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

ARIEL CHRISTINA EURE

and

LAYLA HELWA

Plaintiffs

v.

FRIENDS' CENTRAL SCHOOL CORP., CRAIG SELLERS,

PHILLIP SCOTT and Board Members John and Jane Does #1-29

Defendants

CIVIL ACTION NO. 2:18-cv-01891 PBT

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

ORAL ARGUMENT REQUESTED

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

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I. PRELIMINARY STATEMENT

At first blush, this matter deals simply with a motion to dismiss a civil rights case with pendent claims as Defendants claim protection under the Establishment Clause of the First Amendment to the U.S Constitution. However, the attack amounts to something much more, something dangerously precedent-setting were it to be approved, namely that a private school and those affiliated with it are exempt from the reach of Federal and State Civil Rights Acts. This is all despite Friends Central's professed adherence to notions of responsibility, equality and diversity. When the rubber meets the road, these Defendants are insisting that they are untouchable and above it all.

However, Defendants fail any applicable test. In no way do Plaintiffs' claims require inquiry into religious tenets of Quakerism. Plaintiffs do not make any claims or counts based therein. Rather, Plaintiffs Complaint references guidelines and policies set forth by the school so as to depict the environment in which Plaintiffs worked and to justify their adherence to those guidelines and policies. It is easy for this Court and a jury not to understand such terms as integrity, equality, truth, diversity, concepts embraced by Defendants, from which they now seek to distance themselves.

Should this Court accept Defendants arguments, then there is nothing to keep any purportedly religious school from claiming immunity from the Civil Rights laws, or any other laws for that matter, taking us back to the dark ages in American jurisprudence.

Defendants cite cases for broad propositions without regard to the actual facts thereof or the procedural context. One must question whether the cases were even read. Many of the cases cited actually support Plaintiffs position. Defendants' overwhelming reliance upon cases at the summary judgment stage or later, amounts to an admission that discovery should proceed in this case and indeed it should as there is no basis for any of Plaintiffs' counts to be dismissed.

In the unlikely event that this Court deem Plaintiffs' Complaint to be deficient, then Plaintiffs request allowance to submit a curative amended complaint as referenced by the US District Court for the Western District of Pennsylvania, in *Myers v. Shaffer,* 2012 U.S. Dist. LEXIS 61266 [21]) (2012) relying upon a decision of the Third Circuit:

> If a civil rights complaint is subject to *Rule 12(b)(6)* dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile. *Alston v. Parker,* 363 F.3d 229, 235 (3d Cir. 2004). A district court must provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend... Court of Appeals:

Il. PROCEDURAL HISTORY

The Complaint sets forth the procedural history, including Plaintiffs' EEOC involvement, and speaks for itself.

RELEVANT BACKGROUND- ALLEGATIONS OF THE COMPLAINT

General Background

Defendants cherry pick portions of the Complaint, then editorialize and mischaracterize it. Defendants impermissibly argue facts. For example, despite the Complaint's clear words, Defendants claim that Plaintiffs "refused to heed their supervisors" The Complaint, is devoid of

such assertions or admissions.

Allegations Identifying Parties

There is no need for Defendants to cherry pick. The Complaint speaks for itself.

The Religious Underpinnings of Plaintiffs' Claims

Paragraphs 1, 11, 13, 33, and 62 as described Defendants are not what Plaintiffs pied.

The Complaint speaks for itself. Again, Plaintiffs' Complaint is not grounded upon application of Quaker precepts. Defendants nakedly assert that simply referencing Quaker precepts, as published by Defendants, renders Defendants out of reach of this Court, something clearly contrary to case law.

Counts of the Complaint

Count I

Count I, is set forth as is stated in Plaintiffs' Complaint. Contrary to the cherry picking, mischaracterizing and editorializing, the Complaint speaks for itself. Defendants' claims are simply astounding; i.e., that "Plaintiffs set forth no facts reflecting a hostile work environment, merely repeating that they were disciplined for their failure to comply with their supervisors' directives regarding reactions to and measures for discussion of the proposed outside speaker." This merely reflects their alternate statement of facts and their deliberately ignoring what Plaintiffs have clearly set forth as a "hostile: environment.

Count II

Contrary to Defendants' cherry- picked and editorialized comments, Count II is set forth as is stated in Plaintiffs' Complaint. By citing the summary judgment case of *Strezzi* v. *Citizens Bank of Pennsylvania,* (Docket No. 13-2276, Oct. 7, 2013) (US 3d Cir) explicitly labeled " Non-Precedential", Defendan ts admit that Count II should proceed to discovery.

3.-6. Counts III, IV, V. and VI

Counts III through VI are set forth as is stated in Plaintiffs' Complaint. The paragraphs, cherry picked, referenced and editorialized upon by Defendants instead stand for themselves, in the context of the entire Complaint.

ARGUMENT

The Legal Standard for 12(b)

When ruling on a motion to dismiss a complaint pursuant to FRCP 12(b)(6), it is well established that the Court must " accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips* v. *County of Allegheny,* 515 F.3d 224, 231 (3d Cir. 2008); *quoting Pinker* v. *Roche Holdings Ltd.,* 292 F.3d 361, 374 at n. 7 (3d Cir. 2002).

Notice pleading under FRCP 8(a), requires "only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Phillips* v. *County of Allegheny,* 515 F.3d at 231, *quoting Bell Atlantic Corp.* v. *Twombly,* 550 U.S. 544, 545 (2007).

Plaintiffs are required only to meet the simple above-stated standard ; not the " particularity" standard imposed by FRCP Rule 9, when it comes to fraud or mistake. What is more, Plaintiffs are specifically allowed to plead alternative claims and inconsistent claims and has here done so. Defendants ignore the clear wording of FRCP Rule 8 (d) and (e) which read as follows:

> Pleading to BeConcise and Direct; Alternative Statements; Inconsistency
>
> In General. Each allegation must be simple, concise and direct. No technical form is required.
>
> Alternative Statements of a Claim or Defense. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.
>
> Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.
>
> Construing Pleadings; Pleadings must be construed so as to dojustice.

This court must accept all factual allegations in Plaintiffs' Complaint as true and draw all reasonable inferences in favor of the Plaintiffs. *Cornell Companies, Inc.* v. *Borough of New* 834 F.2d 1163, 1164-64 (3d Cir. 1987). "[A] complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Phillips* v. *County of Allegheny,* 515 F.3d at 231, *quoting Bell Atlantic Corp.* v. *Twombly,* 550 U.S. at 545 (2007). The US Supreme Court made clear in *Twombly* that notice pleading "does not impose a probability requirement at the pleading stage." *Bell Atlantic Corp.* v. *Twombly,* 550 at 545. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *In re Burlington Coat Factory Securities Litigation,* 114 F.3d 1410 (3d Cir. 1997), *quoting Scheuer* v. *Rhodes,* 416 U.S. 232,236 (1974). *See also Wisniewski* v. *Johns-Manville Corp.,* 812 F.2d 81 (3d Cir. 1987) (noting that "[u]nder the federal notice pleading rules, the threshold for stating a cause of action to survive a Rule 12(b)(6) motion is very low").

There is no heightened pleading requirement in civil rights actions. "The Plaintiff in a civil rights action does not need to plead specific facts; rather, the complaint ' must only give the defendant fair notice of what the plaintiff s claim is and the grounds upon which it rests.' " *Cornell Companies, Inc.* v. *Borough of New Morgan,* 512 F. Supp. 2d 238, 269 (E.D. Pa. 2007), *quoting Thomas* v. *Independence Twp.,* 463 F.3d 285,295 (3d Cir. 2006).

The Third Circuit has made it clear that "a plaintiff will not be thrown out of court on a Rule 12(b)(6) motion for lack of detailed facts." *Id.* This Court in *Cornell Companies* enunciated a special standard for civil rights cases, such as Plaintiffs', that:

> civil rights complaint is not subjectto dismissal due to the absence of factual allegations. The Complaint is only required to set forth the facts necessary to provide notice of the claim and the basis for the relief sought. Should more facts be necessary to define the disputed facts and issues, the Federal Rules provide other procedural mechanisms for that purpose, such as discovery.
>
> ***
>
> The need for discovery before testing a complaint for factual sufficiency is particularly acute for civil rights plaintiffs, who often face informational disadvantages.

> Plaintiffs may be unaware of the identities and roles of relevant actors and unable to conduct a pre-trial investigation to fill in the gaps. *Id.* (internal citations omitted).

It is only at the summary judgment stage, after discovery has taken place, that "defendants can argue there is a lack of factual support to allow a claim against them to proceed." *Id.*

Given that Plaintiffs' facts pled are assumed to be true, Defendants arguing facts eviscerates their Rule l 2(b)(6) motion. The moving party cannot merely rest upon recitations of evidence supportive of its own position, since such differences present questions for the finder of fact, and not the judge deciding a motion to dismiss. *Bailets* v. *Pa. Tpk. Comm'n,* 123 A.3d 300 (Pa. 2015), *citing Alderwoods (Pennsylvania), Inc.* v. *Duquesne Light Co.,* 106 A.3d 27, 41 (Pa. 2014).

Defendants cite a host of case decisions rendered at summary judgment and procedurally subsequent thereto, even post-trial decisions. By definition, these cases involve an entirely different stage of litigation with differing standards of Court consideration. Summary judgment and other motions come after the parties have been availed discovery. In this case, discovery has not commenced. The mere citation of such cases by Defendants, regardless of their holdings, is itself an admission that this case should proceed, at least, through discovery after which Defendants may more appropriately make the same arguments at the summary judgment stage.

Here, at the pleading stage, Plaintiffs simply "must provide enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element' of a particular cause of action." *Phillips* v. *County of Allegheny,* 515 F.3d 224, 234 (3d Cir. 2008). Plaintiffs have done so. Moreover, a review of the Complaint hardly makes for the conclusion that Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief.

12(B) (1) Subject Matter Jurisdiction.

Defendants make the extraordinary argument that they are immune from suit, claiming that this Court lacks jurisdiction over them. This Court's jurisdiction was invoked by Plaintiffs Complaint as follows:

> This Court has subject matter jurisdiction over Plaintiffs' claims for relief under 28 U.S.C. Sections 1331, 1337, 1343, 2201, and 2202 since those claims are based in part on violation of Section 706 (f)((a) and (3) of Title VII of the Civil Rights Act of 1964, as amended 42. U.S.C, Section 2003-5(f) (1) and (3) ("Title VII")
>
> Jurisdiction is also invoked pursuant to 28 U.S.C. Section 1367, granting this Court supplemental or pendent jurisdiction over the state claims under the laws of Pennsylvania, including the Pennsylvania Human Relations Act, 43 P.S. Sections 951 et seq. as well as Pennsylvania statutory and common law claims, because the state claims and federal claims are so interrelated that they are the same case or controversy under Article III of the United States Constitution. ….

Again, Defendants cite cases for broad propositions which are factually and legally inapposite.

Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005) is wholly inapplicable, involving the destruction of a sailboat in the Virgin Islands with attendant admiralty concerns. The question was whether equitable tolling saved Hedges claim. The Appeals Court held that there was jurisdiction and upheld the court below in terms of dismissal of the case on statute of limitations grounds. Significantly, the Appeals Court found that the District Court erred "by evaluating the

Government's Motion to Dismiss under Fed. R. Civ. P. 12(b)(l) for lack of subject matter jurisdiction, rather than under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted."

Defendants then cite *Kehr Packages, Inc. v. Fidelcor, Inc.* 926 F.2d 1406 ((3d Cir. 1991) where, **following discovery** (emphasis supplied), defendants filed an FRCP 12(b)(l) motion and a motion for summary judgment. This case involved vastly different facts and RICO claims. The Third Circuit stated: "The district court granted this motion because it found the RICO claims in plaintiffs complaint to be legally insufficient. Thus, although the court denominated its order as one under Rule 12(b) (1), it appeared to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief could be granted." Further:

> The legal standard s governing these two motions are different. A district court can grant a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on the legal insufficiency of a claim. But dismissal is proper only when the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or, is wholly insubstantial and frivolous." Bell v. Hood, *327 US. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).* See also Oneida Indian Nation v. County of Oneida, *414 US. 661, 666, 94 S.Ct. 772, 776, 39 L.Ed. 2d 73 (1974)* (claim must be "so insubstantial, implausible, foreclosed by prior decisions of this Court, otherwise completely devoid of merit as not to involve a federal controversy"). Ordinarily, a court must assume jurisdiction over a case before deciding legal issues on the merits. Bell, *327 US. at 682, 66 S.Ct. at 776.* A Rule 12(b)(6) dismissal for failure to state a claim is not subject to the same limitations. The claim need not be wholly insubstantial to be dismissed. As this court has noted , "[the]he threshold to withstand a motion to dismiss under [Rule]l 2(b)(l) is thus lower than that required to withstand a Rule 12(b)(6) motion. *Lunderstadt , v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989) Kehr,* at "l. Standard and Scope of Review, par5")

The Third Circuit stated that a Plaintiff may be prejudiced if what is in essence a Rule 12(b)(6) challenge to a complaint is treated as a 12(b)(l) as the burdens are placed on different parties. Clearly Defendants are attempting this tactic here. However, Plaintiffs' claims are anything but immaterial, insubstantial, or frivolous. So as not to prejudice the Plaintiff in *Kehr ,* the Third Circuit Court of appeals chose to view the matter under FRCP 12(b)(6).

Defendants cite the case of *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977) which holds that in a Rule 12(b)(1) motion "the district court may not presume the truthfulness of plaintiffs allegations, but rather must "evaluate for itself the merits of [the] jurisdictional claims." This summary judgment opinion cited here involves Sherman Act applicability. Here the Third Circuit vacated the dismissal. Again, the prejudice posed for Plaintiff's in a 12(b)(l) context is noted:

> This 12(b)(l) factual evaluation may occur at any stage of the proceedings, from the time the answer has been served until after the trial has been completed. It is a combination of the timing of the factual jurisdictional attack, the plaintiff's having the burden of proof, and the court's having a free hand in evaluating jurisdictional evidence that can unfairly preclude Sherman Act plaintiffs from reaching the merits of their cases. And it is because the nexus they will have to establish to succeed on the merits is at least in part the same nexus they must allege or even prove to withstand jurisdictional attacks, that we feel it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at a trial stage. In the case sub judice, for instance, the plaintiffs had alleged substantial interstate connection and effects. This is not to say that the trial court may never

dismiss a Sherman Act claim on a factual 12(b)(l) motion. In an unusual case, it may be clear that plaintiffs would not be able to prove the necessary interstate nexus. In the case before us, however, that inability is not apparent from the record. *Mortensen,* at par 28.

Most importantly, the Third Circuit also states "We have held that 'a complaint should not be dismissed for failure to state a claim unless is appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957). *Mortensen* at par 40. Clearly, in Plaintiffs' case, there are ample sets of facts which would entitle these Plaintiffs to relief.

Defendants cite *Markowitz v. Northeast Land Co.,* 906 F.2d 100, 103 ((3d Cir. 1990) purportedly to support their argument that "Where as here, no relief can be granted under any set of facts that could be proved, dismissal of claims under Rule l 2(b) is appropriate." *Markowitz* involved a motion to dismiss an amended complaint claiming that defendant's contracts for sale of land lots violated the Interstate Land Sales Full Disclosure Act. The District Court found that completion of construction within two years of the sale date made them exempt from that Act. Accordingly, it dismissed the complaint and refused pendent jurisdiction over state law claims. However, the Third Circuit reversed and remanded, branding this a 12(b)(6) matter.

What Defendants are really attempting through their 12(b)(l) motion is to directly attack the merits and prejudice the Plaintiffs, all as disallowed in *Red Square Corporation* v. *Novik, Inc.,* 2:07-cv-498-AJS filed August 2, 2007 where the USDC for the Western District of Pennsylvania cited the hereinbefore referenced *Bell* v. *Hood* and *Oneida Indian Nation* cases requiring that the claims be so insubstantial, implausible, foreclosed by prior decisions, or otherwise completely devoid of merit. This is clearly not the case here.

Plaintiffs' Six Counts Are Not Barred Under the Establishment Clause

While the Complaint speaks for itself and need not be parsed or taken out of context, it refers to basic Quaker tenets as espoused by a purportedly Quaker-related institution. Doing so does not require the Court to interpret questions of Quaker scripture, doctrine, or cannon. There is no mystery here. There are no Quaker hierarchy issues or sect competition characteristic of Establishment Clause cases. Rather the Complaint sought simply to depict the nature of the environment espoused and Plaintiffs' adherence to those simple tenets.

Defendants do not point to a single Quaker tenet that would have to be researched and adjudicated by the Court. Instead they simply re-reference the background described by Plaintiffs. Defendants fail to point out any specific problems that would require this Court to divest itself of its clear jurisdiction. They simply make a naked assertion which would exempt Defendants from the reach of civil rights statutes and a host of other statutes, all of which are neutral on their face and application.

While Defendants cited factually and legally inapposite cases, two key cases actually are on point. The Pennsylvania Supreme Court in *Connor* v. *Archdiocese of Philadelphia,* 975 A.2d 1084 (Pa. 2009) exhaustively analyzes the history and applicability of judicial abstention regarding religion. The Commonwealth Court in *Chestnut Hill College, vs. Pa Human Relations Commission,* 844 C.D. 2016 (Decided April 07., 2017) specifically provides for the application of civil rights protection to religious institutions. Simply reading those two cases undermines Defendants' claims.

The Supreme Court of Pennsylvania in *Connor,* begins as follows:

The single issue presented in the instant case is whether the civil courts of this Commonwealth have subject-matter jurisdiction over a tort suit alleging defamation and negligent infliction of emotional distress arising out of a parochial school's expulsion of a student for allegedly bringing a weapon to school, and the school' s communication of the expulsion to the school

community. Citing the long-standing common-law precept known as the deference rule, according to which civil courts decline to exercise jurisdiction over the cases that would require them to decide ecclesiastical questions, the lower courts held that they lacked jurisdiction over the instant case. For the reasons that follow, we hold that the lower courts erred in finding that the deference rule applies here, and we therefore reverse and remand the matter to the trial court for proceedings consistent with this Opinion.

The Supreme Court traced the origin and development of the "deference rule" commencing with *Watson v. Jones,* 13 Wall. 679, 80 U.S. 679, 20 L.Ed.666 (1872). This case involved a property dispute between a church and its national denomination. That did not mean that there was no role for civil courts as "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* At 797. Moreover:

As emphatic as the Watson Court was in refusing to decide questions of ' ecclesiastical law and religious faith,' however, the Court was careful to note that not all decisions made by church authorities related to such doctrinal questions. Thus the Court conceded that, for example: if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. *Id.* at 733.

Then the context was then broadened with the introduction of "neutral principles " . *Jones v. Wolf,* 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) was the deference rule case prior to *Connor,* permitting courts to get involved as:

The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general-flexibility in ordering private rights and obligations to reflect the intention of the parties." *Jones,* 443 U.S. at 603, 99 S.Ct. 3020.

Furthermore, the Court in *Connor* specifically notes that "All disputes among members of a congregation, however, are not doctrinal disputes. Some are simply disputes as to meaning of agreements on wills, trusts, contracts, and property ownership. These disputes are questions of civil law and are not predicated on any religious doctrine."

Regarding non-property disputes, the *Connor* Court canvassed the various jurisdictions and concluded that:

> Our research has convinced us that the most thorough and persuasive analyses are yielded by a claim-by-claim, element-by-element approach to the question of whether to apply the deference rule.....Therefore, we conclude that in determining whether to apply the deference rule, the fact-finding court must: (1) examine the elements of each of the plaintiff's claims; (2) identify any defenses forwarded by the defendant; and (3) determine whether it is reasonably likely that, at trial, the fact-finder would ultimately be able to consider whether the parties carried their respective burdens as to every element of each of the plaintiff's claims without "intruding into the sacred precincts. *Beaver Butler,* 489 A.2d at 1321

Finally, *Connor* reinstated Appellant's negligent emotional distress and defamation claims as Appellees did not seek to satisfy the elements-based approach. Nor, as here, did they cite relevant religious authority. Specifically, when it came to the matter of defamation the *Connor* court recalled

the admonition in *Cantwell v. Connecticut,* 310 U.S. 296, 303-04, 60 S.Ct. 900, 84 L. Ed. 1213 (1940) that while the freedom to believe is absolute, such is not the case with respect to the freedom to act.

Therefore, the *Connor* Court stated that the "extra-judicial cases cited by appellees in which the deference rule was applied are not persuasive in this instance, as resolution of the disputes at issue in those cases would obviously intrude into the sacred precincts." The Court concluded by saying, "Simply put, it does not appear that this case will require 'Caesar [to] enter [] the Temple [and] decide what the Temple believes." *Beaver-Butler,* 489 A.2d at 1320, reversing the Superior Court.

More precisely, Commonwealth Court in *Chestnut Hill College v. Pennsylvania Human Relations Commission* No. 844 C.D. 2006 (Decided April 07, 2017) makes clear that Defendants are not exempt from civil rights laws:

> This case involves an issue of first impression, whether a Catholic college's expulsion decision is reviewable by the Pennsylvania Human Relations Commission. (Commission). A former African-American student, Allan-Michael Meads (Student) filed a Complaint alleging Chestnut Hill College (College) expelled him based on racial discrimination in violation of the Pennsylvania Human Relations Act (Act): and the Pennsylvania Fair Educational Opportunities Act (PFEOA). This Court granted College permission from the Commission' s interlocutory order that denied a motion to dismiss premised on a lack of jurisdiction. College argues the Commission lacks jurisdiction because it is not a public accommodation; rather, it is distinctly private based on its religious nature. College also contends that the religion clauses of the First Amendment preclude the Commission from reviewing its expulsion doctrine.
>
> Upon review, we affirm the denial of the motion to dismiss. Further, we conclude College did not identify any religious doctrine so as to trigger entanglement.
> Accordingly, we remand the matter to the Commission.

In its brief, the Commission claimed that the Act and PFEOA were both " neutral anti discrimination" Jaws. The Student claimed that the case's resolution did not involve issues of Catholic doctrine or entanglement between church and state. Moreover, he claimed that the First Amendment did not bar decisions regarding discrimination, with the elimination of racial discrimination of paramount concern. So too is this the case here against Friends Central.

The Court referenced the "deference rule" as set forth in *Orthodox Diocese v.*

Milivojevich. 426 U.S. 696 (1976) and the fact that the U.S. Supreme Court refined it in later decisions holding that there are "neutral principles" of law that apply to civil disputes involving religions institutions that are "flexible enough to accommodate all forms of religious

organization and polity" *Jones v. Wolf,* 443 U.S. 595, 604 (1979) so as "to determine the underlying issue by utilizing neutral purely legal principles without delving into ecclesiastical matters." *Peters Creek United Presbyterian Church v. Wash. Presbytery* of Pa. 90 A.3d 95, 104- 05 (Pa Cmwlth, 2014). Reference is also made to the *Connor* Court's three prong approach which enables a fact-finder to determine whether the deference rule applies, i.e.,

> (l) examine the elements of each of the plaintiff's claims;
> identify any defenses forwarded by the defendant; and
> determine whether it is reasonably likely that at trial, the fact-finder would ultimately be able to consider whether the parties carried their respective burdens as to every element of each of the Plaintiff's claims without intruding into the sacred precincts [or ecclesiastical matters.]. *Id.* At 1103.

As in *Chestnut Hill,* so too here. Given Plaintiffs claims, there is no need to construe religious doctrine. As in *Chestnut Hill,* Defendants do not cite any religious doctrine-based defense to the racially-motivated discrimination claims. Furthermore, the Court held that the state ruling was consistent with federal jurisprudence. (See *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.,* 477 U.S. 619 (1986)

As to the "entanglement doctrine", the Court stated that "Courts find an unconstitutional entanglement with religion in situations where a ' protracted legal process pit[s] church and state as adversaries,' and where the government is placed in a position of choosing among "competing religious visions." *Equal Emp't Oppty. Comm 'n v., Catholic Univ of Am.,* 83 F.3d 455,465 (D.C. Cir. 1996) Entanglement must be "excessive" before it runs afoul of the Establishment Clause. *Mobley v. Coleman,* 11 A.3d 216, 220 (Pa. Cmwlth. 2015)

As is the case here, in considering the application of civil rights laws, the Court noted that "Here, College offers mere speculation that adjudication of Student's racial discrimination claim will result in unconstitutional entanglement. College does not explain how Student's expulsion decisions require review of ecclesiastical matter.... Thus College does not meet this threshold burden." Clearly, this same analysis should dispose of Defendants motion in the case at hand.

The remaining cases cited by Defendants are readily distinguishable factually, procedurally, and legally:

Presbyterian Church v. Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969) is a post verdict case about faith and practice between local churches and a general church. The Supreme Court decided that there was no place for civil courts to determine purely ecclesiastic questions, as was clearly the case in that matter and not here.

Similarly, *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976) dealt with a dispute over control of the Serbian Eastern Orthodox Diocese for the United States and Canada regarding the power to appoint and remove Bishops. This post-trial opinion again suggests that this case should proceed to discovery.

Defendants cite a Connecticut case, *DeCorso v. Watchtower Bible & Tract Soc'y of N Y , Inf.,* 829 A. 2d 38 (Conn app. Ct. 2003) as being "very much on point." Yet this summary judgment case called for a determination as to infliction of emotional distress within the context of the Jehovah's Witness Church teachings and issues of "clergy malpractice".

Next, Defendants move to Massachusetts, citing *Murphy v. Int'l Soc'yfor Krishna Consciousness,* 409 Mass. 842, 851, 571 N.E. 2d 340 (Mass. 1991) a case on post-trial motions, dealing with whether there was an impermissible restraint on the right to practice religion freely and the matter of intentional interference with parental rights. The court stated that "Both this court and the United States Supreme Court have recognized that the concept of the free exercise of religion involves both belief and activity, and, while the freedom to believe particular religious principles is absolute and may not lawfully be infringed, the freedom to act in response to religious beliefs does not enjoy the same immunity." The Court concluded by vacating the judgment and remanding the remaining claims for retrial.

Next, the Delaware companion cases of *Tell* v. *Roman Catholic Bishops and Ford vs. Roman Catholic Archbishop,* 2010 Del Super. LEXIS 162 (Super. Ct. Apr. 26, 2010) dealt with whether the Court could assert personal jurisdiction over out-of-state Roman Catholic dioceses and a parish, regarding alleged sexual abuse in Delaware by priests employed by the out-of-state entities. This was a case of personal jurisdiction. Here the Court decided that while canon law may regulate the relationship between diocese and priest, it does not supply the test for personal jurisdiction under Delaware law.

Also cited is a Philadelphia Common Pleas case, *Patterson* v. *Shelton,* No, 2945, 2014 Phila Ct. Comm. Pl. LEXIS 359 (C.P. Nov 10) which is factually inapposite: "The crux of the allegations in the Complaint was that the Appellee, the head of the Church of the Lord Jesus Christ of the

Apostolic Faith ("the Church") misappropriated church funds during the time period of 1991-1994. This court, applying the Deference Rule, determined that it could not adjudicate this dispute without interpreting church doctrine and concluded that the court lacked subject matter jurisdiction. "The Court then referred to the 19-year duration of the case, which did not end with this ruling. Finally, it cited the one exception referenced in *Connor* which Defendants here choose purposely to ignore, namely the "neutral principles of law approach" which allows "civil courts to exercise jurisdiction over cases involving religious institutions that can be decided based upon secular legal authority." *Id.* at 585-586 setting forth the neutral principles previously referenced herein. The Court then canvassed misappropriation cases cross
country and examined the church Bylaws which provided that all Church property is the personal property of the Appellee. The court upheld the trial court decision that it could not use the principles of law and would otherwise have to '" intrude into the sacred precincts" of the Church. This case is simply factually and legally inapposite to Plaintiffs' case.

Defendants cite *Southeastern Pennsylvania Synod of the Evangelical Lutheran Churcn in America* v. *Meena,* 19 A.3d 1191, (Pa. Cmwlth.2011), a summary judgment decision over an inter-synod property dispute.

Defendants cite another case with a " long and winding history", *Askew* v. *Trustees of the General Assembly of Church,* 776 F. Supp. 2d 25 (E.D. Pa. 2011), dealing with a factional dispute in the church and a request that a receiver be appointed, all necessitating an inquiry into high ecclesiastical matters.

Defendants cite *Askew v. Trustees of the General Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith Inc.,* 776 F. Supp. 2d 25 (E.D. Pa. 2011) another post discovery decision. According to the second paragraph, "T he dispute stems from an internal schism in the Church of the Lord Jesus Christ of the Apostolic Faith." . The Complaint sought a declaration that the church's Articles of Incorporation were illegal, alleging breach of fiduciary duties, asking for restitution over misappropriation of funds and appointment of a custodian.
Again, the court referred to the " non-entanglement principle" having civil courts defer resolution of issues involving religious doctrine to the highest court of a hierarchical church organization. However, the Court was careful to qualify this by stating:

> Still the First amendment does not remove from the purview of the civil courts all controversies involving religious institutions. (citation omitted) When a church dispute turns on a question devoid of doctrinal implications, civil courts may employ neutral principles of law to adjudicate the controversy. *Id.* at Section III, par 5, page 10

Here, Plaintiffs' Complaint is devoid of any questions of doctrinal implications whatsoever. Defendants cite *Warnick* v. *All Saints Episcopal Church,* 38 Pa. D.&C. 5th 38 (C.P. Phila), claiming mistakenly that defamation and breach of contract claims were rooted in public discussions of adherence to certain religious moral principles. Yet "[T]this case involves the constitutional question of whether a civil court may interfere with how a church chooses a priest." The Court bases its decision on an extensive record, concluding "Even if the Bill of Rights did not contain an Establishment Clause and a Free Exercise Clause protecting religious freedom, Defendants would be entitled to summary judgment because Father Warnick failed to make out the elements of his claims or offer sufficient evidence under the law for any of his claims to proceed to trial." Plaintiffs Eure's and Helwa' s claims are not rooted in, nor have any connection to religious principles. They should be afforded the same opportunity for a record.

Finally, Defendants string cite the following cases, from diverse jurisdictions, all factually inapposite and mostly at much later procedural stages:

Lee v. Sixth Mount Zion Baptist Church of Pittsburg, Civil Action No. 15-1599, 2017 U.S. Dist. LEXIS 133858 at* 1 (W.D. Pa. Aug 22, 2017) dealt with an employment dispute between Pastor and Church, a summary judgment case.

Laidlaw v. *Midatlantic Converge Worldwide,* No. 00864, 2017 Phila C.t Com. Pl. LEXIS 203 at *1 (C.P. July 19, 2017) is a summary judgment opinion arising from an affair between a spouse and church pastor, based upon what the court described as obsolete "heart balm" torts.

Himaka v, Buddhist Churches of Am., 917 F. Supp. 698, 709 (N.D. Cal. 1995) is a summary judgment opinion involving a Buddhist minister's claims of harassment. There, Title VII claims were upheld despite an earlier motion to dismiss. Plaintiff was permitted to file a Second Amended Complaint alleging causes of action for sexual harassment, disparate wage treatment, other employment discrimination on the basis of gender and retaliation, all in violation of Title VII. Here the Court considered the evidence with respect to the wage discrimination claim, quid pro quo sexual harassment claim, hostile work environment claim evaluating them according to the record. Only on retaliation with respect to funding and breach of implied covenant of good faith and fair dealing claims did the Court find First Amendment obstacles. Of note, this is the only case involving Title VII cited by Defendants and it actually supports Plaintiffs' position.

Pielech v. Massasoit Greyhound, 423 Mass. 534, 668 N.E. 2d 1298 (1996) is another summary judgment opinion. Plaintiffs, pari-mutuel clerks, were employed by the Defendant race track. Despite their regular schedule they requested Christmas day off. Their request was denied. Plaintiffs submitted supporting information that they were devout Roman Catholics. The Court invoked the "Entanglement Doctrine" declaring that protection for Plaintiffs would promote excessive government entanglement with religion.

Geraci v. Eckankar, 526 N.W. 2d 391 (1995) is a Minnesota Appeals Court decision on Plaintiff s appeal from summary judgment, concluding that the First Amendment of the US Constitution and provisions of the Minnesota Constitution insulate a religious employer from discharge-based claims brought by a non-minister. Defendant Eckankar "is an hierarchical church and religion "throughout the US and the world". Plaintiff s membership in the religion was a condition of her employment, unlike the employment requirements at Friends Central.

To conclude, the cases cited by Defendants are factually inapposite. Plaintiffs' case is not about doctrinal differences, not about excommunication, not about allocation of church property, not about church hierarchy, and not about anything that requires doctrinal examination. Friends Central is not in and of itself a religious entity. Actually, it takes pains to state that it differs in terms of its approach. There is nothing articulated requirement that all students and members of the faculty be devout Quakers and that all matters are to be conducted according to some specifically referenced Quaker doctrine which would reign supreme over the rules of society.

Defendants are not a professed religious cult exempted from the laws of society. Plaintiffs quote simple concepts and Defendants professed commitment to the same rules and regulations that govern the broader society.

> As described on its current website, "Friends' Central School is an independent, coeducational Quaker day school. ....Our pedagogy is grounded in continuing revelation, reflection, integrity, and a willingness to accept responsibility. Under the heading "A Quaker History of Inclusivity and Diversity" FCS states the following:
>
> When Friend s' Central School was founded in 1845, it was a time of great division among Quakers. Our school was founded to include and serve all Quakers and was, by design, co-educational and open to non-Friends' from the day it opened. This interest in inclusivity continues today as Friends' Central strives for racial, religious and socio economic diversity in its student body and among its faculty.
>
> We are committed to building and maintaining an inclusive and diverse community. All constituencies-faculty, staff, students, administrators, parents, trustees, and alumni/ae- are responsible for an awareness of and ongoing dialogue around equity issues of race and ethnicity, gender, sexual orientation, privilege, religion, physical ability, and family structure, as well as for enhancing the Philosophy of Inclusivity and Awareness articulated in our Diversity Statement.

It is sadly ironic that Defendants profess to accept responsibility, but by their motion hypocritically claim immunity from responsibility under the law. Quite clearly, Plaintiffs ' reference to these and other statements do not lead us into a morass of entanglement with religion. Rather, Plaintiffs references provide the Court with insight into the environment in which Plaintiffs worked and how they were led to believe they should act. No consideration of their lawsuit occasions delving into religious doctrine. Rather this lawsuit and its claims prompt a jury to ultimately deciding whether statutory and common law were breached.

Counts I, II, **and ID Do Not Fail to State Claims.**

Counts I is a claim of Violation of Title VII of the U.S. Civil Rights Act of 1964. Count II is a post-employment retaliation claim under Title VII. Count III is a claim under the Pennsylvania Human Relations Act. While Defendants may choose to address some of those counts together, each count must be considered by this Court on its own.

The Hostile Work Environment Claims of Counts I and ill

Plaintiffs have adequately described what amounts to a hostile environment in consideration of their protected characteristics, and not as Defendants claim as a result of a postponement, and ultimately outright cancellation of an outside guest speaker's appearance, or of "supervisors' attempts to engage in discourse and discussion concerning the Plaintiffs attendance at a student protest." Defendants are here impermissibly fabricating a factual narrative to suit their desires, in clear violation RFCP 12(b) standards.

In contrast to Defendants' proposed factual description objected to above, regarding a workplace actually permeated with discriminatory intimidation, Plaintiffs have supplied the better part of 42 pages of detailed narrative claiming discrimination and a hostile environment which are incorporated by reference.

Again, Defendants rely on a case at the summary judgment stage, *National Railroad (Amtrak) v. Morgan,* 536 U.S. 101 (2002) which involved strict enforcement of a time period covered by an EEOC charge. At page 115, the U.S. Supreme Court stated:

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. See 1 *B. Lindemann & P. Grossman, Employment Discrimination Law* 348- 349 (3d ed. 1996) (hereinafter Lindemann) ("The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence"). The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a simple act of harassment may not be actionable on its own. See *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21 (1993). ("As we pointed out in *Meritor [Savings Bank, FSB v. Vinson ,* 477 U.S. 57, 67 (1986),] ' mere utterance of an ... epithet which engenders offensive feelings in a[n]employee *ibid.* (internal quotation marks omitted), does not sufficiently affect the conditions of employment to implicate Title VII") Such claims are based on the cumulative effect of individual acts.

The Court elaborates by stating that it examines all of the circumstances including whether it has unreasonably interfered with an employee' s work performance. Plaintiffs Eure and Helwa can further particularize their circumstances during discovery. Plaintiffs have adequately pied events and acts, the cumulative effect of which can easily be construed as a hostile environment.

Defendants also cite *Rasheen Griffin v. Harrisburg Property Services* I, 421 Fed. Appx.

204 (3d Cir. 2011) which is specifically labeled "Non-Precedential" and was a summary judgment decision ruling that Plaintiff had failed to present sufficient evidence.

With respect to the elements of a hostile environment claim , Defendants rely on another summary judgment case: *Jones v. Norton,* 2008 U.S. Dist. LEXIS 7466 (E.D. Pa. 2008) where, after discovery, it was decided that the plaintiff could not prove a single element of a hostile environment, that he was not detrimentally affected within the meaning of Title VII, and that there was no basis for respondeat superior liability. Unlike Plaintiffs case here, all of Jones' allegations stemmed from a single incident.

Defendants cite *Castleberry v. ST! Grp,* 863 F.3d 259 (3d Cir 2017) for the proposition that the correct standard for a hostile environment is 'severe or pervasive'. However, the Third Circuit questions the notion that a single incident cannot qualify, holding instead that the focus should be on "severe" and "pervasive."

Of paramount importance however is the fact that in reversing the dismissal the Third Circuit says:

But most importantly, what Defendants and the District Court ignore is that in every case they cite the claim was resolved at summary judgment. Under the McDonnell- Douglas framework, a claim of employment discrimination necessarily survives a motion to dismiss so long as the requisite prima facie elements have been established. That is so because "it may be difficult" for a plaintiff to prove discrimination "[b]efore discovery has unearthed relevant facts and evidence." *Swierkiewicz v. Sorema N A.,* 534 U.S. 506, 512(2002) Here Plaintiffs have established those elements, and thus their claims should not have been dismissed at this early stage of the litigation.

The cases that Defendants cite with respect to qualification of a single incident all predate *Castleberry.*

Finally, Defendants cherry pick the Complaint claiming that "Plaintiffs have not noted any instances of race- or gender-based derogatory comments or harassment.", while simultaneously acknowledging Plaintiff's claims in Paragraphs 15 and 16.

Plaintiffs Eure and Helwa have more than adequately met the applicable standardwith respect to Counts I and III.

Title VII and the PHRA Do Cover Sexual Orientation

Defendants are simply incorrect in asserting that Title VII and the PHRA do not cover gender or sexual orientation. The case cited, *SEPTA v. City of Phila.,* 159 A.3d 443 (Pa. 2017) does not support Defendants' argument, as it instead focused on whether SEPTA is exempted and/or sovereignly immune from the jurisdiction of Philadelphia civil rights provisions.

Nor does the summary judgment opinion in *Prowel v. Wise Bus. Forms, Inc.* 579 F.3d 285 (3d Cir. 2009) support Defendants' argument. It focused on whether there were sufficient facts for gender stereotyping to be submitted to a jury. In addressing *Bibby v. Philadelphia Coca-Cola Bottling Co.,* 260 F.3d 257 (3d Cir. 2001), which itself admitted that things were changing, the Third Circuit made a clear pronouncement as to the state of the law:

In evaluating Wise' s motion for summary judgment, the District Court properly focused on our decision in *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257 (3d Cir. 2001), wherein we stated "Title VII does not prohibit discrimination based on sexual orientation. Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation," Id., at 261 (citation omitted). This does not mean, however, that a homosexual individual is barred from bringing a sex discrimination claim under Title VII which plainly prohibits discrimination"because of sex", 42 U.S. Section 2000-2(a). As the District Court noted, "once a plaintiff shows that harassment is motivated by sex, it is no defense that it may also have been motivated by anti-gay animus." Dist

Ct. Op. at 6 (citing *Bibby,* 260 F.3d at 265. In sum
" [w]hatever the sexual orientation of a plaintiff bringing a same-sex sexual harassment claim, that plaintiff is required to demonstrate that the harassment was directed at him or her because of his or her sex." *Bibby.* 260 F.3d at 265.

Further, despite conflicting appellate court rulings on the matter of sexual orientation, it is noteworthy that the U.S. Supreme Court has not had cause to take up the issue.

What is more, the EEOC continues to interpret and enforce Title VII's prohibition of sex discrimination "as forbidding any employment discrimination based on gender identity or sexual orientation." (EEOC Website: What You Should Know About EEOC and the Enforcement Protections for LGBT Workers.) The EEOC website also contains " Examples of Court Decisions Supporting Coverage of LGBT- Related Discrimination Under Title VII.", including *EEOC v. Scott Med. Health Ctr.,* P.C. _F. Supp. 3d _ , 2016 WL 6569233 (W.D. Pa. Nov 4, 2016) where a motion akin to Defendants was denied, as the Court held that "Title VII's
' because of sex' provision prohibits discrimination on the basis of sexual orientation." The case which still controls is *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) holding that employment discrimination based on sex stereotypes is unlawful sex discrimination under Title Vil. The Court stated that Title VII's " because of sex" provision strikes at the "entire spectrum of disparate treatment of men and women resulting from sex stereotypes" *Id.* (quoting) *City of Los Angeles Dep't of Water& Power v. Manhard,* 435 U.S. 702, 707 n.13 (1978) (internal citation omitted." An expansive view was also taken by the Supreme Court in *Oncale v. Sundowner Offshore Servs.,* 523 U.S. 75, 79-80 (1998) where Justice Scalia stated in the majority opinion that while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII... statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils... "

Plaintiffs Have Stated a Claim for Post- Employment Retaliation

Plaintiffs have adequately stated a claim for post-employment retaliation . There was nothing at all "bland" about the scenario described by Plaintiffs, where Defendants went out of their way to express disdain, disparage and deliberately place Plaintiffs in a false light, all because well after their firing and without the use of school instrumentalities, they scheduled an off-campus meeting with former students. This is not something that should now be dealt with as a matter of law. It certainly is not the case that there are no set of facts that Plain tiffs could aver, such that this claim be dismissed.

Count VI-Negligent Supervision is not pre-empted by the PHRA.

Plaintiffs have included a count for negligent supervision of Defendant Sellers against Board Chair Scott and individual board members. Now that Defendants have argued that the PHRA does not apply to this case when it comes to Plaintiffs gender discrimination claims, they argue that the PHRA pre-empts Plaintiffs' Count VI. They cannot have it both ways.

Aside from the fact that the Federal Rules of Civil Procedure permit pleading of alternate theories of liability , the body of fact pleading is anything but co-terminous with the discrimination claims.

Defendants invoke *Kountry Kraft Kitchens,* No. 11-474, 2012 WL 6561510, at* 14 (M.D. Pa. Dec. 17, 2012. There the Middle District of Pa, indeed held that there was pre-emption, after noting FRCP 8(d)(3) which states that "[a] party may state as many separate claims or defenses as it has, regardless of consistency" as well as FRCP 18 allowing a part to join "independent or alternative claims.". The Court claimed in Footnote 4 that given ongoing discovery " Randier should be in a position to determine which cause of action to pursue." Given that discovery has not started, Plaintiffs here are not in such a position.

V. Conclusion

For all of the above reasons, Plaintiffs' case should be permitted to proceed to discovery.

In the unlikely event that this Court should find any of the counts to be infirm, then Plaintiff requests the opportunity to replead.

Respectfully Submitted

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