COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
DIVISION NO. II
CASE NO: 22-CI-431
Electronically Filed

DEBORAH TOMES WILKINS PLAINTIFF

vs. **INDIVIDUAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS**

WESTERN KENTUCKY UNIVERSITY, et al. DEFENDANTS

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Defendants Timothy Caboni ("President Caboni"), Dr. Phillip W. Bale ("Dr. Bale"), David Brinkley ("Mr. Brinkley"), Susan Howarth ("Ms. Howarth"), and Tony Glisson ("Mr. Glisson") (collectively "Individual Defendants"), by counsel, respectfully move this honorable Court to enter the Order tendered herewith, dismissing Plaintiff's Complaint against the Individual Defendants in its entirety pursuant to Kentucky Rule of Civil Procedure 12.02(f) for failure to state a claim upon which relief can be granted. In support of this Motion, Defendants submit the following Memorandum of Law.

INTRODUCTION

This matter arises after WKU relieved Plaintiff Deborah Wilkins of her responsibilities on November 22, 2021 following several years of erratic, unprofessional, aggressive, and intimidating behavior that indicated Wilkins was no longer advancing the interests of WKU, but rather her own personal self-interests. WKU continues to pay Wilkins through the expiration of her employment contract, on June 30, 2022.

In a scatter-shot and indiscriminate Complaint, Plaintiff alleges thirteen causes of action, at times failing to even distinguish which claims are brought against which of the six named Defendants. Indeed, many of the named Defendants have no factual allegations tying them to any

of the causes of action asserted by Wilkins. For instance, Mr. Glisson's name appears in two paragraphs of Wilkins' 154-paragraph Complaint, without any factual allegations to support how he purportedly retaliated against her or interfered with her job duties.

As an initial point, all of Plaintiff's causes of action alleged against the Individual Defendants fail to state a claim upon which relief can be granted under the doctrines of governmental immunity and qualified immunity. The claims all arise from personnel actions taken by the Individual Defendants as employees or agents of WKU. Because those functions are governmental functions and not proprietary, the Individual Defendants are shielded by governmental immunity. Even if not shielded by governmental immunity, the Individual Defendants are nevertheless shielded by qualified immunity because their acts were discretionary in nature. *See Robinson v. Kentucky Cmty. & Tech. Coll. Sys.*, 2015 WL 5656312, at *2 (Ky. App. Sept. 25, 2015).

Should the Court decline to apply immunity to the Individual Defendants at this point, the Court should nevertheless dismiss Counts 5, 7, 8, 9, 10, 11, and 13 of Plaintiff's Complaint. Each of these Counts fails to state a claim upon which relief may be granted.

In Count Five of her Complaint, Plaintiff alleges that Defendant Caboni defamed her by virtue of the statements made in his November 22, 2021 separation letter. However, Plaintiff's Complaint fails to allege that the letter was published to a third party, a required element of a viable defamation. Indeed, Plaintiff's Complaint admits that the separation letter was redacted when provided to a third-party via Open Records Act request, thereby asserting facts which defeat her own claim.

In Count Seven of her Complaint, Plaintiff alleges that Caboni committed fraud when Caboni approached her to discern her interest is possibly retiring and having the remaining term

of her employment contract "bought out" by WKU. To state a claim for fraud, Plaintiff must allege facts sufficient to show she justifiably relied upon President Caboni's alleged fraudulent statements. However, Plaintiff has not and cannot allege facts that she justifiably relied on those President Caboni's statement as to her buy out for two main reasons. First, her employment agreement contained a provision indicating that WKU's Board of Regents would need to approve all employment agreement terms and contracts. Second, as general counsel, Plaintiff was well-aware that a buyout of her employment contract would require Board of Regents approval due to the significant funding such a buyout would require.

In Count Eight of her Complaint, Plaintiff asserts a claim for tortious interference with a contractual relationship. In essence, Plaintiff alleges WKU is liable for interfering with its own contract with her through the acts of its agents and employees. However, this claim fails as a matter of law because Kentucky law requires the party to be interfering with the contract to be a third-party to the contract. *Harstad v. Whiteman*, 338 S.W.3d 804, 814 (Ky. App. 2011). When a party to the contract is an organizational entity like WKU, the acts of its agents and employees cannot form the basis of a tortious interference claim because WKU, like any organization, acts through its agents and employees.

In Count Nine of her Complaint, Plaintiff asserts the Individual Defendants are liable to her under a theory of promissory estoppel, again related to the proposed buyout of her employment contract. Just like a fraud claim, promissory estoppel claims require sufficient allegations of justifiable reliance. Plaintiff has not and cannot allege facts that she justifiably relied on those President Caboni's statement as to her buy out for two main reasons. First, her employment agreement contained a provision indicating that WKU's Board of Regents would need to approve all employment agreement terms and contracts. Second, as general counsel, Plaintiff was well-

aware that a buyout of her employment contract would require Board of Regents approval due to the significant funding such a buyout would require. Finally, Promissory estoppel is a quasi-contract claim. The Individual Defendants, negotiating as disclosed agents for WKU—to the extent the negotiated at all—, cannot be liable on a contract claim.

In Count Ten of her Complaint, Plaintiff asserts that the Individual Defendants placed her in a false light by virtue of the contents of her separation letter. However, Plaintiff's Complaint fails to allege that the letter was published to a third party, a required element of a viable false light claim. Indeed, Plaintiff's Complaint admits that the letter was redacted when provided to a third-party via Open Records Act request, thereby asserting facts which defeat her own claim. Finally, Plaintiff's Complaint fails to allege any fact that any Individual Defendant, other than Caboni, was aware of the contents of the alleged defamatory letter.

In Count Eleven of her Complaint, Plaintiff alleges that the Individual Defendants falsified the "Request to Modify a Position" in WKU's Interview Exchange system and the Electronic Personnel Action Form when Plaintiff became the Title IX Coordinator. Complaint, ¶¶49-51. She alleges a negligence *per se* claim for violation of KRS 517.050, which criminalizes falsification of business records with the intent to defraud. As interpreted, KRS 517.050 requires proof that the defendant committed fraud – i.e., that it made a misrepresentation with the intent to induce action by the plaintiff. Here, Plaintiff fails to allege that she took any action in reliance on the purported falsification of the two forms.

Finally, Count Thirteen of Plaintiff's Complaint asserts a claim for intentional infliction of emotional distress. Plaintiff's claim for intentional infliction of emotional distress fails as a matter of law because none of the conduct alleged is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency...." *Humana of Kentucky, Inc. v. Seitz,* 796

S.W.2d 1, 3 (Ky.1990). Her Complaint is similarly devoid of allegations that she suffered severe emotional injury as required by Kentucky law. *Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012).

FACTUAL BACKGROUND

While each of the bases for dismissal identified in the Introduction and more fully addressed in this Memorandum of Law are questions of law which do not require factual determinations by this Court, Individual Defendants nevertheless rigorously and emphatically disputes the factual allegations within Plaintiff's Complaint. Individual Defendants adopt and affirm the statement of facts presented in Defendant WKU's Motion to Dismiss filed contemporaneously with Individual Defendants' Motion. The factual background is provided to the Court for context and need not form the basis of the questions of law that the Court ultimately will resolve in deciding this Motion to Dismiss.

ARGUMENT

I. Motion to Dismiss Standard of Review

When considering a motion to dismiss under CR 12.02(f), the pleadings should be construed in a light most favorable to the plaintiff, with all allegations taken in the complaint to be true. *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007). In making this decision, "the circuit court is not required to make any factual determination; rather, the question is purely a matter of law." *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). The court should consider whether, if all of the plaintiff's allegations in its Complaint are true, its claims state a claim upon which relief can be granted.

A. The Individual Defendants Are Entitled to Immunity

First, WKU's employees are entitled to government immunity. "WKU is a state agency because it serves as a central arm of the state performing the essential function of educating state citizens at the college level and because it receives money from the state treasury in support of this

function." *Autry v. W. Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 20017) (citing *Withers v. University of Kentucky*, 939 S.W.2d 340, 343 (Ky.1997)). "Further, KRS 44.073(1) says that WKU is a state agency, as a state institution of higher education." *Id.* "State agency officials or employees, when sued in their official capacity, have the same immunity as their employer. Since this Court has determined that WKU, their employer, is entitled to governmental immunity, the employees sued here in their official capacity are likewise entitled to governmental official immunity." *Id*. at 718. Despite claiming she is suing the Individual Defendants in their individual capacities, her allegations against them all arise from acts performed as employees of WKU.

"The immunity does not extend, however, to agency acts which serve merely proprietary ends, *i.e.*, non-integral undertakings of a sort private persons or businesses might engage in for profit." *Breathitt Cnty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). All the acts alleged in Plaintiff's Complaint relate to personnel decisions by employees of WKU. The hiring or firing of employees is a governmental function, not a proprietary function. *See Young v. Hammond*, 139 S.W.3d 895, 914 (Ky. 2004) (Keller, J., dissenting).

Even if not entitled to governmental immunity, the Individual Defendants are nevertheless entitled to qualified immunity. Qualified official immunity is "immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions." *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001). Whether qualified official immunity is applicable depends on whether the task at issue is ministerial versus discretionary. *See Marson v. Thomason*, 438 S.W.3d 292, 296 (Ky. 2014). A government employee can only be personally liable for negligently performing a ministerial act. *Id.* For example, the duty is ministerial when it involves the enforcement of a known rule. *Yanero*, 65 S.W.3d at 529. On the other hand, "when performance

of the job allows for the governmental employee to make a judgment call, or set a policy, the fact that there is uncertainty as to what acts will best fulfill the governmental purpose has resulted in immunity being extended to those acts where the governmental employee must exercise discretion." *Marson*, 438 S.W.3d at 296. A discretionary act is usually described as one calling for a "good faith judgment call made in a legally uncertain environment." *Yanero*, 65 S.W.3d at 522. "[A]t their core, discretionary acts are those involving quasi-judicial or policy-making decisions." *Marson*, 438 S.W.3d at 297.

"The hiring, firing and disciplinary personnel decisions that constitute [plaintiff's] claims are part of an 'inherently subjective process which, of course, is the essence of a discretionary function.' Personnel decisions are not ministerial, as they require more than 'obedience to the orders of others.'" *Robinson v. Kentucky Cmty. & Tech. Coll. Sys.*, 2015 WL 5656312, at *2 (Ky. App. Sept. 25, 2015) (quoting *Yanero, supra,* and *Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 845 (Ky.App.2003)). Because each of Plaintiff's claims against the Individual Defendants concern personnel decisions, actions, or inactions, they are inherently discretionary acts. As such, the Individual Defendants are each entitled to qualified immunity.

B. The Defamation Claim Against President Caboni Fails to State a Claim upon which Relief May Be Granted

In order to state a cognizable claim for defamation, a plaintiff must demonstrate that: (1) a defamatory statement was made; (2) about the plaintiff; (3) the statement was published; and (4) the statement caused injury to the plaintiff's reputation. *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981). *See also Smith v. Martin*, 331 S.W.3d 637 (Ky. App. 2011). Here, Plaintiff's claim for defamation against President Caboni fails (1) Plaintiff failed to allege facts establishing publication and (2) the statements made by President Caboni are otherwise privileged. Whether publication has occurred and whether a privilege applies are both questions

of law. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 794 (Ky. 2004); *Simpson v. Lexington Fayette Urb. Cty. Gov't,* No. 2003 WL 22220255 at **8–9 (Ky. App. Sept. 26, 2003) *citing Caslin v. General Electric Co.*, 608 S.W.2d 69 (Ky. App. 1980).

The sole basis for Plaintiff's defamation claim is President Caboni's November 22, 2021 letter relieving her of her responsibilities. Complaint, ¶ 107. However, Plaintiff's Complaint admits that the letter was handed to her by WKU's Provost and, when produced in response to Open Records Act requests, was redacted so that any statements pertaining to the basis of her separation were shielded from public disclosure. Complaint, ¶¶ 67, 79. Absent these allegations, Plaintiff does not indicate that WKU disclosed the letter to any third persons. Taking these facts as true as asserted by the Plaintiff, Plaintiff's claim for defamation a matter of law because she has not shown publication to a third party.

The first instance of potential publication claimed by Plaintiff relates to the meeting she had with the Provost and WKU's Counsel on November 22, 2021 in which she was handed the letter and asked to read it. Complaint, ¶ 67. Even viewing those facts in the light most favorable to Plaintiff and assuming that the Provost or WKU's Counsel were aware of the contents of the letter she was handed, that fact does not amount to publication. Kentucky Courts recognize that intraorganization communications are *at least* afforded a qualified privilege and do not constitute publication to a third party. *Wyant v. SCM Corp*., 692 S.W.2d 814, 816 (Ky. App. 1985) (recognizing that internal communications within an organization are afforded a qualified privilege). *See also Caslin,* 608 S.W.2d at 70 (holding that job performance reports are privileged); *Simpson*, 2003 WL 22220255 at * 9 (dismissing defamation claim based on privilege where the communications concerned the plaintiff's "job performance"); *Rich v. Kentucky Country Day, Inc.,* 793 S.W.2d 832 (Ky. App. 1990). In other words, "[s]tatements made in the context of the

employment relationship are qualifiedly privileged ... so that every-day business can be carried out without the threat of suit." *Haas v. Corr. Corp. of Am.,* 2016 WL 1739771 at *5 (Ky. App. Apr. 29, 2016), *citing Wyant v. SCM Corporation,* 692 S.W.2d 814 (Ky. App. 1985).

While no Kentucky court has directly addressed whether intraorganizational communications satisfy the "publication" requirement, the Kentucky Supreme Court in *dicta* has indicated those communications would likely not constitute publication. *Toler*, 458 S.W.3d at 282. In *Toler*, the Court noted it "seems strange to claim the *Company* published defamatory material to a third party when all parties involved were Company agents." *Toler*, 458 S.W.3d at 282. Indeed, the majority of courts considering whether an organizational defendant commits publication when it communicates internally among its agents, officers or directors have concluded that intra-corporate communications do not constitute publication.[1]

[1] Alabama: *Dixon v. Economy Co*., 477 So. 2d 353, 354 (Ala. 1985); *Walton v. Bromberg & Co., Inc*., 514 So. 2d 1010, 1012 (Ala. 1987); *Hanson v. New Technology, Inc*., 594 So. 2d 96, 100–01 (Ala. 1992); *Burks v. Pickwick Hotel*, 607 So. 2d 187, 189–90 (Ala. 1992); Florida: *Biggs v. Atlantic Coast Line R. Co.*, 66 F.2d 87 (5th Cir. 1933); Georgia: *Monahan v. Sims,* 294 S.E.2d 548, 551 (Ga. App. 1982); *ITT Rayonier, Inc. v. McLaney*, 420 S.E.2d 610, 612 (Ga. 1992); *Ekokotu v. Pizza Hut, Inc*., 422 S.E.2d 903, 904–05 (Ga. App. 1992); *Fly v. Kroger Co.*, 432 S.E.2d 664, 666 (Ga. App. 1993); *Nelson v. Glynn-Brunswick Hosp. Authority*, 571 S.E.2d 557, 560 (Ga. App. 2002); Indiana: *Delval v. PPG Industries, Inc*., 590 N.E.2d 1078, 1080–81 (Ind. Ct. App. 1st Dist. 1992); Louisiana: *Williams v. UPS*, 757 Fed.Appx.342, 345 (5th Cir. 2018); *Danna v. Ritz-Carlton Hotel Co., LLC,* 213 So. 3d 26 (La. Ct. App. 4th Cir. 2016), writ denied, 210 So. 3d 285 (La. 2016); Missouri: *Hellesen v. Knaus Truck Lines, Inc*., 370 S.W.2d 341, 344 (Mo. 1963); *Dvorak v. O'Flynn*, 808 S.W.2d 912, 916–17 (Mo. Ct. App. E.D. 1991) [dicta]; *Lovelace v. Long John Silver's, Inc.*, 841 S.W.2d 682, 684-85 (Mo. App. 1992); Nevada: *Crowe v. Wiltel Communications Systems*, 103 F.3d 897, 899–901 (9th Cir. 1996); *M&R Inv. Co. v. Mandarino*, 748 P.2d 488, 491 (Nev. 1987); Oklahoma: *Messina v. Kroblin Transp. Systems, Inc*., 903 F.2d 1306, 1309 (10th Cir. 1990); *Hensley v. Armstrong World Industries, Inc*., 798 F. Supp. 653, 657 (W.D. Okla. 1992); *Edwards v. Creoks Mental Health Services, Inc.*, 505 F. Supp. 2d 1080, 1096 (N.D. Okla. 2007); *Tatum v. Philip Morris Inc*., 809 F. Supp. 1452, 1471 (W.D. Okla. 1992), aff'd, 16 F.3d 417 (10th Cir. 1993); Pennsylvania: *Keddie v. Pennsylvania State Univ.*, 412 F.Supp. 1264, 1277 (M.D.Pa. 1976); Tennessee: *Woods v. Helmi*, 758 S.W.2d 219, 222–24 (Tenn. Ct. App. 1988); Washington: *Robel v. Roundup Corp*., 103 Wash. App. 75, 10 P.3d 1104, 1114 (Div. 3 2000), review granted, 143 Wash. 2d 1008, 21 P.3d 291 (2001) and decision aff'd in part, rev'd in part on other grounds, 148 Wash. 2d 35, 59 P.3d 611 (2002). [dictum]; Wisconsin: *Halsell v.*

Kentucky courts have also otherwise rejected defamation claims where the alleged defamation was in the employment context. For instance, the court in *Hereford v. Norton Healthcare, Inc.*, 2017 WL 3129194 at *3 (Ky. App. July 21, 2017) upheld the dismissal of a defamation claim brought by an employee alleging wrongful dissemination of information relating to her termination, like Plaintiff's claim. The *Hereford* court found that the defendants "could not have defamed [the plaintiff] for publishing the truth that [the plaintiff's] employment was terminated for a HIPAA violation" and the veracity of whether the allegation that the plaintiff had violated HIPAA is not material. *Id.* *See also Brett v. Media Gen. Operations, Inc.*, 326 S.W.3d 452, 459 (Ky. App. 2010) (dismissing defamation claim because "rumors and innuendo are not enough to constitute defamation").

As to the second instance of potential publication, Plaintiff's Complaint refers to the release of the letter in response to an Open Records Act request to a request from the Bowling Green Daily News. Complaint, ¶79. However, Plaintiff's Complaint admits that the entire second paragraph of the letter, which contained statements concerning the reasons for Plaintiff being relieved of her duties, was redacted. Thus, to the extent Plaintiff claims the reasons for the University's decision defamed her, Plaintiff cannot rely upon the production of the letter *in a redacted format* in response to the Open Records Act as publication of those statements. To the contrary, the redaction

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Kimberly-Clark Corp., 683 F.2d 285, 288-289 (8th Cir. 1982). *But c.f., Jones v. Britt Airways, Inc.*, 622 F.Supp. 389, 391 (N.D.Ill.1985) (applying Illinois law); *Pirre v. Printing Devs., Inc.*, 468 F.Supp. 1028, 1041–42 (S.D.N.Y.1979) (applying New York law); *Kelly v. Gen. Tel. Co.*, 136 Cal.App.3d 278, 186 Cal.Rptr. 184, 186 (1982); *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 662 A.2d 89, 103 (1995) (per curiam); *Southern Bell Tel. & Tel. Co. v. Barnes*, 443 So.2d 1085, 1086 (Fla.Dist.Ct.App.1984); *Luttrell v. United Tel. Sys., Inc.*, 9 Kan.App.2d 620, 683 P.2d 1292, 1294 (1984); *Bander v. Metro. Life Ins. Co.*, 313 Mass. 337, 47 N.E.2d 595, 601 (Mass.1943); *Brantley v. Zantop Int'l Airlines, Inc.*, 617 F.Supp. 1032, 1034 (E.D.Mich.1985) (applying Michigan law); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 335 (Tex.App.1986).

indicates that WKU actively made attempts to protect Plaintiff's privacy and the reasons for her separation from public view. Without factual allegations establishing publication to a third party, Plaintiff's cause of action for defamation as a matter of law.

C. The Fraud Claim Against President Caboni Fails to State a Claim upon which Relief May Be Granted

In Count Seven of her Complaint, Plaintiff alleges that President Caboni committed fraud, fraudulent misrepresentation, and fraud in the inducement related to representations she claims President Caboni made to her with regard to the buyout of her contract with WKU. Under any theory sounding in fraud, a plaintiff must establish that she reasonably or justifiably relied upon the purported fraudulent statement or representation. *See United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999) (discussing elements of fraud claim); *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011) (discussing elements of fraudulent misrepresentation claim); *Bear, Inc. v. Smith*, 303 S.W.3d 137, 142 (Ky. App. 2010) (discussing elements of fraud in the inducement claim).

Generally, whether a party justifiably relied upon a fraudulent statement or representation is a question of fact. However, courts are nevertheless permitted to determine justifiable or reasonable reliance "when no trier of fact could find that is was reasonable to rely on the alleged statements or when only one conclusion can be drawn." *Yung v. Grant Thornton, LLP*, 563 S.W.3d 22, 47 (Ky. 2018) (citations omitted). This is especially true when common sense, knowledge or experience of the plaintiff, ordinary care by the plaintiff, or contractual terms would make plaintiff's reliance unreasonable. *See also Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544, 549 (Ky. 2009) (holding that parties to transaction have obligation to exercise ordinary vigilance or inquiry to test representations made to them); *Vest v. Goode*, 209 S.W.2d 833, 836 (Ky. 1948) (holding plaintiff, who was an attorney, could not establish he reasonably relied on

misrepresentations about a loan renewal when he failed to make a reasonable investigation to protect his interests); *Mayo Arcade Corp. v. Bonded Floors Co.*, 41 S.W.2d 1104, 1109 (Ky. 1931) (holding fraud in the inducement claim failed as a matter of law where "the truth or falsehood of the representation might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglected to do so, and he is remediless."). *See also Ann Taylor, Inc. v. Heritage Ins. Services, Inc.*, 259 S.W.3d 494, 498-499 (Ky. App. 2008) (holding that party could not reasonably rely on certificate of insurance that expressly stated it was subject to all terms and exclusions of the policy of insurance).

For instance, in *Bassett v. National Collegiate Athletic Association*, the federal court applying Kentucky law dismissed fraud claims against the University of Kentucky on the basis that the plaintiff, a former assistant football coach and recruiter, could not prove justifiable reliance as a matter of law. 428 F.Supp.2d 675, 678-679 (E.D.Ky. 2006). Specifically, the former coach alleged that UK confronted him with allegations of recruitment violations and told him if he resigned, he would not be subject to any further investigation or criminal prosecution. *Id*. The court dismissed the fraud claim because the coach had significant experience and knowledge concerning NCAA rules violations, requirements that UK report the violations to the NCAA, and that UK had no control over the NCAA's investigations and disciplinary process. *Id*. at 682-683. In so holding, the court recognized that "[i]t is well established under Kentucky law that equity will grant no relief to a complaining party who has means of knowledge of the truth or falsity of representations." *Id*. at 684 (quotations omitted). Further, "[t]he claimant must be justified in relying upon the representations in the exercise of common prudence and diligence." *Id*. (quotations omitted).

Here, Plaintiff worked as general counsel for WKU since 1994 and was fully aware that

actions on employment contracts were subject to approval of the Board of Regents. *See* Complaint, ¶12 (acknowledging Board of Regents approval of employment contracts was a long-term practice of WKU existing under multiple administrations). Indeed, Plaintiff executed an Employment Agreement with WKU that expressly stated:

> 9. **BOARD OF REGENTS APPROVAL:** The parties agree and understand that the terms of this Employment Agreement are subject to its recommendation by the President of the University to the Board of Regents, and contingent upon approval of the Board at its next regular meeting following the date the Agreement is executed.

Further, as general counsel, Wilkins understood the requirement that the Board of Regents approve any employment contracts. In fact, Plaintiff negotiated and signed similar language in the addendum to her employment agreement, which made it contingent upon Board approval, as alleged in Paragraph 34 of the Complaint. As a result, even if President Caboni represented to her on behalf of WKU an intention to "buy-out" her contract as alleged in Paragraph 118 of the Complaint, Wilkins understood that President Caboni lacked authority to bind WKU and that ultimately, any modification of her contract or buyout of her contract was contingent upon the Board of Regents' approval. As a result, Plaintiff – much like the experienced coach in *Bassett* who possessed knowledge of the applicable processes – cannot claim she justifiably relied upon any representations by President Caboni.

D. The Tortious Interference Claim Against the Individual Defendants Fails to State a Claim upon which Relief May Be Granted

Plaintiff alleges that the Defendants interfered with her employment agreements with WKU. She alleges that each of the Individual Defendants were employees of WKU, and acknowledges that the actions each allegedly undertook with regard to Plaintiff were within the job duties and roles as employees of WKU. Complaint, ¶ 3. "Kentucky courts have not recognized a claim against a Defendant for interfering with its own contract or prospective business

relationship." *AMC of Louisville, Inc. v. Cincinnati Milacron, Inc.*, 2000 WL 33975582, *5 (W.D.Ky. Jan. 25, 2000) (citations omitted). *See also Carmichael-Lynch-Nolan Advertising Agency, Inc. v. Bennett & Associates, Inc.*, 561 S.W.2d 99, 102 (holding party must be stranger to the contract to interfere with it, otherwise it is a breach of contract claim amongst parties). *See also Harstad v. Whiteman*, 338 S.W.3d 804, 814 (Ky. App. 2011) (recognizing Kentucky law requires the tortfeasor in tortious interference claims to be a third-party to the contract). This is because the elements for a tortious interference claim require the plaintiff to "show that a contract existed between it *and a third party* followed by a breach by the third party." *Industrial Equip. Co. v. Emerson Elec. Co.*, 554 F.2d 276, 289 (6th Cir. 1977) (applying Kentucky law).

Because "a corporation can only act through its agents or employees", a claim for tortious interference premised upon actions of the employees or agents of a party to the contract fails as a matter of law. *See Thompson v. Sysco Louisville Food Srvcs., Co.*, 2008 WL 2065238, *3 (Ky. App. May 16, 2008). This is because there is no "third party" to the contract causing the interference. *Id*. Here, Plaintiff's Complaint against the Individual Defendants alleges that they interfered with her contract with WKU. WKU, like a corporation, can only act through its agents and employees. As agents and employees of WKU, the Individual Defendants are not third parties to Plaintiff's Contract with WKU. Accordingly, as a matter of law, Plaintiff's claim for tortious interference fails.

E. The Promissory Estoppel Claim Against the Individual Defendants Fails to State a Claim upon which Relief May Be Granted

A claim for promissory estoppel requires the plaintiff to show "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance…" *Sawyer v. Mills*, 295 S.W.3d 79, 89 (Ky. 2009). Just as with a fraud claim, a claim for promissory estoppel requires justifiable

reliance. *Butler v. Progressive Cas. Ins. Co.*, 2005 WL 1009621 *4 (W.D. Ky. 2005), *citing FS Invs., Inc. v. Asset Guar. Ins. Co.*, 196 F.Supp.2d 491 (E.D.Ky.2002)(citing *McCarthy*, 796 S.W.2d at 12-13). As set forth above regarding Plaintiff's fraud claim, Plaintiff's claim fails as a matter of law because she understood President Caboni lacked authority to enter into employment contracts without Board of Regents' approval. Plaintiff worked as general counsel for WKU since 1994 and was fully aware that actions on employment contracts were subject to approval of the Board of Regents. *See* Complaint, ¶12 (acknowledging Board of Regents approval of employment contracts was a long-term practice of WKU existing under multiple administrations). Indeed, Plaintiff executed an Employment Agreement with WKU that expressly stated:

> 9. **BOARD OF REGENTS APPROVAL:** The parties agree and understand that the terms of this Employment Agreement are subject to its recommendation by the President of the University to the Board of Regents, and contingent upon approval of the Board at its next regular meeting following the date the Agreement is executed.

Further, as general counsel, Wilkins understood the requirement that the Board of Regents approve any employment contracts. *See Bassett v. National Collegiate Athletic Association*, 428 F.Supp.2d 675, 678-679 (E.D.Ky. 2006). In fact, Plaintiff negotiated and signed similar language in the addendum to her employment agreement, which made it contingent upon Board approval, as alleged in Paragraph 34 of the Complaint. As a result, even if President Caboni represented to her on behalf of WKU an intention to "buy-out" her contract as alleged in Paragraph 129 of the Complaint, Wilkins understood that President Caboni lacked authority to bind WKU and that ultimately, any modification of her contract or buyout of her contract was contingent upon the Board of Regents' approval. Thus, Plaintiff cannot claim she justifiably relied upon any representations by President Caboni.

Further, promissory estoppel is a quasi-contractual doctrine. *See Bergman v. Baptist Healthcare Sys., Inc.*, 167 F. App'x 441, 448 (6th Cir. 2006) (applying Kentucky law). It is

axiomatic in contract law that a disclosed agent negotiating on behalf of its principal (WKU) – whether acting with actual or apparent authority – is not liable if the principal breaches the promise. *See Potter v. Chaney*, 290 S.W.2d 44, 46 (Ky. 1956). *See also Prima Intern. Trading v. Wyant*, 2009 WL 722609, at *6 (E.D.Ky. Mar. 17, 2009). At the time of the alleged interaction between Plaintiff and Caboni which forms the basis of the promissory estoppel claim, Plaintiff concedes that she understood Caboni to be negotiating a buy-out of her employment contract *on behalf of* WKU. As a result, she cannot state a claim for promissory estoppel against Caboni since she understood him to be acting as an agent of WKU at the time of the alleged offer.

F. The Invasion of Privacy - False Light Claim Against the Individual Defendants Fails to State a Claim upon which Relief May Be Granted

Under Kentucky law, a false light claim is an extension of the tort of invasion of privacy. *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 887 (Ky. 1981). In order to establish a valid claim for false light, the plaintiff must show that the defendant gave (1) "publicity to a matter concerning another that places the other before the public in a false light; (2) the false light in which the other was placed would be highly offensive to a reasonable person; and, (3) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Restatement (Second) of Torts, §652E (1976) (adopted by *McCall*, 623 S.W.2d at 887). Much like defamation, a false light claim requires publication. "The notion of 'publication' is a term of art and defamatory language is 'published' when it is intentionally or negligently communicated to someone other than the party defamed." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 794 (Ky. 2004), overruled on other grounds by *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276 (Ky. 2014).

As detailed above concerning Plaintiff's defamation claim, Plaintiff's Complaint alleges that Caboni's letter to Wilkins detailing the basis for her being relieved of her duties placed her in a

false light and defamed her. Complaint, ¶¶ 63-64. However, Plaintiff's Complaint admits that the letter was handed to her by WKU's Provost and, when produced in response to Open Records Act requests, was redacted so that any statements pertaining to the basis of the University's decision were shielded from public disclosure. Complaint, ¶79. Absent these allegations, Plaintiff does not indicate that the Individual Defendants disclosed the letter to any third persons. Taking these facts as true as asserted by the Plaintiff, Plaintiff's claim for false light fails as a matter of law because she has not shown publication to a third party and are qualifiedly privileged. For the same reasons detailed above regarding Plaintiff's defamation claim, which Individual Defendants adopt and assert with regarding to the Invasion of Privacy – False Light claim, Plaintiff's claim must be dismissed as a matter of law.

G. The Falsification of Business Records Claim Against the Individual Defendants Fails to State a Claim upon which Relief May Be Granted

KRS 446.070 "creates a private right of action in a person damaged by another person's violation of any statute that is penal in nature and provides no civil remedy, if the person damaged is within the class of persons the statute intended to be protected." *Hargis v. Baize*, 168 S.W.3d 36, 40 (Ky. 2005). In order to successfully plead a negligence *per se* claim, Plaintiff must therefore allege sufficient facts to establish a violation of the statute. Here, Plaintiff's claim for falsification of business records pursuant to KRS 517.050 fails because she does allege facts sufficient to show a violation of the statute.

Specifically, KRS 517.050(1) requires that a person falsifying business records do so with an intent to defraud. As interpreted, "intent to defraud" requires the plaintiff to establish the six elements of fraud, which includes establishing a *material* representation made with an intent to induce detrimental reliance by the defrauded party. *See Fleming v. Flaherty & Collins, Inc.*, 529 Fed.Appx. 654, 659 (6th Cir. 2013). Thus, even if a plaintiff can establish a record contains false

or incorrect information, she cannot prove a violation of KRS 517.050 unless she also establishes the false or incorrect information pertained to a material matter, was intended to induce some action, and in fact induced the action to the detriment of the plaintiff.

Here, Plaintiff alleges that the business records that were purportedly falsified relate to the "Request to Modify a Position" in WKU's Interview Exchange system and the Electronic Personnel Action Form. Complaint, ¶¶49-51. Even assuming the information entered onto these forms was correct, Plaintiff fails to allege how that information was material. As recognized in *Fleming*, merely alleging that a false entry was made is insufficient unless it is accompanied by an explanation of how the misrepresentation was material to inducing some action. 529 Fed. App'x. at 659. Further, Plaintiff fails to indicate that the Defendants intended for her to rely upon the information submitted in the forms or that in fact relied upon the information. In fact, the only intent she alleges that WKU had relating to the alleged falsification was to retaliate against her by "diminishing [her] status, humiliating and embarrassing her…" Complaint, ¶52.

H. The Intentional Infliction of Emotional Distress Claim Against the Individual Defendants Fails to State a Claim upon which Relief May Be Granted

To establish a claim of intentional infliction of emotional distress, "the plaintiff must prove the following elements: [t]he wrongdoer's conduct must be intentional or reckless; the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; there must be a causal connection between the wrongdoer's conduct and the emotional distress and the distress suffered must be severe." *Osborne v. Payne,* 31 S.W.3d 911, 913-914 (Ky. 2000). In order for conduct to be considered "extreme and outrageous" it must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency...." *Humana of Kentucky, Inc. v. Seitz,* 796 S.W.2d 1, 3 (Ky.1990).

The question of whether the defendant's conduct is "outrageous" is a question of law.

Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 788-789 (Ky. 2004) ("[I]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery."). In making this determination, Kentucky courts have explained that:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Id. at 789 (citing Restatement (Second) of Torts § 46(1), cmt. d (1965)). In short, "major outrage is essential to the tort," and "the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." *Id.* at 791–92.

As a starting point, Kentucky courts have recognized that wrongful termination of an employee "does not rise to the level of outrageous conduct required to support an IIED claim." *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 572 (Ky. App. 2005). This is true even if the termination is alleged to be the result of discrimination. *Id*. (citing *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 376 (6th Cir. 1999). Recognizing that the level of outrageousness is very high, courts have dismissed intentional infliction of emotional distress claims in cases where the facts are much more egregious than those presented in this case. For instance, in *Humana of Kentucky, Inc. v. Seitz*, the Supreme Court of Kentucky upheld the dismissal of an intentional infliction of emotional distress case involving a stillborn child. 796 S.W.2d 1, 3-4. In *Humana*, a mother gave birth in a bedpan to stillborn infant and was immediately overcome with grief. The nurse responding to her screams told her to "shut up" and wrapped the baby in a sheet. *Id*. at 2. When the mother inquired where the nurse was taking her baby, the nurse told her "we dispose of

them right here at the hospital." *Id*. While the Court described the nurse's behavior as callous, cold, and lacking in compassion and taste, the Court held the behavior was not sufficiently egregious to support a claim for intentional infliction of emotional distress. *Id*. at 3-4.

Here, Plaintiff has alleged that her separation and the reasons stated in the letter notifying her that she had been relieved of her duties constitute the basis of her claim. Complaint, ¶151. However, neither her separation itself or even the reasons for it amount to the outrageous and egregious conduct that is necessary to properly state a claim for intentional infliction of emotional distress. The Court, as a matter of law, is empowered to determine that these acts fail to exceed "all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Stringer*, 151 S.W.3d at 789.

Further, Plaintiff has not alleged that the emotional distress which she allegedly suffered was "severe." As Kentucky courts have explained, "severe emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case." *Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012) (internal quotation marks omitted). By contrast, "[d]istress that does not significantly affect the plaintiff's everyday life or require significant treatment will not suffice." *Id.* In his Complaint, Plaintiff nowhere makes any allegation related to the severity or seriousness of her alleged emotional distress. Accordingly, Plaintiff's Intentional Infliction of Emotional Distress Claim fails as a matter of law.

CONCLUSION

Plaintiff Deborah Tomes Wilkins' Complaint should be dismissed for failing to state claims against the Individual Defendants because each Individual Defendant is shielded by the doctrine of governmental immunity or qualified immunity. Alternatively, Plaintiff's causes of action for

defamation, fraud, tortious interference with a contractual relationship, promissory estoppel, invasion of privacy – false light, falsification of business records and intentional infliction of emotional distress should be dismissed for failing to state legally viable claims upon which relief may be granted. For the reasons fully stated within this memorandum, Counts 5, 7, 8, 9, 10, 11, and 13 of Plaintiff's Complaint should be DISMISSED.

Respectfully submitted,

/s/ R. Gregg Hovious
R. Gregg Hovious
Jennifer M. Barbour
MIDDLETON REUTLINGER
401 S. Fourth Street, Suite 2600
Louisville, Kentucky 40202
Ph: (502) 584-1135
ghovious@middletonlaw.com
jbarbour@middletonlaw.com
Counsel for Defendant WKU

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the clerk of the court by using the KYeCourts' eFiling System and a copy of the foregoing was served, via Email and U.S. Mail this 12th day of May, 2022 to the following counsel of record:

Matthew J. Baker
911 College Street
Suite 200
Bowling Green, Kentucky 42101
mbakerlaw@bellsouth.net

Counsel for Plaintiff

/s/ R. Gregg Hovious
Counsel for Defendant WKU