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

ARIEL EURE, *et al.*, Plaintiffs, v. FRIENDS' CENTRAL SCHOOL CORP., *et al.*, Defendants.	No.: 2:18-cv-01891-PBT CIVIL ACTION - LAW

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE FRIENDS DEFENDANTS[1] FOR DISMISSAL OF THE COMPLAINT

I. PRELIMINARY STATEMENT

The Friends Defendants, by and through their undersigned counsel, hereby move to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. The Friends Defendants respectfully submit this Memorandum of Law in Support of their Motion to Dismiss the Complaint filed by the plaintiffs, Ariel Christina Eure and Layla Helwa.[2] Under the Establishment Clause of the First Amendment to the U.S. Constitution, each of the six counts is subject to dismissal for lack of subject matter jurisdiction. Furthermore, several of the counts are subject to dismissal for failure to state a claim upon which relief can be granted based upon settled statutory and decisional law.

[1] For purposes of this submission, the defendants, Friends' Central Corp., Craig Sellers and Philip Scott and unidentified Jane and John Does, will be referred to as "the Friends Defendants" or individually as "FCS," "Sellers" and "Scott".

[2] For purposes of this submission, the plaintiffs, Ariel Christina Eure and Layla Helwa, will collectively be referred to as "Plaintiffs" or individually as "Eure" and "Helwa."

II. PROCEDURAL HISTORY

Sometime after March 9, 2017, FCS was served with Plaintiffs' Notices and Charge of Discrimination pursuant to Title VII of the Civil Rights Act ("Title VII"), which were issued by the Philadelphia Office of the United States Equal Opportunity in Employment Commission ("EEOC"). For the Eure charge (No. 530-2017-01868), boxes for race, color, and sex discrimination were ticked, as well as for retaliation. For the Helwa charge (530-2017-01869), boxes for race, color, sex, and religion-based discrimination were ticked, as well as for retaliation. On December 12, 2017, Eure and Helwa filed amended charges to include an allegation of post-employment retaliation. On March 12, 2018, the EEOC issued right-to sue letters. Plaintiffs filed the instant Complaint on May 7, 2018.[3]

III. RELEVANT BACKGROUND – ALLEGATIONS OF THE COMPLAINT

A. General Background

The Complaint[4] sets forth claims surrounding events in February 2017 precipitated by the Plaintiffs' engagement of a speaker at FCS. *See* Complaint ¶¶ 26-28. Plaintiffs allege in their Complaint that Art Hall, Upper School principal, and Assistant Head of School, Mariama Richards, warned them against attending a student protest[5] as it would be detrimental to their

[3] A copy of the six-count, 56-page Complaint is annexed hereto as Exhibit A.

[4] In conjunction with a motion under Rule 12(b)(1) for lack of subject matter jurisdiction, the district court may not presume the truthfulness of plaintiff's allegations, but rather must "evaluate for itself the merits of [the] jurisdictional claims." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Furthermore, although courts accept as true all facts alleged by the plaintiff in the complaint as well as any reasonable inferences that can be drawn from those facts when considering a motion to dismiss pursuant to Rule 12(b)(6), *see, e.g., Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993), the Friends Defendants make no admissions as to them and demand strict proof thereof.

[5] Per the Complaint, after conducting a February 8 walkout of the Meeting for Sharing, on February 10, students conducted a protest relating to the postponement of the outside teacher's speaking engagement. Plaintiffs allege that, as club advisors, they went to the gymnasium with the students and claim that they were never told not to attend the student protests. *See id.* ¶¶ 31-35.

positions with FCS. *See* Complaint ¶¶ 31-33. Plaintiffs admit in their Complaint that they refused to heed their supervisors. *See id.*

Plaintiffs have raised six counts in their Complaint. Counts I, II, and III involve alleged civil rights violations under Title VII and the Pennsylvania Human Relations Act ("PHRA"), while Counts IV, V, and VI sound in defamation, false light, and negligent supervision, respectively.

B. Allegations Identifying the Parties

The Complaint describes Eure as a "gay African American female" who at the time of the events described in this suit was teaching English Literature and World History at FCS, and who claims membership in protected categories of individuals. *See* Complaint ¶ 3. It describes Helwa as a "brown-skinned gay female of Egyptian/Puerto Rican descent. . . who is also a member of the Muslim religion" who at the time of the events described in this suit was teaching history at FCS, and who claims membership in protected categories of individuals. *See id.* ¶ 4.

Plaintiffs describe FCS as a Pennsylvania non-profit corporation overseen by a Board of Trustees and note that FCS describes itself as "guided by the Quaker testimonies of simplicity, peace, integrity, community, equality and stewardship." *Id.* ¶ 5. The Complaint identified Sellers as FCS's Head of School, a "self-described Quaker," and an attorney. The Complaint alleges as to him: "Despite his professed adherence to Quaker precepts, at all times set forth herein he orchestrated, set in motion, and directed events, personally making the decision to suspend Plaintiffs and then to fire them, all the while conducting a campaign to defame the Plaintiffs even after their firing." *Id.* ¶ 6.[6]

[6] Philip Scott and "Jane and John Doe" FCS board members are listed in the caption; however, no information is supplied as to them in this portion of the Complaint.

C. The Religious Underpinnings of Plaintiffs' Claims

Dozens of allegations in the Complaint reflect the religious underpinnings of Plaintiffs' claims. These many allegations bring into issue tenets of the faith and practice of the Religious Society of Friends. Here are several examples of the many such allegations: Plaintiffs' descriptions of the "absolute tragedy" that "a school which professes to operate according to the fundamental Quaker principles of tolerance has proven to [sic] intolerant," their allegation that they were attracted to FCS "based upon the school's representations that it was a Quaker learning institution," their reliance on the FCS website, which says in part that "FCS . . . has been guided by the Quaker testimonies of simplicity, peace, integrity, community, equality and stewardship," and the Friends Defendants' alleged "patronizing disdain for fundamental Quaker values," the Friends Defendants' decision not to renew Plaintiffs' contracts as "the result of a deliberate and thoughtful Quaker decision-making process. Complaint ¶¶ 1, 11, 13, 33, 62.

The foregoing is just a sampling of the many allegations that are laden with the guiding principles and testimonies of the Religious Society of Friends. As detailed in a later following section of this Memorandum, Plaintiffs have grounded their Complaint on the quality of FCS and the other defendants' adherence to the Religious Society of Friends' guiding principles, as well as their own adherence. The pages and pages of these religion-based allegations will be addressed below in more detail.

D. Counts of the Complaint

1. Count I

Count I of the Complaint is stated by both Plaintiffs against FCS and is couched as a violation of Title VII of the Civil Rights Act of 1964, as amended, for "Discrimination based upon "Race, Color, Sex (including sexual orientation), Religion, Maintenance of a Hostile Work

Environment, and Retaliation." Plaintiffs allege they have been discriminated against illegally because of their race, color and sex; Helwa also alleges that she was discriminated against because of her religion. *See* Complaint ¶¶ 75-78. They allege that FCS is responsible for retaliating against Plaintiffs' "standing up for their rights," complain of discriminatory treatment and allege the existence of a hostile work environment. They allege the applicability of *respondeat superior*. *See id.* ¶¶ 79-83. Plaintiffs set forth no facts reflecting a hostile work environment, instead 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. *See id.* ¶¶ 84-86.

2. Count II

Count II of the Complaint is stated by both Plaintiffs against FCS and is couched as a violation of Title VII of the Civil Rights Act of 1964, as amended, for "Post-Employment Retaliation." Plaintiffs aver that FCS's retaliation against Plaintiffs did not stop with their firing but was typified by purported malicious publications and attempted obstruction of an EEOC investigation, which allegedly persisted after their filings with the EEOC and Pennsylvania Human Rights Commission. *See id.* ¶¶ 87-89. Plaintiffs claim that Section 704 of Title VII as cited in *Stezzi v. Citizens Bank of Pennsylvania* makes it unlawful for an employer to discriminate against employees because they have opposed an unlawful practice or made a charge, and that FCS violated Title VII by issuing communications that went to and beyond the Friends' Central community, and that FCS is liable for discrimination under the doctrine of *respondeat superior* due to the action of its employees. *See id.* ¶¶ 90-94.

3. Count III

Count III of the Complaint is stated against by both Plaintiffs against FCS and is couched as a violation of Violation of the Pennsylvania Human Relations Act, for "Discrimination based upon "Race, Color, Sex (including sexual orientation), Religion, Maintenance of a Hostile Work Environment, and Retaliation." Plaintiffs allege violations of the Pennsylvania Human Relations Act *("PHRA"), stating that they are in protected classes, and that they have been discriminated against, as detailed in their charges filled with the EEOC. *See id.* ¶¶ 95-97. They claim that Defendant FCS is liable for the acts of management and their coworkers, particularly Defendant Sellers, because they knew of their conduct and did nothing, because FCS and its board established a corporate culture encouraging discrimination, harassment and retaliation, and that this conduct has impaired Plaintiffs' ability to gain suitable employment. *See id.* ¶¶ 98-102.

4. Count IV

Plaintiffs claim that all of the defendants defamed them by "speaking about them" to the FCS community and the media, and that offending statements were made and/or approved by defendant Sellers. They further claim that: these statements can be accessed via a Google search and that this constitutes re-publication; the statute of limitations has been tolled because a writ has been served upon Defendant Sellers; unidentified Board members also republished defamatory statements. *See id.* ¶¶ 103-104.

Plaintiffs claim that: language directed at Plaintiffs was actuated by malice, or at least negligence, and is therefore not privileged; statements "made the clear inference" that Plaintiffs had done something wrong; Defendants' statements harmed the reputation of Plaintiffs in that they have had to "rebut defamatory allegations" in job interviews and have been precluded from getting suitable employment. *See id.* ¶¶ 105-107. Plaintiffs additionally aver that Defendants

have: abused privilege, impugned Plaintiffs' personal character and standing, thus creating defamation *per se*, and that Plaintiffs have suffered not only harm but special harm. They claim that Defendants have defamed Plaintiffs willfully, wantonly and with malice, and that punitive damages are appropriate as well as other damages. *See id.* ¶¶ 114-116.

5. Count V

Plaintiffs allege that they were placed in a "false light," alleging that Defendants' statements were not true, were offensive and publicized maliciously, and that punitive damages are appropriate in addition to other damages. *See id.* ¶¶ 117-121.

6. Count VI

Plaintiffs allege that FCS, Phillip Scott, and unidentified board members were negligent in their supervision of Sellers by allowing him to engage in discrimination and defamation of the Plaintiffs. Plaintiffs define negligence, and then state that Pennsylvania law allows a negligence claim if an employer knows or should have known that an employee was dangerous, careless or incompetent and that such employment might harm a third party. *See id.* ¶¶ 122-125. Plaintiffs allege that Defendants "promulgated a code of conduct" in the FCS Handbook and therefore owed a duty of care to Plaintiffs. They further allege that Sellers' past employment decisions and his practices of isolating others from the board, and his "obvious disdain for those who differed from him" and history of prior complaints made it reasonably foreseeable that Sellers would harm Plaintiffs and others. In addition to negligence, they also allege elevated *mens rea* such as malice, *etc.*, and request punitive damages in addition to other relief. *See id.* ¶¶ 126, 127.

III. ARGUMENT

A. Standard Applicable to a Motions to Dismiss under Rule 12(b) (1) and (6)

A pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The statement required by Rule 8(a)(2) must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), courts "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. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (internal quotation and citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausibility is required, and a claim only has factual plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). This standard, which applies to all civil cases, "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678.

The inquiry at the motion to dismiss stage is "normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

In contrast to that under Rule 12(b)(6), "the standard to be applied to a Rule 12(b)(1) motion is much more demanding." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). Where, as here, subject matter jurisdiction is challenged under Rule 12(b)(1), "'the plaintiff must bear the burden of persuasion.'" *Id.* (quoting *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)). Furthermore, the district court may not presume the truthfulness of plaintiff's allegations, but rather must "evaluate for itself the merits of [the] jurisdictional claims." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

As addressed below, settled jurisprudence militates for the Court's dismissal of the action for lack of subject matter jurisdiction pursuant to the Deference Rule of the Establishment Clause of the First Amendment to the United States Constitution. In the alternative, if the Court were to retain jurisdiction, the law is settled that Plaintiffs cannot make out the elements of several of their claims: there are separate grounds for dismissal of facets of the Title VII and PHRA claims in that they fail to meet their required elements; and the state law claim for negligent supervision is preempted by Plaintiffs' PHRA claims. Where, as here, no relief can be granted under any set of facts that could be proved, dismissal of claims under Rule 12(b) is appropriate. *See Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990).

B. Plaintiffs' Six Counts are Barred under the Establishment Clause.

Plaintiffs have pointedly and repeatedly couched their Complaint in terms of how well FCS and the other defendants have measured up to the Religious Society of Friends' guiding principles including with respect to the decision to suspend them and then terminate their employment and regarding the substance of the statement they allege defamed them and placed them in a false light. Although Plaintiffs may contend that their lengthy allegations are only offered by way of background and do not implicate the Establishment Clause, this contention

fails under settled law. Were the Court to countenance Plaintiffs' dozens of allegations concerning the quality of the parties' adherence to religious principles vis-à-vis the underlying occurrences, then this would necessitate judicial inquiry into the tenets, doctrine and discipline of the Religious Society of Friends.

Such an inquiry is impermissible under the Establishment Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Well-settled jurisprudence prohibits civil courts from resolving disputes that depend upon inquiry into questions of faith and doctrine. *See Presbyterian Church v. Hull Mem'l Presbyterian Church,* 393 U.S. 440, 449 (1969). In *Hull*, the Court reversed the Supreme Court of Georgia's decision upholding a jury award of church property to the local church on the basis of the jury's finding that the general church had abandoned original tenets and doctrine in adopting new tenets and doctrines on which the general church was founded. The Court said, "[i]f civil courts undertake to resolve such controversies in order to adjudicate [disputes], the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests." *Id.*

Indeed, the Supreme Court has instructed: "where resolution of the dispute cannot be made without extensive inquiry…into religious law and polity," courts are to accept the decision as binding. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976). This is the case even if the decision is seen as arbitrary or not in compliance with religious law or regulation, which is what Plaintiffs appear to be arguing here. *See id.* at 721.

Here are the allegations of the Complaint requesting that the Court weigh and interpret tenets of the faith and practice of the Religious Society of Friends and determine the quality of the parties adherence to them:

- In their opening statement, the Complaint describes as an "absolute tragedy" that "a school which professes to operate according to the fundamental Quaker principles of tolerance" has proven to [sic] intolerant." Complaint ¶ 1.
- Plaintiffs state that Defendants have made "false and pretextual assertions of being an educational institution adhering to Quaker values." *Id.* ¶ 2.
- They quote from an FCS document filed with the EEOC, in which FCS says: "Since its establishment in 1845 by the Religious Society of Friends, FCS . . . has been guided by the Quaker testimonies of simplicity, peace, integrity, community, equality and stewardship." *Id.* ¶ 5.
- Plaintiffs allege that they were attracted to FCS "based upon the school's representations that it was a Quaker learning institution" and that they relied upon those representations. *See id.* ¶ 11.
- They also stated that their work as faculty advisors for a proposed club for "Peace and Equality in Palestine" was "fully consistent with Quakers' explicit support for non-violent activism." *Id.*
- Plaintiffs posit that "what transpired at FCS was especially abhorrent. Consistent with their religious beliefs, Quakers are typically associated with liberal values, tolerance for diversity and dissent, support of human and civil rights, opposition to war, and personal activism, all consistent with their religious beliefs." *Id.* ¶ 12.
- The Complaint goes on to quote from a Quaker Information Center document striving to answer the question of what Quakers believe, which summarizes this by saying that "it is about activism, living a Christian life by example, by deeds instead of words communicated by or through a priest." *Id.*

- Plaintiffs quote at length from the FCS website description of "Our Philosophy," stating that they relied on this document, which says in part that "FCS . . . has been guided by the Quaker testimonies of simplicity, peace, integrity, community, equality and stewardship." *Id.* ¶ 13.
- Plaintiffs depict their own actions as being not only in accordance with the law, FCS policies and procedures, but also as "embodying Quaker testimonies; namely, that truth is always revealing itself, by having open discussion before making decisions." Plaintiffs claim that they "had a right to rely on FCS's Philosophy and Quaker principles." *Id.* ¶ 15.
- Plaintiffs claim that they were asked to become advisors to a club which came to be known as "Peace and Equality for Palestine" and that they were "subjected to repeated instances of intolerance and outright discrimination from defendants who maintained an illegal working environment antithetical to the Quaker principles and contrary to applicable civil rights laws." *Id.* ¶ 17.
- Plaintiffs quote from a letter they sent to the proposed guest speaker saying that school administration is supportive of the group "and feels it aligns with our Quaker mission and values." *Id.* ¶ 22.
- In their letter to the proposed guest speaker notifying him of the cancellation, Plaintiffs asserted that despite "the administration's recognition that the decision to cancel the event contradicts with its Quaker values," the event would be cancelled. *Id.* ¶ 29.
- Plaintiffs characterize events and an email as exhibiting a "patronizing disdain for fundamental Quaker values." *Id.* ¶ 33.
- Plaintiffs describe the meeting in which they were informed of their suspension as "making a mockery of Quaker practice." *Id.* ¶ 38.

- Plaintiffs also quote statements by FCS describing itself as a Quaker school, for instance a February 13, 2017 statement starting "As a Quaker school. . ." and which goes on to assert that "[t]here are very real concerns about the conduct of [Plaintiffs] for their disregard of our guiding testimonies which include community, peach and integrity." *Id.* ¶ 50. Plaintiffs describe this as "malicious language" that defamed them and placed them in a false light. *Id*.
- Plaintiffs quote FCS' statement of May 10, which describes the decision not to renew Plaintiffs' contracts as "the result of a deliberate and thoughtful Quaker decision-making process." *Id.* ¶ 62.
- In summary paragraphs before their six stated Counts, Plaintiffs allege that their suspension and firing "is not only entirely at odds with basic tenets of Quaker education," but also with sections of the Employee Handbook, which they quote at length, including a repetition of FCS's statement that they are "guided by the Quaker testimonies of simplicity, peace, integrity, community, equality, and stewardship." *Id.* ¶ 71.
- Plaintiffs claim that "despite FCS' identifying itself as a Quaker school and thus an adherent of basic Quaker values" . . . that the school behaved in such a manner "as to stifle anything resembling the kind of free expression that a Quaker institution is supposed to value and promote." *Id.* ¶ 74.

Plaintiffs are thus requesting that the Court conduct an inquiry into the quality of the defendants' adherence to the guiding testimonies of the Religious Society of Friends, their own expectations of and reliance on Friends' guiding principles, and how well they followed said principles. The law is clear that such an inquiry is unworkable where a plaintiff is requesting that the court, in weighing the plaintiff's claims, interpret the guiding testimonies of a faith. Indeed,

Pennsylvania courts recognize the "the long-standing common-law precept known as the Deference Rule which precludes civil courts from exercising jurisdiction over cases that would require them to decide ecclesiastical questions." *Connor v. Archdiocese of Philadelphia,* 975 A.2d 1084, 1085 (Pa. 2009). However, there is one exception called the "neutral principles of law approach" which allows "civil courts to exercise jurisdiction over cases involving religious institutions that can be decided based on secular legal authority." *Id.* at 585-586. In order to apply the neutral principles approach, there must be an ability to resolve the legal issues without delving into church matters. *See id.* As will be seen, relevant decisional law as well as the doctrine-heavy allegations of the instant Complaint militate for the conclusion that the neutral principles approach is unworkable in the case at bar.

The *Connor* Court enunciated a three-prong approach to determining whether the Deference Rule should apply:

> [W]e 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.

Id. at 607-608 (internal citations omitted). As can be seen from the above-quoted portions of the Complaint, Plaintiffs have consciously enmeshed the guiding principles of the Religious Society of Friends into each one of their claims. The same principles provided the basis for the Friends Defendants' decision not to renew the Plaintiffs' contracts.

In *Connor,* the Pennsylvania Supreme Court examined whether a civil court should properly exercise jurisdiction over a suit alleging defamation and negligent infliction of emotional distress arising out of a parochial school's expulsion of a student for allegedly

bringing a pen-knife to school and the school's communication to the school community concerning the child's expulsion. There, the concern was that parents with children at the school could identify the child who brought the pen-knife to school by way of a letter sent by the head of the school, and also the characterization of the item essentially as a "weapon," when it was a small part of a manicure set. The Court concluded:

> In any event, we have already determined, after reviewing the elements of appellants' defamation claims and appellees' apparent truth defense that it is reasonably likely that the trial court will ultimately be able to consider whether the parties carried their respective burdens as to each element of appellants' defamation claims without intruding into the "sacred precincts."

975 A.2d at 1113. Plaintiffs will undoubtedly seize upon *Connor* and the recent decision of *Chestnut Hill Coll. v. Pa. Human Rels. Comm'n*, 158 A.3d 251 (Pa. Commw. Ct. 2017), to argue against application of the Deference Rule. Importantly, however, the *Connor* plaintiffs did not call into question the quality and nature of the parochial school officials' adherence to tenets of Catholicism. In *Chestnut Hill*, the school did not cite governing religious principles as grounds for the student's expulsion. Rather, the Chestnut Hill court observed: "Importantly, College did not identify any Catholic doctrine as grounds for Student's expulsion. Rather, College stated '[Student's] expulsion was the result of [his] own willful, deceitful and dishonest behavior which included the misappropriation of funds for his own personal use and benefit.'" 158 A.3d at 263.

Unlike the secular explanation for expulsion of *Chestnut Hill*, the basis for non-renewal of the contracts was Plaintiffs' own disregard for the Religious Society of Friends' guiding principles of discourse and discussion and peace in the community. *Id.* ¶ 50. And, unlike the plaintiffs in *Connor,* Plaintiffs here have made a point of ushering religion onto center stage. They repeatedly allege that the Friends Defendants are improperly employing, or failing to employ, tenets of the Religious Society of Friends. They assert that Defendants have made "false

and pretextual assertions of being an educational institution adhering to Quaker values," Complaint ¶ 2, thus inviting the Court to examine Quaker values and determine whether the Friends Defendants have indeed adhered to their faith's values. Plaintiffs allege that their suspension and firing "is not only entirely at odds with basic tenets of Quaker education," but also with sections of the Employee Handbook, which they quote at length, including a repetition of FCS's statement that they are "guided by the Quaker testimonies of simplicity, peace, integrity, community, equality, and stewardship." Complaint ¶ 71. It seems that Plaintiffs seek to depict the Friends Defendants as less-than-ideal examples of members of the Religious Society of Friends, ones who are not in suitable levels of compliance with relevant religious tenets. The plaintiff floated a similar theory in *Milivojevich, supra.* There, the U.S. Supreme Court held that such claims impermissibly invite a court's scrutiny of the quality and consistency of a defendant's religious beliefs, practices, and tenets.

Although not a Pennsylvania case, very much on point is *DeCorso v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 829 A.2d 38 (Conn. App. Ct. 2003). There, the court applied the Deference Rule while noting that, in alleging the Jehovah's Witnesses' negligent infliction of emotional distress, the plaintiff (who was an ousted member) cited to "Jehovah scripture and publications, which, according to the plaintiff, show what the defendants should have done." 829 A.2d at 46. Such results are by no means unique. *See also, e.g., Murphy v. Int'l Soc'y for Krishna Consciousness,* 571 N.E.2d 340, 347 (Mass. 1991) (holding that trial court infringed defendant-religious institution's free exercise rights by allowing plaintiff to introduce into evidence passages of defendant's sacred text to support plaintiff's claim of "intentional interference with parental rights"); *Tell v. Roman Catholic Bishops of Diocese,* 2010 Del. Super. LEXIS 162, at *20 (Super. Ct. Apr. 26, 2010) (one of the grounds for dismissal was lack of subject matter

jurisdiction where the plaintiff's "invitation to examine canon law to determine the liability of church superiors is fraught with the possibility of an unconstitutional interference with the church."). It can thus be said that where, as here, the centerpiece of a plaintiff's case is to show how the defendant did not perfectly adhere to its own religious principles, courts avoid the potential adjudication of such decidedly non-secular controversies.

Patently, Plaintiffs are asking the Court to impermissibly examine how well the Friends Defendants embody Friends faith and practice. By way of example, they take issue with FCS's statement that, "[a]s a Quaker school, we have long-standing expectations of all members of our community, especially for our teachers, who have the responsibility of guiding young minds. There are very real concerns about the conduct of Ariel Eure and Layla Helwa for their disregard of our guiding testimonies, which include community, peace and integrity." Complaint ¶ 50. Immediately following this quote, Plaintiffs allege that this language was "malicious" and "defamed them and placed them in a false light." *Id.*

On the face of the Complaint, one can see that the Plaintiffs' disregard for discourse and discussion and peace in the community was problematic when in the employment of a Friends school. And yet they depict their own actions as more in consonance with tenets of the Religious Society of Friends than those of the Defendants, describing their own conduct as "embodying Quaker testimonies; namely, that truth is always revealing itself, by having open discussion before making decisions," and stating that they "had a right to rely on FCS's Philosophy and Quaker principles." Complaint ¶ 15.

Without a doubt, Plaintiffs center their claims on the quality of the Friends Defendants' regard for and use of the Religious Society of Friends' guiding testimonies. In such situations, when examining complaints under the *Connor* test, courts sitting in Pennsylvania apply the

Deference Rule and decline to adjudicate matters involving interpretation of religious tenets. *See, e.g., Patterson v. Shelton,* No. 2945, 2014 Phila. Ct. Com. Pl. LEXIS 359, at *7 (C.P. Nov. 10, 2014) (declining to exercise jurisdiction over an action alleging breach of fiduciary duty and fraud in the form of misappropriation of church funds where the congregation's bylaws gave the defendant discretion to make decisions regarding the use of funds); *Southeastern Pennsylvania Synod of the Evangelical Lutheran Church in America v. Meena,* 19 A.3d 1191, 1197 (Pa. Cmwlth. 2011) (declining to review a synodical order requiring relinquishment of keys to a church building, along with all books, records, and financial documents, stating, "[t]o review Synod's decision to impose synodical administration, the trial court would have to examine the internal processes and criteria utilized by Synod and the Synod Assembly to determine the on-going viability of their congregations."); *Askew v. Trs. of the Gen. Assembly*, 776 F. Supp. 2d 25, 25 (E.D. Pa. 2011) (dismissing for lack of subject matter jurisdiction suit asserting claims based on management of a congregation's nonprofit corporation. Where the church had declared plaintiff not to be a member of the church, the court could not delve into the internal decisions of the church).

In cases such as this, where the plaintiff invokes religious principles and the defendant's actions are predicated on them, courts regularly invoke the Deference Rule and decline to become embroiled in interpretation of such principles in conjunction with employment, tort, contract, and civil claims of all types. For example, in *Warnick v. All Saints Episcopal Church,* 38 Pa. D. & C.5th 38 (C.P. (Phila.) 2014), *aff'd*, 116 A.3d 684 (Pa. Super. Ct. 2014), the court noted that the defamation and breach of contract claims were rooted in public discussions of the plaintiff's adherence to certain moral principles of the religion in question. *See id.* at 54. Employing the *Connor* test, the court cited the Deference Rule as one of the bases for declining

jurisdiction. Many courts have done the same. *See also, e.g., Patterson, supra,* (breach of fiduciary duty and fraud); *Southeastern Pennsylvania Synod, supra* (declaratory relief relating to property); *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) (wrongful termination under contract of employment); *Laidlaw v. Midatlantic Converge Worldwide,* No. 00864, 2017 Phila. Ct. Com. Pl. LEXIS 203, at *1 (C.P. July 19, 2017) (defamation and false light); *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (N.D. Cal. 1995) (Title VII retaliation claim); *Pielech v. Massasoit Greyhound*, 423 Mass. 534, 541, 668 N.E.2d 1298, 1303 (1996) (wrongful discharge); *Geraci v. Eckankar*, 526 N.W.2d 391, 401 (Minn. Ct. App. 1995) (statutory sex discrimination and reprisal claims).

It is beyond cavil that the Plaintiffs are not asking the Court simply to apply neutral principles of law. Instead, they are holding themselves out as exemplars of Friends practice and are asking this Court to judge whether the Friends Defendants also properly followed Friends practice. Clearly, the Court's duties do not include interpretation of the faith, principles, or procedures of the Religious Society of Friends, which is what Plaintiffs request. It is therefore respectfully submitted that the Court should relinquish jurisdiction in this action, which Plaintiffs have extensively and quite consciously founded upon application of religious principles.

C. Counts I, II and III Fail to State a Claim.

Counts I and III of the Complaint are stated against by both Plaintiffs against FCS and are couched as violations of Title VII and the Pennsylvania Human Relations Act, respectively, for "Discrimination based upon "Race, Color, Sex (including sexual orientation), Religion, Maintenance of a Hostile Work Environment, and Retaliation." Plaintiffs allege violations of the stated laws, stating that they are in protected classes, and that they have been discriminated

against, as detailed in their charges filled with the EEOC. Counts I and III are addressed together because, "[g]enerally, the PHRA is applied in accordance with Title VII." *Dici v. Pennsylvania,* 91 F.3d 542, 552 (3d Cir. 1996); *see also Fogleman v. Mercy Hosp.*, 283 F.3d 561, 567 (3d Cir. 2002) ("The language of the PHRA is also substantially similar to these anti-retaliation provisions, and we have held that the PHRA is to be interpreted as identical to federal anti-discrimination laws except where there is something specifically different in its language requiring that it be treated differently.").

Count II is alleged on grounds of post-employment retaliation. As set forth below, these theories are insufficiently alleged, and no set of facts and inferences therefrom can support the elements of several of these claims.

1. <u>The Hostile Work Environment Claims of Counts I and III Fail.</u>

Plaintiffs appear to base their claims relating to a hostile work environment upon the postponement of the outside guest speaker's appearance and their supervisors' attempts to engage in discourse and discussion concerning the Plaintiffs attendance at a student protest. It is difficult to see how this amounts to a hostile work environment.

To prevail on a hostile work environment claim, a claimant must establish that the workplace "was permeated with discriminatory intimidation." *Amtrak v. Morgan*, 536 U.S. 101, 115 (2002). Hostile work environment claims based on racial harassment "are reviewed under the same standards as those based on sexual harassment." *Id.* at 116 n. 10; *see also Griffin v. Harrisburg Prop. Servs.*, 421 Fed. Appx. 204, 207 (3d Cir. 2011).

To establish this claim, a plaintiff must show: (1) that he or she suffered intentional discrimination based on race; (2) the discrimination was severe or pervasive; (3) the discrimination detrimentally affected the plaintiff; (3) the discrimination would detrimentally

affect a reasonable person; and (5) the existence of *respondeat superior* liability. *See Jones v. Norton*, 2008 U.S. Dist. LEXIS 7466 (E.D. Pa. 2008). Under relevant law, the Complaint certainly does not meet the standard, which the Third Circuit Court of Appeals recently addressed in *Castleberry v. STI Grp.*: "The correct standard is 'severe or pervasive.'" 863 F.3d 259, 264 (3d Cir. 2017) (citing *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)). The *Castleberry* court went on to say: "We have noted that '[t]he difference [between the two standards] is meaningful' because 'isolated incidents (unless extremely serious) will not amount to [harassment].'" *Id.* (quoting *Jensen [v. Potter]*, 435 F.3d [444] at 449 n.3 (3d Cir. 2006)).[7]

When viewing hostile work environment claims that have survived the Rule 12(b)(6) motion to dismiss phase, one sees egregious conduct, such as racial slurs or gender-based insults, and threatening forms of harassment based upon the plaintiff's protected status. For example, *Castleberry, supra*,

> the plaintiffs alleged that their supervisor used a racially charged slur in front of them and their non-African-American coworkers. Within the same breath, the use of this word was accompanied by threats of termination (which ultimately occurred). This constitutes severe conduct that could create a hostile work environment. Moreover, the allegations could satisfy the "pervasive" alternative established by the standard. Plaintiffs alleged that not only did their supervisor make the derogatory comment, but "on several occasions" their sign-in sheets bore racially discriminatory comments ….

Castleberry v. STI Grp., 863 F.3d 259, 265-66 (3d Cir. 2017).

Courts in this Circuit routinely hold that a "single racially derogatory comment is insufficient." *Capilli v. Nicomatic L.P.*, 2008 U.S. Dist. LEXIS 67775, *31 (E. D. Pa., September 8, 2008); *see also Mclean v. Communications Construction Group, LLC*, 535 F. Supp.2d 485 (D.

[7] *Overruled in part on other grounds by Burlington N. & Santa Fe Ry. Co v. White*, 548 U.S. 53 (2006).

Del 2008) (no prima facie case of hostile work environment based upon a single racially derogatory comment); *Jones v. Norton*, 2008 U.S. Dist. LEXIS 7466 (E.D. Pa. Jan. 31, 2008)(a single altercation where racially charged highly inappropriate outburst by a fellow employee was insufficient); *Killen v. Northwestern Human Services, Inc.*, 2007 U.S. Dist. LEXIS 66602 (E.D. Pa. Sep. 7, 2007) (summary judgment granted where the hostile work environment claim relied upon single incident).

In the instant action, Plaintiffs have not noted any instances of race- or gender-based derogatory comments or harassment. In fact, the sole mention of their employer's attitude toward racial status was Plaintiffs' stated belief that they were treated as token persons of color, describing their supervisors' attitude as racist for assigning Plaintiffs to be involved with race relation activities at FCS. *See* Complaint ¶¶ 15-16.

As such, Plaintiffs have not met the applicable standard, and their claims relating to a hostile work environment as stated in Counts I and III of the Complaint must be dismissed for failure to state a claim upon which relief can be granted.

2. Title VII and the PHRA Do Not Cover Sexual Orientation

Plaintiffs identify themselves as gay in the introductory paragraphs of the Complaint and purport to seek relief for discrimination based upon, *inter alia*, sexual orientation, in Counts I and III. Plaintiffs have not alleged any instances of discrimination against them based upon sexual orientation. *See, generally,* Complaint. It should be noted, in any event, that neither Title VII nor the PHRA accord protections for those complaining of discrimination based upon sexual orientation. *See, e.g., SEPTA v. City of Phila.*, 159 A.3d 443, 459 (Pa. 2017) (Justice Wecht noting in concurrence that the PHRA does not accord protections to "those discriminated against based upon gender identity and sexual orientation" and noting that the General Assembly

recently has "considered and declined to pass proposed legislation" to extend protections to those individuals). *See also Prowel v. Wise Bus. Forms, Inc.,* 579 F.3d 285, 289 (3d Cir. 2009) ("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.") (quoting *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257, 261 (3d Cir. 2001)).

Plaintiffs have not alleged any instances of discrimination against them based upon sexual orientation. Even if they did, the law does not afford them the protections they seek. Accordingly, Plaintiffs' claims relating to sexual orientation-based discrimination as stated in Counts I and III of the Complaint must be dismissed for failure to state a claim upon which relief can be granted.

3. Plaintiffs Have Not Stated a Claim for Post-Employment Retaliation.

Title VII's anti-retaliation provisions, 42 U.S.C. §2000e-3, protect those "who oppose employment practices made illegal by Title VII." *Brangman v. Astrazeneca, LP,* 952 F.Supp.2d 710, 721 (E.D. Pa. 2013). "The Plaintiff must therefore be opposing employment practices made illegal by Title VII." *Id.* Furthermore, a "general complaint of unfair treatment is insufficient to establish protected activity under Title VII." *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.,* 450 F.3d 130, 135 (3d Cir. 2006)[8]. Courts analyze Title VII retaliation claims and PHRA retaliation claims under the *prima facie* requirements for Title VII retaliation. *See Hussein*

[8] It is unclear from the Complaint whether Plaintiffs aver that their protests relating to the outside speaker constitute protected activity. However, if that were the predicate for any portion of their claims, *Curay-Cramer v. Ursuline Acad., supra,* lays it to rest. There, the Third Circuit Court of Appeals affirmed the district court's Rule 12(b)(6) dismissal of the plaintiff's Title VII and PHRA retaliation claims, where a teacher's employment with a Catholic school was terminated after she signed her name to a pro-choice advertisement in the local newspaper. The court concluded that the teacher did not engage in protected activity when she signed a pro-choice advertisement as a form of protest, noting: "we are not aware of any court that has found public protests or expressions of belief to be protected conduct absent some perceptible connection to the employer's alleged illegal employment practice." *Curay-Cramer,* 450 F.3d at 135.

v. UPMC Mercy Hosp., 466 F. App'x 108, 111 (3d Cir. 2012) ("The PHRA, which we generally interpret consistently with Title VII, likewise forbids employers from retaliating against employees for asserting their rights under the PHRA.").

To succeed on a retaliation claim under Title VII and the PHRA, "an employee must have an 'objectively reasonable' belief that the activity he opposes constitutes unlawful discrimination under Title VII." *Ferra v. Potter,* 324 Fed. App'x. 189, 192 (3d Cir. 2009). In order for Plaintiffs' complaints about their treatment by supervisors to constitute protected activity under Title VII, a reasonable person must believe that the conduct complained of violated Title VII. *See id.*; *Barber v. CSX Distribution Servs.,* 68 F.3d 694, 701-02 (3d Cir. 1995) (complaints about unfair treatment in general and expressions of dissatisfaction in the workplace do not constitute "the requisite 'protected conduct' for a *prima facie* case of retaliation.").

"The anti-retaliation provisions of Title VII provide former employees with a legal recourse against post-employment retaliation." *Lin v. Rohm & Haas Co.,* 301 F. Supp. 2d 403, 404-05 (E.D. Pa. 2004) (citing *Robinson v. Shell Oil Co.,* 519 U.S. 337, 346 (1997)). To sustain a claim for post-employment retaliation, as with retaliation during employment, Plaintiffs must show that (1) they engaged in a protected employee activity; (2) the employer took an adverse employment action against them; and (3) there is a causal link between their protected activity and the employer's adverse action. *See Farrell v. Planters Lifesavers Company,* 206 F.3d 271, 279 (3d Cir. 2000).

Under relevant decisional law relating to post-employment retaliation, Plaintiffs have not alleged anything approaching post-employment adverse employment actions. As far as can been gleaned from the Complaint, the only purportedly post-employment "adverse employment action" were (1) a May 26, 2017 letter allegedly sent to Upper School families stating that the

meeting which Plaintiffs had planned with their former students was not a school event, (2) the alleged communication between FCS supervisory personnel with teachers concerning communications with the media as to impending or ongoing litigation, and (3) a statement that FCS was monitoring activity related to the case when asked by the media about the outside speaker's Op-Ed in a local newspaper. *See id.* ¶¶ 64-67, 89.

Under relevant law, post-employment adverse employment actions are more than just something that the plaintiff perceives as negative. For example, in *Lin v. Rohm & Haas Co.*, the court held that an injunction action instituted by the defendant against its former employee did not constitute an "adverse employment action" under Title VII. *See Lin*, 301 F. Supp. 2d at 405. In *Nelson v. Upsala Coll.*, 51 F.3d 383 (3d Cir. 1995), the Third Circuit Court of Appeals surveyed the types of situations in which an adverse employment action might be found.

> *Lazic v. University of Pennsylvania*, 513 F. Supp. 761, 765, 767-69 (E.D. Pa. 1981) (deletion of positive references from personnel file after EEOC charge filed); *Bailey v. USX Corp.*, 850 F.2d 1506, 1507-08 (11th Cir. 1988) (unfavorable reference for a former employee by former employer after EEOC filed); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1163-64 (10th Cir. 1977) (potential future employer informed of circumstances of discharge and a letter of reference modified to reflect that the former employee had filed sexual discrimination charges); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1087 (5th Cir. 1987) (discontinuance of severance benefits after EEOC charge filed); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1054 (2d Cir. 1978) (former employer refuses to issue letter of recommendation and made negative and untrue remarks about plaintiff to prospective employer); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529 (11th Cir.) (former employer persuaded subsequent employer to terminate former employee who had filed EEOC charge), *cert. denied*, 498 U.S. 943, 111 S. Ct. 353, 112 L. Ed. 2d 317 (1990).

51 F.3d at 387-88. To be sure, none of the foregoing cases involved the bland scenarios that Plaintiffs here paint as adverse employment actions, *i.e.*, a former employer's statement that it is monitoring a situation, or common-sense advice to employees to avoid commenting on

impending or ongoing litigation, or letting parents know that an event is not school-sponsored. "Title VII proscribes retaliatory post-employment conduct that relates to an employment relationship, not 'conduct in general which the former employee finds objectionable.'" *Lin v. Rohm & Haas Co.*, 301 F. Supp. 2d at 405 (quoting *Nelson*, 51 F.3d at 385). Plaintiffs have not adequately alleged post-employment retaliation, nor can they do so, given that the Friends Defendants did not engage in any such actions. The Friends Defendants respectfully urge the Court to dismiss Count II pursuant to Rule 12(b)(6).

D. Count VI (Negligent Supervision) is Preempted by the PHRA.

Plaintiffs have alleged in Count VI that FCS, Phillip Scott, and unidentified board members were negligent in their supervision of Sellers by allowing him to engage in discrimination and defamation of the Plaintiffs. Plaintiffs define negligence, and then state that Pennsylvania law allows a negligence claim if an employer knows or should have known that an employee was dangerous, careless or incompetent and that such employment might harm a third party. *See id.* ¶¶ 122-125. The Complaint makes clear that the alleged claims of discrimination under the PHRA and Title VII are the same ones underlying the negligent supervision claim. *See id.*

It is not necessary to address whether Plaintiffs alleged a sufficient factual basis to support the negligent supervision claims because, even if they have, the claims are preempted by the PHRA. The relevant statute provides that the bringing of an action under the PHRA "shall exclude any other action, civil or criminal based upon the same grievance of the complaint concerned." 43 Pa. Cons Stat. § 962(b). It is thus "firmly established that negligent supervision claims arising out of discrimination cases . . . must be brought under the [PHRA]." *Randler v. Kountry Kraft Kitchens*, No. 11-474, 2012 U.S. Dist. LEXIS 177926 (M.D. Pa. Dec. 17, 2012)

(citing cases); *see also Stell v. PMC Technologies, Inc.*, No. 04-5739, 2005 U.S. Dist. LEXIS 18093 (E.D. Pa. Aug. 24, 2005) (dismissing negligence claim based on a theory of negligent supervision as preempted by the PHRA when underlying claim is discrimination arising in employment context); *McGovern v. Jack D's, Inc.*, No. 03-5547, 2004 U.S. Dist. LEXIS 1985 (E.D. Pa. Feb. 3, 2004) (noting the "weight of authority cuts in favor of preemption with regard to negligent supervision claims"). *Black v. Cmty. Educ. Ctrs., Inc.*, No. 13-6102, 2014 U.S. Dist. LEXIS 27885, at *13 (E.D. Pa. Mar. 4, 2014) ("plaintiff's negligent-supervision claims arise out of her allegations of discrimination, and, thus, are preempted by the PHRA.").

Furthermore, in the event that the PHRA claims are dismissed on jurisdictional or substantive grounds, the negligent supervision claim are subsumed and cannot stand independently. They must also be dismissed by operation of the preemption. *See, e.g., Robinson v. Amtrak*, 880 F. Supp. 2d 575, 586 (E.D. Pa. 2012) (because the facts that underlie negligent supervision are the same as those that support the underlying allegations of discrimination, negligent supervision claim was preempted by PHRA claim dismissed along with PHRA claim); *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 492 n.12 (3d Cir. 2013) ("when a regulation covers (in that it substantially subsumes)" a plaintiff's state law claims, they will be preempted). There is thus no question that the Court should dismiss Count VI (Negligent Supervision) as preempted by the PHRA.

IV. CONCLUSION

For the above reasons, the Friends Defendants respectfully urge the Court move to dismiss Plaintiffs' Complaint in its entirety and with prejudice for lack of subject matter jurisdiction. As an alternate remedy, and if the Court does not elect to dismiss the Complaint for lack of subject matter jurisdiction, the Friends Defendants respectfully urge the Court to grant their motion pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

Respectfully submitted,

/s/ Michele Weckerly

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Dated: July 3, 2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of Defendants' Motion to Dismiss was served upon the following counsel and parties via electronic filing and regular U.S. mail:

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