UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JENNIFER ELLER

Plaintiff,

v.

PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS, PRINCE GEORGE'S COUNTY BOARD OF EDUCATION, and MONICA GOLDSON in her official capacity

Defendants.

Case Number: 18-cv-03649-TDC/TJS

PLAINTIFF JENNIFER ELLER'S REPLY MEMORANDUM IN SUPPORT OF HER MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

For over five years, Jennifer Eller faced unimaginable and unconscionable discrimination, harassment, and even physical assault at PGCPS on account of being a transgender woman. The record of this harassment, to which Defendants present no dispute or contrary evidence, is overwhelming. It is supported not only by Ms. Eller's testimony, but also by contemporaneous emails, witness accounts, testimony of coworkers and supervisors, and other documentary evidence. Yet, ten years after the harassment began, Defendants still do not appreciate its severity or their role in failing to stop it. The undisputed evidence showing what any reasonable person would find to be egregious harassment is "no more than rude treatment" in Defendants' view. Defendants' opposition is thus characterized by the same concerning ambivalence—a blind eye to a transphobic environment that permeates their schools—that hampered their contemporaneous response to the hostile work environment Ms. Eller endured.

In support of her hostile work environment and constructive discharge claims, Ms. Eller has presented a compelling and detailed account of the persistent sex-based harassment that she faced at the hands of PGCPS students, parents, and teachers due to her transgender status, and each element of those claims is satisfied. Defendants do not dispute that this harassment was unwelcome and based on Ms. Eller's sex. They also do not—and cannot—deny that PGCPS students, faculty, and parents engaged in the numerous actions described in Ms. Eller's motion and the evidentiary record.

Instead, Defendants continue to downplay—or fundamentally misunderstand—the severity and pervasiveness of the harassment that took place at their schools and the cumulative effect of such harassment on Ms. Eller. They also continue to rely upon minimal, half-hearted actions taken by the PGCPS administration and irrelevant facts that have no bearing on, much less contradict, that such harassment occurred. But the record is clear, and any reasonable person would find the sex-based harassment Ms. Eller faced to be severe, pervasive, imputable to Defendants, and so outrageous as to force one to resign. Thus, summary judgment should be granted in Ms. Eller's favor on her hostile work environment and constructive discharge claims.

Summary judgment should also be granted in Ms. Eller's favor on several of Defendants' affirmative defenses, given that Defendants have abandoned their prior argument regarding timely exhaustion of administrative remedies under Title VII, incorrectly assert that certain claims are barred by the statute of limitations, and fail to address Ms. Eller's other arguments regarding the inadequacy of Defendants' affirmative defenses.[1]

ARGUMENT

I. Ms. Eller Is Entitled to Summary Judgment on Her Hostile Work Environment and Constructive Discharge Claims.

A. Defendants' Limited Effort to Dispute Only Two Elements of Ms. Eller's Hostile Work Environment Claims Fails.

In their opposition, Defendants do not dispute that Ms. Eller (a) experienced unwelcome harassment, or (b) that this harassment was based on her sex and transgender status, two of the four elements of her hostile work environment claims. Defendants also do not directly dispute or offer any evidence contradicting the fact that Ms. Eller was subject to constant sex-based harassment over the course of many years, including misgendering, transphobic epithets, threats of violence, and actual violence. Rather, Defendants merely argue whether the harassment that Ms. Eller faced was (a) severe or pervasive and (b) imputable to Defendants, the two remaining elements of her hostile work environment claims. But because Defendants' effort fails to identify a dispute of any *material* fact relevant to these elements, the Court should grant summary judgment in Ms. Eller's favor on these claims.

1. The Harassment That Ms. Eller Experienced Was Severe and Pervasive.

Defendants do not contest that Ms. Eller subjectively perceived the environment within

[1] This cross-reply brief addresses only Defendants' arguments that oppose the bases for Plaintiff's motion for summary judgment. Plaintiff acknowledges that Defendants' Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment ("Opp."), ECF No. 102, also included reply arguments that purported to support Defendants' motion for summary judgment, but as appropriate, Plaintiff does not address those in this cross-reply.

PGCPS to be abusive, but they mistakenly assert that Ms. Eller has not established that the environment was objectively severe or pervasive. *See* Opp. at 8. Despite the great level of detail set out in Ms. Eller's motion, declaration, and additional documentary evidence describing the unrelenting, transphobic discrimination that she faced at multiple schools from 2011 to 2016, Defendants make the incredible assertion that "[t]he comments alleged by Plaintiff in her Opposition were infrequent and constitute no more than rude treatment by students." Opp. at 8. This characterization of the events described in Ms. Eller's motion has no basis in reality and reveals Defendants' fundamental misunderstanding of and ambivalence to the severity of the harassment that took place. Defendants' assertions would require this Court to ignore the facts showing that Ms. Eller was forced to endure harassment that was both severe *and* pervasive—more than is necessary to support her claims, as she need only "prove the harassment was severe *or* pervasive." *Harris v. Mayor & City Council of Baltimore*, 429 F. App'x 195, 202 n.7 (4th Cir. 2011) (emphasis in original).

Defendants seek to break down the events described by Ms. Eller as isolated, individual events. But the Court "cannot…view the conduct without an eye for its cumulative effect." *Sunbelt Rentals, Inc.*, 521 F.3d at 318. The collective discriminatory conduct of students, staff, and parents created a hostile work environment within PGCPS. Because the underlying conduct identified is not disputed, the Court can determine *as a matter of law* that it is objectively severe or pervasive (or, indeed, both). Where, as here "overwhelming evidence" of "severe harassment" is not in dispute and "[t]he record is replete with specific facts alleging that [a plaintiff] endured prevalent abuse and harassment at the workplace," summary judgment is appropriate because "no rational trier of fact could find for" an employer like Defendants. *D'Annunzio v. Ayken, Inc.*, 25 F. Supp. 3d 281, 289-90 (E.D.N.Y. 2014).

The sex-based harassment that Ms. Eller experienced was frequent and occurred continuously over the course of over five years. *See* JR 397-424, ¶¶ 16-25, 29-39, 63-65, 84, Ex. 15; JR 447, Ex. 23 (documenting ongoing harassment and numerous individual incidents at Kenmoor MS, Friendly HS, and James Madison MS from May 2011 through November 2016).

Ms. Eller documented numerous individual incidents in emails to her supervisors, and she reported additional incidents in person.[2] That list was by no means exhaustive, and no list could accurately capture the constant environment of hate and abuse that Ms. Eller endured. *See* JR 408, ¶ 39, Ex. 15. By any standard, the harassment that Ms. Eller experienced was "'persistent, demeaning, unrelenting, and widespread,'" creating a hostile work environment. *See E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 316 (4th Cir. 2008) (quoting *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997)).

This harassment, far from constituting simply "rude treatment by students," was of unusual severity and included sex-based and transphobic epithets and comments, constant misgendering of Ms. Eller, threats of physical violence, and physical assault, all of which were sufficiently severe to alter Ms. Eller's workplace conditions *See* ECF No. 98-1, Plaintiff's Mot. for Partial Summ. J. and Opp. to Defs.' Mot. for Summ. J. ("Mot.") at 10-11; JR 397-424, ¶¶ 16-25, 29-39, 63-65, 84, Ex. 15. The intentional misgendering and use of sex-based epithets by students and faculty against a transgender woman are more than mere offensive utterances. *See Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *11 (E.E.O.C. Apr. 1, 2015) (failure to use the employee's correct name and pronoun can constitute unlawful, sex-based harassment); *Sunbelt Rentals*, 521 F.3d at 318 (the "habitual use of epithets" can create a severe and pervasive environment); *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir.1995) (holding that alleged harassment was sufficiently severe or pervasive where an Iranian plaintiff was called "names like 'the local terrorist,' a 'camel jockey' and 'the Emir of Waldorf'" on an almost daily basis over the course of six months). Threats of physical violence and assault—ignored by Defendant—while not necessary to make out a hostile work environment claim, "undeniably strengthen[] a hostile work environment claim." *Sunbelt Rentals*, 521 F.3d at 318 (citing *White v. BFI Waste Servs.*, 375 F.3d 288, 298 n. 6 (4th Cir.

[2] As discussed in Ms. Eller's earlier Motion for Sanctions (ECF 75-1), due to Defendants' failure to preserve emails predating Fall 2014, the number of incidents Ms. Eller reported *by email* is actually larger than what the record reflects.

2004)).

The PGCPS administration not only failed to remedy such discrimination but actively contributed to the hostile work environment through their own actions, which included discouragement of Ms. Eller's transition, a concerted refusal to implement any relevant antidiscrimination training, and statements that Ms. Eller should not advocate for LGBTQ issues. For example, a human resources representative demanded that Ms. Eller present as male and told her that a note from her therapist was "garbage," administrators told her not to wear skirts or dresses because it would make people uncomfortable, and Assistant Principal Connelin told Ms. Eller that she should grow a thicker skin, should stop "proselytizing" the students, should not advocate for any LGBTQ issues on campus, and should ignore any teachers or staff who expressed disapproval of transgender people. JR 418, ¶ 69, Ex. 15; JR 399, ¶ 25, Ex. 15; *see also* JR 412, ¶ 49, Ex. 15 (PGCPS took approximately three years to update Ms. Eller's primary email address to be disconnected with the first name she had before her transition); JR 408-18, ¶¶ 41, 46-48, 68, Ex. 15 (administrators at Friendly High School and James Madison Middle School refused Ms. Eller's repeated attempts to implement diversity training).

A recently decided transgender discrimination case from this District is instructive. There, the court found "ample evidence" of severe and pervasive conduct where "employees and supervisors ridiculed and mocked [plaintiff] on account of her transgender status," an individual "physically assaulted [plaintiff] an[d] called her a 'faggot,'" and plaintiff was purposely outed to new staff and misgendered both in person and in the scheduling system, all of which went "unchecked." *Membreno v. Atlanta Rest. Partners, LLC*, No. 19-CV-00369-PX, 2021 WL 409746, at *11 (D. Md. Feb. 5, 2021). The *Membreno* court recognized such conduct could be sufficient to establish a hostile work environment claim. Defendants here do not dispute the same types of facts in this case. Indeed, the conduct aimed towards Ms. Eller goes well beyond the conduct alleged in *Membreno*. Moreover, unlike *Membreno*, in which there were factual disputes as to the reasons for the employee's termination, here, the undisputed record of the unrelenting harassment that Ms. Eller endured is sufficient for any reasonable person to conclude

that it constitutes a hostile work environment.

Defendants, attempting to downplay the severity of the harassment that Ms. Eller faced, make a number of irrelevant and incorrect assertions in their opposition brief. First, Defendants contend that "Plaintiff specifically only identifies three (3) employees who allegedly made inappropriate comments to her during her nine (9) year tenure." Opp. at 9.[3] The fact that Ms. Eller only identifies a limited number of faculty members *by name* in no way detracts from the fact that Ms. Eller faced discrimination from numerous individuals within the PGCPS system, including faculty, students, and parents. Ms. Eller identified a number of other employees by name who engaged in discriminatory behavior in addition to the three conceded by Defendants, including Kathleen Gregory (JR 397, ¶ 18, Ex. 15), Courtney Ball (JR 398, ¶ 23, Ex. 15), Mr. Enchelmaier (JR 399, ¶ 23, Ex. 15), Mr. Ecton (JR 402, ¶ 34, Ex. 15), and Mr. Connelin (JR 418, ¶ 69, Ex. 15). Another colleague, Mr. Beall, stopped speaking with Ms. Eller completely, making it difficult for Ms. Eller to carry out her job. JR 399, ¶ 23, Ex. 15. Ms. Eller also described many other instances of discrimination by faculty members, including instances where faculty referred to her transition as "disgusting," (JR 397, ¶ 17, Ex. 15), referred to Ms. Eller as a "he-she" and blocked her entry into the teacher's lounge (JR 402, ¶ 34, Ex. 15), and asked Ms. Eller if it was worth all the disruption she was causing just so she could wear a skirt (*id.*). *See also* JR 80-81 at 312:18-316:3, Ex. 1 (discussing harassment by teachers); JR 411, ¶ 48, Ex. 15 (teacher interrupted Officer Burks' diversity training and stated "I don't know why we have to go through changes for someone else"). The fact that, several years later, Ms. Eller is not able to specifically recall every employee who harassed her by name does not detract from the fact that these incidents occurred, contributing to a hostile work environment.

Second, Defendants' argument that "Plaintiff does not identify which parents made inappropriate remarks" (Opp. at 9) is similarly beside the point. Both through testimony in this

[3] The relevant time period here is the five-and-a-half years after Ms. Eller came out as transgender to her supervisors and began to socially transition in the workplace, i.e., from early 2011 to late 2016. Defendants' focus on Ms. Eller's overall nine-year tenure as their employee, Opp. at 9, appears to be an attempt to dilute the seriousness of the harassment she has alleged.

litigation and in contemporaneous documents and conversations during the time of her employment, Ms. Eller identified numerous instances in which parents engaged in discriminatory conduct towards her on the basis of her transgender status, including derogatory remarks that were made in the presence of PGCPS administrators and faculty. *See, e.g.*, JR 402 ¶ 35, Ex. 15 (parent informed everyone that she was filing a formal complaint that there was a "Tranny" in the classroom); *id.* ¶ 36 (parents instructed their students to skip Ms. Eller's class, filed complaints with the school board about her presence in the classroom, and misgendered her during parent-teacher conferences); JR 404 ¶ 37, Ex. 15 (parent who was upset with her child's grades stood in the main office and said that the school had a pedophile working for them and talked about how she knew with certainty what was under Ms. Eller's skirt); JR 404-05 ¶ 37, Ex. 15 (parent stated to Ms. Eller, "Let's get this straight: are you a man or a woman?"); JR 411, ¶ 48, Ex. 15 (Ms. Eller received particularly aggressive phone call with a parent who insisted she was a man); JR 420, ¶ 76, Ex. 15 (Ms. Eller was informed by the English Department Chair that the AP English classes were being taken away from her because parents were complaining about her "lifestyle" being inappropriate). The *names* of those parents are immaterial to whether Ms. Eller experienced those acts of harassment, and Defendants present no evidence disputing that these incidents occurred.

Third, Defendants once again assert that a hostile work environment does not exist because certain administrators testified after the fact and in the context of this litigation that Ms. Eller was "beloved" by certain students and received "accolades" from certain parents. Opp. at 9. However, this testimony (even if true) does not erase the fact that Ms. Eller was subject to a hostile work environment by numerous students, parents, and faculty. Indeed, some individual incidents involving students, staff, and parents were by themselves sufficiently severe to create a hostile work environment. There can be no dispute that the collective discriminatory conduct of students, staff, and parents, when considered *cumulatively*, created a hostile work environment within PGCPS. Testimony by a limited number of administrators that Ms. Eller was liked by some students and parents does not contradict the robust body of evidence that the harassment

Ms. Eller faced was both severe and pervasive. *See e.g.*, *Membreno*, 2021 WL 409746, at *1 (finding a hostile work environment challenge survived defendant's summary judgment motion even when her co-workers regarded her as a "leader" and a "remarkably hard worker" and she was selected as employee-of-the-month five times).

Fourth, Defendants' focus on Ms. Eller's involvement in an after-school LGBTQ club called "Caring Colors" has little relevance to the hostile work environment allegations at hand. The formation of a *student club* in no way answers the question of whether *a teacher* was experiencing a hostile *work* environment, as such clubs are meant to support students. Moreover, the club was not in existence for most of the time that Ms. Eller experienced a hostile working environment. *See* JR 79-80 at 305:5-311:6, Ex. 1. Ms. Eller also testified that the school did not provide any funding or Caring Colors, and no administrators attended its meetings. *See* JR 79 at 308:12-17, Ex. 1. To the contrary, support systems such as "Caring Colors" are often formed *in response* to a continuing hostile environment, as those facing discrimination attempt to find a way to cope within their abusive environment. The transphobic, non-inclusive environment at PGCPS affected not only Ms. Eller, but others including students as well. *See, e.g.*, JR 447, Ex. 23 (Ms. Eller reported to PGCPS "that the work environment is openly hostile toward transgender workers making it a psychologically unsafe environment with the potential of becoming a physically unsafe environment"); *id.* (Ms. Eller reported to PGCPS that "a trans man student…is now experiencing routine harassment from other students"); JR 467-68, Ex. 32 (discussion of Ms. Claggett's misgendering of a trans male student). That Ms. Eller worked to fight against the discrimination she and others were facing does not absolve Defendants of their obligations to her and others to prevent and stop sex-based harassment.

Finally, Defendants' suggestion that an environment cannot be hostile because Ms. Eller "remained employed and did not quit for six (6) years" is equally misguided. Opp. at 10. That an individual makes continued efforts to survive within a hostile work environment in no way suggests that the environment was not abusive. Ms. Eller tried to continue within her chosen profession due to her love for teaching until she could no longer cope with the mental stress of

returning to work each day. *See* JR 423 ¶ 82, Ex. 15. By that point, in 2016, Ms. Eller had been subjected to discriminatory abuse so severe that she was forced to check into an outpatient psychiatric program, where she was diagnosed with post-traumatic stress disorder. *See* JR 423-25 ¶¶ 83-87, Ex. 15; JR 730-60, Ex. 48. The hostile environment within PGCPS not only detracted from Ms. Eller's job performance and discouraged her from remaining on the job (which is itself actionable), but constituted an "especially egregious" example of an environment "so heavily polluted with discrimination as to destroy" Ms. Eller's "emotional and psychological stability." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986)); *see also Membreno*, 2021 WL 409746, at *1-2 (plaintiff permitted to pursue hostile work environment claim due to harassment suffered "[f]or the lion's share of" her "nearly ten years" working for Defendants). Defendants have thus failed to counter the extensive evidence showing that Ms. Eller was subject to severe and pervasive harassment from faculty, parents, and students, and have instead focused their attention on irrelevant (and in some cases inaccurate) arguments. Given Defendants' failure to show any genuine dispute regarding the egregious harassment that Ms. Eller was forced to endure, summary judgment is warranted. *See, e.g.*, *Kirkland v. Morton's of Chicago*, No. C-96-02301 MHP, 1997 WL 703780, at *4 (N.D. Cal. Oct. 14, 1997) (granting summary judgment on hostile work environment claim where defendants did not show a genuine factual dispute as to whether a reasonable person would find conduct sufficiently severe or pervasive); *D'Annunzio*, 25 F. Supp. 3d at 289-93 (same).

2. The Hostile Work Environment Is Imputable to Defendants.

Defendants do not meaningfully contest that the actions of PCGPS staff, students, and parents should be imputed to the Defendants, *see* Mot. at 15-20; nor do they deny that liability based on the systemic nature of the hostile work environment Ms. Eller faced at her time in the PGCPS system can and should be imputed to them, *see id.* at 20-22. Notably, Defendants do not contest the first prong of the imputability analysis: that Defendants knew about the persistent harassment Ms. Eller and other transgender individuals in PGCPS faced. Nor do they dispute

that they received repeated requests from Ms. Eller to take proactive action to mitigate her and the PGCPS transgender community's suffering. Pointing to nothing more than a single deposition excerpt from Ms. Pope-Brown, Defendants make the conclusory assertion that "[t]o the extent Plaintiff identified individuals or individuals were later discovered after investigation, the administration handled each and every situation appropriately." Opp. at 11-12.

First, this testimony has no relationship to any remedial action with respect to the reported pervasive misconduct by PGCPS staff or parents. It relates solely to disciplinary action taken against students. JR 252 at 158:10-159:7, Ex. 11. Defendants do not dispute, among other things, that they took no action following the Letter of Determination against Assistant Principal Robinson (Mot. at 15-16); that there is no evidence of any discipline or corrective action instituted against any co-worker of Ms. Eller (Mot. at 16); or that Officer Burks's 2015 presentation to staff by was an entirely ineffective remedy (Mot. at 17).

Second, Defendants cannot now make an argument that as a factual matter the administration handled "each and every situation appropriately," when it is well-documented that Defendants' discovery failures led to the loss of PS-74 forms, the very documents that would illustrate what discipline was actually imposed on students that harassed Ms. Eller.[4] Relying on the testimony of PGCPS administrator Robin Pope-Brown to make the conclusory assertion that "appropriate" remedial actions were taken with respect to student misconduct in all circumstances is woefully insufficient to overcome the plethora of record evidence of repeated remedial failures in the record. *E.g.*, Mot at 19 (citing administrators' failure to recall any particular discipline). Nor does this address the more global issue that the PGCPS supervisors repeatedly downplayed the severity of students' comments and threats against Ms. Eller. *See* Mot. at 19-20. Defendants do not dispute—and indeed readily acknowledge—that they only

[4] Indeed, Magistrate Judge Sullivan issued an order that recommends the Court "preclude Defendants from (1) arguing that the lost or destroyed PS-74 forms corroborated Defendants' version of events regarding the type of discipline imposed on students that harassed Plaintiff, and (2) offering any evidence about the contents of the PS-74 forms not already produced in discovery." ECF 84; *see also* Mot. at 19 & n.8 (discussing Magistrate Judge Sullivan's order).

characterized students' conduct (if and when it was addressed) as "disrespect"; Defendants do not even have a prohibition against harassing a teacher based on their gender identity in the Student Code of Conduct. *Id.* Moreover, Defendants implemented no training that could have prevented such student harassment before it occurred, training that was particularly important due to the fact that every year, new students entered the schools where Ms. Eller taught. *See* JR 408-12, ¶¶ 40-50, Ex. 15. These lapses show a failure to "take reasonable measures to try to prevent" the harassment of Ms. Eller. *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002). And as the Fourth Circuit has explained, where "remedial efforts proved completely ineffective," it can be found that the responsible actor "failed to take additional action ... reasonably calculated to end the harassment." *E.E.O.C. v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 178 (4th Cir. 2009). Defendants have made no suggestion that any remedial efforts in the form of discipline of individual students, which again is unknown and Defendants are precluded from presenting, actually led to any impact on the student body's conduct towards Ms. Eller.

Defendants also do not challenge Ms. Eller's evidence that Defendants have neglected to take any action to remediate the systemic hostile environment faced by transgender PGCPS community members. Defendants repeatedly attempt to reduce Ms. Eller's case into a few discrete instances of misconduct by students and staff against her as an individual, but never deny the fact that transgender students also faced discrimination, even at the hands of PGCPS staff. *E.g.*, JR 703-04 ¶¶ 28-33, Ex. 41; JR 18 at 62:1-63:2, Ex. 1; JR 194 at 248:14-20, Ex. 10; JR 421 ¶ 78, Ex. 15. Defendants again never dispute their actual knowledge of these additional instances of harassment.

To the extent Defendants imply that the organization of the Caring Colors school club by and for LGBTQ students negates their liability for the hostile environment faced by the transgender community, this assertion is both wrong and borderline offensive. A school club *for students* organized *by students* with limited faculty support or school-provided resources does not replace the obligation of Defendants to protect them through system-wide policy changes.

See supra at 8. The burden is not on Ms. Eller, nor any other transgender individual facing harassment, to make the effort necessary to eradicate the hostile environments they faced. Rather, it is *Defendants* who have the burden to take remedial action "reasonably calculated to end the intolerable working environment." *Amirmokri*, 60 F.3d at 1133.

B. Undisputed Evidence Supports Summary Judgment on Ms. Eller's Constructive Discharge Claims.

The hostile environment faced by Ms. Eller compelled her to resign her position at PGCPS and would have compelled any reasonable person in her position to resign. Although Defendants note Ms. Eller's short tenure at James Madison Middle School (Opp. at 11), the length of her tenure at that particular school is irrelevant and does not negate the cumulative effect of the previous five years of frequent and continuous harassment within other PGCPS schools. Indeed, her relative short tenure at James Madison is indicative of the hostile environment that permeated the entirety of the PGCPS system—so infected with transphobia that such harassment followed Ms. Eller across three different schools through a period of just over five years.

Ms. Eller's transfer to James Madison in August of 2016 was one more example of her attempting to continue to pursue her passion of teaching, notwithstanding the persistent challenges she faced as a transgender employee at PGCPS. Contributing to Ms. Eller's forced resignation was the realization that she could find no school within PGCPS where she would be able to teach free of persistent and severe harassment due to her transgender status; this realization was heartbreaking and traumatic to her. JR 423 ¶¶ 81-82, Ex. 15. The harassment Ms. Eller faced at James Madison was the last straw.

Indeed, the harassment Ms. Eller experienced just in her short tenure at James Madison reinforced the systemic nature of the problem at PGCPS. By the time she took FMLA leave in October 2016 she had already been faced with a threat to burn down her house, repeated misgendering, and derogatory remarks about transgender individuals in her presence. JR 416-417 ¶ 64, Ex. 15. The continuation of the harassment in the new school caused Ms. Eller to feel

overwhelmed and interfered with her ability to focus at work. JR 417 ¶ 65, Ex. 15. As she had always done, Ms. Eller reported these instances to the James Madison administration and again requested diversity training that would address harassment and discrimination on the basis of gender identity. JR 417-418, ¶¶ 66-69, Ex. 15.

In response, Ms. Eller received the same inadequate and disheartening responses she had become accustomed to from PGCPS administrators. Mr. Connelin, an assistant principal at James Madison, suggested she grow a thicker skin and to refrain from advocating for LGBTQ issues on campus. JR 418, ¶ 69, Ex. 15. Any reasonable person facing this ceaseless harassment, and the blatant reality that the environment would not change no matter at which PGCPS school she worked, would have felt compelled to resign to protect her health. The suggestion that Ms. Eller's employment with Target and the Department of Defense—part-time employment with lower pay and fewer benefits—compelled her to resign, Opp. at 11, not her diagnosis of PTSD from the constant and long-term abuse, discrimination, and retaliation she experienced as a PGCPS employee, is unsupported by any evidence and offensive. JR 423-25 ¶¶ 82-87, Ex. 15.

The fact that Ms. Eller took a leave of absence prior to her formal resignation in August 2017 does not preclude a finding that she was constructively discharged. Opp. at 11. Ms. Eller took a leave of absence to safeguard her health, immediately upon concluding that she could no longer mentally deal with the stress of returning to the hostile work environment she faced at PGCPS. JR 423 ¶ 82, Ex. 15. Between the time of starting her leave of absence and formal resignation, Ms. Eller attended intensive outpatient treatment, and then additional therapy to try and recover from and grapple with the trauma she faced at PGCPS. JR 423-25 ¶¶ 83-88, Ex. 15. Coming to terms with the fact that for the preservation of her mental health, Ms. Eller could not return to PGCPS schools in their present state, *i.e.*, with no structural changes in place to protect transgender individuals, is a decision any reasonable individual in Ms. Eller's position would

have taken a serious amount of time to make.[5]

Defendants cite no authority for the proposition that a constructive discharge claim is not viable when a plaintiff has taken a leave of absence before submitting her formal resignation. Rather, in its decision establishing that a constructive discharge claim does not accrue until the time of actual resignation, the U.S. Supreme Court contemplated that a teacher might wait until the end of the school year to resign. *See Green v. Brennan*, 136 S. Ct. 1769, 1778 (2016). Ms. Eller reasonably concluded she could not participate in the 2017-2018 school year at PGCPS after she was compelled to take medical leave and step away from the intolerable environment that resulted in irremediable, chronic PTSD. JR 558 ¶ 68, Ex. 36. No reasonable fact finder could conclude that this constant harassment for over five years, across three schools, resulting in a serious diagnosis, leave of absence, and resignation, did not constitute a constructive discharge. Ms. Eller is entitled to summary judgment.

C. Ms. Eller Pled Separate Hostile Work Environment and Constructive Discharge Claims.

Defendants assert that Ms. Eller has pled "a combined hostile work environment constructive discharge claim" and that Ms. Eller must satisfy the elements of both a hostile work environment and constructive discharge to prevail on summary judgment on such a combined claim. Opp. at 7. While the assertion is factually wrong, it is also legally irrelevant. For all of the reasons already stated, even if the only claim asserted was such a combined claim, Ms. Eller would be entitled to summary judgment due to the severe nature of Defendants' harassment. However, Ms. Eller in fact alleges separate hostile work environment and constructive discharge claims. *See Green*, 136 S. Ct. at 1779 (recognizing separate claims for a hostile work environment and a constructive discharge based on a hostile work environment).

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[5] Ms. Eller sought part-time alternative work in a more supportive work environment in early 2017 because she was on an unpaid leave of absence by this time and needed income to support her living and medical expenses. As Defendants note, Ms. Eller was on approved FMLA leave from October 18, 2016, until January 6, 2017, and then on a leave of absence from January 9, 2017, until June 15, 2017. *See* ECF 97-1, Defs. Mot. for Summ. J. ("Defs. Mot.") at 3.

While Ms. Eller did not plead constructive discharge *under its own count* in her First Amended Complaint, this Court has recognized a separate cause of action for constructive discharge even where the constructive discharge claim was not separately pled. *See, e.g.*, *Hodge v. Walrus Oyster Ale House*, No. CV TDC-18-3845, 2019 WL 6069114, at *8 (D. Md. Nov. 15, 2019) (Chuang, J.) ("Reading the Complaint liberally, the Court construes Hodge as asserting a claim of constructive discharge under Title VII and Section 1981…"); *Breck v. Maryland State Police*, No. CV TDC-16-2075, 2017 WL 2438767, at *3 (D. Md. June 5, 2017) (Chuang, J.) ("Although [plaintiff] does not expressly assert a claim for constructive discharge in the Complaint, the language of the Complaint is readily susceptible of such an interpretation.").[6]

Defendants cite to *Evans v. International Paper Company*, 936 F.3d 183 (4th Cir. 2019), in support of their argument that Ms. Eller has pled a combined hostile-environment constructive discharge claim, but that case involved wholly different circumstances. There, "by the summary judgment stage of the case, the district court found [plaintiff's] 'hostile work environment claim solely focuse[d] on her constructive discharge' noting 'there does not appear to be any dispute' on that issue.'" *Evans*, 936 F.3d at 191 (citing *Evans v. Int'l Paper Co.*, No. 3:16-01215-JMC, 2018 WL 1558870, at *6 n.3 (D.S.C. 2018)). Moreover, Plaintiff "fail[ed] to object to [Defendant's] combined claim characterization in her Memorandum in Opposition to [Defendant's] Motion for Summary Judgment." *Id.* Here, Ms. Eller does object to the characterization that she has pled only a combined claim, and her complaint does not "solely focus" on her constructive discharge.

Rather, Ms. Eller alleges both that she endured a hostile work environment over the course of many years, and that the harassment she faced was so severe that it eventually forced her to resign. One need only look to the Amended Complaint. With regards to her hostile work

[6] Indeed, the fact that Ms. Eller has pled a constructive discharge claim separately from a hostile work environment claim is even more clear here than in these other cases. In *Breck*, for example, the complaint simply stated that the state police had "forced Plaintiff to retire to avoid termination" without any explanation as to how or why such termination was forced. Complaint at 4, *Breck v. Maryland State Police*, No. CV TDC-16-2075 (D. Md.).

environment claim, Ms. Eller pled, *inter alia*, that the "harassment was sufficiently severe or pervasive as to alter the terms, conditions, and privileges of Ms. Eller's employment, and to create an abusive, intimidating, humiliating, hostile, offensive working environment for Ms. Eller," Amend. Compl. (ECF No. 4) ¶ 146, and that "Defendants willfully ignored or were recklessly indifferent to the discrimination, harassment, and hostile work environment to which Ms. Eller was subjected," *id.* ¶ 148. Ms. Eller then separately pled with regards to her constructive discharge claim that, *inter alia*, "[t]he persistent discrimination, harassment, and hostile work environment that Ms. Eller endured was so severe or pervasive that it led to her constructive termination by forcing her to resign her employment as a teacher at Prince George's County Public Schools." *Id.* ¶ 147.

Federal Rule of Procedure 10(b) only requires separate counts when the claims are based "on a separate transaction or occurrence." "The fact that one count asserts several possible theories of recovery does not compel separation under Rule 10(b) where the complaint is sufficiently clear as written." *Granger v. Hadi*, No. 1:06-CV-196-SPM/AK, 2007 WL 9735487, at *1 (N.D. Fla. Nov. 13, 2007). Indeed, "if the claims arise from the same actions or underlying circumstances, separation under Rule 10(b) is not necessary." *Id.* That is the case here: "a hostile-work-environment claim is a 'lesser included component' of the '*graver* claim of hostile-environment constructive discharge.'" *Green*, 136 S. Ct. at 1779 (emphasis in original). It is thus irrelevant whether Ms. Eller pled her hostile work environment and constructive discharge claims under separate counts or the same count when the claims are based on the same facts and they were clearly articulated in her Amended Complaint.

The Amended Complaint should be construed as alleging separate hostile work environment and constructive discharge claims.[7]

[7] As discussed below, Defendants do not contest that Ms. Eller's constructive discharge claims, which were brought within two years of Ms. Eller's forced resignation on August 18, 2017, are timely. *See* Mot. at 23 (citing *Green*, 136 S. Ct. at 1777 and *Breck*, 2017 WL 2438767, at *3). Rather, Defendants contend only that certain hostile work environment and retaliation claims under Title IX, FEPA, and the County Code are untimely, an argument that has no merit. *See infra* at 17.

II. Ms. Eller Is Entitled to Summary Judgment on Several Affirmative Defenses.

Finally, in order to narrow the remaining issues to be tried, this Court should grant Ms. Eller summary judgment on certain affirmative defenses asserted by Defendants. *See* Mot. at 35. Defendants do not address Ms. Eller's arguments that summary judgment is warranted on Defendants' fifth and sixth affirmative defenses because: (a) Defendants' reliance on Maryland's common law employment at-will doctrine is misplaced because Ms. Eller's claims are based in statutes and the federal Constitution, all of which provide exceptions to that doctrine; and (b) Defendants' invocation of Ms. Eller's "voluntary resignation" provides no defense where the evidence overwhelmingly supports that her resignation was the result of the extreme emotional stress that Defendants' hostile work environment and retaliatory actions had created. Summary judgment should therefore be granted in Ms. Eller's favor on these affirmative defenses.

Summary judgment should also be granted in Ms. Eller's favor on Defendants' fourth affirmative defense. In their reply, Defendants do not attempt to shore up the argument that Ms. Eller failed to timely exhaust administrative remedies for certain Title VII retaliation allegations after Ms. Eller pointed out the flaws in this argument. *See* Defs. Mot. at 13-14 (raising argument on timely administrative exhaustion); Mot. at 26 (response); Opp. at 4-6 (timeliness arguments omit mention of administrative exhaustion).

Finally, summary judgment should be granted in Ms. Eller's favor on Defendants' third affirmative defense because Defendants' statute of limitations arguments have no merit. Opp. at 4-6. Defendants contend that equitable tolling should not apply under these circumstances to toll Ms. Eller's Title IX, FEPA, and County Code hostile work environment claims, but this defense fails for two reasons. First, Defendants ignore that Ms. Eller's constructive discharge claims under Title IX, FEPA, and the County Code are timely, as they were filed in November and December 2018 and her resignation occurred in August 2017. Second, with regard to her hostile work environment claims under these statutes, it would be unjust to allow the limitations period to run while Ms. Eller was in outpatient psychiatric care at Georgetown University Hospital. Ms. Eller was not able to actively engage in prosecution of her claims during this time while recovering from

the trauma she experienced due to Defendants' hostile work environment. *See* JR 423-25 ¶¶ 83-87, Ex. 15; JR 730-60, Ex. 48. While Defendants are not incorrect in noting that Ms. Eller was represented by counsel during this time, Ms. Eller's participation was vital to advancing the EEOC investigation that was taking place at the time, and she was unable to do so due to her mental state. Moreover, Defendants' attempts to distinguish between institutionalization and Ms. Eller's outpatient psychiatric program miss the point. The record shows that during her time at Georgetown University Hospital, Ms. Eller was mentally absent, experienced numerous physical symptoms, was unable to carry out normal everyday tasks, and did not communicate with anyone other than her nurse, partner, and one neighbor. JR 423-25 ¶¶ 83-87, Ex. 15; JR 730-60, Ex. 48. The Fourth Circuit has noted that equitable tolling can be applied in cases of mental incapacity—appropriate here due to Ms. Eller's mental state at the time. *See United States v. Sosa*, 364 F.3d 507, 513 (4th Cir. 2004).[8] Defendants' statute of limitations arguments should therefore be rejected and summary judgment granted in favor of Ms. Eller on their third affirmative defense.

CONCLUSION

For the foregoing reasons, Ms. Eller respectfully requests that the Court grant her summary judgment as to Counts II-V, which assert hostile work environment and constructive discharge claims, as well as Defendants' third through sixth affirmative defenses.

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Respectfully submitted,

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
(admitted *pro hac vice*)
Carl Charles (admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

/s/ Elliott C. Mogul
Paul Pompeo (admitted *pro hac vice*)
Douglas F. Curtis (admitted *pro hac vice*)
Lori B. Leskin (admitted *pro hac vice*)
Elliott C. Mogul (admitted *pro hac vice*)
Thomas McSorley (No. 18609)

[8] Defendants also misstate the date on which Ms. Eller started working part-time at Target. Ms. Eller started at Target on February 10, 2017, not in January 2017. *See* Mot. at 25 (citing JR 425-26 ¶¶ 90-92, Ex. 15). In any event, Ms. Eller only seeks to have the statute of limitations tolled for either the 60 days from the time she took a medical leave of absence to the time she was released from outpatient psychiatric hospitalization at Georgetown University Hospital (October 18, 2016 to December 16, 2016) or alternatively for the 45 days she spent in outpatient psychiatric hospitalization (November 2, 2016 to December 16, 2016). *See* Mot. at 24-25.

120 Wall Street, 19th Floor
New York, NY 10005
Telephone: (212) 809-8585
Fax: (212) 809-0055
ogonzalez-pagan@lambdalegal.org
ccharles@lambdalegal.org

Rebecca Neubauer (admitted *pro hac vice*)
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: +1 202.942.5000
Fax: +1 202.942.5999
paul.pompeo@arnoldporter.com
douglas.curtis@arnoldporter.com
lori.leskin@arnoldporter.com
elliott.mogul@arnoldporter.com
tom.mcsorley@arnoldporter.com
rebecca.neubauer@arnoldporter.com

Attorneys for Plaintiff