *see also*  *Hosanna-Tabor*, 565 U.S. at 186, 132 S.Ct. 694 (again emphasizing  *Watson*'s “spirit of freedom”). The freedom that radiates from  *Watson* does not stop when it reaches a Baptist church. To the contrary, matters of faith and doctrine can be decided inside a church *regardless* of the denominational name that appears on its door. And courts must respect those decisions, again, regardless of what denominational name appears on its door.

Ignoring this core principle from  *Watson*, McRaney and the dissent instead seize on dicta in that decision. True, the  *Watson* court noted that “the ordinary principles which govern voluntary associations” could apply to certain church *property* disputes.  80 U.S. (13 Wall.) at 725. But the  *Watson* Court very clearly limited this “ordinary principles” dictum to “such cases”—that is, to property-dispute cases.  *Ibid.*; *see also* Lael Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. 1253, 1276–77 (2023) (“Weinberger, *Limits*”) (“The Supreme Court has never applied the neutral-principles analysis outside of the property-law context.”). And the authority cited in the  *Watson* decision itself proves just how little work “ordinary principles” can do. The  *Watson* Court emphasized that “no better representative” of the ordinary-principles standard for church-property disputes “can be found than that of  *Shannon v. Frost.*”  *Watson*, 80 U.S. (13 Wall.) at 725 (citing  *Shannon v. Frost*, 42 Ky. 253

(1842). [Shannon](#), in turn, emphasized that civil courts “hav[e] no ecclesiastical jurisdiction” and hence “cannot revise or question ordinary acts of church discipline or excision.” [42 Ky. at 258](#). The court also held “[w]e cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.” [Ibid.](#)

Rather, the [Shannon](#) court held it could only note that the church did in fact expel certain former members and that the church's decision was final, binding on the civil courts, and preclusive of the expelled individuals' claims to church property. *See* [id. at 258–61](#).⁷ [Shannon](#) shows that the ordinary principles approach is endogenous to the church autonomy doctrine—it is not some freestanding exception to the doctrine that allows courts to tread on *terra sancta* in the name of “neutrality.” Nothing in [Watson](#) or [Shannon](#) suggests, as the dissent does, that civil courts ever get to second guess church decisions.

7

The church in [Shannon](#), it should be noted, was “a Baptist Church,” and the relevant dispute between “discordant and dislocated parties” within that single congregation. [42 Ky. at 253](#). The church autonomy doctrine nevertheless applied to protect “ordinary acts of church discipline” and governance from civil court interference. [Id. at 258](#).

*16 Third, the dissent and McRaney confuse sufficient and necessary conditions for the church autonomy doctrine. It is obviously *sufficient* to trigger the church autonomy doctrine that a higher ecclesial body made a decision that binds an inferior ecclesial body. [Watson](#) is a clear example. *See* [80 U.S. \(13 Wall.\) at 734](#) (describing the Presbyterian form of church government, in which the General Assembly is supreme). But that does not mean hierarchical church governments are *necessary*. That is why our sister courts across the country have recognized the autonomy of non-hierarchical churches and religious entities. *See, e.g.*, [Lee](#), [903 F.3d at 121–23](#) (applying the doctrine to a Baptist church); [Garrick](#), [95 F.4th at 1112–14](#) (stating that the doctrine would apply to an independent Bible college, before ruling on other grounds); [Korte v. Sebelius](#), [735 F.3d 654, 668, 675–78 \(7th Cir. 2013\)](#) (stating that the doctrine applies

to religious small businesses). Worryingly, the dissent's logic would exclude from the church autonomy doctrine several Christian denominations and other, non-Christian religions with non-hierarchical governance, such as Judaism, Sunni Islam, and Sikhism. *See* Br. of *Amicus Curiae* The Becket Fund for Religious Liberty at 3–4. And it would prioritize hierarchical organizations like the “Church of Scientology”—which, under the dissent's logic, would enjoy broad autonomy protections⁸ because it has a clearly identified founder (L. Ron Hubbard) and a “Captain of the Sea Org” (David Miscavage)—over non-hierarchical Baptists who do not have a singular leader.

8

But see [United States v. Heldt](#), [668 F.2d 1238, 1242–43 \(D.C. Cir. 1981\)](#) (affirming criminal convictions against Scientology leaders who used the “Guardian Offices of Scientology” to steal government documents and to conceal Scientology practices from federal investigation). Cases like [Heldt](#) implicate an important question: What is a religion? Thankfully, that question is not implicated here because all agree, obviously, that Baptist churches and missionary groups are religious organizations.

Fourth, even accepting the dissent's premise that Baptists cannot invoke the church autonomy doctrine over matters of church governance, that still would not help McRaney. Recall that the NAMB and BCMD selected McRaney to conduct “church planting and evangelism,” ROA.1702, core religious activity at the heart of both organizations' Christian mission. Evaluating his performance in that role cannot be analogized to applying “objective, well-established concepts of trust and property law,” [Jones v. Wolf](#), [443 U.S. 595, 603, 99 S.Ct. 3020, 61 L.Ed.2d 775 \(1979\)](#), or declaring “that the majority rules” in a local congregation, [Watson](#), [80 U.S. \(13 Wall.\) at 725](#). Rather, the inquiry turns on the degree to which both NAMB and BCMD believed McRaney to have fulfilled his gospel calling—precisely the sort of question the church autonomy doctrine exists to protect from secular meddling. *See* [McClure v. Salvation Army](#), [460 F.2d 553, 558 \(5th Cir. 1972\)](#) (“The relationship between an organized church and its ministers is its lifeblood.”). That neither NAMB nor BCMD is strictly subordinate to a higher Baptist authority is irrelevant, much less a reason to more readily second guess either's evaluation of McRaney's ministerial qualities. Christ advised the Apostles that “where two or three are gathered in

my name, there I am among them.” *Matthew* 18:20 (ESV). We decline to hold, by contrast, that where two religious entities gather to spread the gospel, both forgo their First Amendment right to autonomy in doing so. *See also infra* Part III.B.2 (applying the ministerial exception).

Fifth and finally, the amicus brief submitted by current and former Baptist leaders does not help the dissent. That brief adamantly insists that there is no singular “Baptist Church” and that, therefore, “McRaney, BCMD, and NAMB are [not] inside that single institution.” Amicus Br. at 13. We wholeheartedly agree. Baptists—no less than Presbyterians, Episcopalians, or Catholics—are free to organize themselves in whatever way they choose. They can form General Assemblies or not. They can form ecclesiastical courts or not. They can choose ecclesiastical hierarchies or not. All of those decisions, for people of all faiths, are entirely beyond judicial competence or review.



But it does not follow that courts *do* have competence to review ecclesiastical disputes so long as they arise in non-hierarchical Baptist congregations. The church autonomy doctrine is triggered by the subject matter of the dispute, not the organizational structure of the disputants. The subject matter of this dispute is an evangelism project. Its stakes are eternal not judicial. And it matters not one bit that the particular evangelicals before us happen to be Baptists from different non-hierarchical congregations instead of soul-saving Presbyterians from a singular hierarchical one.

B

*17 Because the church autonomy doctrine applies to Baptists as it applies to Jews and Catholics, we next consider whether McRaney's particular claims fall within the doctrine's ambit. His first set of claims concerns NAMB's conduct leading to his termination by BCMD. McRaney alleges that NAMB tortiously caused BCMD to fire him by defaming him through the dissemination of “disparaging falsehoods” that also intentionally inflicted emotional distress. ROA.1325–26. The First Amendment bars these claims under both general church autonomy principles and the ministerial exception.


1

Start with general church autonomy principles. Resolving these claims would require the district court to decide “matters

of faith and doctrine,”  *Our Lady of Guadalupe*, 591 U.S. at 747, 140 S.Ct. 2049 (quotation omitted), and “risk judicial entanglement in religious issues,”  *id.* at 761, 140 S.Ct. 2049. That is reason enough to enter judgment for NAMB.

McRaney claims that NAMB defamed him and hence tortiously interfered with his employment contract with BCMD. As McRaney tells it, NAMB relied on defamatory statements about his compliance with the SPA as pretext for exiting the partnership with BCMD. And the result of that allegedly defamatory interference was BCMD's termination of McRaney.

The tortious interference claim requires McRaney to show that NAMB's actions were intentional, “calculated to cause damage” to him, and done “without right or justifiable cause.” *Alfonso v. Gulf Pub. Co.*, 87 So. 3d 1055, 1060 (Miss. 2012). He must also show that “actual damage or loss resulted” and that NAMB's “acts were the proximate cause of the loss or damage” he suffered. *Ibid.* And to prevail on the defamation claim, McRaney must show “(1) a false and defamatory statement concerning [him]; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; (4) and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Short v. Versiga*, 283 So. 3d 182, 185 (Miss. 2019) (quotation omitted).

Resolving these claims would impermissibly require a court “to decide matters of faith and doctrine.”  *Our Lady of Guadalupe*, 591 U.S. at 746, 140 S.Ct. 2049 (quotation omitted). To take just a few elements: Can a secular court determine whether NAMB's decision to exit the SPA had “right or justifiable cause,” without answering inherently religious questions about the SPA's content or McRaney's conformance with it? When a secular court considers the SPA, how should it determine if McRaney succeeded in “penetrating lostness,” “making disciples,” and “church planting”? ROA.1701–02. Can a secular court determine whether NAMB's conduct was the “proximate cause” of BCMD's decision to terminate McRaney, without unlawfully intruding on a religious organization's internal management decisions? And can a secular court decide it was “false” that McRaney's leadership lacked Christ-like character?

To ask these questions is to answer them: No.

The SPA is not a mere civil contract; it is “an inherently religious document” that is “steeped in religious doctrine.”

McRaney, 2023 WL 5266356, at *3–4. It seeks to “accomplish the Great Commission as given to us by our Lord in Matthew 28:19–20 and Acts 1:8.” ROA.1702. It defines a partnership predicated on commitments to biblical authority, kingdom advancement and evangelism, and explicitly incorporates SBC's confession of faith. How those values, goals, and beliefs translate to specific strategies for successful evangelism are “religious controversies [that] are not the proper subject of civil court inquiry.” Milivojevic, 426 U.S. at 713, 96 S.Ct. 2372.

*18 McRaney is quite right that “breach” and “contractual agreement” are secular terms. Blue Br. at 32 (quotations omitted). For example, the secular meaning of “breach” is a “violation or infraction of ... [an] agreement.” *Ibid.* (quoting BLACK'S LAW DICTIONARY 232 (11th ed. 2019)). But McRaney's problem is that determining *what conduct constitutes breach* of the SPA “turn[s] on the resolution ... of controversies over religious doctrine and practice.” Blue Hull Mem'l Presbyterian Church, 393 U.S. at 449, 89 S.Ct. 601. In that sense, McRaney's argument is identical to the ones that failed in Harris, Lippard, Schoenhals, and McNair. See *supra* Part II.B.2.b. So too in Hosanna-Tabor and Our Lady of Guadalupe—both dealt with facially “neutral” causes of action. But in all of these cases, the courts concluded *application* of the neutral rules to religious institutions “concern[ed] government interference with an internal church decision that affects the faith and mission of the church itself.” Hosanna-Tabor, 565 U.S. at 190, 132 S.Ct. 694.

Nor could a secular court evaluate whether McRaney's conduct “constitute[d] adequate spiritual leadership,” Lee, 903 F.3d at 121, or was in “conformity ... to the standard of morals required of” his ministerial responsibilities, Watson, 80 U.S. (13 Wall.) at 733. It is essential for a “religious body” to ensure that its representatives “live up to the religious precepts” they “espouse[]” because the “credibility of a religion's message depend[s] vitally on the character and conduct” of its “messenger[s].” Hosanna-Tabor, 565 U.S. at 201, 132 S.Ct. 694 (Alito, J., concurring). Civil courts have no role to play in policing those matters.

2

The ministerial exception “gilds the lily.” Patchak v. Zinke, 583 U.S. 244, 261, 138 S.Ct. 897, 200 L.Ed.2d 92 (2018) (Breyer, J., concurring).⁹ As the district court noted, McRaney's “claims ... are brought to protest his dismissal from church leadership.” McRaney, 2023 WL 5266356, at *3. True, McRaney sued NAMB, rather than his former employer BCMD. But that does not change the analysis.

9 There is no dispute that McRaney was a minister. Anyone “who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith” is a minister. Our Lady of Guadalupe, 591 U.S. at 754, 140 S.Ct. 2049 (quotation omitted). McRaney's role as BCMD's Executive Director was ministerial: He was responsible for implementing the SPA with NAMB through church planting and evangelism.

The First Amendment's protection of a religious organization's right to decide “who will personify its beliefs,” Hosanna-Tabor, 565 U.S. at 188, 132 S.Ct. 694, and “who will minister to the faithful,” *id.* at 195, 132 S.Ct. 694, extends just as strongly to ministries structured through voluntary associations and at-will partnerships. The opposite rule would irrationally exclude from the First Amendment's protections religious groups that “for theological reasons have few to no paid clergy,” such as the Church of Jesus Christ of Latter-day Saints and Jehovah's Witnesses. Br. of Amicus Curiae Becket Fund for Religious Liberty at 15–16. The availability of the ministerial exception cannot turn on the choices religious organizations make about “the formation of corporate entities.” Cath. Charities, 605 U.S. at 259, 145 S.Ct. 1583 (Thomas, J., concurring). Indeed, the decision how to structure a religious institution is *itself* a religious decision. See *ibid.* And “one religious denomination cannot be officially preferred over another” for this—or any—reason. Larson v. Valente, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982).

Persuasive decisions in our sister circuits confirm this point. Take Starkey. There, a former schoolteacher brought

federal discrimination claims against the Catholic school where she had worked and tortious interference claims against the Archdiocese that, she alleged, caused her termination.

See [41 F.4th at 938](#). Even though the Archdiocese was not the schoolteacher's former employer, the Seventh Circuit held the ministerial exception barred her claims against it “because they litigate the employment relationship between the religious organization and the employee” and “require[] review of the Church's authority over the employer.” [Id.](#) at 945.

*19 Or take [Bell v. Presbyterian Church \(U.S.A.\)](#), 126 F.3d 328 (4th Cir. 1997). There, a pastor who was terminated from a religious nonprofit sued the “four national religious organizations” that “created and funded” the nonprofit but were not his employers. [Id.](#) at 329. Nevertheless, the ministerial exception barred the pastor's claims against all four organizations. [Id.](#) at 332–33. Otherwise, resolving the claims would “interpose the judiciary into ... the decisions of ... constituent churches, relating to how and by whom they spread their message and specifically their decision to select their outreach ministry through the granting or withholding of funds.” [Id.](#) at 332.

These cases confirm what the Supreme Court has already told us: We “are bound to stay out of employment disputes” involving ministers and ecclesiastical organizations. [Our Lady of Guadalupe](#), 591 U.S. at 746, 140 S.Ct. 2049. McRaney's claims against NAMB “litigate the employment relationship between” himself and BCMD, [Starkey](#), 41 F.4th at 945, and would force a court to “interpose” itself into NAMB's and BCMD's “decisions ... relating to how and by whom they spread their message” and how they fund it, [Bell](#), 126 F.3d at 332. Secular courts have already interposed into NAMB's and BCMD's internal affairs far too much. If we continued to interfere in this dispute, “a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith.” [Our Lady of Guadalupe](#), 591 U.S. at 747, 140 S.Ct. 2049. Instead, every “church must be free to choose those who will guide it on its way.” [Hosanna-Tabor](#), 565 U.S. at 196, 132 S.Ct. 694.¹⁰



10 McRaney cannot dodge the ministerial exception by recasting his tortious interference claim as a defamation or emotional distress claim. Such claims threaten “a collateral attack on a decision that is otherwise solidly protected by the ministerial exception” because they effectively require courts “to review the merits of the congregation's decision.” Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 Geo. J.L. & Pub. Pol'y 119, 155 (2009). Courts have rightly held that the ministerial exception bars these claims. Cf. [In re Diocese of Lubbock](#), 624 S.W.3d at 516; [Hutchison](#), 789 F.2d at 396 (dismissing defamation and emotional distress claims because they “relate[] to appellant's status and employment as a minister of the church” and “therefore concern[] internal church discipline, faith, and organization”); see also *supra*, Part II.B.2.a. Indeed, the ministerial exception's application to defamation suits may have ancient origins. See [McRaney](#), 980 F.3d at 1082 (Oldham, J., dissenting from denial of rehearing en banc) (citing 10 Edw. 2, stat. 1 c. 4 (1316); *Nicholas Fuller's Case* (1607), 12 Co. Rep. 41, 44 (K.B.)).



C


McRaney's post-termination claims fare no better. Again, these claims sound in tortious interference, defamation, and intentional infliction of emotional distress. But they boil down to two grievances. First, McRaney complains that NAMB's conduct has caused other religious organizations not to hire him as a minister and resulted in his disinvitation from speaking engagements at church conferences—turning him into a “professional pariah.” ROA.1323. Second, McRaney objects to NAMB's posting a no-entry photo of him behind the reception desk at its headquarters. ROA.1320. The church autonomy doctrine bars these claims.



Start with the missed employment opportunities. McRaney's operative complaint named the Safari Christian Business Alliance and the Jacksonville Baptist Theological Seminary as examples of potential employers that failed to hire him because of NAMB's alleged defamation. McRaney alleges the first was seeking an “expert in the field of ministry” and the second was “impressed with” McRaney's “ministry



credentials” so it could “upgrade the quality of teaching and training” it provides. ROA.1321–22 (quotation omitted).

*20 The ministerial exception defeats these claims for the same reason it defeats McRaney's claims relating to his termination by BCMD: They are collateral attacks on BCMD's ministry-leadership decisions. *See supra*, Part III.B.2. McRaney's tortious interference and defamation claims against NAMB for these failed employment opportunities would require a court to determine *why* the other two religious institutions did not hire McRaney for ministry roles. To side with McRaney, the court would have to hold that the ministry groups rejected him because of NAMB's defamation—and *not* because the ministries found another Christ-like leader they liked better, trusted better, or otherwise preferred for any other non-defamatory ecclesiastical reason. That would violate each organization's right “to select, and to be selective about, those who will serve as the very ‘embodiment of its message’ and ‘its voice to the faithful.’”  *Hosanna-Tabor*, 565 U.S. at 201, 132 S.Ct. 694 (Alito, J., concurring) (quoting  *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006)).

Next take the disinvitations from speaking engagements. For example, a pastor disinvited McRaney from speaking at a church conference in Mississippi. McRaney alleges he was disinvited because an NAMB board member pressured the pastor. But the pastor testified that he disinvited McRaney after seeing his posts on Facebook “declaring war” on NAMB. ROA.2298. And the pastor believed that war was “incompatible” with a successful conference because many of the conference's ministry partners were affiliated with NAMB. ROA.2299. Again, adjudicating these tortious interference and defamation claims would require a court to “interpose” itself into a religious organization's “decisions ... relating to how and by whom [it] spreads [its] message.”  *Bell*, 126 F.3d at 332. That is intolerable: “The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine ... is unquestioned.”  *Watson*, 80 U.S. (13 Wall.) at 728–29.¹¹

¹¹ Although the First Amendment “gives special solicitude to the rights of religious organizations,” of course, “freedom of association is a right enjoyed by religious and secular groups alike.”  *Hosanna-Tabor*, 565 U.S. at 189, 132 S.Ct. 694;



see also  *Cath. Charities*, 605 U.S. at 257, 145 S.Ct. 1583 (Thomas, J., concurring). Cf.  *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (holding unconstitutional under the First Amendment a state law that limited organizers from choosing participants in a parade).

Same for the no-entry photograph at NAMB's headquarters. McRaney cannot use the vehicle of a defamation or emotional distress claim to collaterally attack the outcome of a church discipline proceeding. *See* Lael Weinberger, *Limits*, *supra* at 1260–61 (“[T]he ‘ministerial exception’ ... has been long understood to protect churches from defamation lawsuits challenging church discipline proceedings.”). The decision to exclude someone from participation in a religious organization is itself a religious decision that secular courts cannot pierce. *See*  *Paul v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 819 F.2d 875, 880 (9th Cir. 1987) (holding that the First Amendment defeats emotional distress and defamation claims against Jehovah's Witnesses’ practice of shunning); cf.  *Askew v. Trs. of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc.*, 684 F.3d 413, 420 (3d Cir. 2012) (holding that the “First Amendment shields religious institutions from ... intrusive inquiry” into their “internal excommunication procedures”). Even if NAMB's exclusion of McRaney from its headquarters was based on concerns about security, the genesis of the decision was doctrinal difference.¹²


¹² We also doubt that posting a no-entry photograph of someone behind a reception desk is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Herbert v. Herbert*, 374 So. 3d 562, 571 (Miss. Ct. App. 2023) (emphasis omitted), *cert. dismissed*, 375 So. 3d 671 (Miss. 2023).

* * *

*21 NAMB has endured protracted discovery, two rounds of summary judgment, a previous appeal, and a close en banc rehearing poll. Regrettably, this litigation has caused NAMB's and BCMD's “[c]hurch personnel and records” to “become subject to ... the full panoply of legal process designed to probe the mind of the church in the selection of its ministers.”

 *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985); see also  *Cath. Bishop of Chi.*, 440 U.S. at 502, 99 S.Ct. 1313 (explaining that “the very process of inquiry” into a church's internal communications can “impinge on rights guaranteed by the Religion Clauses”). This unconstitutional violation of church autonomy ends today.

The district court's entry of summary judgment in favor of NAMB is AFFIRMED.¹³

¹³ The district court also purported to dismiss for lack of jurisdiction. As we have explained, however, with-prejudice merits dismissals and without-prejudice jurisdictional dismissals are very different. See, e.g.,  *Spivey v. Chitimacha Tribe of Louisiana*, 79 F.4th 444, 448–49 (5th Cir. 2023). As we have explained in the foregoing pages, the district court did have jurisdiction to enter judgment on the merits. Therefore, we VACATE the district court's decision insofar as it purported to dismiss for lack of jurisdiction. And we AFFIRM the entry of final judgment ending this case on the merits.

Irma Carrillo Ramirez, Circuit Judge, dissenting:

William McRaney sued a board of an organization for which he did not work, alleging interference with contract, interference with prospective business relations, defamation, and intentional infliction of emotional distress. Because his secular claims against a third-party organization do not implicate matters of church government or of faith and doctrine, I respectfully dissent.

I

A

In 2012, the Baptist Convention of Maryland and Delaware (“BCMD”) and the North American Mission Board (“NAMB”) entered into a Strategic Partnership Agreement (“Agreement”) to “jointly develop, administer and evaluate a plan for penetrating lostness through church planting and evangelism.” The Agreement established BCMD and NAMB's “relationships and responsibilities” regarding

hiring, cooperation, and funding. It specifically provided that the hiring of “missionaries must go through the approval process of both the convention and NAMB.” The Agreement would be “cooperatively developed and approved by representatives of [BCMD and NAMB],” and NAMB and BCMD “shall conduct a review of this [] Agreement as necessary.” Finally, the Agreement provided that it could be amended by mutual agreement and terminated “after consultation between the executive director and the president of [NAMB] or his designee.”

BCMD hired McRaney as its Executive Director in 2013. McRaney is an ordained minister, but in his role as Executive Director, he focused on “[s]etting and implementing a vision for [BCMD] and providing leadership.” Evangelism was not “in the job description.”

Conflicts between McRaney and NAMB arose soon after his arrival. According to NAMB, McRaney offered positions to candidates and imposed associational giving requirements on church planters without NAMB's approval. McRaney continued “act[ing] unilaterally,” despite multiple conversations with NAMB personnel reminding him about “the importance of coordination between BCMD and NAMB *before* decisions are made.” NAMB also raised concerns about McRaney's disregard for NAMB staff, as well as additional concerns about budget shortfalls and work allocation. McRaney, on the other hand, “persistently maintained” that he had adhered to the Agreement.

*22 The relationship between McRaney and BCMD continued to deteriorate until, on December 2, 2014, NAMB informed BCMD that it intended to terminate the Agreement. In the letter, NAMB stated that “[McRaney]’s serious and persistent disregard of the Strategic Partnership Agreement between BCMD and NAMB has resulted in a breach of the Agreement.” According to NAMB, McRaney's actions, “in willfully and repeatedly ignoring the Strategic Partnership Agreement[,] have left NAMB with no other solution at this time.” On June 8, 2014, BCMD's General Mission Board terminated McRaney's employment, but soon after McRaney's termination, NAMB rescinded the termination letter and restored its relationship with BCMD.

B

McRaney sued NAMB, bringing pre- and post-termination claims for interference with contract, interference with

prospective business relations, defamation, and intentional infliction of emotional distress. He alleged that NAMB spread “disparaging falsehoods” about him—namely, that he breached the Agreement—that prompted BCMD to terminate his employment. He also alleged that, after his termination, NAMB engaged in additional tortious conduct, including “blacklist[ing]” him and impeding his opportunities as a speaker at conferences and meetings.

NAMB moved for summary judgment on McRaney's claims, arguing that “this suit poses an unconstitutional intrusion into BCMD's ‘choice of minister’ and its internal governance and policy.” NAMB also argued that the ecclesiastical abstention doctrine barred adjudication of McRaney's claims. The district court granted NAMB's motion, holding that it lacked subject-matter jurisdiction because “this case would delve into church matters.” It explained that McRaney's claims would require the court to determine why BCMD fired McRaney and whether NAMB's actions were done “‘without right or justifiable cause’—in other words, whether the NAMB had a valid religious reason for its actions.” That, the district court concluded, it could not do.

McRaney appealed. This court held that, at such an early stage of litigation, it did not appear “certain that resolution of McRaney's claims will require the court to address purely ecclesiastical questions.” *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 349 (5th Cir. 2020). “His complaint [instead] asks the court to apply neutral principles of tort law to a case that, on the face of the complaint, involves a civil rather than religious dispute.” *Id.* This court acknowledged, however, that further proceedings and factual development could reveal that McRaney's claims cannot be resolved without deciding purely ecclesiastical questions. *Id.* at 350. The district court, at that point, would be free to “reconsider whether it is appropriate to dismiss some or all of McRaney's claims.” *Id.* Until then, this court concluded, the dismissal of McRaney's claims was “premature.” *Id.* at 351.





C




On remand, NAMB again moved for summary judgment, arguing that “the First Amendment precludes adjudication of this lawsuit.” The district court again determined that “it [could not] adjudicate [McRaney]’s claims in this case without impermissibly delving into church matters in violation of the ecclesiastical abstention doctrine.” It

reiterated the reasons it gave in its original opinion to support granting NAMB's second motion. It also determined that the Agreement is “an inherently religious document” that is “steeped in religious doctrine.” The district court dismissed McRaney's claims rather than remanding them because “[i]f this Court lacks jurisdiction to hear [McRaney]’s claims because the claims involve ecclesiastical disputes, then the state court otherwise lacks jurisdiction.” McRaney timely appealed.

II

*23 McRaney argues that the district court erred in determining that the ecclesiastical abstention doctrine applied to bar his claims.¹

¹ Although the district court did not address the ministerial exception in granting NAMB's second motion for summary judgment, NAMB argues that the ministerial exception precludes adjudication of McRaney's claims. The ministerial exception bars claims brought by a minister challenging a church's decision to fire him.  *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 196, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). It only applies to disputes between employees and employers, however, not to disputes between employees and third parties. See  *id.* at 195–96, 132 S.Ct. 694;  *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 180 (5th Cir. 2012) (applying  *Hosanna-Tabor* and affirming the dismissal of a music director's employment-discrimination claims against a Catholic diocese and Catholic church). Here, McRaney is suing a third party, NAMB, rather than his employer, BCMD.

Under the ecclesiastical abstention doctrine, secular courts cannot adjudicate “strictly and purely ecclesiastical” questions.  *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733, 20 L.Ed. 666 (1871). This doctrine protects a church's right to construe “[its] own church laws,”  *id.*, and anticipates the practical consequences of secular judges deciding disputes rooted in religious doctrine,  *id.* at 729 (“It is not to be supposed that the judges of the civil court can be as competent

in the ecclesiastical law and religious faith of all these bodies in each.”). It applies to “theological controvers[ies], church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.” [Id.](#) at 728. In short, for the doctrine to be applicable, McRaney’s claims must concern either “matters of church government” or matters of “faith and doctrine.” [Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.](#), 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952).

A

McRaney first argues that the district court erred because “this case does not involve an intra-church dispute in any respect, nor is it about church government.” I agree.

The Supreme Court first applied the ecclesiastical abstention doctrine in [Watson v. Jones](#), 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1871). It involved the Walnut Street Presbyterian Church’s purchase and conveyance of property to the church’s trustees “to have and to hold to them, and to their successors, to be chosen by the congregation.” [Id.](#) at 683. The church experienced certain internal “disturbances,” [id.](#) at 684, and two factions emerged, each contending that it was entitled to the property, [id.](#) at 717. One of the factions requested an injunction to restrain the other from taking possession of the property and worshipping in the church. [Id.](#) at 721.







The Supreme Court distinguished situations in which “the property is held by a religious congregation which ... so far as church government is concerned, owes no fealty or obligation to any higher authority,” from those in which “the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals.” [Id.](#) at 723. The Supreme Court found that the Walnut Street Presbyterian Church was in the latter class. [Id.](#) at 726. “[T]he local congregation [was] itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments.” [Id.](#) at 726–27. In these cases involving religious organizations, “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories

to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.” [Id.](#) at 727.

*24 Since [Watson](#), the Supreme Court has continued to apply the doctrine to disputes concerning “member[s] of a much larger and more important religious organization ... under its government and control.” [Id.](#) at 726–27. In [Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America](#), 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952), it concluded that it could not adjudicate a dispute between churches in Moscow and North America over the right to occupy a Russian Orthodox Church in New York. The Russian Orthodox Church was a “hierarchical church with a Patriarch at its head,” [id.](#) at 101, 73 S.Ct. 143, and “[n]othing indicate[d] that either the Sacred Synod or the succeeding Patriarchs relinquished [its] authority or recognized the autonomy of the American church,” [id.](#) at 105–06, 73 S.Ct. 143. And in [Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich](#), 426 U.S. 696, 709, 708, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976), the Supreme Court reversed the Illinois Supreme Court, finding that its judgment “rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes.” See also [Jones v. Wolf](#), 443 U.S. 595, 602, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) (“[T]he [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.”).

Unlike the hierarchical churches in [Watson](#) or [Kedroff](#), there is no unified “Baptist Church.” Each Baptist church is autonomous—individual congregations rule themselves according to the governing documents and procedures they have independently established. Brief of Current and Former Baptist Leaders as *Amici Curiae* at 10. By choice, Baptist congregations cooperate or coordinate in local associations for mutual fellowship, support, and the pooling of resources. Local Baptist associations are also often in “fellowship” with state conventions like BCMD. “Just as local associations exercise no authority over congregations, the state conventions exercise no authority over either the

local associations or the congregations within those local associations.” When local Baptist churches cooperate in state conventions, and when those conventions cooperate in the Southern Baptist Convention, neither the individual churches nor the individual conventions surrender any authority. Brief of Current and Former Baptist Leaders as *Amici Curiae* at 11. According to the Southern Baptist Convention, “[n]o local, state or national entity may exercise control or authority over any Southern Baptist church. Baptists reject the idea of a religious ‘hierarchy’ or ‘umbrella’ superior to the local church, or that any Baptist Convention is in hierarchy or governing relationship over another Convention.” Ltr. of *Amici Curiae* Ethics and Religious Liberty Commission and Thomas More Society at 1, *McRaney*, 966 F.3d 346 (5th Cir. 2020) (No. 19-60293) (filed Dec. 14, 2020).

Because there is no unified “Baptist Church,” there can be no “intrachurch dispute” or dispute about “church government” in this case. The Supreme Court recognized that Baptists are “a religious congregation which ... so far as church government is concerned, owes no fealty or obligation to any higher authority.”  *Watson*, 80 U.S. at 721. This differentiates Baptists from the Presbyterian church in  *Watson*, which is “a subordinate member of some general church organization in which there are superior ecclesiastical tribunals.”  *Id.* at 723. Disputes among Baptists “must be determined by the ordinary principles which govern voluntary associations,”  *id.* at 725, because they lack the “system[s] of ecclesiastical government” that secular courts must accept as final and binding,  *id.* at 729. NAMB’s actions in this case do not—and cannot—implicate “church government.” See  *Kedroff*, 344 U.S. at 116, 73 S.Ct. 143.


Notably, current and former Baptist leaders agree. See Brief of Current and Former Baptist Leaders as *Amici Curiae* at 10–13. They reiterate that “the individual autonomy of local churches is a venerable, core Baptist distinctive.” *Id.* at 10. Accordingly, “a dispute between McRaney (a former employee of BCMD, a state Baptist convention) and NAMB (an entity of the Southern Baptist Convention) [could not be] an ‘internal’ dispute of ‘the Baptist Church.’ ” *Id.* at 12. To conclude otherwise would first require that there exist a “‘Baptist Church’ with [a] unified ‘mission’ and ‘government.’ ” *Id.* at 13. Even then, “McRaney, BCMD, and NAMB [would also need to be] inside that single institution.” *Id.* And “when NAMB allegedly interfered with McRaney’s BCMD employment [and defamed him], NAMB [must have been]


exercising ‘the Baptist Church’s’ unreviewable governance over one of ‘the Church’s’ leaders stationed at a subordinate entity.” *Id.* Such a result would, according to Baptist leaders, be “foreign to Baptist polity.” *Id.* at 13.



B

*25 Next, McRaney argues that his claims do not implicate “faith and doctrine.” He instead brings “familiar state law tort claims,” and asks this court to “apply neutral principles of tort law to a case that ... involves a civil rather than religious dispute.” *McRaney*, 966 F.3d at 349. I agree.

“Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes” involving religious entities.


 *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969). “[T]here are neutral principles of law, developed for use in all ... disputes, which can be applied

without ‘establishing’ churches.”  *Id.* Secular courts may settle a dispute implicating religious entities or churches “so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.”

 *Wolf*, 443 U.S. at 602, 99 S.Ct. 3020 (quoting  *Maryland & Va. Churches*, 396 U.S. 367, 368, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970) (Brennan, J., concurring)). As our sister courts agree, the First Amendment “does not provide religious organizations with a blanket immunity from suit, discovery, or trial.”² *O’Connell v. U.S. Conf. of Cath. Bishops*, 134 F.4th 1243, 1258 (D.C. Cir. 2025).


² See, e.g., *Garrick v. Moody Bible Inst.*, 95 F.4th 1104, 1112 (7th Cir. 2024) (“Courts may exercise authority [in disputes involving religious institutions] when the resolution does not require inquiry into doctrinal disputes.”); *Wells by & through Glover v. Creighton Preparatory Sch.*, 82 F.4th 586, 595 n.4 (8th Cir. 2023) (“Just because Creighton is a Jesuit school and Wells spoke in a vulgar manner does not necessarily mean this case requires an inquiry into religious doctrine, much less an ‘extensive’ one.”); *Belya v. Kapral*, 45 F.4th 621, 630 (2d Cir. 2022) (“But secular components of a dispute involving religious parties are not insulated from judicial review[.] ... So long as the court relies exclusively on objective, well-

established [legal] concepts, it may permissibly resolve a dispute even when parties are religious bodies.”).

The question, then, is whether adjudication of McRaney's claims will necessitate consideration of “theological controvers[ies], church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.”  *Watson*, 80 U.S. at 728.


1

McRaney brings two sets of almost identical claims based on NAMB's pre- and post-termination conduct. He claims that before he was fired, NAMB “disparaged McRaney with the serious assertion to his employer, BCMD, that [he] violated [the Agreement,]” which led BCMD to terminate his employment. He also alleges “NAMB personnel contended that [McRaney] lied, and that he ‘almost single-handedly ruined’ the BCMD.” These allegations form the basis of his pre-termination claims for interference with contract, defamation, and intentional infliction of emotional distress.

To establish an interference with contract claim, McRaney must establish that: (a) NAMB's acts were intentional; (b) these acts were done with the unlawful purpose of causing McRaney damage and loss, without right or justifiable cause; and (c) actual loss occurred. See  *Collins v. Collins*, 625 So.2d 786, 790 (Miss. 1993). No matter of faith or doctrine is implicated in adjudicating this claim. NAMB's motion—and the summary-judgment record—confirm that its conflicts with McRaney arose because he “would act unilaterally,” offering positions to candidates and imposing additional requirements on church planters without its approval. This violated the Agreement, NAMB claims, because NAMB and BCMD had agreed that the entities would act jointly and that “missionaries [would] go through the approval process of both [entities].” Consideration of whether NAMB acted intentionally with an unlawful purpose in informing BCMD that McRaney engaged in “serious and persistent” disregard of the Agreement without right or justifiable cause, and whether these actions caused BCMD to fire McRaney, does not implicate religious questions.

*26 As for McRaney's second pre-termination claim, the elements of a defamation claim are: (a) a false and defamatory statement concerning plaintiff; (b) unprivileged publication to a third party; (c) fault amounting at least to negligence on

part of publisher; and (d) harm caused by publication. See *Armistead v. Minor*, 815 So. 2d 1189, 1193 (Miss. 2002). McRaney specifically alleges that NAMB defamed him by telling BCMD that he breached the Agreement, as well as by telling others that he lied and “almost single-handedly ruined” the BCMD. The focus in assessing McRaney's defamation claim will be whether NAMB made these statements to third parties and whether they are true. Inquiry into Baptist religious beliefs—or McRaney's ministerial qualities—will not be required.

McRaney's final pre-termination claim is an intentional infliction of emotional distress claim. To succeed on this claim, McRaney must establish that: (a) NAMB acted willfully or wantonly; (b) NAMB's acts evoke outrage or revulsion in a civilized society; (c) the acts were directed at or intended to cause McRaney harm; (d) McRaney suffered severe emotional distress from those acts; and (e) his resulting emotional distress was foreseeable. See *McGrath v. Empire Inv. Holdings, LLC*, No. 1:11-CV-209-A-S, 2013 WL 85205, at *7 (N.D. Miss. Jan. 7, 2013). Adjudicating this claim will require consideration of why NAMB told BCMD that McRaney breached the Agreement, as well as why it told others that he lied and “almost single-handedly ruined” the BCMD. Determining whether NAMB acted “willfully or wantonly” does not implicate religious beliefs, procedures, or law. NAMB offered evidence that its relationship with McRaney broke down because he repeatedly acted unilaterally. It offered no “religious explanation for its actions which might entangle the court in a religious controversy in violation of the First Amendment.”  *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 472 (8th Cir. 1993).

2

McRaney also alleges that after BCMD fired him, NAMB took the “unprecedented step of posting a photo of [him] at the reception desk of NAMB's headquarters, for the purpose of denying him entry to the building.” McRaney also claims that NAMB “blackball[ed] or blacklist[ed] him,” and he offers examples of this alleged “decade-long vendetta,” including that a member of NAMB's Board of Trustees interfered with his invitation to speak at a large event. He allegedly lost out on two jobs because “the perception portrayed by NAMB ... was that [McRaney] was a troublemaker.” These allegations form the basis of his post-termination claims for interference

with prospective business relationships, defamation, and intentional infliction of emotional distress.

To succeed on his claim for interference with prospective business relationships, McRaney must establish that: (a) NAMB's actions were intentional; (b) NAMB's actions were committed to cause McRaney damage in his lawful business; and (c) actual damage and loss resulted. *See Biglane v. Under the Hill Corp.*, 949 So.2d 9, 16 (Miss. 2007). Adjudication of this claim will require consideration of whether NAMB's actions were intended to interfere with McRaney's prospective business relationships. Consideration of whether NAMB posted a no-entry photograph of McRaney for a reason other than “communicat[ing] that [McRaney] was not to be trusted and an enemy of NAMB” or called him a “troublemaker” in order to “blackball” him does not implicate matters of faith or doctrine.

As with McRaney's pre-termination defamation claim, the focus in assessing his post-defamation claim will be on whether NAMB made the alleged statements and their veracity. McRaney alleges that NAMB has falsely claimed that he “resigned” from BCMD, that he is unreasonable, greedy, and seeking to unfairly enrich himself, and that he has refused to engage with NAMB in “biblical reconciliation.” Although the question of whether McRaney did or did not engage in “biblical reconciliation” could require interpretation of a religious procedure or belief, the allegations that McRaney resigned or that he seeks to unfairly enrich himself are removed from matters of faith or doctrine. Determining the veracity of these claims would not require any inquiry into Baptist religious beliefs, nor would it require assessing whether McRaney fulfilled his gospel calling. His defamation claim does not fail in its entirety.

*27 McRaney's final post-termination claim is for intentional infliction of emotional distress. Adjudication will require assessment of why NAMB posted a no-entry photo of him at their headquarters, as well as why it portrayed an impression of McRaney as a “troublemaker.” Determining whether NAMB acted “willfully or wantonly” does not implicate religious beliefs, procedures, or law. NAMB offered evidence that the photo was “an unoffensive headshot of [McRaney], without any accompanying text.” It has also argued that “posting the photograph was a self-evidently reasonable step under the circumstances” because “[b]y 2016, [McRaney] had become a serious security risk for NAMB.” NAMB has already offered secular explanations to defend against McRaney's secular allegations. Resolution of McRaney's post-termination intentional infliction of emotional distress claim requires no more than resolution of a secular claim.

*

Because they do not implicate matters of faith and doctrine, McRaney is entitled to continue pursuing his secular claims regarding NAMB's pre- and post-termination conduct.

III

I respectfully dissent from affirming the entry of summary judgment in favor of NAMB.

All Citations

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United States District Court, E.D. Pennsylvania.

Amy WAX

v.

The TRUSTEES OF the
UNIVERSITY OF PENNSYLVANIA

CIVIL ACTION NO. 25-269

|

Signed August 27, 2025

|

Filed August 28, 2025

Attorneys and Law Firms

Caleb Acker, Baker Hostetler LLP, Washington, DC, [Jason Torchinsky](#), [Kellen S. Dwyer](#), Holtzman Vogel Baran Torchinsky & Josefiak PLLC, Washington, DC, Samantha K. Harris, Allen Harris PLLC, Narberth, PA, [Susan Greene](#), Holtzman Vogel Baran Torchinsky & Josefiak PLLC, Buffalo, NY, for Amy Wax.

A. [Klair Fitzpatrick](#), [Arielle Hannah Steinhart](#), Mary Ann Ferguson McNulty, [Michael L. Banks](#), Morgan, Lewis & Bockius LLP, Philadelphia, PA, [Joe H. Tucker, Jr.](#), Tucker Law Group, Philadelphia, PA, for The Trustees of the University of Pennsylvania.

MEMORANDUM OPINION[Savage](#), District Judge

*1 After she was disciplined for “flagrant unprofessional conduct” based on statements she had made in class and in public that demeaned and denigrated racial minorities, Amy Wax, a tenured professor at University of Pennsylvania Carey School of Law, brought this action against the Board of Trustees of the University of Pennsylvania (“Penn”). She asserts that Penn discriminated against her based on the content of her speech and her status as a White Jewish woman. She brings federal claims for race discrimination and state law claims for breach of contract and false light invasion of privacy.

As much as Wax would like otherwise, this case is not a First Amendment case. It is a discrimination case brought under

federal antidiscrimination laws. It calls for us to determine whether offensive comments directed at racial minorities are protected by those laws.

Having considered Penn's motion to dismiss the Amended Complaint for failure to state a cause of action, we conclude Wax has failed to allege facts that show that her race was a factor in the disciplinary process and there is no cause of action under federal antidiscrimination statutes based on the content of her speech. Thus, we will dismiss the federal discrimination claims and decline to exercise supplemental jurisdiction over her state law claims.

Background¹

¹ The facts are recited from the allegations in the Amended Complaint. We accept them as true and draw all reasonable inferences from them in favor of Wax. We also consider documents attached to the Amended Complaint.

Wax began her career at Penn Carey Law School as a tenured professor on July 1, 2001.² Five years later, she was named the Robert Mundheim Professor of Law.³

² Am. Compl. ¶ 37, ECF No. 22 [“Compl.”].

³ *Id.* ¶ 38.

In 2017, Wax co-authored an opinion essay in the *Philadelphia Inquirer* lamenting the loss of bourgeois culture while denigrating racial minorities.⁴ This instigated student and faculty complaints against Wax for statements she made in the article and later for statements she made in the following years.

⁴ *Id.* ¶ 39.

On March 2, 2022, Dean Theodore W. Ruger sent Wax a letter charging she had “shown a callous and flagrant disregard for [the] University community” and inviting an informal resolution.⁵ The letter cited the following as examples of her conduct:

- When asked by a Black student if she agreed with the claim that Black people are inherently inferior to white people, Wax responded: “You can have two plants that

grow under the same conditions, and one will just grow higher than the other.”

- Wax asserted on a panel that “our country will be better off with more whites and fewer nonwhites.”
- Wax told the *New Yorker* that “women, on average, are less knowledgeable than men” and “less intellectual than men.”
- Wax publicly described Black people as having “different average IQs” than people of other races, such that “Blacks are not going to be evenly distributed throughout all occupations” and that this phenomenon is “not due to racism.”
- *2 • Wax asserted that “the United States is better off with fewer Asians” and that Asian people lack “thoughtful and audacious individualism.”
- Wax told a Black colleague that it is “rational to be afraid of Black men in elevators.”
- Wax, speaking on a panel with a gay colleague, asserted that “no one should have to live in a dorm room with a gay roommate,” and separately stated that same-sex relationships are selfish and not focused on family or community.
- Wax stated on a podcast that she “often chuckle[s]” at advertisements that show interracial marriages because “[t]hey never show blacks the way they really are: a bunch of single moms with a bunch of guys who float in and out. Kids by different men.”
- In an appearance on *Tucker Carlson Today*, Wax asserted that “Blacks” and other “non-Western groups” harbor “resentment, shame and envy” against Western people for their “outsized achievements and contributions even though, on some level, their country is a shithole.”⁶

⁵ *Id.* ¶ 52; Charging Document of Dean Ruger 11, ECF No. 22-1 (attached as Ex. 4 to Compl.).

⁶ Charging Document of Dean Ruger.

On June 23, 2022, after attempts at informal resolution had failed, Dean Ruger requested the Chair of the Faculty Senate to convene a Hearing Board. The Chair began assigning faculty members to the Hearing Board in June 2022.⁷

⁷ Compl. ¶ 61.

After faculty members were assigned, Wax filed motions to disqualify all members. Before filing the motions, she requested information about the Hearing Board members, including whether they had attended a presentation by Professor Anita L. Allen on February 16, 2022, where the University’s speech standards were discussed.⁸ Penn denied the request.⁹ The composition of the Hearing Board was finalized on September 13 when Wax’s motions to disqualify its members were denied.¹⁰

⁸ *Id.* ¶ 63.

⁹ *Id.* ¶ 65.

¹⁰ *Id.* ¶ 66.

The Hearing Board conducted a three-day hearing from May 1 to May 3, 2023.¹¹ On June 21, 2023, the Hearing Board published its report, finding Wax had engaged in “flagrant unprofessional conduct.”¹² The Board found that she was in dereliction of her scholarly responsibilities, had violated privacy policies, and had not treated students with equitable due respect.¹³ The Board recommended a one-year suspension at half pay, loss of the named chair, loss of summer pay in perpetuity, and a public reprimand.¹⁴

¹¹ *Id.* ¶ 67. At oral argument, plaintiff’s counsel could not say what reasons were given in her motions.

¹² Hearing Board Report, ECF No. 22-1 (attached as Ex. 6 to Compl.).

¹³ *Id.*

¹⁴ Compl. ¶ 68.

The Hearing Board sent its report to then-President Liz Magill on June 21, 2023.¹⁵ Magill issued her decision upholding the proposed sanctions on August 11, 2023.¹⁶ On September 24, 2023, Interim President J. Larry Jameson published Magill’s decision on Penn’s website.¹⁷

¹⁵ *Id.* ¶ 69.

¹⁶ *Id.* ¶ 75.

¹⁷ *Id.* ¶ 77.

Wax appealed to the Faculty Senate Committee on Academic Freedom and Responsibility (“SCAFR”).¹⁸ On May 29, 2024, SCAFR issued its report, finding no procedural defects.¹⁹

¹⁸ *Id.* ¶ 78.

¹⁹ *Id.* ¶ 79.

On May 30, 2024, Provost John Jackson sent Wax a draft reprimand, advising her that he would release it later that day.²⁰ At Wax's request, Interim President Jameson met with her.²¹ As a result of that meeting, attorneys for Penn and Wax engaged in settlement negotiations, which ultimately failed.²²

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ On September 23, 2024, in accordance with the sanctions, Provost Jackson sent a letter to Wax as a “public reprimand” and notified her that he intended to impose the sanctions recommended by the Hearing Board.²³ Penn published the formal reprimand and publicized the sanctions that same day in its online campus newspaper.²⁴

²³ *Id.* ¶ 80.

²⁴ *Id.* ¶ 81.

The following day, Jameson published the SCAFR Report on Penn's website.²⁵ SCAFR member Jules van Binsbergen wrote a dissenting report, arguing that the procedure “did not appropriately protect” Wax's rights.²⁶

²⁵ *Id.* ¶ 82.

²⁶ *Id.* ¶ 84.

Penn Carey Law School Dean Sophia Lee advised Wax that Penn was imposing the sanctions, including loss of her named chair, a one-year suspension at half pay with benefits intact, and loss of summer pay in perpetuity.²⁷ Because Wax had already commenced teaching, including a year-long seminar, for the 2024-2025 academic year, the one-year suspension was delayed until July 1, 2025.²⁸




²⁷ *Id.* ¶ 82.


²⁸ *Id.*




Wax brought this action for race discrimination under Title VI, Title VII and Section 1981 of the Civil Rights Act, and breach of contract and false light invasion of privacy under Pennsylvania law.²⁹ She withdrew a cause of action under the Americans with Disabilities Act.

²⁹ She also brought a claim under the ADA for failure to reasonably accommodate. She voluntarily dismissed that claim. 25-cv-269, Plaintiff's Notice of Voluntary Dismissal with Prejudice as to Certain Claim (ECF No. 30), March 20, 2025.

Standard of Review

To survive a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting  *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing  *Twombly*, 550 U.S. at 556).

A conclusory recitation of the elements of a cause of action is not sufficient. *Oakwood Lab's LLC v. Thanoo*, 999 F.3d 892, 904 (3d Cir. 2021). The plaintiff must allege facts necessary to make out each element. *Id.* (quoting  *Iqbal*, 556 U.S. at 669, 679). In other words, the complaint must contain facts which support a conclusion that a cause of action can be established.

In considering a motion to dismiss under Rule 12(b)(6), we first separate the factual and legal elements of a claim, accepting the well-pleaded facts as true and disregarding legal conclusions. Then, we determine whether the alleged facts make out a plausible claim for relief.  *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009) (quoting  *Iqbal*, 556 U.S. at 679). All well-pleaded allegations in the complaint are accepted as true and interpreted in the light most favorable to the plaintiff, and all inferences are drawn in the plaintiff's favor. See  *McTernan v. City of York*, 577 F.3d

521, 526 (3d Cir. 2009) (quoting [Schrob v. Catterson](#), 948 F.2d 1402, 1408 (3d Cir. 1991)).

In deciding a motion to dismiss, courts generally consider only the allegations of the complaint, exhibits attached to the complaint, documents incorporated by reference in the complaint, and matters of public record. [Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.](#), 394 F.3d 126, 134 (3d Cir. 2004) (citing [In re Burlington Coat Factory Sec. Litig.](#), 114 F.3d 1410, 1420, 1426 (3d Cir. 1997)); [Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.](#), 998 F.2d 1192, 1196 (3d Cir. 1993) (citations omitted).

*4 Because Dean Ruger's charging document and the Hearing Board's report are attached and integral to Wax's amended complaint, we may consider the exhibits without converting the motion to dismiss to a motion for summary judgment.

Analysis

Discrimination – (Counts II, III, V – Section 1981, Title VI, Title VII)

Wax proffers two theories of race discrimination. First, she claims that she was discriminated against based on the racial content of her speech. She argues she was disciplined for what she said about some races while others who spoke negatively about other races were not disciplined. Essentially, she is asserting a race discrimination claim based on the content of her speech. Second, she alleges that she was disciplined because of her status as a White, Jewish woman.

The anti-discrimination statutes protect speakers, not speech. They forbid discrimination based on the race of the speakers, not the racial content of their speech.

Section 1981 of the Civil Rights Act states: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses,

and exactions of every kind, and to no other.” [42 U.S.C. § 1981\(a\)](#).

Title VI states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” [42 U.S.C. § 2000\(d\)](#).

Title VII provides that “[i]t shall be an unlawful employment practice for an employer—(1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” [42 U.S.C. § 2000e-2\(a\)\(1\)](#).

To support her first theory, Wax claims that Penn punishes some speakers for the racial content of their speech but does not punish other speakers who engage in speech of the same or materially similar content depending on the race of the subject of the speech.³⁰ Specifically, she claims that anti-Jewish speech is not subject to discipline while speech directed at other racial groups is.³¹

³⁰ *Id.* ¶ 136.

³¹ *Id.* ¶ 138.

To make out claims under [Section 1981](#), Title VI, and Title VII, Wax must plausibly allege that she was subjected to intentional discrimination because of her race. Alleging that one was discriminated against because of one's own protected characteristic (race) is an essential element of a race discrimination claim. Federal antidiscrimination law does not provide a cause of action for disparate treatment of speech conduct. In other words, it is the speaker, not the speech, that is protected.

Both parties rely upon *Frith v. Whole Foods Market, Inc.* (*Frith I*) to support their arguments. [517 F. Supp. 3d 60 \(D. Mass. Feb. 5, 2021\)](#). In that case, employees at Whole Foods alleged their employer was discriminating against them by disciplining them for wearing BLM masks while employees wearing apparel with other messages were not disciplined. The district court dismissed the claim, concluding plaintiffs' allegations amounted to content-based speech discrimination, which does not support a Title VII claim. [Frith](#), [517 F. Supp. 3d at 71](#). As the district court pointed out, the Supreme Court

had recently “reinforced what the plain language of the statute makes clear: that the proper focus [of a discrimination claim] is on the protected characteristic of the individual employee bringing the claim.” *Id.* (citing [Bostock v. Clayton Cnty.](#), 590 U.S. 644, 658 (2020)).

*5 The First Circuit affirmed with slightly different reasoning. It reiterated that in a discrimination case, “the proper focus is on the protected characteristic of the individual plaintiff.” [Frith v. Whole Foods Market, Inc. \(Frith II\)](#), 38 F. 4th 263, 271 (1st Cir. 2022) (citing [Bostock](#), 590 U.S. at 658). After settling that threshold issue, the appeals court considered whether the plaintiffs had properly pleaded discrimination based on their status as Black employees, their advocacy for Black employees, and their association with Black employees. *Id.* at 273. In its discussion, the court made the statement, relied on by Wax, that “[u]nlike the district court ... [plaintiffs] have pleaded discrimination claims that are, conceptually, consistent with Title VII.” *Id.* at 274. Wax interprets this statement to mean a Title VII claim can be based on the racial content of speech instead of the race of the speaker.³² She is wrong.

³² Pl.’s Br. at 26.

The *Frith II* court’s statement explained that plaintiffs had either pleaded discrimination based on their race as Black employees or their association with Black employees. “Unlike the district court, then, we do not think that appellants have failed to allege that the race of the individual plaintiffs was a motivation for the discrimination ... It is clear from the complaint that appellants all fall into one of two categories, Black employees who are subject to racial discrimination and non-Black employees who are subject to racial discrimination [by association].” *Id.* In other words, the plaintiffs had pleaded discrimination based on the race of the speakers, not the racial content of their speech. *Frith* did not hold, as Wax contends, that a Title VII claim need not be based on the plaintiff’s own protected characteristic.

Wax misconstrues *Frith II* again when she claims it supports her novel theory for a speech-based discrimination claim. She relies on the *Frith II* court’s statement that it did not think “the fact that both Black and non-Black employees were disciplined for wearing Black Lives Matter masks undercuts the discrimination claim.”³³ The court elaborated that the plaintiffs had alleged race was a factor because they had

pleaded an associational race discrimination claim based on their association with Black people through their messaging. It did not hold that the speech content formed the basis of a discrimination claim under Title VII. *Id.* at 271. Neither do we.

³³ *Id.*

Wax does not allege facts showing that she was discriminated against because she was speaking on behalf of any protected class. She did not associate with any person or persons who were in a protected class. She did not support any protected class. To characterize her comments as supportive of those she criticized and denigrated is not plausible.³⁴

³⁴ Some of the comments are set forth in the charging letter attached as Ex. 4 to the Amended Complaint.

Wax’s second theory is that her own race as a White, Jewish woman was a motivating factor in Penn’s decision to discipline her. She claims that Penn’s disciplinary action occurred under circumstances giving rise to an inference of intentional discrimination.³⁵ She baldly claims that Penn’s speech policy³⁶ “discriminates based on the race or other ground of the speaker,”³⁷ and that anti-Jewish speech is not subject to discipline.³⁸ She alleges this policy creates a racially hostile environment and that Penn chose not to punish antisemitic speech or prevent a racially hostile environment, which “contributed to the violation of” her [Section 1981](#) rights.³⁹ She claims, without any factual support, that her race was a but-for cause of her discipline.⁴⁰

³⁵ Compl. ¶¶ 133, 154, 176.

³⁶ *Id.* ¶ 7. Wax alleges Penn has a “Speech Policy.” She defines the policy as a collection of policies that provide that “some races may not be criticized while other racial or ethnic groups can be – and routinely are – subjected to virulently racist speech without consequence.” *Id.* She has not pointed to any written or official “Speech Policy” at Penn, much less one that condones discrimination, despite her attempts to turn her conclusory assertion into a factual allegation by presenting it as such.

³⁷ *Id.* ¶ 137.

38 *Id.* ¶ 138. Her complaint states that anti-Jewish speech is not subject to the same discipline under the Speech Policy as speech alleged to target other racial groups. She does not include other examples of “speech alleged to target other racial groups.” The only example of speech about racial groups other than Jews is her own.

39 *Id.* ¶¶ 139, 141-42.

40 *Id.* ¶ 146.

*6 Upon a closer look, her claim that Penn discriminated against her based on her race is based on the same argument she made about the content of her speech. She expressly claims that Penn treats the content of antisemitic speech differently than her speech. Again, she focuses on the content of speech, not the speaker. She defines Penn's speech policy as allowing some races to be criticized and others not. That clearly goes to speech content.

Wax's amended complaint could not be clearer. At paragraph 145, she frames her discrimination claim, stating “Penn's actions against [Professor] Wax were triggered by Professor Wax's speech on affirmative action and other comments involving the topic of race and were intended to punish her for engaging in speech Penn disfavored. At the same time, Penn did not punish any antisemitic speech.”⁴¹ So, she alleges, the discipline “was directly caused by Penn's racially discriminatory Speech Policy.”⁴²

41 *Id.* ¶ 145.

42 *Id.* ¶ 147.

Wax alleges no direct evidence of discrimination based on her race. Neither does she allege any facts about the disciplinary proceedings that raise an inference of discrimination. Her claim of discrimination rests on comparing what she said to what others at Penn said who were not disciplined. In sum, her allegations center on the absence of discipline for speech Wax deems antisemitic as compared to her speech for which she was disciplined.

In the absence of direct evidence, her discrimination claim rests on an inference of racial discrimination based on comparator evidence. To survive a motion to dismiss, “[the plaintiff] must allege facts sufficient to make plausible the existence of ... similarly situated parties.” *Danao v. ABM Janitorial Servs.*, 142 F. Supp. 3d 363, 375 (E.D. Pa. Oct.

7, 2015) (quoting *Perano v. Twp. of Tilden*, 423 Fed. Appx. 234, 238 (3d Cir. 2011)). A similarly situated party is one whose employment situation is nearly identical to that of the plaintiff, *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 170 (3d Cir. 2013), and who engaged in similar misconduct. *Wilcher v. Postmaster Gen.*, 441 F. Appx 879, 882 (3d Cir. 2011); *Opsatnik v. Norfolk S. Corp.*, 355 F. Appx 220, 223 (3d Cir. 2009).

Penn argues that the persons cited in the Amended Complaint are not comparators. It identifies them as employees in schools other than the law school. This, Penn argues, disqualifies them as comparators.

Penn's comparator argument is not persuasive. The disciplinary policy applies to all university faculty. The handbook is a university policy and dictates the university-wide disciplinary process. The Hearing Board is comprised of faculty from the university applying the same standards to all Penn faculty. Thus, comparators are faculty throughout the university, not only in the law school.

Wax's discrimination claim fails for a different reason. The seven persons she identifies as having been treated differently are not comparators. The content of their speech is not comparable to the speech for which she was sanctioned. They did not speak about race as she did. All but one commented on political issues surrounding the Israeli-Hamas conflict, which she characterizes as antisemitic. She was sanctioned for harmful speech directed at specific demographics in the University. The remarks of her purported comparators were not antisemitic; they were critical of Israel's treatment of Palestinians.

The seven persons Wax claims are comparators are: (1) Dwayne Booth, a non-tenured lecturer who posted an allegedly antisemitic cartoon;⁴³ (2) Ahmad Almallah, a Palestinian poet and artist-in-residence who lectures at Penn and participated in a rally;⁴⁴ (3) Julia Alekseyeva, a professor at Penn who posted on social media about the murder of Brian Thompson;⁴⁵ (4) Anne Norton, a Penn professor who posted a comment about Hamas and a comment about Jews on social media;⁴⁶ (5) Huda Fakhreddine, an associate professor at Penn, who made a statement in support of Hamas and teaches a course that touches on Palestine;⁴⁷ (6) Jill Richards, a Penn librarian who made a Facebook post in support of

Hamas;⁴⁸ and (7) Ibrahim Kobeissi, a Penn Health employee who commented on the Israel/Gaza conflict.⁴⁹

43 *Id.* ¶¶ 9-10.

44 *Id.* ¶ 17.

45 *Id.* ¶ 20.

46 *Id.* ¶ 90.

47 *Id.* ¶¶ 94-95.

48 *Id.* ¶ 101.

49 *Id.* ¶ 102.

She also points to an “encampment” of protestors at Penn. It is unclear how an encampment of unnamed individuals holding a protest are comparators to Wax. Regardless, she concedes that 33 protestors were arrested and the encampment was disbanded, *id.* ¶¶ 88-89, casting doubt on her assertion that the alleged comparators in the group were not disciplined. She lists as a comparator a “crowd of Penn faculty and students [who] gathered to call for an attack against Tel Aviv.” *Id.* ¶ 104. We likewise decline to give comparator weight to an undefined crowd. Therefore, we will confine our analysis to the seven individuals named in Wax’s complaint.

*7 Some of these statements may have been unprofessional and potentially offensive. That is not the issue. Wax must show much more than a potentially offensive statement. She must show that the individuals who made the statements are similarly situated both in terms of the severity of their conduct and their employment conditions. See [Mandel](#), 706 F.3d at 170; [Wilcher](#), 441 F. Appx at 882; [Opsatnik](#), 355 F. Appx at 223.

As is apparent from Wax’s allegations and what she did not allege, the purported comparators are not comparators. She did not allege any of them made more than two harmful statements. See [Wilcher](#), 441 F. Appx at 882. She did not allege they made statements about the law school or even the wider University community. All of the comments in her complaint had to do with current events. None of the alleged comparators had a pattern of making denigrating and derogatory statements about minorities. Wax also does not identify the race of the alleged comparators,

except Almallah, a Palestinian who participated in a rally in support of Palestine. They do not compare to Wax, a tenured law professor with a record of derogatory and discriminatory statements to and about members of the university community, who was given warnings and on whom lesser disciplinary measures were imposed before she was subjected to disciplinary proceedings.⁵⁰

50 *See* Charging Document of Dean Ruger.

Other than the allegations relating to purported comparators, Wax includes no other factual assertions supporting her claim that she was disciplined because she was White and Jewish. There are no factual allegations in her complaint showing that her race was part of her disciplinary hearing or appeal or that it had anything to do with bringing the charges against her. Without them, her claim that her status as a White, Jewish woman was a cause of her discipline is conclusory. See [Oakwood Lab’s LLC](#), 999 F.3d at 904 (quoting [Iqbal](#), 556 U.S. at 669, 679). As she alleges, Penn initiated disciplinary proceedings against her because of the content of her speech,⁵¹ not her race. Having failed to allege facts from which one could reasonably infer that she was treated differently than other faculty members on the basis of her race, the claim that she was discriminated against is an unsupported conclusion.

51 Compl. ¶ 2.

In sum, her allegations, accepted as true, do not pass the plausibility test. Conclusory statements are not substitutes for facts. Subjective beliefs are not facts.

Wax now asserts an associational discrimination claim when she asks us to read her comments disparaging Black students as a statement on behalf of a protected class, – racial groups harmed by Penn’s affirmative action policies – for which she is being discriminated against.⁵² This is not a plausible interpretation of her comments. Nothing in the disciplinary process or her comments leads to the conclusion that she was penalized for associating with a protected class. Her comments were not advocacy for protected classes. They were negative and directed at protected classes. Criticizing minorities does not equate to advocacy for them or for White people. Her claim that criticism of minorities was a form of advocating for them is implausible.

52 Pl. Br. at 29.

Wax has not stated a plausible cause of action that she was discriminated against based on her race. Therefore, we will grant Penn's motion to dismiss Wax's discrimination claims under [Section 1981](#), Title VII, and Title VI.

State Law Claims

*8 “Where the claim over which the district court has original jurisdiction is dismissed before trial, the district court *must* decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.” [Hedges v. Musco](#), 204 F.3d 109, 123 (3d Cir. 2000) (emphasis in original) (citing [Borough of West Mifflin v. Lancaster](#), 45 F.3d 780, 788 (3d Cir. 1995)); [28 U.S.C. § 1367\(c\)\(3\)](#).

Contrary to Wax's assertion,⁵³ there is no federal issue implicated here.⁵⁴ Having dismissed her federal claims, we decline to exercise supplemental jurisdiction over the state law breach of contract and false light invasion of privacy claims.

53 Compl. ¶ 33.

54 At oral argument, plaintiff's counsel acknowledged that they cannot bring a First Amendment claim. Oral Argument Tr., June 16, 2025, 7:20-21.

Where the complaint does not withstand a 12(b)(6) motion, a curative amendment must be allowed unless amendment would be inequitable or futile. [Alston v. Parker](#), 363 F.3d 229, 235 (3d Cir. 2004). An amendment is futile if the proposed amendment would still fail to state a claim upon which relief can be granted. [Shane v. Fauver](#), 213 F.3d 113,115 (3d Cir. 2000) (quoting [In re Burlington Coat Factory Sec. Litig.](#), 114 F.3d 1410, 1434 (3d Cir. 1997)). There is nothing Wax can add that would make her discrimination claims plausible. Thus, because amendment would be futile, Wax will not be given leave to amend her complaint once again.

All Citations

Slip Copy, 2025 WL 2483973