IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STACY BAILEY,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. 3:18-CV-01161-L
	§	
MANSFIELD INDEPENDENT SCHOOL DISTRICT, DR. JIM VASZAUSKAS, AND DR. KIMBERLY CANTU,	§	
	§	
Defendants.	§	

PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND BRIEF IN SUPPORT

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

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TO THE HONORABLE SAM A. LINDSAY,
UNITED STATES DISTRICT JUDGE:

COMES NOW, Stacy Bailey, Plaintiff, and files this Plaintiff's Brief in Support of Plaintiff's Response to Defendants' Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim and Brief in Support and would respectfully show the court as follows:

I.

SUMMARY OF ARGUMENT

The pleadings reveal this case presents a claim concerning the significant professional interference Bailey experienced from Defendants after she shared a photo of her future wife and made a passing, vague comment about a gay artist. Such presents constitutional claim upon which relief can be granted. See *Gill v. Devlin*, 867 F. Supp.2d 849, 856 (N.D. Tex. 2012).

A high performing 10 year teacher was suspended for 8 months after showing a photo of her future wife to students just as heterosexual teachers had done. During this suspension the

teacher was asked to resign and was told the school district was considering firing her. The district took the extraordinary step of issuing a statement to the public why the teacher was suspended, and worse, the statement was false and cast a stigma upon her. Then the teacher was transferred to a teaching position that was more arduous and for which she had no experience. And by virtue of the fact she had to disclose the suspension to potential future employers, the district has impeded her teaching career and the teacher is stuck at a school district that took her for task for merely referencing her future spouse as other heterosexual teachers had.

Bailey's extensive pleading easily meets the threshold set by *Twombly.* Likewise, Bailey's pleading sets forth a custom and policy which meets the threshold set by *Monell*.

The Constitution clearly protects same sex marriages. Moreover, the Constitution clearly prohibits discrimination by a government employer against an teacher based upon her sexual orientation.

Bailey states a claim for monetary damages by setting forth that because she was a lesbian who shared she was marrying a woman her rights were violated by placing her on an eight-month administrative leave, discussing non-renewal of her contract, asking Bailey to quit, issuing a false statement about Bailey's employment to the public contrary to usual practice, falsely suggesting she had engaged in unprofessional acts, creating a stigma about Bailey, removing her from an elementary school teaching position and assigning her to a more onerous position in a high school, and making it more difficult for her to obtain another teaching position with another school district by unnecessarily placing her on an extended administrative leave are a series of adverse actions that when considered separately and together establish an adverse action.

Bailey's pleading presents a case afforded protection by the Constitution and is afforded a remedy by section 1983. Accordingly, Bailey asserts the 12(b)(6) motion should be dismissed.

Alternatively, Bailey should be afforded the opportunity to amend her complaint to address any infirmities identified by the Court.

II.

BAILEY SUFFICIENTLY PLED ALLEGATIONS

We begin with the premise that a Rule l 2(b)(6) motion to dismiss "is viewed with disfavor and is rarely granted." *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496,498 (5th Cir. 2000) (quoting *Lowrey v. Tex. A & M Univ. Sys.,* 117 F.3d 242,247 (5th Cir. 1997)); *accord Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir. 1982).

In considering a motion to dismiss, all allegations in a complaint must be "taken as true and construed in the light most favorable to" the plaintiff. *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009). A complaint need only allege sufficient facts to show "a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombley.* 550 U.S. 544, 570 (2007). The plausibility analysis is "context-specific," and Courts are advised to draw upon "judicial experience and common sense" in applying it. *Ashcroft v. Iqbal,* 129 S.Ct. at 1950. However, assessing plausibility does not involve analysis of the merits. *Twombley,* 550 US. at 556-579 citing *Neitzke v. Williams,* 490 U. S. 319, 327 (1989). To survive a Rule 12 (b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff grounds for entitlement to relief-including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Sullivan,* 503 F. 3d 397, 401 (5th Cir. 2007). Ultimately, the question for a Court to decide is whether the Complaint states a valid claim when viewed in the light most favorable to the plaintiff. *Shandong Yinguang Chem. Indus. Joint Stock Co., Ltd. v. Potter,* 607 F.3d 1029, 1032 (5th Cir. 2010).

The Court in *Twombly* specifically stated that it was not imposing a "heightened" pleading requirement. 550 U.S. at 553-54; *cf Leatherman v. Tarrant County,* 507 U.S. 163 (1993) (previously rejecting a heightened pleading requirement for federal complaints in Section 1983 municipal-liability claims and holding such claims are governed by Federal Rule of Civil Procedure 8's notice pleading standard). *See also, e.g., Stemler v. City of Florence,* 126 F.3d 856, 873 (6th Cir. 1997) ("Since governmental action 'must bear a rational relationship to a legitimate governmental purpose,' [citing *Romer]* and the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause."); *Nabozny v. Podelesny,* 92 F.3d 446,458 (7th Cir. 1996) (holding that even *pre-Romer,* reasonable school officials should know that failing to protect some students from harm based solely on their sexual orientation would violate the most deferential equal- protection standard); *Beall v. London City School Dist. Bd. Of Educ.,* No. 2:04-cv-290, 2006 WL 1582447, at *14-15 (S.D. Ohio June 8, 2006) (unreported decision) (noting that anti-gay discrimination is both objectively unreasonable and clearly proscribed so as to defeat qualified immunity).

Importantly, the Court should not evaluate the merits of the allegation, but must satisfy itself only that Bailey has adequately pled a legally cognizable claim. *United States ex rel. Riley v. St. Luke's Episcopal Hosp*., 355 F.3d 370, 376 (5th Cir. 2004). Construing the pleading and allegations together, Bailey has stated claims for which relief can be granted.

Bailey's allegations are far from conclusory. Bailey has pled she is a lesbian and was born that way, that she was a longtime teacher with exemplary performance reviews. (Plaintiff's Amended Complaint ¶ 1-4, 15).

Bailey pled she shared a photo of her and her future wife along with other photos of her family in a "Back to School" slide show. (Plaintiff's Amended Complaint, ¶ 17). Bailey pled that other teachers shared with students photos and other information about opposite sex future spouses and persons they had married without consequence. (Plaintiff's Amended Complaint, ¶ 14, 17). Bailey also indicated to students that an artist was a partner of another artist the students had previously studied, just as she had indicated the romantic connection of a male and female artist without consequence. (Plaintiff's Amended Complaint, ¶ 24). Bailey had previously taught the same subject matter without consequence. (Plaintiff's Amended Complaint, ¶ 24). Bailey indicated she never used any age inappropriate terms with students. (Plaintiff's 1st Amended Complaint, ¶).

Bailey asserted sufficient facts to establish a claim against Mansfield School administrators Superintendent Jim Vaszauskas (hereinafter referred to as "Superintendent Vaszauskas") and Dr. Kimberly Cantu (hereinafter referred to as "Dr. Cantu").

Bailey pled "Dr. Cantu met with Plaintiff to discuss the parent complaint alleging Bailey was promoting the "homosexual agenda" by discussing her future wife in the classroom, telling Bailey, "You can't promote your lifestyle in the classroom." (Plaintiff's 1st Amended Complaint, ¶ 18-9). Bailey said, "We plan to get married. When I have a wife, I should be able to say this is my wife without fear of harassment. When I state that, it is a fact about my life, not a political statement." Defendant Cantu responded, "Well right now it kind of is (a political statement).'" (Plaintiff's 1st Amended Complaint, ¶ 19). Bailey also pled when she inquired about "changing policy to keep this from happening again Defendant Cantu said, 'You are right. It is time to get the ball rolling on that. You need to realize this is Mansfield and there could be some pushback.'" (Plaintiff's 1st Amended Complaint, ¶ 20). Bailey further pled that Dr. Cantu informed Bailey of another parent complaint and accused Bailey of showing sexually inappropriate images to her

students, which Bailey denied and claimed it was discrimination. (Plaintiff's 1st Amended Complaint, ¶ 23-25).

Dr. Cantu told Bailey she had done nothing wrong. (Plaintiff's 1st Amended Complaint, ¶ 21). Despite this, Dr. Cantu placed Bailey on suspension that lasted 8 months, which is unusually long, even though Dr. Cantu acknowledged that it was time to ban discrimination against lesbians at Mansfield I.S.D. though she may get some push back." [1](Plaintiff's 1st Amended Complaint, ¶ 25).

Furthermore, Bailey pled Superintendent Vaszauskas issued the statement putting forth the pretextual reasons Mansfield I.S.D. suspended Bailey, contrary to Mansfield I.S.D. usual policy of not commenting publicly about personnel issues. (Plaintiff's 1st Amended Complaint, ¶ 33).

Moreover, Bailey pled Superintendent Vaszauskas made the decision about Bailey's suspension and all subsequent actions, including placing her on an eight-month administrative leave, discussing non-renewal of her contract, asking Bailey to quit, issuing a false statement about Bailey's employment to the public contrary to usual practice, falsely suggesting she had engaged in unprofessional acts, creating a stigma about Bailey, removing her from an elementary school teaching position and assigning her to a more onerous position in a high school, and making it more difficult for her to obtain another teaching position with another school district by unnecessarily placing her on an extended administrative leave all because of her sexual orientation and status as a lesbian and her familial relationships. (Plaintiff's 1st Amended Complaint, ¶ 26-42, 45, 49. 50, 54).

[1] While Bailey acknowledges that the facts pled against Mansfield I.S.D. and Superintendent Vaszauskas are more substantial, Bailey's pleading reveals Dr. Cantu carried out the unconstitutional decision to suspend Bailey made by Superintendent Vaszauskas despite acknowledging Bailey did nothing wrong. Accordingly, Dr. Cantu participated in a meaningful way in the violation of Bailey's Constitutional rights.

Thus, such allegations are sufficient to establish that Superintendent Vaszauskas and Dr. Cantu acted in an unconstitutional manner.

III.

CUSTOM OR POLICY ALLEGATIONS AGAINST MANSFIELD I.S.D. SUFFICIENT

Bailey's pleadings regarding custom and policy are sufficient with regard to Mansfield I.S.D. and Superintendent Vaszauskas.

To state a claim under § 1983, a plaintiff must "(1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *James v. Tex. Collin Cty.*, 535 F.3d 365, 373 (5th Cir. 2008).

A local government such as a school district is considered a "person" subject to liability under § 1983. *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978). A school district cannot be held vicariously liable under § 1983 for the tortious' conduct of its employees. *Id*. at 694; *Hinojosa v. Butler*, 541 F.3d 285, 296 (5th Cir. 2008). However, a plaintiff may properly bring a § 1983 claim against a local government if she alleges that her injury resulted from the entity's custom or policy. *Monell*, 436 U.S. at 694; *Hinojosa*, 547 F.3d at 296. The Fifth Circuit has further explained:

> A plaintiff may prove the existence of a "custom or policy" in one of two ways. First, a pattern of unconstitutional conduct may be shown on the part of municipal actors or employees. A pattern of conduct is necessary only where the municipal actors are not policymakers. Alternatively, it may be shown that a final policymaker took a single unconstitutional action.

Zarnow v. City of Wichita Falls, Tex., 614 F.3d 161, 169 (5th Cir. 2010) (internal citations omitted). Finally, the plaintiff must show that the custom or policy was also the "moving force"

behind the constitutional violation. *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009). However, "the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violation federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains." *Bd. of Cty. Comm'rs of Bryan Cty., Olka. V. Brown*, 520 U.S. 397, 405 (1997).

Additionally, assuming that the Board of Trustees for Defendant Mansfield I.S.D. may delegate through: (1) express statement for formal action or (2) conduct or practice encouraging the agent in a policy-making role. *Zarnow v. City of Wichita Falls, Tex.*, 614 F. 3d 161, 167 (5th Cir. 2010) (citing *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984)). A person who has been delegated such authority must be one who "takes the place for the governing body in a designated area of city administration" rather than just a decisionmaker implementing another's polices. *See Id*. at 167 (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984)). A policymaker must decide the goals for a particular city or municipality to function and must devise the means of achieving those goals. *Id*. The fact that an individual's decision is final, is not sufficient to make him a policymaker because permitting municipal liability based on customs of all officers with final or supervisory power would lead to vicarious liability. *Jett v. Dallas Independent School District*, 7 F.3d 1241, 1247 (5th Cir. 1994); *Bolton v. City of Dallas*, 541 F.3d 545, 549-50 (5th Cir. 2008). While the ability to make the final decision does not make one a policymaker, nor does the existence of administrative review foreclose the finding of delegated authority. *Zarnow*, 614 F.3d at 168 (citing *Bennett*, 728 F.2d at 769).

Custom of usage requires "persistent and widespread . .. practices of [municipal] officials [which] [a]lthough not authorized by written law, [are] so permanent and well-settled as to [have] the force of law." *Spell v. McDaniel,* 824 F.2d 1380, 1386 (4th Cir. 1987). Of course, the duration and frequency of the practices must be sufficient to support a finding of

actual or constructive knowledge by the municipal body that the practices have become customary among its employees. *Id.* at 1387. Furthermore, "a municipal .. . ' custom' that is itself unconstitutional, i.e., when it directly commands or authorizes constitutional violations, [citing *Monell,* 436 U.S. at 661, 694-95], the causal connection between the [custom] and the violation is manifest and does not require independent proof." *Id.* (citing *Okla. City v. Tuttle,* 471 U.S. 808, 822 (1985)).

Mansfield I.S.D. argues that *Jett v. Dallas I.S.D.*, 7 F.3d 1241, 1245 (5th Cir. 1993) stands for the proposition that the Board of Trustees is the final decisionmaker for the school district. (Defendants' 12(b)(6) Motion, p. 12). However, the provisions of the Texas Education Code regarding school districts have been repealed and appear to have been superseded by substantially different provisions. Compare Tex. Educ. Code § 23.01, § 23.26 (repealed) with §§ 11.051, 11.151.

The Texas Education Code currently provides that the Board of Trustees, and the Superintendent shall contribute to the operation of the district. Tex. Educ. Code § 11.011. Section 11.1511 of the Texas Education Code now sets forth an extensive list of powers and duties for school boards, which includes non-renewing contracts but does not list transfers of educators as a power of the Board of Trustees. Tex. Educ. Code §11.1511(b)(14).

It appears the Texas Education Code Thus, the current version of the Texas Education Code underwent substantial rewrite beginning in 1995. does not appear to make the Board of Trustees the sole final decision maker of the school district with regard to transfers.

Additionally, the current version also provides the Board of Trustees shall work with the superintendent. Tex. Educ. Code § 11.1512(b). The Texas Education Code also provides the superintendent may recommend or be delegated the authority to make all personnel decisions. Tex. Educ. Code §11.1513(a)(2).

Moreover, the current version of the Texas Education Code empowers the superintendent as the Chief Executive Officer of the school district. Tex. Educ. Code § 11.201. Indeed, the Texas Education Code vests the superintendent with the responsibility for the assignment, supervision and evaluation of all personnel of the school district. Tex. Educ. Code § 11.201(d)(2, 4).

Finally, the Texas Education Code vests the superintendent with the responsibility for initiating the termination and suspension of an employee or the non-renewal of a contract. Tex. Educ. Code § 11.201.

Thus, it appears that the current provisions of the Texas Education Code § 11.201(d)(2,4) the superintendent appears to be the final policymaker for suspending and transferring teachers. Tex. Educ. Code § 11.201(d)(2,4). Accordingly, it appears the current version of the Texas Education Code makes Superintendent Vaszauskas whose actions may be imputed to Mansfield I.S.D. for purposes of *Monell*.[2]

In addition, Bailey pled Mansfield I.S.D. and/or Superintendent Vaszauskas issued a public statement, admittedly contrary to its usual practice of not commenting publicly on personnel matters that expressly references Bailey's sexual orientation and marriage and provides false statements regarding Bailey's conduct, to wit, that she engaged in age inappropriate discussions or sex and sexual orientation. (Plaintiff's Amended Complaint, ¶ 33-42). A finder of fact may infer if the stated reason for an employment action is false that the real reason is illegal discrimination: "[R]ejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 147 (2000) *citing St. Mary's Honor*

[2] These provisions seem to supplement and supersede the provisions of the Texas Education Code relied upon in *Jett*.

Ctr, v. Hicks, 509 U.S. 502, 513 (1993). The release of this false statement contrary of its normal custom of refraining from comment on public matters evidences a policy of discrimination on the basis of Bailey's sexual orientation and ill treatment because she was at the time of the statement married to a woman. Accordingly, Bailey's pleadings provide a basis for liability for illegal discrimination based on custom and policy against both Mansfield I.S.D. and Superintendent Vaszauskas. Indeed, the March 27 Statement provides the basis for subsequently transferring Bailey.

Moreover, Mansfield I.S.D. and Superintendent Vaszauskas assert in the March 27 Statement that a lesbian showing a photo of her fiancé is an "inappropriate discussion" of sexuality and sexual orientation while not requiring such scrutiny if a heterosexual showed a photo of a future spouse who was of the opposite sex.[3] (Paragraphs 33-42). This statement

[3] To the point, Bailey pled:

> 36. The March 27 Statement evinces a policy (and/or practice or custom) only for gay/lesbian teachers whereby the School District derogates apparently exclusive decision-making power from the teacher (or School Board) to individual parents. The official Statement sets out that "parents have the right to control the conversation . . . [as it relates to] sexual orientation." "Parents hav[e] certain rights pertaining to the topics to which their children are exposed." Mansfield I.S.D. indicates no such policy for other teachers in opposite-sex marriages or relationships; no such policy exists.
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> * * *
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> 38. The March 27 Statement made clear that if Plaintiff had not mentioned her prospective same-sex marriage with her now-wife, then there would have been no complaints or concerns. The Statement treats Plaintiff's reference of her impeding marriage as the dispositive fact in the application of its policy and/or custom (e.g., "discussion[] . . . about sexual orientation"; "conversation with students"; "expose[]" the "topic[]" of a same-sex marriage). The Statement also refers to "protect[ing] the learning environment of our students" in effect from references to same-sex marriages.
>
> 39. The March 27 Statement suggests that Plaintiff's references to her future wife was not "age appropriate," that it constituted a discussion of "sex", and that it "exposed" "children" to "[non-]age-appropriate instruction." No factual basis is provided. This reflects a policy (and/or practice or custom) of Mansfield I.S.D. depicting and treating same-sex marriage as an inherently inappropriate or explicit subject. Mansfield I.S.D. adopts no such policy (and/or customs or policies) for a heterosexual teacher who mentions her husband or his wife. The March 27 Statement implies a policy (and/or custom or practice) that gay/lesbian teachers may have untoward or inappropriate sexual attitudes or predilections towards children (a longstanding, widely known, and baseless stereotype). The Statement also seriously overstates the extent of Plaintiff's reference to her prospective marriage, calling it, for example, "ongoing discussions . . . about sexual orientation."

of policy by Mansfield I.S.D. and/or Superintendent Vaszauskas is discriminatory and does not withstand constitutional scrutiny. *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1729-30 (2018)(public rhetoric of commission cast doubt on the lack of discrimination in a decision of that body). The March 27 Statement sets forth Mansfield I.S.D.'s policy of holding a lesbian planning to be married to a woman to a different standard than heterosexual teachers. Moreover, in the March 27 Statement itself Mansfield I.S.D. acknowledges it is violating its own policy of not discussing personnel issues of its employees in this instance because the employee was a lesbian who raised issues of same sex marriage.[4] (Plaintiff's Amended Complaint, ¶ 40).

Additionally, Bailey pled that Mansfield I.S.D. maintained an unconstitutional policy by failing to provide protection by policy prohibiting discrimination based upon sexual orientation while enacting policies that prohibited other unconstitutional forms of discrimination, which gave the green light to discriminate against lesbians and those in same sex relationships. (Plaintiff's 1st Amended Complaint, ¶ 52-3). Not only does Mansfield I.S.D.'s failure in this regard constitute a policy decision by a policy maker, such failure also evidences discrimination on the basis of sexual orientation by failing to provide

(Plaintiff's Amended Complaint, 36, 38-9).

[4] 40. "The March 27 Statements adopts an exceptional new policy (and/or custom or practice) of publicly commenting on personnel matters when they relate to "disrupt[ive]" gay/lesbian issues. The Statement openly acknowledges that "the District's general rule [is] not to comment on employee personnel matters," since it "protects both the employee and the District." Nonetheless, the Statement applied this new exception to Plaintiff and publicly discussed her personnel matter in detailed and often knowingly erroneous terms. The public issuance of the Statement predictably generated widespread media attention."

(Plaintiff's 1st Amended Complaint., ¶ 40).

equal protection of the law through its policies as it does for other constitutionally protected traits.

IV.

CONSTITUTION CLEARLY ESTABLISHES RIGHT TO BE FREE FROM DISCRIMINATION BASED UPON SEXUAL ORIENTATION

It is clearly established that the Constitution prohibits discrimination in employment based upon sexual orientation. *Gill v. Devlin*, 867 F. Supp.2d 849, 856 (N.D. Tex. 2012)(holding at least by 2009 it was clearly established that the Constitution prohibited discrimination based upon sexual orientation).

In 1996, the Supreme Court held that the Equal Protection Clause is implicated when the government engages in class-based dis-crimination that rests upon sexual orientation. *See Romer v. Evans*, 517 U.S. 620, 633–35 (1996). In *Romer*, the Court examined a state constitutional amendment that prohibited all legislative, executive, or judicial action at any level of state or local government that was designed to protect lesbians, gay men, or bisexuals. *Id.* at 624. Colorado adopted the law in response to a growing number of municipalities that enacted ordinances banning discrimination against gay people. *Id.* at 623–24. The Supreme Court concluded that the amendment "classifie[d] homosexuals not to further a proper legislative end but to make them *unequal* to everyone else." *Id.* at 635 (emphasis added). It therefore held that statute violated the Equal Protection Clause. *Id.* at 635–36. *Romer* clearly established—more than fifteen years ago—that discrimination based on sexual orientation cannot be sustained unless the differential treatment, at a minimum, bears some rational relationship to an independent and legitimate governmental interest. Adverse government action engaged in for its own sake, and that is based on moral disapproval or animus toward homosexuals, can never constitute a legitimate governmental interest. *Romer*, 517 U.S. at 633–35.

Thus, it is well settled that gay and lesbian people constitute a distinct class for the purpose of constitutional analysis. *Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings College of*

the Law v. Martinez, --- U.S. ---, 130 S. Ct. 2971, 2990 (2010) (quoting *Lawrence v. Texas,* 539 U.S. 558, 575 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.") (italics in original). As Justice O'Connor aptly explained in her concurrence in *Lawrence*, which relied on an equal-protection analysis, "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward *gay persons as a class*." *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) (emphasis added). *See also Romer*, 517 U.S. at 633 (striking down a law that identified persons by a single trait [sexual orientation] and then denied them, *as a class of persons*, protection across the board). The Fifth Circuit likewise recognizes that gay and lesbian people constitute a distinct class that can trigger equal-protection concerns. *See Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (noting that class-based distinctions based on sexual orientation violate equal protection where they fail, at a minimum, rationally to advance a legitimate governmental interest).

Since *Romer*, numerous cases have recognized that unjustified government sexual-orientation discrimination is clearly established as unconstitutional. *See, e.g.*, *Obergerfell v. Hodges*, 135 S. S.Ct. 2584 (2015)(holding same sex couples have the same right as opposite sex couples to intimate associations and legal enactments that purport to ban same sex marriages unconstitutional); *U.S. v. Windsor*, 570 U.S. 744 (2013) (federal law depriving same sex married couples federal tax deductions unconstitutional); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134–35 (2003) (noting that plaintiff students "are members of an identifiable class for equal protection purposes because they allege discrimination on the basis of sexual orientation"); *Gill v. Devlin*, 867 F. Supp.2d 849, 856 (N.D. Tex. 2012)(holding discrimination based upon sexual orientation clearly established at least by 2009); see also *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997) ("Since governmental action 'must bear a rational relationship to a legitimate governmental purpose,' [citing *Romer*] and the desire to effectuate one's animus against homosexuals can never be a

legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause."); *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 325 (E.D.N.Y. 2002)(denying qualified immunity to principal for teacher's employment discrimination claims based on sexual orientation because "since the Supreme Court's decision in [*Romer*] it has been well-established that governmental discrimination against homosexuals could violate the equal protection clause."); *Quinn v. Nassau County Police Dep't.*, 53 F. Supp. 2d 347, 357–58 (E.D.N.Y. 1999) (police officer alleging employment discrimination based on sexual orientation stated a violation of equal protection, noting that "[t]he *Romer* Court established that government discrimination against homosexuals, in and of itself, violates the Equal Protection Clause."); *Beall v. London City Sch. Dist. Bd. Of Educ.*, No. 2:04-cv-290, 2006 WL 1582447, at *14–15 (S.D. Ohio June 8, 2006) (un-reported decision) (noting that anti-gay discrimination is both objectively unreasonable and clearly proscribed so as to defeat qualified immunity).

The suspension cascaded into a series of personnel actions that adversely impacted Bailey. Mansfield I.S.D.'s stated reason for suspending Bailey is false: Even under a rational basis inquiry, Bailey did not engage in age inappropriate discussions with her students. A finder of fact may infer if the stated reason for an employment action is false that the real reason is illegal discrimination: "[R]ejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) *citing St. Mary's Honor Ctr, v. Hicks*, 509 U.S. 502, 513 (1993). Indeed, the March 27 Statement accuses Bailey of engaging in "age inappropriate" discussions with students by merely referencing her future wife, who is also a female, despite the fact that other teachers routinely refer to their opposite sex fiancées and spouses without incident.

Moreover, "[the exercise of their freedom on terms equal to others must be given great weight and respect by the courts." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018)(Plaintiff's Amended Complaint ¶ 39). Thus, just because parents

have a right to have input and a certain level of control of their child's education does not serve as a basis for a government entity or actor to discriminate against an employee based upon their sexual orientation or because of a plan to marry a woman that was consummated prior to the issuance of the March 27 Statement by Mansfield I.S.D.

At this stage, Mansfield I.S.D. and Superintendent Vaszauskas are estopped from establishing that their espoused reason for taking a series of actions against Bailey were not a mere pretext for unconstitutional discrimination based upon sexual orientation.

V.

BAILEY STATED A CLAIM FOR DAMAGES

Defendants assert Bailey failed to state a claim for damages. Bailey has been subjected to conduct that separately and considered in totality constitute adverse actions which may serve as a basis for damages.[5]

Bailey pled Defendants discriminated against Bailey because of her sexual orientation and in violation of her right to marry "by placing her on an eight-month administrative leave, discussing non-renewal of her contract, asking Bailey to quit, issuing a false statement about Bailey's employment to the public contrary to usual practice, falsely suggesting she had engaged in unprofessional acts, creating a stigma about Bailey, removing her from an elementary school teaching position and assigning her to a more onerous position in a high school, and making it more difficult for her to obtain another teaching position with another school district by unnecessarily placing her on an extended administrative leave." (Plaintiff's 1st Amended

[5] The Fifth Circuit has suggested that it should re-examine what constitutes an adverse employment action in light of the Supreme Court's holding in the *White* case. *Porter v. Houma Terrebonne Housing Auth. Bd. Of Com'rs*, 810 F.3d 940, 945 (5th Cir. 2015)("the significance of any given act of retaliation will often depend on the particular circumstances. Context matters") citing *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 67 (2003). However, even applying current case law, Bailey has pled an adverse employment action for which she could recover damages.

Complaint, ¶ 56-7). Defendant Mansfield I.S.D. asked for Bailey's resignation and repeatedly indicated it would not renew her contract. (Plaintiff's 1st Amended Complaint, ¶ 28, 30). While Bailey did not resign, it is important to note when analyzing her situation that if she had resigned there is sufficient evidence to support the conclusion she was constructively discharged. Indeed, Bailey pled that Defendants withdrew "plans to end Plaintiff's employment and instead [took] steps to make employment intolerable in hopes Plaintiff would quit and go away." (Plaintiff's 1st Amended Complaint, ¶ 44). Accordingly, Bailey pled a claim for which damages could be awarded.

A. TRANSFER TO HIGH SCHOOL POSITION CONSTITUTES DEMOTION

Moreover, Bailey has pled facts that demonstrate Mansfield I.S.D.'s transfer of her was in fact a demotion.[6] A transfer to a position that is objectively worse may constitute a demotion, and, thus, an adverse employment action. *Thompson v. City of Waco*, 764 F.3d 500, 505 (5th Cir. 2014); *Allison v. Tarrant County*, 92 F. Supp.2d 601 (N.D. Tex. 2000). A transfer that involves changes in duties or can otherwise be characterized as a demotion, and thus, an adverse employment action. *Thompson,* 764 F.3d at 506; *see also DeLeon v. Kalamazoo Cnty Road Comm'n*, 739 F.3d 914, 919 (6th Cir. 2014). Indeed, assigning a teacher to a more demanding teaching position may constitute an adverse action. *Vega v. Hempstead Free School District*, 801 F.3d 72, 91 (2nd Cir. 2015). A position that provides less room for advancement also may be a factor in determining whether an employment action is materially adverse. *Alvarado v. Texas Dept. of Public Safety*, 492 F.3d 605, 613 (5th Cir. 2007).

[6] Assessment of whether a transfer constitutes a demotion is fact intensive better suited for the summary judgment or trial stage. *Thompson v. City of Waco*, 764 F.3d 500, 506 (5th Cir. 2014).

Bailey pled that she was transferred from a position at an elementary school where she had 18-21 students position in a high school where she had classes of 38-40 students and the associated increase in workload. (Plaintiff's 1st Amended Complaint, ¶ 49). Furthermore, Bailey pled she had no experience teaching at the high school level and was required to develop an entirely new curriculum. (Plaintiff's 1st Amended Complaint, ¶ 49). Accordingly, the pleadings set forth allegations that the new position was objectively worse.

B. 8 MONTH SUSPENSION

Furthermore, subjecting an employee to an internal investigation may serve as the basis for an adverse action. *Richardson v. New York State Office of Mental Health*, 2014 WL 3818928 (N.D. N.Y.) *citing Lee v. City of Syracuse*, 603 F. Supp.2d 417, 436 (N.D.N.Y. 2009) abrogated on other grounds by *Widomski v. State University at Orange*, 748 F. 3d 471 (2d Cir. 2014); *see also Morales v. N.Y.S. Dept of Labor*, 865 F.Supp2d 220, 250-51 (N.D. N.Y. 2012)(whistleblower email followed closely in time by lengthy in time considered retaliatory), *affirmed*, 530 Fed. Appx 13 (2d Cir. 2013).

Bailey pled she was suspended for 8 months, which was unusually long. Moreover, Bailey pled she was required to disclose the suspension to future employers, limiting her ability to advance in her career or find other employment to get away from the treatment she received at Mansfield I.S.D.

C. MARCH 27 STATEMENT

Issuing public statements regarding an employee who has engaged in a protected activity may constitute an adverse action. *Haliburton, Inc. v. Administrative Review Board*, 771 F.3d 254 (5th Cir. 2014)(publicly disclosing whistleblower's identity held to be adverse employment action for which only non-economic damages may be recovered); *see also Greengrass v. Intern'l*

Monetary Sys. Ltd., 776 F.3d 481 (7th Cir. 2015)(Publicly disclosing an employee's information in an attempt to obstruct employee's efforts obtain other employment an adverse action); *Lore v. City of Syracuse*, 670 F.3d 127 (2nd Cir. 2012); *Dixon v. Int'l Board of Police Officers*, 504 F.3d 73 (1st Cir. 2007)(employer comments on television stating employee unfit for job held adverse action).

Mansfield I.S.D. acknowledged in the statement it issued about Bailey was contrary to its normal practice of not publicly commenting on personnel issues involving its employee. Such statement exposed Bailey to unwarranted statements about her professionalism.

D. TOTALITY OF THE CIRCUMSTANCES

Bailey asserts that Mansfield I.S.D. and Superintendent Vaszauskas and Dr. Cantu burdened Bailey's right to marriage and discriminated against because of her sexual orientation "by placing her on an eight-month administrative leave, discussing non-renewal of her contract, asking Bailey to quit, issuing a false statement about Bailey's employment to the public contrary to usual practice, falsely suggesting she had engaged in unprofessional acts, creating a stigma about Bailey, removing her from an elementary school teaching position and assigning her to a more onerous position in a high school, and making it more difficult for her to obtain another teaching position with another school district by unnecessarily placing her on an extended administrative leave." (Plaintiff's 1st Amended Complaint, ¶ 56-7). Considering these actions in their totality, they give rise to a claim for damages for Bailey.

Bailey would submit that the actions taken against her could constitute a constructive discharge has Bailey resigned and, thus, her situation should be examined in the context of a constructive discharge. An employer constructively discharges an employee if it makes working conditions so intolerable that a reasonable employee would resign. *Perret v. Nationwide Mut. Ins. Co.*, 770 F.3d 336, 338 (5th Cir. 2014). Several factors have been identified relevant to constructive

discharge including: (1) demotion; (2) reduction in job responsibilities; (3) badgering, harassment or humiliation calculated to encourage the employee to resign. 770 F.3d at 338. Another aggravating factor used to support constructive discharge include the employer's insidious intent to create the intolerable working conditions. *Haley v. Alliance Compressor, LLC*, 391 F.3d 644 (5th Cir. 2004). An employee may also be constructively discharged if they are given an ultimatum to quit or be fired.[7] *Perrett*, 770 F.3d at 338-39 citing *Faruki v. Parsons S.I.P., Inc.,* 123 F.3d 315, 319 (5th Cir. 1997); *Jenkins v. State of La., Through Dep't of Corrs.,* 874 F.2d 992, 996 (5th Cir. 1989); *Davis v. City of Grapevine,* 188 S.W.3d 748, 766 (Tex. App. – Fort Worth, 2006).

Thus, Bailey was subjected to treatment that could have reasonably compelled her to resign. Moreover, these actions have damaged Bailey's career and have imposed a stigma upon her. (Plaintiff's Amended Complaint, ¶ 48). Measuring intolerability of a situation should be assessed in determining whether Bailey was subjected to an adverse employment action.

VI.

BAILEY STATES A CLAIM UNDER THE DUE PROCESS CLAUSE

The Constitution guarantees an employee due process prior to being disciplined or discharged. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *see also Gilbert v. Homar*, 520 U.S. 924, 929 (1997). Moreover, liberty interests are implicated when a public employee is publicly accused of misconduct that is false of a stigmatizing nature that accompanies a termination or other serious discipline. *Canon v. City of Palm Beach*, 250 F.3d 1299, 1301 (11th

[7] In *Davis,* the plaintiff presented evidence that his managers informed him that "it would be in his best interest if he decided to resign rather than be terminated because future employers may ask the City whether Davis resigned or was terminated." *Davis,* 188 S.W.3d at 766. Likewise, in *Faruki,* the plaintiff presented testimony that his supervisor had told him he should find another job, and that he had one week before he would be placed on indefinite unpaid leave. *Faruki,* 123 F.3d at 319; *see also Stephens v. C.I.T. Grp./Equip. Fin., Inc.,* 955 F.2d 1023, 1027–28 (5th Cir. 1992)(holding that employee "reasonably could have believed that his demotion was a harbinger of dismissal" where there was a demotion, continuing limitations on the employee's salary and responsibility, and a supervisor repeatedly asked him whether he was going to quit his job). In this case, Bailey was put on administrative leave, asked to resign and repeatedly told her contract was being considered for non-renewal.

Cir. 2001). Providing a public employee notice and opportunity to be heard in the form of a name clearing hearing to refute the stigmatizing statements. *Dressler v. Jenne*, 87 F. Supp.2d 1308, 1314 (S.D. Fla 2000); *Morgan v. Tandy*, 2000 WL 682659 (S.D. Ind. 2000).

Bailey had a property right in maintaining the confidentiality of the suspension and investigation undertaken against her. Moreover, Bailey has the right opportunity to clear her name of very serious false stigmatizing allegations that were made public.

Accordingly, Bailey has appropriately made a Due Process claim.

VII.

BAILEY'S RIGHT TO MARRY WAS BURDENED

Defendants argue that Bailey's pleading fails to demonstrate how her marriage was burdened by Defendants. Bailey would show her right to marry has been unconstitutionally burdened.

The Supreme Court has long recognized the right to marry is a fundamental one that is protected from governmental interference. *Obergerfell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) *citing Loving v. Virginia*, 388 U.S. 1, 12 (1967) and *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). In 2015, the Supreme Court recognized that same sex couples have the same fundamental right as opposite sex couples to marry. *Obergerfell*, 135 S. Ct. at 2598.

Bailey planned to and eventually did marry someone of the same sex. Bailey's marriage was burdened by not allowing Bailey to discuss her plans for marriage with her students just as teachers had discussed their opposite sex fiancé without consequence. Instead, a stigma was imposed on Bailey for merely showing a photo of her future spouse she was suspended for purportedly discussing age appropriate topics. If a school district were able to prohibit a member of a mixed race couple that had plans to marry to reveal their impending nuptials to students while allowing white couples to do so, such would violate the teachings of *Loving v. Virginia*, 388 U.S.

1, 12 (1967). Likewise, to prohibit same sex couples from sharing who they choose to marry similarly violates the teachings of *Obergerfell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

Furthermore, Bailey was stigmatized for discussing her now wife with her students, having such labeled as "age inappropriate." Certainly, stigmatizing a teacher discussing her marriage to someone of a different race by labeling such discussions as "age inappropriate" would violate the teaching of *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Likewise, stigmatizing a lesbian for referencing her "future wife" likewise violates Bailey's right to marry.

Moreover, Texas is a community property state. Tex. Const. Art. XVI, § 15; Tex. Family Code § 3.002. Under community property laws, spouses are bestowed a right in the income of the other spouse. *See, e.g., Harris v. Harris*, 765 S.W.2d 798, 802 (Tex. App.—Houston [14th Dist.] 1989, writ denied). By virtue of her wrongful suspension, Bailey is now required to disclose the suspension which has made it "more difficult to obtain future employment in other school districts, especially as an elementary school teacher." (Plaintiff 1st Amended Complaint ¶). Thus, such impacts Bailey's ability to contribute to the community estate going forward.

Finally, Bailey's new position at Lake Ridge High School is more onerous than her previous position, thus, presumably requiring her to work more and have less time to devote to her spouse.

VIII.

IF BAILEY'S FEDERAL CLAIMS ARE DISMISSED, COURT SHOULD DECLINE JURISDICTION OVER BAILEY'S STATE CONSTITUTIONAL CLAIMS

Bailey agrees that if the Court dismisses Bailey's federal claims, the Court should decline jurisdiction over Bailey's state law claims. *McClellan v. Gronwaldt*, 155 F.3d 507, 519 (5th Cir. 1998).

IX.

IF NECESSARY, BAILEY SHOULD BE GRANTED OPPORTUNITY TO REPLEAD

While Bailey asserts she has stated claims for which relief can be granted, if the Court determines that Bailey has not sufficiently pled a claim for which relief is granted against any or all Defendants, Bailey requests the opportunity to replead. *In re Am. Airlines, Inc., Privacy Litig*., 370 F.Supp.2d 552, 567–68 (N.D. Tex. 2005); see also *Adams v. Mut. of Omaha Ins. Co.,* No. 3:13-CV-4881-D, 2014 WL 1386563, at *6 (N.D. Tex. Apr. 9, 2014).

X.

PRAYER

Taking Bailey's pleading as a whole, it is clear Bailey has pled claims of discrimination based upon her sexual orientation and in violation of her right to marry against Defendants for which relief can be granted. Defendants actions have thrown daunting obstacles in her career that have not been visited upon teachers with opposite sex spouses.

Accordingly, because Bailey has stated a claim upon which relief can be granted, Defendants' Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim should be denied. Alternatively, Bailey should be granted an opportunity to amend her pleading to address any issues identified by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2018, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court and in accordance with the Federal Rules of Civil Procedure. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means: Thomas E. Myers.

/s/ JASON C.N. SMTIH
JASON C. N. SMITH