

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NOEL KOENKE,

Plaintiff,

v.

SAINT JOSEPH'S UNIVERSITY,

Defendant.

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Case No. 2:19-cv-04731-NIQA

**MOTION OF DEFENDANT SAINT JOSEPH'S UNIVERSITY
TO DISMISS PLAINTIFF'S COMPLAINT**

For all the reasons set forth in the accompanying Memorandum of Law in Support of Defendant's Motion to Dismiss, which is incorporated herein by reference, Defendant Saint Joseph's University moves this Court to dismiss the Complaint of Plaintiff Noel Koenke with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6).

s/ Kristine Grady Derewicz

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CERTIFICATE OF SERVICE

I, Michael Romeo, hereby certify that on this 4th day of December, 2019, Defendant Saint Joseph's University's Motion for Dismissal was filed using the Eastern District of Pennsylvania's ECF system, to which all counsel of record have consented, and through which this document is available for viewing and downloading, causing a notice of electronic filing to be served upon all counsel of record.

/s/ Michel Romeo _____
Michael Romeo

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Defendant Saint Joseph's University (the "University" or "Saint Joseph's"), a Catholic, Jesuit non-profit institution of higher education, submits this Memorandum of Law in Support of its Motion to Dismiss the Complaint of Plaintiff Noel Koenke pursuant to Fed. R. Civ. P. 12(b)(6).

I. INTRODUCTION

Noel Koenke was a liturgical minister working in the University's Campus Ministry department (the "Department" or "Campus Ministry"). Ms. Koenke is lesbian, and she married a woman while working at Saint Joseph's. At no time did Saint Joseph's discriminate against Ms. Koenke in any way, nor did Saint Joseph's take any action that could be construed as creating a hostile work environment. Saint Joseph's is committed to the inclusiveness of all people in its community.

Instead, and as explained in Ms. Koenke's Complaint, in the context of her impending marriage, Ms. Koenke's supervisor asked her to exercise discretion in her public statements about her marriage, solely due to its conflict with Catholic doctrine. After she complained about this request and met with Saint Joseph's Vice President of Human Resources, the VP of HR sent Ms. Koenke a letter that discussed the fact that Ms. Koenke's job duties at the University were ministerial, observed that Ms. Koenke had in the past "demonstrated sensitivity to the conflict between your intent to enter into a same-sex marriage and Catholic teaching," and asked that Ms. Koenke "be respectful of Catholic teaching and the ministerial nature of the responsibilities you fulfill in your position" Saint Joseph's wrote, "[w]e simply ask that you respect your University ministerial functions and exercise prudent judgment and discretion in doing so."

On these facts, Ms. Koenke attempts to state claims of workplace discrimination under Title IX. For many reasons, these claims fail, including the fact that she was not discriminated against while working at the University.

First and foremost, Ms. Koenke's discrimination and hostile work environment claims must be dismissed because they are time-barred. Beyond this threshold issue, Ms. Koenke's claims do not pass the scrutiny that must be applied under the First Amendment to the U.S. Constitution because, both as a ministerial employee and due to the very nature of her claims, any judicial analysis will necessarily conflict with the Free Exercise and Establishment Clauses. On that basis, this Complaint should be dismissed in its entirety with prejudice. As the U.S. Supreme Court explained,

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their missions. . . . [T]he First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012).

Further, both Title IX's statutory language and case law informing discrimination and hostile work environment claims compel the dismissal of Ms. Koenke's claims. For all of these reasons, Ms. Koenke's Complaint should be dismissed with prejudice.

II. STATEMENT OF FACTS

Saint Joseph's statement of facts is based exclusively on Ms. Koenke's averments in her Complaint. For purposes of this motion only, and as required by Federal Rule of Civil Procedure 12(b)(6), Saint Joseph's accepts as true all sufficiently-pled facts in the Complaint. Notwithstanding this procedural posture for purposes of this motion only, should this case proceed beyond this Motion to Dismiss, Saint Joseph's will dispute Ms. Koenke's assertion that she was discriminated against in violation of Title IX.

Ms. Koenke was hired by Saint Joseph's in or around July 2010 as Coordinator for Liturgy and Music. Complaint, at ¶ 12. Ms. Koenke was promoted in or around May 2016 to the position of Assistant Director for Music and Worship. *Id.* Ms. Koenke generally received positive performance evaluations, and she quit her employment on November 13, 2017. *Id.* at ¶¶ 12, 16(mm).

A. The University Asks Ms. Koenke To Exercise Discretion in July-August 2013

On or about July 12, 2013, Plaintiff's supervisor, Thomas Sheibley, Director of Campus Ministry, mindful of Ms. Koenke's ministerial position in the Department, asked her to exercise discretion with regard to public or social media statements about her relationship and upcoming marriage to an individual of the same sex. *Id.* at ¶ 16(a). That same day, Ms. Koenke spoke with Springs Steele, Saint Joseph's Vice President for Mission and Identity, about her earlier conversation with Mr. Sheibley. *Id.* at ¶ 16(e). Mr. Steele stated "[t]hat wasn't handled well." *Id.*

On July 17, 2013, Ms. Koenke had another meeting with Mr. Sheibley, who confirmed the earlier request for discretion. *Id.* at ¶ 17(f). On July 22, 2013, Ms. Koenke met again with Mr. Steele and asked if the University could provide written guidance outlining the request for

discretion relayed by Mr. Sheibley. *Id.* at ¶ 16(g). Mr. Steele declined Ms. Koenke’s request. *Id.*

On July 23, 2013, Ms. Koenke filed a complaint of discrimination with Sharon Eisenmann, Vice President of Human Resources. *Id.* at ¶ 16(h). That same day, Ms. Eisenmann met with Ms. Koenke and explained that Ms. Koenke was not experiencing discrimination. *Id.* On August 5, 2013, Ms. Eisenmann delivered a letter to Ms. Koenke reflecting their July 23, 2013 conversation and stating, “[w]e simply ask that you respect your University ministerial functions and exercise prudent judgment and discretion in doing so.” *Id.* at ¶ 16(i); *see also* a copy of the August 5, 2013 letter, attached hereto as Exhibit A.¹

B. Other Events Which Occurred During Plaintiff’s Employment

In or around July 2016, Ms. Koenke claims that she received a document from a priest on staff at the University, which indicated that anyone living an “openly same-sex lifestyle” could not have a leadership role, or words to that effect. Complaint, at ¶ 16(t). At some point thereafter, a co-employee asked Ms. Koenke whether she had seen this document. *Id.* at ¶ 16(u). At another point in 2016, an administrative assistant told Ms. Koenke that campus security was downstairs. *Id.* at ¶ 16(z). Ms. Koenke thought that campus security was there to escort her off campus. *Id.* Ms. Koenke does not allege that campus security actually had any interaction with her.

At an undisclosed time during Plaintiff’s employment, Ms. Koenke claims that a priest saw her speaking with another woman. *Id.* at ¶ 16(o). The priest approached Ms. Koenke and

¹ While Saint Joseph’s recognizes the general rule that, when considering a motion to dismiss, courts may only consider the facts alleged in the complaint, “an exception to the general rule is that a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (Alito, J.).

asked her if she was discussing anything regarding her same-sex partner. *Id.* Ms. Koenke told the priest that she went along with the other individual's assumptions that her significant other was a man. *Id.* On another undisclosed date, a co-employee approached Plaintiff and asked her if she was concerned about losing her position with the University because of her relationship. *Id.* at ¶ 16(q). Lastly, during an orientation in summer of 2017, Mr. Sheibley told Ms. Koenke that a parent had asked him whether the University "taught anything that wasn't in line with catholic teaching concerning LGBT issues." *Id.* at ¶ 16(x).

C. Ms. Koenke's Actions During Her Employment

Ms. Koenke alleges that, throughout her employment, she refrained from referring to her spouse using feminine pronouns, and instead would refer to her spouse as "he" or "him." *Id.* at ¶¶ 16(l-p, bb). When other individuals on campus assumed that Ms. Koenke's spouse was male, she would not correct them. *Id.* Ms. Koenke regularly declined to attend after-hours activities with coworkers. *Id.* at ¶ 16(w). During her tenure with the University, Ms. Koenke took several leaves of absence, one in August 2013; one in late October and early November 2014; and finally, one from August 2017 up to the conclusion of her employment in November 2017. *Id.* at ¶ 23(a-d).

D. The End of Ms. Koenke's Employment

While out on a leave of absence, Ms. Koenke contacted Ms. Eisenmann to schedule a meeting for November 3, 2017, three days before her tentative return-to-work date. *Id.* at ¶ 16(hh). Ms. Koenke met with Ms. Eisenmann on November 3, and stated that she "did not wish to return to work under the terms and conditions being currently imposed." *Id.* at ¶ 16(ii). On November 9, 2017, Ms. Koenke met with Ms. Eisenmann and Mr. Sheibley, and read a statement she had prepared relaying her feelings and opinions about her employment with Saint Joseph's. *Id.* at ¶ 16(jj). On the same day, Ms. Koenke (at her request) was presented with an offer of

severance in connection with her desire to leave her employment. *Id.* at ¶ 16(kk). Ms. Koenke rejected the severance offer and resigned her position on November 13, 2017. *Id.* at ¶ 16(mm).

E. Ms. Koenke Files Suit

On October 11, 2019, Ms. Koenke filed a lawsuit against the University, stating claims under Title IX. In her Complaint, Ms. Koenke alleges she was discriminated against, subject to a hostile work environment, and constructively discharged in violation of Title IX.

III. ARGUMENT

A. The Motion To Dismiss Standard

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a pleading that does not state a claim upon which the court may grant relief. Pursuant to Rule 8, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual content from which the court may draw a reasonable inference that the defendant is liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

B. Ms. Koenke’s Hostile Work Environment Claims Are Barred by Title IX’s Two Year Statute Of Limitations.

Ms. Koenke’s claims are all varying iterations of harassment and constructive discharge brought pursuant to Title IX.² It is undisputed that the statute of limitations for Title IX claims

² Although Ms. Koenke alleges four distinct counts, she relies on the same factual bases in support of each Count, namely ¶¶ 16(a-mm) of the Complaint. Because the factual predicates are identical, Ms. Koenke has failed to articulate meaningful differences among Counts I, II, and IV. As a result, for purposes of this motion, it is assumed that Counts I, II, and IV all allege sexual harassment, and those Counts are analyzed concurrently. Plaintiff’s constructive discharge claim is analyzed separately.

is two years. *Moore v. Temple Univ.*, 674 F. App'x 239, 241 (3d Cir. 2017); *Bougher v. Univ. of Pittsburgh*, 882 F.2d 74, 77-78 (3d Cir. 1989).

Ms. Koenke filed her Complaint on October 11, 2019. As a result, the relevant limitations period extends back to October 11, 2017, and, as a matter of law, any allegedly wrongful acts occurring before that date may not be considered. *See Bougher*, 882 F.2d at 78 (affirming entry of summary judgment for school on hostile environment claim and refusing to consider alleged unlawful acts predating the relevant limitations period); *Moore*, 674 F. App'x at 241 (affirming grant of summary judgment for school on sexual harassment claim and recognizing that “Plaintiff filed her complaint on July 29, 2013; thus, any claims that accrued before July 29, 2011 are time-barred.”); *Ally v. Temple Univ.*, No. 19-561, 2019 WL 4735495, at *2 (E.D. Pa. Sept. 26, 2019) (dismissing Title IX claim because the events underlying Plaintiff’s claims all fell outside the relevant statute of limitations).

1. Ms. Koenke’s Discrimination/Hostile Environment Harassment Claims are Barred by the Statute of Limitations.

In Counts I, II and IV, Ms. Koenke alleges that she was subject to a hostile work environment in violation of Title IX. The allegations Ms. Koenke relies on in support of this claim, however, occurred outside the limitations period—before October 11, 2017. Construing the Complaint in the light most favorable to Ms. Koenke, only the following events took place after October 11, 2017:

- While out on leave, Ms. Koenke reached out to Ms. Eisenmann to schedule a meeting for November 3, 2017, three days before her tentative return-to-work date;
- Ms. Koenke met with Ms. Eisenmann on November 3, and stated that she “did not wish to return to work under the terms and conditions being currently imposed”;

- On November 9, 2017, Ms. Koenke met with Ms. Eisenmann and Mr. Sheibley, and read a statement she had prepared relaying her feelings and opinions about her employment with Saint Joseph's University;
- On the same day, Ms. Koenke was presented with a severance agreement;
- Ms. Koenke rejected the severance agreement and resigned her position on November 13, 2017.

Complaint, at ¶¶ 16 (hh-mm).

As a matter of law, none of these allegations can support a hostile work environment claim. As discussed at length *infra*, for Ms. Koenke's claim to survive, she must allege: (1) she suffered intentional discrimination because of sex; (2) the discrimination was pervasive and regular; (3) the discrimination was subjectively offensive; (4) the discrimination was objectively offense; and (5) *respondeat superior* liability exists. *Cardenas v. Massey*, 269 F.3d 251, 260 (3d Cir. 2001). Ms. Koenke does not allege that she suffered harassment or discrimination *after* October 11, 2017. Necessarily, then, she cannot establish the second, third, or fourth prong of her hostile work environment claim. Because the actions forming the basis of Ms. Koenke's claim predate the relevant limitations period, her hostile work environment claims – as enumerated in Counts I, II and IV – are time-barred and must be dismissed.

2. The Continuing Violations Doctrine Does Not Save Ms. Koenke's Discrimination/Hostile Work Environment Claim.

The continuing-violation doctrine does not shield Ms. Koenke's discrimination/hostile work environment claims from dismissal. At the outset, it is an unsettled question of law whether the continuing violation doctrine applies to Title IX claims. *See Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 566 (3d Cir. 2017) ("It's an open question in our Court whether [the

continuing violations doctrine] applies under Title IX . . . [and] we need not decide this question today.”) Assuming it does, however, it does not alter the ultimate conclusion.

As an exception to the statute of limitations, the continuing-violation doctrine permits an untimely filing when a defendant’s conduct is part of a continuing practice, “so long as the last act evidencing the continuing practice falls within the limitations period.” *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001). In dicta in *Mercy Catholic Medical*, the court noted that – even if applicable – the continuing violations doctrine would not protect the plaintiff’s hostile environment claim. *Mercy Catholic Medical*, 850 F.3d at 566. The court recognized that the only two actions occurring within the limitation period were (1) plaintiff’s dismissal and (2) a supervisor’s advocating for her dismissal during an appeal hearing. *Id.* The Third Circuit concluded that the hospital’s decision to terminate plaintiff was a discrete act actionable on its own, and her supervisor did not make sexualized comments or physical contact in advocating for her dismissal. *Id.*

Just as in *Mercy Catholic Medical*, Ms. Koenke has not alleged a single discriminatory comment or action which occurred during the limitations period. Instead, Ms. Koenke admits that she was on leave from August 2017 until her resignation on November 13, 2017, and, with regard to actions in the limitations period, she recites only how she felt during the meetings with human resources, quotes the statement that she read during that meeting, and alleges the details of her separation from the University. As a matter of law, these allegations are insufficient to invoke the continuing-violations doctrine because “a continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.” *Weis-Buy Servs., Inc. v. Paglia*, 411 F.3d 415, 423 (3d Cir. 2005); *Gould v. Borough*, 615 F. App’x 112, 116 (3d Cir. 2015) (“The doctrine, the effect of which we note litigants frequently overread, focuses,

however, solely on continual unlawful acts, not continual ill effects from an original violation.”) (internal quotation omitted); *Tearpock-Martini v. Borough of Shickshinny*, 756 F.3d 232, 236 (3d Cir. 2014) (same); *Keel v. Del. State Univ. Bd. of Tr.*, No. 17-1818(MN), 2019 WL 494621, at *4 (D. Del. Feb. 8, 2019) (same). Accordingly, Ms. Koenke cannot avail herself of the continuing violations theory to excuse her failure to comply with the statute of limitations.

Even if Saint Joseph’s were to assume, *arguendo*, that Ms. Koenke could point to a discriminatory act within the limitations period, she cannot establish that any of such alleged acts were “more than the occurrence of isolated or sporadic acts of intentional discrimination” sufficient to implicate the continuing violations doctrine. *Shenkan v. Potter*, 71 F. App’x 893, 895 (3d Cir. 2003). Third Circuit precedent instructs courts to “consider two factors in determining whether to apply the continuing violation doctrine: (1) whether the violations were related in subject matter and (2) whether the acts were recurring.” *Bennet v. Susquehanna Cnty. Children & Youth Servs.*, 592 F. App’x 81, 84 (3d Cir. 2014).

For purposes of this motion, the University does not dispute that the alleged violations concerned the same subject matter. Ms. Koenke fails, however, to allege that the discriminatory acts were frequent enough to implicate the continuing violations doctrine. *See e.g., Camplese v. Morgan Stanley Smith Barney, LLC*, No. 1:15-cv-00784, 2017 WL 2264349, at *6 (M.D. Pa. May 24, 2017). Construing the Complaint in the light most favorable to Plaintiff, Ms. Koenke alleges the following affirmative acts took place prior to October 11, 2017:

- Between July 12 and 23, 2013, Mr. Sheibley asked Ms. Koenke to be discreet about her relationship with and upcoming marriage to a woman. Mr. Steele stated, in reference to the aforementioned meeting, “That wasn’t handled well.” Mr. Sheibley confirmed that Ms. Koenke should be discreet about her personal

relationship at work. Later, Mr. Steele told Ms. Koenke that the University would not supply her with written guidance explaining its request for discretion. On July 23, 2013, in response to a complaint, Ms. Eisenmann explained that Ms. Koenke was not experiencing discrimination.

- On August 5, 2013, Ms. Eisenmann delivered a letter to Ms. Koenke, confirming the University's view that Ms. Koenke was not experiencing discrimination and asking her to be discreet.
- On an undisclosed date, a priest saw Ms. Koenke talking to another individual, and the priest asked Ms. Koenke whether she was talking about her same-sex partner. Ms. Koenke stated that she went along with the person's assumption that she was engaged to a man, and the priest replied, "That was a good choice."
- On an undisclosed date, a co-employee asked Ms. Koenke if she feared for her job.
- Sometime in July 2016, a priest forwarded a document to Ms. Koenke which stated that "anyone living an openly same-sex lifestyle could not have a leadership role, or words to that effect. On an undisclosed date, a co-employee asked Ms. Koenke if she had seen this document.
- Sometime in 2016, a co-employee told Ms. Koenke that campus security was downstairs.³

³ Ms. Koenke does not allege that this instance actually had anything to do with her, just that she thought it could have.

- In the summer of 2017, Mr. Sheibley told Ms. Koenke that a parent asked him if the University “taught anything that wasn’t in line with Catholic teaching concerning LGBT issues.”

Complaint at ¶¶ 16(a, e, f, g, h, i, o, x, z).

Stated another way, Ms. Koenke bases her Complaint on a cluster of conversations in July 2013, a letter in August 2013, two events in 2016, one event in 2017, and three conversations which took place at undisclosed times. Regardless of whether any of these acts can actually constitute intentional discrimination, they did not occur with sufficient frequency to implicate the continuing violations doctrine. *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 716 (3d Cir. 1997) (Alito, J.) (affirming district court that seven-month break between employment periods barred Plaintiff’s reliance on continuing violation theory); *Bishop v. Nat’l R.R. Passenger Corp.*, 66 F. Supp.2d 650, 662 (E.D. Pa. 1999) (“The seventeen month period when [alleged harasser] and [Plaintiff] had no contact is too great for her claim to cover any acts occurring before that period.”); *Coombs v. Target Corp.* No.12-4651, 2013 WL 664186, at *4 (E.D. Pa. Feb. 25, 2013) (concluding that a two-year break in allegations of discrimination “destroys the pattern of harassment and does not establish a continuing violation because the prior act or acts are temporarily too attenuated to enable Plaintiff to keep those claims alive.”). Accordingly, Ms. Koenke cannot rely on the continuing violation doctrine to shield her discrimination and hostile environment claims from dismissal. As a result, Counts I, II and IV should be dismissed with prejudice as time-barred.

C. Dismissal is Proper Because Ms. Koenke’s Claims Are Barred by the Free Exercise and Establishment Clauses of the First Amendment.

Beyond the threshold question of the statute of limitations, this Court must consider the foundational application of the First Amendment of the United States Constitution to this dispute

and must, as a matter of law, conclude that its application compels dismissal of Ms. Koenke's Complaint. Under both the Free Exercise Clause and the Establishment Clause of the First Amendment, a religious employer's employment-related decisions related to ministerial employees, borne of the employer's religious affiliation and related religious doctrines and teachings, are beyond the purview of judicial oversight. Saint Joseph's communications to Ms. Koenke regarding her same-sex marriage constitute exactly the type of employment communication that is protected by the First Amendment. Accordingly, her Title IX claims must be dismissed.

The U.S. Supreme Court held in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* that the Establishment and Free Exercise Clauses of the First Amendment "bar the government from interfering with the decision of a religious group to fire one of its ministers." 565 U.S. at 181.⁴ More broadly, the Court explained that the ministerial exception "precludes application of such legislation [Title VII] to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188.

Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over selection of those who will personify its beliefs.

Id.

⁴ *Hosanna-Tabor* and other relevant cases analyze the application of Title VII and other employment discrimination statutes in the First Amendment context. As Ms. Koenke points out in her Complaint, her Title IX claim should be analyzed under the same statutory construct as Title VII claims. Additionally, courts have specifically acknowledged the application of the ministerial exception and First Amendment freedoms in Title IX cases. *See, e.g., Garrick v. Moody Bible Inst.*, No. 18-c-0573, 2019 WL 4674570 (N.D. Ill. Sept. 25, 2019).

1. Saint Joseph's Is A Religiously-Affiliated Employer.

Saint Joseph's is a Catholic, Jesuit university that educates students to, among other things, "find God in all things." See *Mission Statement*, Saint Joseph's University, available at [https://www.sju.edu/about/history-mission/mission] (last accessed Nov. 25, 2019). Saint Joseph's Campus Ministry department, of which Ms. Koenke was a member (Complaint, at ¶ 16(a)),

[S]erves the mission of Saint Joseph's University by making visible the religious identity of the institution, and by nurturing the spiritual development of students, faculty, and staff. . . . Challenged by a world in need of healing and motivated by Jesus Christ, Campus Ministry fosters a community of believers called to be 'persons for and with others,' and empowers leaders for Church and society, thus participating in the unfolding of God's plan for creation.

See *Campus Ministry*, Saint Joseph's University, available at [www.sju.edu/campusministry] (last accessed Nov. 25, 2019). As a religiously-affiliated university, Saint Joseph's is entitled to freedom from governmental oversight of its employment relationship with its ministers. This freedom does not mean, however, that the University will elect to or does engage in discrimination; rather, it means that the bedrock principle of "freedom of religion" places its oversight of ministerial employees beyond the purview of judicial oversight.

2. Ms. Koenke's Position at Saint Joseph's Was Ministerial.

Ms. Koenke was hired at Saint Joseph's in 2012 as the University's "Coordinator for Liturgy and Music" and promoted in 2016 to "Assistant Director for Music and Worship." While employed in these capacities, she completed a degree in Pastoral Care from another local Catholic university. (Complaint, at ¶ 12).

The *Hosanna-Tabor* Court held, "We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister." 565 U.S. at 190. The Court noted, however, that consideration should be given to an employee's formal title, the substance

reflected in that title, the employee's own use of the title, and the important religious functions the employee performs for the church. *Id.* at 192. Similarly, the Third Circuit in *Petruska v.*

Gannon University held:

[a]s a general rule, an employee will be considered a minister if her primary duties include 'teaching, speaking the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship.' . . . Although we do not view this list as exclusive, we agree that a focus on the function of an employee's position is the proper one.

462 F.3d 294, 304 n.6 (3d Cir. 2006) (citations omitted).

Here, Ms. Koenke's titles convey the ministerial nature of her role, focusing specifically on liturgy, worship and music. The fact that she worked in Campus Ministry and reported *directly and only* to the Director of the Department further supports the University's assertion that her duties were to support primarily and directly the Catholic identity of Saint Joseph's. And, her assertion in her Complaint that she secured a master's degree in pastoral counseling while employed at Saint Joseph's evidences her acknowledgement of the ministerial nature of her position in the Department. Based on these facts, evident from the face of her Complaint, Ms. Koenke is properly considered a ministerial employee under the teaching of *Hosanna-Tabor* and *Petruska*. See, e.g., *Demkovich v. St. Andrew the Apostle Parish*, 343 F. Supp.3d 772, 778 (N.D. Ill. 2019) (plaintiff's role as music director, choir director and organist constituted a ministerial role).

3. Ms. Koenke's Claims Arise from Saint Joseph's Request to her Regarding her Same Sex Marriage Which Were Based on Roman Catholic Doctrine.

Ms. Koenke's claims emanate exclusively from communications by representatives of Saint Joseph's in connection with her "relationship with and upcoming marriage to a person of the same sex (female)." Complaint, at ¶ 16(a). Saint Joseph's allegedly discriminatory actions,

therefore, are based solely on Ms. Koenke's marriage that is not recognized under and is contrary to Catholic teaching.⁵

In paragraphs 16(a) and 16(f) of her Complaint, Ms. Koenke describes the request she received from her supervisor: "asking [her] not to be public, from that point moving forward, about [her] relationship with and upcoming marriage to a person of the same sex," with later confirmation that she "could not be fully open and should be discreet . . . about who [she] told, and regarding who would find out about [her] . . . upcoming marriage." Then, Ms. Koenke refers to the August 5, 2013 letter she received from Saint Joseph's Vice President of Human Resources Sharon Eisenmann, and she points to this letter as a penultimate expression of Saint Joseph's alleged violations of Title IX. Complaint, at ¶ 16(i). Ms. Eisenmann explained Saint Joseph's position as follows:

As a Campus Minister/Liturgy and Music Coordinator, your duties in this position are almost exclusively ministerial; that is, you are responsible for the University's most important Catholic religious services, focusing on the planning and saying of Mass, facilitating and leading religious retreats for our students, and the like. In the context of this ministerial role and position, your marriage to another person of the same sex presents a direct conflict with the established teaching of the Catholic Church, which does not endorse or recognize such marriages as part of the Church's foundational doctrines.

Ms. Eisenmann went on to state:

In the past, you have demonstrated sensitivity to the conflict between your intent to enter into a same-sex marriage and Catholic teaching, and the University appreciates your continued commitment in this regard. Mindful of your intent to be respectful of Catholic teaching and the ministerial nature of the responsibilities you fulfill in your position, the University will not impose any

⁵ "The Catholic Church's official opposition to gay marriage is commonly known . . . and there is no reason to question the sincerity of the [University's] belief that the opposition is dictated by Church doctrine." *Demkovich*, 343 F. Supp.3d at 786. Indeed, Ms. Koenke does not challenge the fact that the Catholic Church does not condone gay marriage.

particular rules or requirements on your conduct with regard to your spouse or your own commemoration of your marriage. We simply ask that you respect your University ministerial functions and exercise prudent judgment and discretion in doing so.

See Exhibit A.

With this letter, Saint Joseph's set the expectations for Ms. Koenke's on-going employment in Campus Ministry at the University. These are the "terms, conditions, privileges" of employment of which Ms. Koenke complains in her Complaint. And they stem directly from the Catholic Church's religious teaching and doctrine regarding same-sex marriage.

4. As a Matter of Law, Saint Joseph's Decisions Regarding Ms. Koenke, As A Ministerial Employee, Are Not Subject To The Oversight Of Title IX Under The Religion Clauses.

The purpose underlying *Hosanna-Tabor* jurisprudence is the concern that judicial oversight of religious employers' employment decisions necessarily results in impermissible "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. The Fifth Circuit succinctly explained, "[W]e cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of the church." *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999). For Ms. Koenke to proceed on her claims, the court must do just that.

a. *The Free Exercise Clause and the Ministerial Exception Bar Ms. Koenke's Claims.*

In *Hosanna-Tabor*, the plaintiff was terminated from her employment at Hosanna-Tabor Lutheran Church, and the Court's opinion focused on the question arising from those facts: whether the constraints of Title VII could be applied to a church's selection or non-selection of its ministers. 565 U.S. at 188-89. The Court concluded that, in fact, the ministerial exception

was a proper construct to ensure a church's free exercise of religion in the face of claims of discriminatory termination of employment. *Id.* at 196. The Third Circuit explains, "[t]he Free Exercise Clause protects not only the individual's 'right to believe and profess whatever religious doctrine one desires,' . . . but also a religious institution's right to decide matters of faith, doctrine, and church governance." *Petruska*, 462 F.3d at 306 (citations omitted). Here, similarly, Saint Joseph's decision allegedly to constrain Ms. Koenke's work-related communications regarding her same-sex marriage is outside the purview of Title IX due to the application of the ministerial exception.

In *Petruska*, the plaintiff was counseled, demoted and ultimately terminated from her employment in a reorganization due to her gender and her opposition to perceived discriminatory actions on the part of Gannon University. 462 F.3d at 299-301. She filed claims against Gannon under Title VII, among other legal theories, and Gannon moved to dismiss her Complaint based on application of First Amendment principles. *Id.* at 302-303. The court posed the operative question as, "whether applying Title VII to Gannon's decision to restructure would infringe upon its free exercise rights and whether adjudication of Petruska's Title VII claims would result in unconstitutional entanglement under the Establishment Clause." *Id.* at 303. Opting to adopt the ministerial exception, the court recognized the importance of "bar[ring] any inquiry into a religious organization's underlying motivation for the contested employment decision." *Id.* at 304 (footnote omitted). On the facts presented in that case, the court applied the ministerial exception to Gannon's decision to reorganize and to terminate Petruska because "Gannon's choice to restructure constituted a decision about who would perform spiritual functions and about how those functions would be divided." *Id.* at 307-08.

Here, Ms. Koenke's Title IX claims based on Saint Joseph's Catholic identity and affiliation with Catholic teaching regarding same-sex marriage fall squarely under the ministerial exception. Its communications with Ms. Koenke regarding her marriage constitute a decision regarding how Saint Joseph's ministerial employees would perform their spiritual duties and embody the Catholic teaching that was foundational to her ministerial role in Campus Ministry. For this court to delve into the accuracy or propriety of that communication in connection with her ministerial role while employed in Campus Ministry is a clear infringement on Saint Joseph's right to free exercise of its religion, and Ms. Koenke's claims cannot stand.

In her Complaint, Ms. Koenke anticipates an argument that the ministerial exception does not apply to her claims because her case does not concern Saint Joseph's *selection* of its ministers; rather, she posits that her claims rest upon Saint Joseph's alleged creation of a hostile work environment through its request to her to "not be fully open" regarding her same-sex marriage. Complaint, at ¶¶ 14-16. Ms. Koenke's efforts to forestall the application of the ministerial exception fail, however, both because her Complaint shows that her claims are based on alleged tangible adverse employment actions, namely Ms. Eisenmann's request that Ms. Koenke "respect your University ministerial functions and exercise prudent judgment and discretion in doing so," and because the ministerial exception—and the Free Exercise Clause—should not be so narrowly construed.

To suggest, as Ms. Koenke does, that a church's decision to terminate a minister constitutes the free exercise of religion, but that its request to a ministerial employee to act in a manner respectful of the church's religious doctrine is not, simply belies logic and sound legal reasoning under these facts and applicable law. The purpose underlying the Supreme Court's recognition of the ministerial exception is broad and instructive, focusing on "interfere[nce] with

the internal governance of the church,” “protect[ing] a religious group’s right to shape its own faith and mission,” and “government interference with an internal church decision that affects the faith and mission of the church itself.” 565 U.S. at 188, 189. These underpinnings of the *Hosanna-Tabor* ruling—and not the specific application of those underpinnings to the facts presented in that case—are the Court’s lasting holding. Application of these Constitutional ideals to the present case compels the conclusion that Saint Joseph’s employment action at issue be free from judicial oversight as it was an expression of its “right to shape its own faith and mission” through request to its minister. Were this court to permit Ms. Koenke’s claims to proceed, there would be no alternative but to intrude upon Saint Joseph’s religious freedom, thus trampling its right, as a Catholic, Jesuit employer, to the free exercise of religion under the First Amendment. The ministerial exception should apply to this case, even in the absence of a claim for discriminatory discharge.⁶

Further, as set forth above, Ms. Koenke’s claims are, in fact, based on a tangible employment action: Saint Joseph’s communication of its expectations of discretion and professionalism to her. This communication is just as tangible as any decision to terminate, demote or reassign an employee. Such a conclusion is particularly apt in this case, where the aforementioned communication is the foundation of Ms. Koenke’s constructive discharge claim.

⁶ Saint Joseph’s notes that other courts have extended the ministerial exception to cases in which the plaintiff experienced employment actions short of termination. *See, e.g., Young v. Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994) (denial of promotion); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000) (constructive discharge); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996)(denial of tenure); and *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (salary determination, place of assignment, and duties to be performed).

As a result, the ministerial exception as set forth in *Hosanna-Tabor* and *Petruska* should be applied.⁷

b. *Ms. Koenke’s Claims Are Barred By The Establishment Clause, As Adjudication Of The Claims Will Require Unnecessary Entanglement.*

Beyond analysis of the protections set forth in the Free Exercise Clause, Saint Joseph’s is entitled to protection against unnecessary entanglement into its religious expression under the Establishment Clause of the First Amendment. To discern whether a statutory provision violates the Establishment Clause, the U.S. Supreme Court enunciates a three-part test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . and finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Entanglement may be substantive—the government deciding between competing religious views—or procedural—“the state and church pitted against each other in a protracted legal battle.” *Petruska*, 462 F.3d at 311. “Therefore, courts typically consider the character of the claim, the nature of the remedy, and the presence or absence of a ‘direct conflict between the . . . secular prohibition and the proffered religious doctrine.’” *Id.* (citation omitted). Because adjudication of Ms. Koenke’s claims would necessarily pose a direct conflict between the secular prohibition and the proffered Catholic religious doctrine, her claims are barred by the Establishment Clause and must be dismissed.

⁷ Ms. Koenke’s *ad damnum* clauses reveal that her claim is, in fact, based on a tangible employment action in that she seeks, among other things, back pay, front pay, and lost benefits. “An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination. Such relief would be dependent on a determination that [Saint Joseph’s] was wrong to have [instructed Ms. Koenke], and it is precisely such a ruling that is barred by the ministerial exception.” *Hosanna-Tabor*, 565 U.S. at 194.

In *Demkovich v. St. Andrew the Apostle Parish*, the District Court for the Northern District of Illinois held that the plaintiff's hostile work environment claim based on sex, sexual orientation, and marital status was barred by the Establishment Clause because the litigation would excessively entangle the government in religion. 343 F. Supp.3d 772, 786 (N.D. Ill. 2018). "The overarching principle of religious autonomy still may require dismissal where a 'religious employer offers a religious justification' for the adverse action or where the claim will otherwise 'pose too much intrusion into the religious employer's Free Exercise and Establishment Clause rights.'" *Id.* at 782.

Demkovich was the "Music Director, Choir Director and Organist" for the defendant Parish and the Archdiocese of Chicago. *Id.* at 776. He was gay and married to another man. *Id.* Demkovich was subjected to harassment from supervisors and co-workers based on his sexual orientation and marriage to another man. *Id.* Ultimately, he was fired and told, "[y]our union is against the teachings of the Catholic church." *Id.* Demkovich filed claims of employment discrimination under, among other statutes, Title VII, although he limited his claims to hostile work environment, choosing not to state a claim based on his discharge.

The court found, first, that Demkovich was a ministerial employee. *Id.* at 778. Then, the court concluded that Demkovich's claims were barred by application of the Establishment Clause and concepts of excessive entanglement. *Id.* at 786.⁸ As a threshold matter, the defendant offered a religious justification for the alleged harassing conduct, specifically the Catholic Church's opposition to same-sex marriage:

⁸ The *Demkovich* Court considered whether the plaintiff's claims were subject to the Free Exercise application of the ministerial exception since there was no claim of a tangible adverse employment action and held that "there is no categorical bar to that narrow category of claims brought by ministers" and that courts should consider the issue of excessive entanglement when evaluating those claims. 343 F. Supp.3d at 785-86.

This official position weighs as an excessive-entanglement concern in this case, because the harassing statements and conduct are motivated by an official Church position Of course, regulating *how* the official opposition is expressed is not as directly intrusive as outright punishing the Church for holding that position (which a federal court cannot do). But it comes close, and must weigh in favor of barring the claim under the Religion Clauses.

Id. at 786. Further, Demkovich’s status as a minister weighed in favor of “more protection of the Church under the First Amendment.” *Id.* The court opined, “The Archdiocese might very well assert that it has a heightened interest in opposing same-sex marriage amongst those who fulfill ministerial roles.” *Id.* at 786-87. Finally, the court held that litigating the issues central to Demkovich’s claims would necessarily include litigating the notion of the Church’s opposition to same-sex marriage. “All in all, there are too many circumstances—in this particular case for this particular set of claims—that would result in excessive entanglement with, and intrusion on, the Church’s religious doctrine to allow the claims based on sex, sexual orientation, and marital status to move forward.” *Id.*⁹

For the same reasons present in *Demkovich*, Ms. Koenke’s claims of discrimination under Title IX—whether for hostile work environment, gender stereotyping, constructive discharge, or tangible employment actions—cannot move forward. Saint Joseph’s commitment to its Catholic identity and Catholic teaching in the context of its communication to Ms. Koenke forms the basis

⁹ The *Demkovich* court also noted the importance of avoiding discovery related to questions of religious doctrine, and this concern supports the notion that these issues are properly evaluated on a motion to dismiss under Rule 12(b)(6), before either party is subject to the burdens of discovery. *Demkovich*, 343 F. Supp.3d at 785, 787.

of its defenses to her claims.¹⁰ Additionally, Ms. Koenke specifically seeks to litigate the legitimacy of the Church’s teaching in this regard, as evidenced by her *ad damnum* clauses in which she seeks injunctive relief to require Saint Joseph’s to implement policies and training “which [are] fully LGBT-inclusive and cover[] all employees and all forms of sexual orientation harassment or abuse” On these grounds, this court should dismiss Ms. Koenke’s Title IX claims because any adjudication of those claims will result in excessive entanglement violative of the Establishment Clause of the First Amendment.

D. Dismissal Is Proper Because Sexual Orientation Is Not A Protected Class Under Title IX.

1. Ms. Koenke Seeks Protection Under Title IX Based On Her Sexual Orientation.

Plaintiff’s Complaint should be dismissed because Plaintiff’s claims are not actionable under Title IX. The overwhelming majority of factual averments in Ms. Koenke’s Complaint reference her sexual orientation. Indeed, of the 39 factual allegations contained therein, 25 explicitly relate to Plaintiff’s sexual orientation.¹¹ The common theme permeating Plaintiff’s complaint is that she was treated differently because of her sexual orientation. She alleges that, unlike straight coworkers, she was asked to be discreet about her relationship, and that she felt like she was being asked to go back in the closet. *See* Complaint, at ¶¶ 16(a-mm). Additionally, in her prayer for relief concluding each count, Plaintiff asks the court for injunctive relief

¹⁰ For this reason, the Ninth Circuit’s decision in *Bollard v. California Province of the Society of Jesus* is inapposite. 196 F.3d 940 (9th Cir. 1999). In that case, the defendant specifically disavowed any religious basis for the alleged discriminatory actions and, thus, the court held that adjudication of the plaintiff’s claims would not result in excessive entanglement. *Id.* at 949. In contrast, Saint Joseph’s position is that its communication to Ms. Koenke was borne of Catholic teaching regarding same-sex marriage directly tied to her ministerial duties and role in the Department.

¹¹ Although the Complaint is nearly 70 pages long, Plaintiff relies on the same factual allegations under each distinct count, labeled as ¶¶ 16(a-mm).

“requiring that [Saint Joseph’s] adopt and enforce a clear and unambiguous policy of anti-harassment which is fully LGBT-inclusive and covers all employees and all forms of sexual orientation harassment or abuse[.]” *See* Complaint, at ¶¶ 21, 36, 51, and 66. Clearly, the salient theme in Plaintiff’s complaint is that she was treated differently based on her sexual orientation, not because she is a woman.

2. The Department Of Education Instructs That Title IX Does Not Apply To Ms. Koenke’s Claims.

Department of Education (DOE) guidance specifically instructs that Title IX does not apply to discrimination on the basis of sexual orientation, short of claims of physical sexual advances.¹² The DOE’s revised Sexual Harassment Guidance states:

Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.

¹² In 2017, the DOE withdrew its most recent guidance relating to sexual harassment claims under Title IX. (*See* “Dear Colleague Letter,” Department of Education, Office of Civil Rights (Sept. 22, 2017), available at [<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>]) (last accessed Nov. 21, 2019)). In doing so, the DOE stated it “will continue to rely on its *Revised Sexual Harassment Guidance*, which was . . . issued in 2001.” *Id.*

“Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties,” Department of Education, Office of Civil Rights, available at [<https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>] (last accessed Nov. 21, 2019) (emphasis added). Thus, looking to the DOE’s explanatory guidance compels this Court to conclude that Ms. Koenke has failed to state a claim under Title IX, as she does not allege anything close to a physical advance or assault.

In light of this directive from the Department of Education, Ms. Koenke’s reliance on the Department of Justice Legal Manual is misplaced. Notably, the Department of Justice Legal Manual – which predates, yet contemplates, the 2001 guidance – explicitly states: “[t]o the extent that information in this Manual is construed to conflict with the Sexual Harassment Guidance, the Department of Education Sexual Harassment Guidance should be followed.” *See* “Overview of Title IX: Interplay with Title VI, Section 504, Title VII, and the Fourteenth Amendment,” Title IX Legal Manual, United States Department of Justice, available at [<https://www.justice.gov/crt/title-ix>] (Last accessed Nov. 18, 2019). Thus, Ms. Koenke fails to cite to proper authority and her reliance on the DOJ manual is improper.

3. Title VII Analysis Applies To Title IX Cases, And The Third Circuit Holds That Title VII Does Not Apply To Sexual Orientation Claims.

As Ms. Koenke notes in her Complaint, the DOJ Manual notes “the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case.” *See* “Overview of Title IX: Interplay with Title VI, Section 504, Title VII, and the Fourteenth Amendment,” Title IX Legal Manual, United States Department of Justice, available at [<https://www.justice.gov/crt/title-ix>] (Last accessed Nov. 18, 2019). Notwithstanding the foregoing, in the context of hostile environment harassment claims, the Third Circuit has explicitly followed this principle, recognizing “Title IX’s hostile environment harassment cause

of action originated in a series of cases decided under [Title VII]. . . . Title VII cases are therefore instructive.” *Doe by and through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534 (3d Cir. 2018).

As a matter of law, however, “Title VII does not prohibit discrimination based on sexual orientation.” *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (noting that “Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”) “Since *Bibby*, courts in this district have uniformly held that harassment or discrimination based on sexual orientation is not actionable under Title VII.” *Doe v. Casino*, 381 F. Supp.3d 425, 430-31 (E.D. Pa. 2019); *see also Prowel v. Wise Business Forms Inc.*, 579 F.3d 285, 289 (3d Cir. 2009); *Kay v. Indep. Blue Cross*, 142 F. App’x 48, 49 (3d Cir. 2005); *Ellingsworth v. Hartford Fire Ins. Co.*, 247 F. Supp.3d 546, 552 (E.D. Pa. 2017); *Guess v. Phila. Hous. Auth.*, 354 F. Supp.3d 596, 602 (E.D. Pa. 2019); *Moyer v. Aramark*, No. 18-cv-02267, 2019 WL 1098951, at *3 (E.D. Pa. Mar. 7, 2019).

Neither the DOE guidance, nor the current state of the law in the Third Circuit, allows Ms. Koenke’s claims to proceed because Ms. Koenke is alleging harassment and discrimination based on her sexual orientation. As a result, her claims are not justiciable and should be dismissed.

E. Ms. Koenke’s Claims Should Be Dismissed Because She Fails to State A Claim Upon Which Relief Could Be Granted.

1. Ms. Koenke Has Failed To State A Claim For Hostile Work Environment Harassment.

Ms. Koenke has not alleged sufficient facts to state a claim for a hostile work environment under Title IX. To establish a hostile work environment, Ms. Koenke must allege: (1) she suffered intentional discrimination based on her membership in a protected class; (2) the discrimination was severe and pervasive; (3) the discrimination was subjectively offensive; (4)

the discrimination was objectively offensive; and (5) *respondeat superior* liability exists. *Cardenas v. Massey*, 269 F.3d 251, 260 (3d Cir. 2001). In analyzing these factors, “the totality of the circumstances must be considered, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it reasonably interferes with an employee’s work performance.” *Harris v. SmithKline Beecham*, 27 F. Supp.2d 569, 577 (E.D. Pa. 1998). Ms. Koenke cannot establish the first, second, or fourth prongs of this analysis.

As to the first prong, Ms. Koenke’s claim rests on her sexual orientation, which is not a protected class under Title IX. In lieu of reciting the authority and arguments outlined above, the University refers to and incorporates its argument in section III(D) to support the conclusion that Ms. Koenke has failed to satisfy the first prong of a hostile work environment claim.

To establish the second and fourth prongs¹³ of her claim, Ms. Koenke must show “discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment.” *Thompkins v. Mercy Phila. Hosp.*, No. 10-2188, 2010 WL 3719099, at *2 (E.D. Pa. Sept. 20, 2010). The Third Circuit has upheld dismissal of a racial hostile work environment claim where the plaintiff alleged multiple instances of wrongful discipline, was ignored by co-workers, had her tires slashed, and was ultimately transferred to a different squad. *Davis v. City of Newark*, 285 F. App’x 899, 901-03 (3d Cir. 2008).

As outlined above, Ms. Koenke’s claim relies on a cluster of conversations in July 2013, a letter in August 2013, two events in 2016, one event in 2017, and three conversations which

¹³ Courts frequently analyze the second, third and fourth prongs of a hostile work environment claim concurrently. *Brooks v. CBS Radio, Inc.*, 342 F. App’x 771, 776 n.5 (3d Cir. 2009) (“Given that the second prong, the ‘severe and pervasive’ element, includes both an objective and subjective inquiry, this requirement substantially overlaps with the third and fourth elements of this Circuit’s hostile work environment claim[.]”)

took place at undisclosed times. In other words, Ms. Koenke alleges a hostile work environment based upon eight distinct events and conversations over an approximately six year period, none of which was physically threatening or humiliating. Simply put, Ms. Koenke has failed to establish that “the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Torres v. Deblasis*, 959 F. Supp.2d 772, 782 (E.D. Pa. 2013) (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002)). As such, Ms. Koenke’s hostile work environment claim should be dismissed.

2. Ms. Koenke Has Failed To State A Claim For Constructive Discharge

Ms. Koenke cannot state a claim for constructive discharge under Title IX. Courts in the Third Circuit utilize an objective test in evaluating constructive discharge claims. *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167 (3d. Cir. 2001). “Specifically, a court must determine whether a reasonable jury could find that the employer permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign.” *Id.*; see also *Nolle v. Guitar Center*, No. 2:11-cv-01503, 2012 WL 4857791, at *3 (W.D. Pa. Oct. 12, 2012) (applying objective test articulated in *Duffy* to Motion to Dismiss constructive discharge claim). As guideposts for applying this test, the Third Circuit has outlined several factors which may be indicative of constructive discharge: “(1) threat of discharge; (2) suggesting or encouraging resignation; (3) a demotion or reduction of pay or benefits; (4) involuntary transfer to a less desirable position; (5) alteration of job responsibilities; and (6) unsatisfactory job evaluations.” *Lebofsky v. City of Phila.*, 394 F. App’x 935, 939 (3d Cir. 2010) (citing *Clowes v. Alleghany Valley Hosp.*, 991 F.2d 1159, 1161 (3d Cir. 1993)).

Here, Plaintiff fails to allege any of the aforementioned. In fact, Ms. Koenke admits that she was promoted in 2016. Complaint, at ¶ 12. Although the *Clowes* factors are not dispositive,

as discussed *supra*, Ms. Koenke has failed to adduce any evidence of overt discrimination.

Rather, Ms. Koenke was asked to be discreet about her same sex marriage due to its conflict with Catholic doctrine. While this request may have subjectively offended Ms. Koenke, “more than subjective perceptions of unfairness or harshness or a stress-filled work environment are required.” *McLaughlin v. Rose Tree Media Sch. Dist.*, 52 F. Supp.2d 484, 493 (E.D. Pa. 1999). Because Ms. Koenke has not alleged “that the working conditions would be so unpleasant or difficult that a reasonable person in Plaintiff’s shoes would resign[,]” her constructive discharge claim should be dismissed. *Clancy-Fisher v. City of Phila.*, No. 02-3713, 2002 WL 31994283, at *4 (E.D. Pa. Oct. 30, 2002).

IV. CONCLUSION

WHEREFORE, for the reasons set forth fully herein, Saint Joseph’s University asks that this Court dismiss with prejudice the Complaint of Plaintiff Noel Koenke as it fails to state any claim upon which relief can be granted.

s/ Kristine Grady Derewicz

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Dated: December 4, 2019

Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Michael Romeo, hereby certify that on this 4th day of December, 2019, Defendant Saint Joseph's University's Memorandum of Law in Support of its Motion for Dismissal of Plaintiff's Complaint was filed using the Eastern District of Pennsylvania's ECF system, to which all counsel of record have consented, and through which this document is available for viewing and downloading, causing a notice of electronic filing to be served upon all counsel of record.

/s/ Michael Romeo _____
Michael Romeo

EXHIBIT A



Office of Human Resources

August 5, 2013

Confidential and Hand-Delivered

Dear Noel,

I write to follow up on the written complaint you filed by email with my office on July 24, 2013. In response to your complaint and at your request, we agreed to meet due to Nancy DuBoise's absence from the campus during the week prior to your scheduled vacation. (Ms. DuBoise serves as the University's Affirmative Action/Equal Opportunity Officer and is the designated Intake Officer under the University's Policy Prohibiting Discrimination, Harassment and Retaliation ("Policy").) During our meeting at your request and with my consent, you were accompanied by Dr. Elizabeth Linehan, RSM and Ms. Evelyn Minick. At that time, you informed me of two discussions you had with Tom Scheibley regarding your then-upcoming same-sex marriage, and you stated that you believed that the University was discriminating against you based upon your sexual orientation. Specifically, you believed that the University's request that you limit some of the public disclosure of your marriage, conveyed to you in your July 12, 2013 discussion with Mr. Scheibley, was experienced by you as discriminatory in nature.

I have confirmed that your conversation with Mr. Scheibley on July 12th occurred largely as you described. Thus, I do not believe the University needs to engage in a fact-finding investigation under the Policy, as the facts you presented in support of your complaint do not appear to be in dispute.

The University's request to you, through Mr. Scheibley, was borne of the unique nature of your role on campus. As a Campus Minister/Liturgy and Music Coordinator, your duties in this position are almost exclusively ministerial; that is, you are responsible for the University's most important Catholic religious services, focusing on the planning and participating in Eucharistic liturgies, facilitating and leading through a pastoral presence religious guidance and retreats for our students, and the like. In the context of this ministerial role and position, your marriage to another person of the same sex presents a direct conflict with the established teaching of the Catholic Church, which does not endorse or recognize such marriages as part of the Church's foundational doctrines. Thus, the University has concluded that the University's request to you does not constitute a violation of the Policy because the University is required to exercise an enhanced level of discretion and oversight when its fidelity to Catholic teaching comes in conflict with the actions of those employees whose responsibility and role is to deliver that teaching to our community.

Despite our conclusion that Mr. Scheibley's instruction to you did not violate the Policy, the University endorses his follow-up discussion with you on July 22, 2013 as well. Thus, the University acknowledges your professional contribution to the University community, and is confident that you will continue to be an integral member of the University's Campus Ministry team.

In the past, you have demonstrated sensitivity to the conflict between your intent to enter into a same-sex marriage and Catholic teaching, and the University appreciates your continued commitment in this regard. Mindful of your intent to be respectful of Catholic teaching and the ministerial nature of the responsibilities you fulfill in your position, the University will not impose any particular rules or requirements on your conduct with regard to your spouse or your own commemoration of your marriage. We simply ask that you respect your University ministerial functions and exercise prudent judgment and discretion in doing so. You asked specifically whether the University takes a position on your right to, for example, have a picture of your spouse on your desk or ask your spouse to accompany you to University functions. We do not.

Finally, to confirm, the University will not take any employment action against you due to your sexual orientation or your marriage. Rather, you continue to be employed at will, as are most other non-tenured employees of the University. We will continue to welcome an open dialogue when you are faced with situations in which your ministerial role is intertwined with your marriage, implicating the conflict with the University's Catholic identity, which is central to its mission.

Please let me know immediately if you have any questions and/or if there is anything I have stated in this letter that is not clear to you.

Sincerely,

A handwritten signature in cursive script that reads "Sharon O'Grady Eisenmann".

Sharon O'Grady Eisenmann
Vice President for Human Resources

