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

DEBORAH TOMES WILKINS PLAINTIFF

vs. **DEFENDANT WESTERN KENTUCKY UNIVERSITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS**

WESTERN KENTUCKY UNIVERSITY, et al. DEFENDANTS

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Defendant Western Kentucky University ("WKU"), by counsel, respectfully moves this honorable Court to enter the Order tendered herewith, dismissing Counts 1, 4, 6, 7, 8, 10, 11, and 13 of Plaintiff's Complaint pursuant to Kentucky Rule of Civil Procedure 12.02(f) for failure to state a claim upon which relief can be granted. As well, Plaintiff's claims for punitive damages in Count 3 should be dismissed for failing to meet the applicable statute of limitations. In support of this Motion, Defendant submits 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. Of those claims which WKU can discern are alleged against it, Plaintiff's Complaint

should be dismissed for failing to state a claim upon which relief may be granted.[1]

In Count One of her Complaint, Plaintiff inexplicably alleges that her employment agreement – which by its express terms terminated on June 23, 2022 and could not be modified without the mutual written consent of WKU and Plaintiff – was breached when it was not extended for an additional four-year term. Complaint, ¶83. Plaintiff would have this Court imply an obligation upon WKU to extend her contract despite the undisputed plain terms of the contract and in clear violation of Kentucky law. Further, to the extent Plaintiff's breach of contract claim is premised on an oral or implied contract to extend her employment contract, WKU is entitled to governmental immunity.

In Count Three of her Complaint, Plaintiff asserts a claim for retaliation in violation of the Kentucky Whistleblower Act under KRS 61.102. She seeks compensatory damages, punitive damages and attorneys' fees under this claim. Complaint, ¶99. However, her claim for punitive damages is barred as a matter of law because she failed to bring it within 90 days of the alleged retaliation. *See Consolidated Infrastructure Manag. Auth. v. Allen,* 269 S.W.3d 852, 856 (Ky. 2008).

In Count Four of her Complaint, Plaintiff asserts that WKU retaliated against her by engaging in a series of purported "protected activities" under KRS 344.280 of the Kentucky Civil Rights Act ("KCRA"). Complaint, ¶¶101-103. Yet, each of these purported "protected activities" were all within Plaintiff's job duties on behalf of WKU – a fact discernible from the allegations within Plaintiff's Complaint, which incorporates her employment agreement and the description of her job duties first as General Counsel and then as Title IX Coordinator. Plaintiff's claims fail

[1] WKU reserves the right to seek dismissal of any other claims that may be asserted against it, but that are not clearly pled against WKU on the face of the Complaint.

to state a claim upon which relief may be granted because of the so-called "manager rule" applicable to civil rights claims premised on protected activity. Under that rule, a plaintiff cannot rely on conduct that falls within the normal scope of her job duties to allege protected activities. Because all of the alleged protected activities detailed in Paragraph 103 of the Complaint indisputably fall within Plaintiff's job duties, Count Four must be dismissed.

In Count Six, Plaintiff asserts a claim for common law wrongful discharge against WKU. However, WKU is entitled to governmental immunity on this claim. *See Stover v. Louisville Metro Dpt. Of Public Health and Wellness*, 2019 WL 258123 (Ky. App. 2019). As a result, Plaintiff fails to state a claim upon which relief can be granted.

In Count Seven of her Complaint, Plaintiff asserts claims sounding in fraud, all of which require a Plaintiff to allege sufficient facts to establish she justifiably relied upon the fraudulent statement or representations forming the basis of the claim. Here, the statement or representation forming the basis of this Count of the Complaint pertain to Defendant Timothy Caboni's discussions with Plaintiff concerning a buyout of the remaining term of her employment agreement. However, Plaintiff has not and cannot allege facts that she justifiably relied on those states 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. 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).

In Count Ten of her Complaint, Plaintiff asserts that WKU has 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. Additionally, WKU is entitled to governmental immunity for intentional torts such as false light.

In Count Eleven of her Complaint, Plaintiff alleges that WKU 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, WKU is entitled to governmental immunity on this tort claim.

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).

Finally, WKU is entitled to governmental immunity on this tort claim.

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, WKU nevertheless rigorously and emphatically disputes the factual allegations within Plaintiff's Complaint. The following factual background is therefore 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.

Wilkins was hired as WKU's first general counsel in 1994 when she was in her early 30s. She served under President Meredith through 1997 and grew into her role under President Gary Ransdell who led the University from 1997 to 2017. Wilkins admittedly provided sound legal advice to Ransdell as the University experienced tremendous growth. During these years, and despite providing generally sound substantive advice, Wilkins experienced significant issues managing interpersonal relationships, communicating with collegiality, and keeping to her duties as general counsel. Her behavior often came at the cost of tumultuous relationships with faculty and staff.

Near the end of President Ransdell's tenure, and after being denied a pay raise, Wilkins demanded that Ransdell extend her a protective employment agreement that allowed her to reach retirement age. Wilkins drafted an exceptionally favorable employment agreement limiting WKU's ability to terminate her to disbarment from the practice of law, a felony conviction, a deliberate refusal to perform her job duties, or a refusal to accept reassignment. That agreement was approved by the Board of Regents at the recommendation of President Ransdell.

With Ransdell's retirement, President Tim Caboni took the helm in 2017. Immediately,

Wilkins was openly hostile towards President Caboni. Her behavior and comments to co-workers indicated that she did not respect Caboni professionally or personally. Nevertheless, Caboni endeavored to work with Wilkins due to her long-standing familiarity with WKU's legal needs.

In the fall of 2018, President Caboni caused WKU to engage the services of a third-party consulting firm to evaluate WKU's leadership team – an endeavor that included assessing Wilkins. Her evaluation is attached as Exhibit A. Consistent with what Caboni and his predecessors had observed, the evaluation found that Wilkins was deficient in "People Leadership." Wilkins' campus and cabinet peers were critical of her ability to defuse conflict situations and promote cooperation. Evaluators commented that Wilkins could be "a more effective leader if: she had a better attitude; if she didn't bully and intimidate employees; . . . [and] if she was a team player." Others observed that "President Caboni and the WKU community would be much better served to seek an attorney who agrees with his vision, promotes community and provides a high level of service to his office. He does not need the drama that Deborah Wilkins brings to her position." When Wilkins received the results of her evaluation, she sent the consultant questions targeted at revealing the identities of evaluators who were critical of her. Rather than utilize the evaluation for growth as a leader, she questioned the consultant's process and the results the review obtained from her peers. Wilkins' questions were so persistent and clearly targeted to uncover the identities of those who critiqued her that the consultant reached out to administration to express her concern that Wilkins was attempting to subvert the anonymity of the evaluation process.

Wilkins began engaging in actions that were for her own self-interest, in violation of University policy, and a violation of the duties and trust placed in her as General Counsel for WKU. For instance, in October 2019, President Caboni received complaints from two senior administrators not known to be hostile to Wilkins expressing their concern that Wilkins was

monitoring their email accounts. By virtue of her role as General Counsel who assisted in responding to Open Records Act requests and responding to litigation discovery requests, Wilkins was given the ability to search the emails and email accounts archived on WKU's server. Other than the IT Department, Wilkins was the only person with such access – access that was given to her because WKU trusted Wilkins as general counsel to act in WKU's best interests and not to breach her confidentiality obligations owing to WKU. President Caboni was aware of access WKU granted Wilkins, and therefore requested IT run a query of all emails searched by Wilkins over the preceding two years. That list revealed that Wilkins was specifically searching President Caboni's entire email account on virtually a weekly basis over a six-month period, as well as searching accounts of other WKU administrators and cabinet members on a regular basis. President Caboni confronted Wilkins about her searches, which she attempted to explain as legitimate searches related to her efforts to respond to discovery requests in ongoing litigation and Open Records Requests.

Wilkins, who had been openly discussing her retirement plans for years, began indicating to staff in her department and President Caboni her intent to retire in June 2022. Around this time, Ms. Wilkins learned that the City of Bowling Green was hiring a new City Attorney. Wilkins instructed Anderson to apply. Anderson ultimately applied, was offered the position, and was prepared to accept it. She notified President Caboni of the offer, as Wilkins insisted.

President Caboni knew that Wilkins' employment agreement would expire in two years, and did not want to lose Mrs. Anderson who had long been part of the succession plan in the General Counsel's office. President Caboni thus accelerated the succession plan and offered Mrs. Anderson the role of General Counsel. To accomplish this, President Caboni approached Wilkins about buying out the remaining two years of her employment agreement in exchange for her early

retirement to determine whether she would be interested before he took the proposal to the Board of Regents. Wilkins expressed interest in the proposal, but voiced concern to President Caboni and outside Counsel for WKU that the Board was unlikely to bless the proposal given the pending budget concerns caused by the brewing COVID-19 pandemic. While President Caboni worked to muster Board approval, Wilkins drafted an employment agreement for Mrs. Anderson that promoted her to General Counsel. After that agreement was signed, President Caboni learned that the Board would not support a buyout of Wilkins' employment agreement, just as Wilkins had predicted.

Unable to offer her an early retirement, President Caboni proposed to create a new, high-level position that would allow Wilkins to serve out the remainder of her employment agreement. Wilkins initially expressed interest and proposed a new role that would allow her to supervise various departments with whom she had a longstanding history of conflict, to include the police department and human resources. President Caboni knew that proposal was untenable and instead created a position as Senior Advisor to the President and *Interim* Title IX Coordinator.

Wilkins negotiated an addendum to her employment agreement which was approved by the Board of Regents. It states that "[p]ursuant to the terms and conditions of this addendum, the University agrees and Wilkins has agreed that her duties as General Counsel, under the Employment Agreement dated October 25, 2013, will end effective June 30, 2020 . . ." The agreement further stated that "[t]he term of this appointment and addendum will be for a period beginning on the 1st day of July 2020, *and expiring on the 30th day of June, 2022*."

However, Wilkins refused to accept the reassignment quietly. She demanded an exit interview with the President, sought to advise the Board of Regents on what she deemed as her accomplishments as General Counsel, and repeatedly sent challenging emails to the President

about why their relationship had failed. Both the frequency and aggressive tone of her communications were a serious distraction. It was evident from her actions that Wilkins was attempting to develop a forthcoming lawsuit against WKU. She submitted a discrimination complaint against a coworker based on an incident that occurred on January 31, 2019—a year and a half prior. With that complaint, she sent an email to President Caboni seeking a face-to-face meeting to find an early resolution that would allow her "to leave WKU on a positive note, but also in a meaningful position," as she wrote. Her intentions with the Title IX complaint were clear: it was submitted as leverage in concluding her employment with WKU.

Even though Wilkins' selfish motivations were clear in submitting the Complaint, President Caboni nevertheless took the complaint seriously and referred it to a respected law firm in Lexington, Kentucky, who specializes in higher education law. That firm investigated and authored a report finding that Wilkins had not been discriminated against based on her gender or age; that the co-worker's behavior that formed the basis of Wilkins' complaint was an isolated incident appropriately addressed by administration; and that Wilkins was not "transitioned [to her new role] as the result of her gender or the events surrounding [the co-worker]."

Despite negotiating her employment agreement addendum to confirm her term of employment would terminate on June 30, 2022, Wilkins began asking questions about whether her employment agreement would be renewed beyond its expiration on June 30, 2022. Her questions were puzzling to President Caboni and Mrs. Anderson because it was clear to all parties involved at the time Wilkins' employment addendum was executed that she was being transitioned to the Senior Advisor and Interim Title IX Coordinator to allow her to serve out her employment agreement. President Caboni and Wilkins had several conversations around that time that she was being transitioned to a role that would allow her to gradually transition out as General Counsel and

retire.

Around this time, Wilkins campaigned for the position of Staff Regent, the staff representative on WKU's Board of Regents. Her campaign was largely based on positions antagonistic to the administration and to President Caboni's agenda. She lost that election to David Brinkley, a party defendant to this action.

Wilkins thereafter campaigned for a position on Staff Senate, a body responsible for representing the staff's interests to administration, and was elected solely because there were an equal number of openings and candidates. She did not muster enough votes to be eligible for any committee positions. Over the three months that she served on the Staff Senate, the morale of that governing body plummeted. She regularly made it known she could take aggressive positions that others could not because she had the protection of an employment agreement. She used information she knew because of her former role as General Counsel in Staff Senate meetings, knowing it would create division between staff and President Caboni. Senators reported that she was unprofessionally aggressive in questioning guest presenters to the Staff Senate, to the point that Senators dreaded attending further meetings and considered resigning. Further, when WKU staff and administration uniformly took a cut in pay to address budget constraints, Wilkins declined any similar cut to her own compensation.

By November 2021, President Caboni concluded that Wilkins could no longer effectively serve out the remainder of her employment contract. She had simply become too disruptive and could no longer be trusted. Therefore, on November 22, 2021, Wilkins was relieved of all responsibilities with the promise that she would continue to be compensated through the expiration of her employment agreement, as amended. WKU has paid, and will continue to pay, all of Wilkins' salary and benefits through June 30, 2022.

After her removal, Wilkins wrote to WKU demanding the return of her personal items, including files and documents, as well as certain files she had saved to her WKU-issued computer. Among the hard files and documents, WKU located a file that Wilkins had begun preparing in early 2020—at exactly the time she was searching the President's emails—that included purely personal information about President Caboni, to include turn-by-turn directions to his out-of-state property and research on his siblings. Additionally, WKU located files on Wilkins' work computer including detailed timelines she had begun creating in 2020 that appeared to be the early workings of a draft complaint, legal research on potential claims against the University, as well as a draft press release prepared in early 2021 about a forthcoming lawsuit she intended to file. All of this information confirmed what WKU had suspected: Wilkins had become obsessed with harming the President personally and professionally, and spent considerable on-the-clock time scheming a lawsuit against the University.

Wilkins' demands for the return of her property were part of a longstanding pattern of Open Records Requests submitted by her that were meant to harass and burden the Office of General Counsel. Between December 2020 and February 2, 2022, Wilkins submitted approximately 15 Open Records Requests related to her. Because of her former position as General Counsel and the nature of the documents sought, they had to be carefully reviewed for claims of privilege and other exemptions under the Open Records Act. After thorough review, the University produced nearly 34,000 pages and 4.7 gigabytes of data. A letter from Mrs. Anderson to Wilkins summarizing Wilkins' harassing requests is attached as Exhibit C.

In sum, Plaintiff's Complaint contains a self-serving and baseless set of allegations that discovery will conclusively prove to be unsubstantiated. Nevertheless, these factual disputes need not be resolved by this Court presently. As will be delineated in more detail below, the Counts

against WKU addressed in this Motion to Dismiss all involve questions of law that may properly be resolved in WKU's favor at this juncture.

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. WKU Is Entitled to Governmental Immunity for the Majority of Plaintiff's Claims

As an initial matter, "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. Western Kentucky University*, 219 S.W.3d 713, 718 (Ly. 2007) (citing *Withers v. University of Kentucky*, 939 S.W.2d 340, 343 (Ky.1997). WKU is therefore entitled to "immunity from suit except where the Kentucky General Assembly specifically waives it…. The doctrine extends to both actions in tort and contract." *Univ. of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. App. 1978). WKU will address the applicability of governmental unity to claims asserted by Plaintiff.

B. The Breach of Contract Claim Against WKU Fails to State a Claim upon which Relief May Be Granted

In order to establish a claim for breach of contract, Plaintiff must establish the existence of a contract, a breach of a provision of that contract, and damages resulting from the breach. *EQT*

Production Company v. Big Sandy Company, L.P., 590 S.W.3d 275, 293 (Ky. App. 2019). "An unambiguous written contract must be strictly enforced according to the plain meaning of its express terms and without resort to extrinsic evidence. Even if the contracting parties may have intended a different result, a contract cannot be interpreted contrary to the plain meaning of its terms." *Cadleway Properties, Inc. v. Bayview Loan Srvc., LLC*, 338 S.W.3d 280, 286 (Ky. App. 2010) (citations omitted).

Plaintiff asserts that she had an employment agreement with WKU and that WKU breached that agreement by not extending it for an additional four years. (Complaint, ¶83)[2]. However, the Employment Agreement dated October 25, 2013 and its Addendum dated May 4, 2020 contain no provision indicating it would be extended beyond its termination of June 30, 2022. To the contrary, both the Employment Agreement states "in any year of this agreement, the parties agree to extend the term of this Agreement in writing under the terms and conditions outlined herein by one (1) additional year at the end of each of the original four (4) years, **with the term of employment, together with extension, not to extend beyond June 30, 2022.**" (Employment Agreement, ¶2). The Employment Agreement further states that it "constitutes the complete Agreement between the parties…" and cannot be "amended, modified, or changed except upon the mutual consent of Wilkins and the University." (*Id*., ¶8). In that event, "[a]ny amendment to modification, to be effective, must be reduced to writing and signed by all parties to this Agreement." (*Id*). The Employment Agreement was modified via written agreement of the parties on May 4, 2020. That addendum states that the term of the agreement expires on June 30, 2022 and is silent as to any

[2] It is important to note that Plaintiff asserts this as the basis of her breach of contract claim against WKU because absent an extension of the contract beyond June 30, 2022, Plaintiff has no damages. This is because Plaintiff continues to receive her salary and benefits under Sections 4 and 5 of the Addendum to Employment Agreement through June 30, 2022.

extension periods. (Addendum, ¶2). It also contains an acknowledgement that the addendum constitutes the complete agreement between the parties and may only be modified if in writing signed by both parties. (*Id*., ¶7).

Simply put, Plaintiff's Employment Agreement and Addendum contain no provision providing for an extension of the contract beyond June 30, 2022. Plaintiff's unilateral expectation of an extension cannot form the basis of her breach of contract claim against WKU. Plaintiff's Complaint does not allege she and WKU ever agreed to modify this Employment Agreement so as to require any extension beyond June 30, 2022 or to even attempt to negotiate a four-year extension following its termination on June 30, 2022. Accordingly, by the plain and unambiguous terms of the agreement, WKU did not breach the contract by failing to extend it for an additional four year.

Finally, Plaintiff's claims fail due to the governmental immunity afforded to WKU. While the KRS 45A.245(1) waives governmental immunity to the extent Plaintiff has a "lawfully authorized written contract", it does not waive for oral or implied contracts. To the extent Plaintiff alleges that she had an implied or oral contract to either extend her written contract, the statutory language clearly states immunity is waived only for actions brought on written contracts. *See also, Furtula v. University of Kentucky,* 438 S.W.3d 303, 306 (Ky. 2014) (the waiver of immunity is not applicable to implied contracts); *Cmmw. v. Whitworth,* 74 S.W.3d 695 (Ky. 2002) (rejecting the argument that the waiver of immunity for written contracts in KRS 45A.245(1) includes a waiver of immunity for suing on an oral contract).

C. The Punitive Damages Claim for Violations of the Kentucky Whistleblower Act Fails to State a Claim upon which Relief May Be Granted

In Paragraph 99 of Count Three of her Complaint, Plaintiff asserts a claim for punitive damages against WKU for alleged violations of the Kentucky Whistleblower Act, KRS 61.102, *et*

seq. However, KRS 61.103(2) expressly states that any claim for injunctive relief or punitive damages under the statute is subject to a 90-day statute of limitations. The Kentucky Supreme Court affirmed this interpretation of the statute in *Consolidated Infrastructure Management Authority, Inc. v. Allen*, holding that "[t]he 90 day limitation found at KRS 61.103(2), by its express language, applies only to claims for injunctive relief and/or punitive damages." 269 S.W.3d 852, 856 (Ky. 2008). All of the purported protected activity took place no later than November 22, 2021—the day Wilkins was relieved of responsibilities—and this suit was not filed until 150 days later on April 21, 2022. As a result, Plaintiff's claim for punitive damages against WKU for alleged violations of the Kentucky Whistleblower Act are time barred.

D. The Protected Activity Claim Against WKU Fails to State a Claim upon which Relief May Be Granted

In Count Four of her Complaint, Plaintiff alleges that WKU retaliated against her in violation of KRS 344.280 for the "protected activity" identified in Paragraph 103 of that Count. As an initial starting point, claims under Kentucky's Civil Rights Act ("KCRA") are evaluated using the same standard applied in federal Title VII claims. *See Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 436 (6th Cir. 2009). *See also Norton Healthcare, Inc. v. Disselkamp*, 600 S.W.3d 696, 719-722 (Ky. 2020) (recognizing Kentucky courts apply the KCRA consistently with federal antidiscrimination laws, including Title VII). Indeed, the KRS 344.280(1), which forms the basis of Count Four of Plaintiff's Complaint, is nearly identical to the statutory language of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a)(2) ("Title VII").

Numerous federal courts addressing protected activity claims under Title VII have adopted the so-called "manager rule", which holds a plaintiff cannot rely on conduct that falls within the normal scope of her job duties to allege protected activities. *See, e.g., Rice v. Spinx Co.,*

Inc., 2011 WL 7450630, at *3 (D.S.C. 2011) ("[A] plaintiff has not engaged in protected activity if he has merely discharged the duties of his job"); *Hill v. Belk Stores Services, Inc.*, 2007 WL 2997556 *1 (W.D.N.C. 2007) (finding the plaintiff's actions were "not legally protected because he acted only within the scope of his duties as a safety program officer, and actions within the scope of an employees['] duties are not protected for the purpose of Title VII); *Vidal v. Ramallo Bros. Printing, Inc.*, 380 F.Supp.2d 60 (D.P.R.2005) (finding that a human resources director did not engage in protected activity when he notified the company's president and vice-president that he intended to start a sexual harassment investigation against them). Rather, for activity to constitute protected opposition, a plaintiff must "step outside" her normal employment role and take "some action against a discriminatory policy." *EEOC v. HBE Corp.*, 135 F. 3d 543, 554 (8th Cir. 1998); *see also Brush v. Sears Holdings Corp.*, 466 F. App'x 781, 786 (11th Cir. 2012) *cert. denied,* 133 S. Ct. 981 (2013) (same); *see McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486 (10th Cir. 1996) (finding that plaintiff "never crossed the line from being an employee merely performing her job as personnel director to an employee lodging a personal complaint about the wage and hour practices of her employer and asserting a right adverse to the company").

Here, Plaintiff acted first as General Counsel for WKU, with her job duties described on Exhibit A to her Employment Agreement, and as Title IX Coordinator, with her job duties described on Exhibit A to the Addendum to her Employment Agreement. A review of the alleged "protected activity" Plaintiff identified in Paragraph 103 of her Complaint indicates that each of these activities fell squarely within her job duties on behalf of WKU.

Each of the alleged protected activities in Plaintiff's complaint relate to reports of violations of state or federal law or WKU policies and procedures, largely in the realms of age, gender or race discrimination. As General Counsel, her job duties included "anticipat[ing] and identif[ying] legal issues and counsel[ing] officers of the institution and other upper management

in orders to develop legal strategies and solutions…" and "provid[ing] legal counsel and guidance to the…President and other upper management…on all legal maters relevant to [WKU], including personnel law, policies, procedures, rules and regulations and laws…" . She was to "develop recommendations respecting the university's compliance with applicable state and federal laws" As Title IX Coordinator, Plaintiff's job duties including implementing and monitoring compliance with Title IX, including investigation of sex, gender, and other discrimination claims. Each of the alleged protected activities identified within Paragraph 103 of the Complaint fall within these job duties.

E. The Common Law Wrongful Discharge Claim Against WKU Fails to State a Claim upon which Relief May Be Granted

In Count Six of her Complaint, Plaintiff alleges WKU wrongfully discharged her exercising a right conferred to her by legislative enactment. Plaintiff does not identify what the right she allegedly exercised that forms the basis of this claim. To the extent she alleges the right pertained to her alleged protected activities as alleged in Count IV or the acts alleged in Count III under the Kentucky Whistleblower Act, those claims cannot properly form the basis of her common law wrongful termination claim. This is because the Kentucky Whistleblower Act and KRS 344 provide a structure for pursuing a claim. *See Stover v. Louisville Metro Dep't of Pub. Health & Wellness*, 2019 WL 258123, at *3 (Ky. App. Jan. 18, 2019). To the extent that her wrongful discharge claim is premised upon some other right, Plaintiff's claim is barred by the doctrine of governmental immunity. *Id*. at *4.

F. The Fraud Claim Against WKU Fails to State a Claim upon which Relief May Be Granted

In Count Seven of her Complaint, Plaintiff alleges that WKU committed fraud, fraudulent misrepresentation, and fraud in the inducement related to representations she claims Defendant

Caboni made to Plaintiff 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, she included similar language making contracts contingent upon Board of Approval when drafting the contract Plaintiff drafted as alleged in Paragraph 34 of her Complaint. As a result, even if 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 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 Caboni.

Finally, WKU is entitled to governmental immunity as to Plaintiff's fraud claims. As noted, WKU is a state agency entitled to governmental immunity. "There is no exception for suits in equity, *fraud*, or bad faith or where the plaintiff is merely seeking a refund of money generated outside of the Commonwealth's taxing power." *Univ. of Kentucky v. Regard*, 2022 WL 627194, at *7 (Ky. App. Mar. 4, 2022). *See also Com. v. Samaritan All., LLC*, 439 S.W.3d 757, 763 (Ky. App. 2014) (holding governmental immunity applies to intentional torts such as fraud).

G. The Tortious Interference Claim Against WKU Fails to State a Claim upon which Relief May Be Granted

Plaintiff alleges that "the Defendants", a term which includes WKU as defined by Plaintiff's Complaint, interfered with her employment agreements with WKU. "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).

H. The Invasion of Privacy - False Light Claim Against WKU 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." Restate (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).

Plaintiff's Complaint alleges that Caboni's letter to Wilkins detailing the basis for her separation placed her in a false light and defamed her. Complaint, ¶¶ 63-64. However, Plaintiff's Complaint admits that the letter terminating her 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, ¶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 false light fails as 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 her separation 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 Landrum v. Braun*, 978 S.W.2d 756, 757-758 (Ky. App. 1998) (affirming motion to dismiss false light invasion of privacy claim where court determined communications with the business were protected by qualified privilege that was a question of law).

While no Kentucky court has directly addressed whether intraorganizational communications satisfy the "publication" requirement, the Kentucky Supreme Court in *dicta* has indicated should 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.[3]

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 WKU redacted the entire second paragraph of the letter, which contained statements concerning the reasons for Plaintiff being relieved of her duties. Thus, to the extent Plaintiff claims the reasons for her separation

[3] 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. 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).

placed her in a false light, 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 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 false light fails as a matter of law.

Finally, WKU is entitled to governmental immunity as to Plaintiff's false light claim. As noted, WKU is a state agency entitled to governmental immunity. The immunity afforded to WKU extends to intentional torts, including claims for defamation and false light. *See Dietz v. Bolton*, 2013 WL 1919562, at *13 (Ky. App. May 10, 2013) (affirming dismissal of defamation and false light claims against Louisville Metro Government arising from statements made during press conference). *See also Com. v. Samaritan All., LLC*, 439 S.W.3d 757, 763 (Ky. App. 2014) (holding governmental immunity applies to intentional torts).

I. The Falsification of Business Records Claim Against WKU 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 not 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. Appx. At 659. Further, Plaintiff fails to indicate that WKU 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.

Finally WKU is entitled to governmental immunity as to Plaintiff's negligence *per se* claim. Specifically, KRS 446.070 does not constitute a legislative waiver of governmental immunity. *See Clevinger v. Bd. of Educ.*, 789 S.W.2d 5, 9 (Ky. 1990) (KRS 446.070 does not constitute a waiver of sovereign immunity); *see also Dep't of Nat. Res. v. Adkins*, 2013 WL 5524138, at *1 n.2 (Ky. App. Oct. 4, 2013) ("KRS 446.070 does not constitute a broad waiver of sovereign immunity[ ]"). As a result, Plaintiff's negligence *per se* claim, like any other tort, is subject to governmental immunity.

J. The Intentional Infliction of Emotional Distress Claim Against WKU 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 from employment and the reasons stated for her being relieved of her duties in the letter constitute the basis of her claim. Complaint, ¶151. However, neither her separation itself or even the reasons stated for the separation 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 her 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. Finally, like Plaintiff's other tort claims, WKU is entitled to governmental immunity on Plaintiff's intentional infliction of emotional distress claim.

CONCLUSION

Plaintiff Deborah Tomes Wilkins' Complaint should be dismissed for failing to state claims against WKU for breach of contract, protected activity, fraud, tortious interference with a contractual relationship, invasion of privacy – false light, falsification of business records and intentional infliction of emotional distress. For the reasons fully stated within this memorandum, Counts 1, 4, 6, 7, 8, 10, 11, and 13 of Plaintiff's Complaint should be DISMISSED.

Respectfully submitted,

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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:

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