IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Case No. 5:07-CV-231

Pamela L. Hensley, Plaintiff, vs. Johnston County Board of Education, and Anthony L. Parker, in his capacity as Superintendent of the Johnston County Schools and in his individual capacity, Defendants.	)	**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS Local Civil Rules 7.1(d) and 7.2, E.D.N.C.**

Defendants Johnston County Board of Education and Anthony L. Parker, by and through counsel and pursuant to Local Civil Rules 7.1(d), and 7.2, E.D.N.C., submit this Memorandum of Law in Support of their Motion to Dismiss. For the following reasons, defendants respectfully request that their Motion to Dismiss be GRANTED.

STATEMENT OF THE CASE

On May 24 2007, plaintiff Pamela L. Hensley filed a Complaint and Demand for Jury Trial in the Johnston County Superior Court seeking an injunction, recovery of compensatory and punitive damages, and reassignment to a particular teaching position from which she had been transferred. On June 20, 2007, defendants filed a Notice of Removal to the United States District Court for the Eastern District of North Carolina. On June 25, 2007, the Court granted the defendants an extension of time to respond to the Complaint up to and including July 30, 2007.

This memorandum of law is submitted pursuant to Local Civil Rule 7.1(d), E.D.N.C., in support of defendants' Motion to Dismiss.

STATEMENT OF THE FACTS

Plaintiff's Complaint stems from her assignment to a teaching position at South Campus Community School in Johnston County. Prior to her South Campus assignment, she had been assigned to teach science at North Johnston Middle School. (Complaint, ¶¶1, 42)(Paragraph references are to the Complaint.)

In January 2005, the parent of a student at North Johnston Middle School complained to Ms. Hensley about her daughter's grade in Ms. Hensley's science class. (¶13). The student's parents (hereafter "the Does") then met with the North Johnston Middle School Principal Ray Stott. During that meeting, the parents complained: (1) that Ms. Hensley had derogated her students' religious beliefs during a November 2004 classroom discussion of evolution and (2) that Ms. Hensley had lowered their daughter's grade in retaliation for comments their daughter had made during the discussion. (¶¶13-15).

In response to the parental complaints, the school system conducted an investigation, led by its attorney. (¶16). In an April 2005 letter from Principal Stott to Ms. Hensley, Mr. Stott stated that there was no support for the second allegation regarding a retaliatory lowering of grades. (¶17). However, the letter also addressed the nature of the classroom discussion on evolution and issues related to grading and the curriculum. (¶18)

After the investigation concluded, the Does, with the assistance of counsel, continued to press their concerns regarding Ms. Hensley's behavior during the November 2004 evolution discussion. Plaintiff alleges that John Doe engaged in public communication and together with his agents communicated with mass media outlets about her teaching. (¶¶19-20). Over a period of several months, the school system negotiated with the Does' attorney to resolve their complaints about Ms. Hensley and to attempt to diffuse the tensions and distractions occasioned by the ongoing discontent. (¶¶21-24).

As part of the proposed resolution, Ms. Hensley was asked whether she would be willing to sign a letter to the parents of students in her eighth grade science class. On August 12, 2005, Plaintiff met with

her representatives from the North Carolina Association of Educators (NCAE) who presented her with a draft of the proposed letter. (¶¶24-25). One of the NCAE representatives was an attorney appointed to represent plaintiff's interests. (¶25). The NCAE representatives recommended that plaintiff agree to sign the letter and she agreed to do so. (¶25). In her Complaint, Plaintiff admits that after reviewing the draft and obtaining the advice of her appointed counsel and other NCAE representatives, she "agreed to comply with the school's *request*." (¶25). In turn, the Does agreed to accept the letter as part of the resolution of their complaint. (¶27).

After the Does agreed to accept the letter, Ms. Hensley reneged on her commitment to sign the letter. (¶28). "The NCAE attorney told Ms. Hensley that she would explore alternatives to this draft of the letter. . . . She was even told that she might be putting her 'career in jeopardy for insubordination.' " Ms. Hensley does not identify the person making these statements, but refers to them in the context of discussions with her own representatives, including her attorney, with the NCAE. (¶27).

Given the setback that Ms. Hensley's reversal posed to the resolution of the Does' complaints, the renewed controversy stemming from the reversal of her position and the continuing tensions and distraction tied to the circumstances, Superintendent Anthony Parker decided to transfer Ms. Hensley to South Campus Community School. Ms. Hensley was informed of this decision at a meeting on December 1, 2005. (¶34). The letter given to plaintiff, "which outlined his reasons for the transfer," stated that her reversal of position on signing the letter "sparked additional complaints" and that the "matter still remains a source of tension and distraction within the school system and has diminished your credibility at North Johnston Middle School." (¶¶34-35).

Upon learning of her transfer, plaintiff sent email messages to a wide array of colleagues and parents explaining her transfer and castigating Dr. Parker. (¶37). Ms. Hensley was assigned to teach language arts remediation at South Campus. Upon learning of her new assignment, plaintiff asked to be re-assigned, raising her hearing impairment as a basis for a reassignment. (¶41). Ms. Hensley, who had taught

science for some five years without any accommodation (¶8), does not allege that she sought any accommodations for her position at South Campus Community School, other than her preference for re-assignment. (¶41). Plaintiff eventually reported to her assigned position at South Campus and alleges no complaints about reduction in salary or benefits, as she has experienced neither. Instead, her Complaint is centered on the school system's refusal to adopt plaintiff's own reassignment plan for herself. (¶¶41-43). Plaintiff subsequently filed an EEOC charge alleging discrimination based on religion and disability and received a Right-to-Sue letter. (¶45). Plaintiff alleges she left the reassigned position at South Campus for a new position outside the JCS system which will result in lower wages and fewer employee benefits than her position at South Campus. (¶47).

STANDARD OF REVIEW

The purpose of a 12(b)(6) motion is to test the legal sufficiency of the Complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). While the court is required to accept as true all well-pleaded allegations in the plaintiff's complaint, the court is not required to accept as true the legal conclusions set forth in the complaint. *Dist. 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085-86 (4th Cir. 1979). Similarly, the court is not required to accept "unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Markets, Inc. v. J.D. Assoc. Ltd. Partnership*, 213 F.3d 175, 180 (4th Cir. 2000). Finally, vague and conclusory allegations do not state a claim upon which relief may be granted. *Simpson v. Welch*,900 F.2d 33, 35 (4th Cir. 1990).

On a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, the burden is on the party asserting jurisdiction to establish that jurisdiction does exist. *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999).

ARGUMENT

I. MS. HENSLEY'S FIRST AMENDMENT AND STATE CONSTITUTIONAL FREE SPEECH CLAIMS SHOULD BE DISMISSED BECAUSE HER SPEECH WAS NOT A SUBSTANTIAL FACTOR IN HER TRANSFER, NOR DID IT ADDRESS ISSUES OF PUBLIC CONCERN.

Because Ms. Hensley fails to allege facts establishing that the speech was a substantial factor in her job transfer, or that she engaged in protected speech regarding a matter of public concern, her free speech claims under the state and federal constitutions should be dismissed. *Peters v. Jenney*, 327 F.3d 307, 322-23 (4th Cir. 2003); *Love-Lane v. Martin*, 355 F.3d 766, 776 (4th Cir. 2004), *cert. denied,* 543 U.S. 813 (2004)*; see also Evans v. Cowan*, 132 N.C.App. 1, 9, 510 S.E.2d 170, 175 (1999) (applying U.S. Supreme Court's standard in *Connick v. Myers* to state constitutional free speech claim). As a public employee, Ms. Hensley is required to adequately allege each of those elements, and her failure to do so leaves her free speech claims fatally flawed.

A. Ms. Hensley's First Amendment claim should be dismissed because she was not transferred as the result of any speech, but rather because she reneged on her agreement to sign a letter to students' parents, upsetting months of negotiation and exacerbating an already difficult situation.

Ms. Hensley's complaint fails to identify any protected speech that was a "substantial factor" in the decision to transfer her, a requirement for a public employee alleging a First Amendment violation. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 356 (4th Cir. 2000), *cert. denied*, 531 U.S. 1152 (2001). Ms. Hensley was not transferred because she engaged in any protected speech, but because she reneged on an agreement to sign a letter to students' parents regarding the conduct of a classroom discussion. The Fourth Circuit, when confronted with similar facts, has rejected a First Amendment claim because the speech was not a substantial factor in the employment action taken against the plaintiff. *Goldstein* at 356.

In *Goldstein*, the plaintiff firefighter claimed that he had been suspended and then terminated from his position in retaliation for speaking out about safety violations and favoritism exhibited by his captain.

Id. at 353. While the Court agreed that Goldstein was engaged in protected speech, it rejected his argument that the defendant fire company took action against him in retaliation for that speech. *Id*. at 356. After repeatedly raising issues with the fire company's Executive Committee, Goldstein agreed to bring additional complaints directly to the fire company's president, rather than to the full executive committee. *Id*. at 351. Within weeks, Goldstein violated that agreement, and the Executive Committee voted to suspend him from the company. *Id*. The court found that "the violation of a prior agreement in this manner furnished a clear justification for sanctions, and any such sanction would have been unrelated to Goldstein's public safety related complaints." *Id*. at 357.

The school system finds itself in the same situation with Ms. Hensley. After being given the opportunity to review the draft of a letter to students' parents and agreeing to sign the letter as written, Ms. Hensley reneged on that agreement. Furthermore, she did so *after* the aggrieved parents had accepted the proposed letter, resolving their complaints against the school system. Her reversal threatened to upset negotiations between counsel for the school system and for the family, and, as stated in Dr. Parker's letter, allowed a source of tension and distraction and loss of credibility to linger within the school system[1]. (¶35). Here, just as in *Goldstein*, the superintendent's actions were motivated not by Ms. Hensley's speech but by her reneging on an earlier agreement and the consequences of that reversal.

B. None of the issues on which Ms. Hensley alleges that she spoke were matters of public concern, requiring dismissal of Ms. Hensley's First Amendment claim.

Even had Ms. Hensley been transferred because of her speech, her First Amendment claim should

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[1]With the consent of the plaintiff, defendants have attached the April 4, 2005, letter from Principal Ray Stott and the December 1, 2005, letter from Superintendent Anthony Parker to its motion to dismiss as Exhibits 1 and 2, respectively. "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Associated v. Zenith Data Systems*, 987 F.2d 429, 431 (7th Cir. 1993); *see also* Fed. R. Civ. P. 10(c). Both of these documents were quoted and referenced in Ms. Hensley's complaint. (¶¶ 17, 18, 34, 35). Should the court believe that considering these documents will convert defendants' motion to dismiss into a motion for summary judgment, the defendants respectfully request that the court not consider them.

be dismissed because she was not engaged, as a citizen rather than as a disgruntled employee, in protected expression regarding a matter of public concern, a required showing for public employees bringing First Amendment claims. *See Peters* at 322-23; *Love-Lane* at 776.

In determining whether speech regards matters of public concern, the Court looks to the content, context, and form of the speech at issue. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). The test is whether the employee was speaking as a citizen about matters of public concern, or as an employee on matters of personal interest. *Connick* at 147. Furthermore, when making statements pursuant to their official duties, public employees are not speaking as citizens for First Amendment purposes, and their speech is not constitutionally protected. *Garcetti v. Ceballos*, 547 U.S. ___, 126 S.Ct. 1951, 1960 (2006); *see also Williams v. Dallas Independent School District*, 480 F.3d 689, 694 (5th Cir. 2007) (holding that athletic director who wrote memo outlining concerns with financial management of athletic department accounts was not entitled to First Amendment protection because, while plaintiff was not required as part of his job duties to write the memo, he did so in the course of performing his job).

Among the issues of public concern Ms. Hensley claims that she raised include the relationship between the school's curriculum and the Establishment Clause of the First Amendment and the accuracy of information being given to the public. (¶49). Neither of those issues raise matters of public concern; rather they concern the school curriculum and a private dispute between Ms. Hensley and her employer. *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998), *cert. denied*, 525 U.S. 813 (1998); *Berard v. Milville*, 113 F.Supp.2d 197, 203 (D. Mass. 2000). *See also Lee v. York Co. School Div.*, 484 F.3d 687 (4th Cir. 2007) (holding that posting of religious items on walls in teacher's classroom was curricular and therefore not protected speech).

In *Boring*, the superintendent transferred a high school drama teacher at the principal's request because the teacher had, among other things, chosen a play with mature themes for a statewide competition. *Id.* at 366. In affirming the dismissal of the plaintiff's First Amendment claim, the court found that because

the choice of play was part of the school curriculum, it did not present a matter of public concern but was instead a private dispute between an employer and employee. *Id.* at 368. The opinion provides the proper standard under which to evaluate Ms. Hensley's claims:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Id*. at 368 (*quoting Connick v. Myers*, 461 U.S. 138, 147 (1983)).

Just as in *Boring*, Ms. Hensley has raised issues related to the school curriculum, not matters of public concern. Furthermore, the accuracy of the letter Ms. Hensley initially agreed to sign before reneging on that agreement is not relevant to a determination of whether Ms. Hensley engaged in protected speech. In *Berard*, the Chief of Police told a police dispatcher he would no longer have a job unless he called the parents of children involved in a bus accident and apologize for the absence of police on the scene. *Berard* at 200. The dispatcher complied, although he was not at fault. *Id.* at 200. In affirming the dismissal of the plaintiff's First Amendment claim, the court found that even if the plaintiff could show he was required to accept responsibility for something that was not his fault, the phone calls related to a private concern, specifically the internal affairs of the police department. *Id.* at 203.

Ms. Hensley's claim is even weaker than that in *Berard*, because the plaintiff in that case was *required*, under the threat of termination, to make inaccurate statements. *Id*. at 200. Even were the contents of the letter a matter of public concern, Ms. Hensley does not allege that *anyone* working for the school system ever told her that she must sign the letter. The only individuals with whom Ms. Hensley ever alleges she spoke about the letter prior to being informed of her transfer were her NCAE representatives. Indeed, her Complaint makes clear that the letter was presented to her as a draft (¶24), that she understood that the Does had not agreed to the wording (¶25), and that she initially agreed to comply with the school system's *request*. (¶25)(emphasis added).

Ms. Hensley also claims that she raised, as a matter of public concern, whether the school system

was altering the curriculum to accommodate religious interests. (¶49). Not only is this issue clearly curricular, there are no facts contained in the Complaint that Ms. Hensley raised this issue with anyone, much less anyone working for the school system. While Ms. Hensley alleges that Mr. Stott "provided directives on how to teach the science course which strongly suggested that Ms. Hensley discontinue the teaching of evolution," there is no allegation that Ms. Hensley responded to these directives in any way, including by altering the curriculum. (¶¶18, 30).

Furthermore, there are no factual allegations to support any claim that Ms. Hensley was taking a stand against religious interests when she reneged on her agreement to sign the letter to parents. According to her own Complaint, Ms. Hensley's concern with the letter to the parents was that it "contained false statements" and that "she had concerns about the widespread dissemination of this message to all of the parents of students in her class." (¶ 28). Ms. Hensley does not allege that she ever told *anyone* that she felt the school system was being overly accommodating to religious interests.

Finally, Ms. Hensley alleges that she raised as a matter of public concern whether her transfer was in the best educational interests of students. (¶49). Ms. Hensley apparently refers to her email to colleagues and parents, written *after* Dr. Parker had informed her that she would be transferred. (¶37). Nothing in Ms. Hensley's factual allegations supports her claim that she was addressing matters of public concern. The email recounted the school system's internal investigation, as well as the events related to Ms. Hensley's initial agreement to sign a letter of apology to parents before reneging on that agreement. *Id*. Ms. Hensley apparently closed her email by implying that Dr. Parker was not interested in "our students." *Id*.

These factual allegations reflect an employee's "dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre." *See Connick* at 148 (1983) (holding that, with the exception of one question related to pressure to work on political campaigns, employee who circulated questionnaire to colleagues asking about their "confidence and trust . . . in various supervisors, the level of office morale, and the need for a grievance committee" was not addressing issues of public concern but extending her

dispute over her transfer). Finding that Ms. Hensley's speech, in castigating Dr. Parker, touches on a matter of public concern would so broaden the definition of public concern that "every criticism directed at a public official . . . would plant the seed of a constitutional case." *Id.* at 149. The Supreme Court specifically rejected such a broad definition, stating that, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.*

Because Ms. Hensley has not adequately alleged facts establishing that she was transferred as a result of any speech in which she engaged, rather than her decision to renege on her agreement to sign a letter to students' parents, and because the speech Ms. Hensley has identified does not raise issues of public concern, her First Amendment claim must be dismissed.

II. MS. HENSLEY'S FEDERAL EQUAL PROTECTION CLAIM SHOULD BE DISMISSED BECAUSE HER COMPLAINT ADMITS FACTS THAT ESTABLISH THE RATIONAL BASIS FOR DEFENDANTS' ACTIONS.

Ms. Hensley's Fourteenth Amendment claim based on her alleged "disparate treatment" by the defendants should be dismissed, because her Complaint admits facts that establish the defendants' rational basis for her transfer. Ms. Hensley does not allege that she is a member of a suspect class, nor does she allege that the defendants have infringed the exercise of her fundamental rights; therefore, there need be only "a *reasonably conceivable* state of facts that could provide a rational basis" for Dr. Parker's and the Board's action. *See Hinton v. Connor*, 366 F.Supp.2d 297, 313 (M.D.N.C. 2005) (citing *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001)) (emphasis added). The same standard applies in a "class of one" claim, under which Ms. Hensley must adequately allege that the Board and Dr. Parker *intentionally* treated her differently than other, similarly situated individuals and that the differential treatment was not rationally related to a legitimate government interest. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (emphasis added).

Ms. Hensley alleges that she was treated differently than similarly situated individuals when the North Johnston Middle School principal identified her grading practices and the pacing of her course as

deficient. (¶18). However, there is no allegation in the Complaint that Ms. Hensley was transferred because of these alleged deficiencies.

Rather, as the facts alleged in the Complaint make clear, there was a rational basis for the defendants' decision to transfer Ms. Hensley. *See McWaters v. Cosby*, 54 Fed.Appx. 379, (4th Cir. 2002) (dismissing plaintiff's equal protection claim where, although she "dutifully asserts irrationality," a review of facts alleged in the Complaint establish numerous rational bases for defendants' actions). Ms. Hensley was transferred only after she initially agreed to sign a letter to students' parents, resolving a contentious issue that had distracted the school system for more than seven months, and then reneged on that agreement. Ms. Hensley does *not* allege that teachers who were accused of unconstitutional conduct, who agreed to help the school system resolve the complaint, and who then changed their minds were treated differently than she was treated. The school system has a rational interest in resolving allegations of unconstitutional conduct by teachers without resort to litigation; transferring Ms. Hensley when she reneged on her agreement to sign the letter to students' parents, inflaming the situation further, conceivably furthers that interest.

Furthermore, given the U.S. Supreme Court's deference to the government as employer, "class of one" claims are not applicable in the public employment arena. *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985 (9th Cir. 2007). After reciting the numerous areas in which the Supreme Court has granted the government as employer much broader latitude than it would enjoy as a regulator, including in the First Amendment context, the *Engquist* court holds that the "class-of-one theory of equal protection is another constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens." *Engquist* at 995. Applying the "class of one" theory in the public employment context would require federal courts "to review the multitude of personnel decisions that are made daily by public agencies," contrary to the Supreme Court's admonition. *Id.*

Ms. Hensley's own factual allegations disclose the rational basis for the Superintendent's and

Board's actions. Furthermore, as a public employee, Ms. Hensley is not entitled to judicial review of her employer's personnel decisions on a "class of one" claim. For these reasons, Ms. Hensley's Fourteenth Amendment equal protection claim should be dismissed.

III. MS. HENSLEY'S CLAIM FOR VIOLATION OF HER STATE CONSTITUTIONAL "RIGHT OF CONSCIENCE" SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Ms. Hensley's claims for violation of rights under Article I, §13 of the North Carolina Constitution should be dismissed because Ms. Hensley has failed to identify any infringement of her religious liberty. Ms. Hensley advances two separate claims under this constitutional provision, which protects individuals' rights to "worship Almighty God according to the dictates of their own consciences. . ." N.C. Const. Art. I, §13.

Ms. Hensley's first claim is that the Board and Dr. Parker violated this right when they indicated that she had "lost credibility when she chose to follow the dictates of her own conscience." (¶62). However, the constitutional provision Ms. Hensley cites protects one's *religious* liberty, not simply the right to act in accord with one's conscience. *See In re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967) (holding that minister's "rights of conscience" were not violated when he was held in contempt for refusing to testify in criminal trial when there was no objection from the defendant), cert. denied, 388 U.S. 918 (1967). In *Williams*, the North Carolina Supreme Court noted that state constitution protects "the right to exercise one's religion, or lack of it . . . *not* one's sense of ethics." *Id.* at 78, 325 (emphasis added).

Ms. Hensley does not allege in her Complaint that she was exercising her religious beliefs or that she was compelled to adopt anyone else's religious beliefs, when she changed her mind about signing the letter to students' parents. Instead, Ms. Hensley alleges that she changed her mind because the letter contained false statements. (¶28). The letter itself, which Ms. Hensley attached to her Complaint, does not espouse religious beliefs; to the contrary, it summarizes the position of religious neutrality that the government is required to assume. *Holloman ex rel Holloman v. Harland*, 370 F.3d 1252 (11th Cir.

2004). *See* Complaint, Exhibit A. Because Ms. Hensley's reversal on signing the letter was not motivated by religious conviction, or a lack thereof, her first claim under Art. I, §13 of the N.C. Constitution should be dismissed.

Second, Ms. Hensley claims that the Board and Dr. Parker violated her rights in that their conduct was "intentionally designed to sponsor a religious view of science." (¶63). The religious liberty clause in the state constitution compels "secular neutrality toward religion." *Heritage Village Church and Missionary Fellowship, Inc. v. State*, 299 N.C. 399, 406, 263 S.E. 2d 726, 730 (1980). In interpreting the clause and its mandate of governmental neutrality, state courts rely upon Establishment Clause jurisprudence, in which "the contours of the neutrality requirement have been most thoroughly defined." *Id.*

Ms. Hensley utterly fails to adequately allege the elements of a legitimate Establishment Clause claim, under which governmental action must (1) lack a secular purpose, (2) have the effect of advancing religion, and (3) foster excessive governmental entanglement with religion, *each* of which is required to show a violation of the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see also Agostini v. Felton*, 521 U.S. 203, 211 (1997).

Ms. Hensley's claim is novel among Establishment Clause claims arising within the public school setting, which typically involve allegations that (1) the plaintiff is being required to fund, usually through tax dollars, programs that benefit religious schools or organizations, or (2) the plaintiff, usually a student, has been compelled to participate in or tolerate religious activity. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88 (2004) (challenging Arizona statute permitting tax credits for contributions supporting parochial schools), *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (challenging program that allowed tax-funded vouchers to be used at parochial schools), *Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290 (2000) (challenging policy permitting student-led, student-initiated prayer prior to high school football games), *Lee v. Weisman*, 505 U.S. 577 (1992) (challenging policy allowing invocations and benedictions in form of prayer at

graduation ceremonies). Ms. Hensley does not allege that she's been required to do either; instead, she appears to claim that the school system's personnel decision constitutes an endorsement of religion. The facts contained in Ms. Hensley's own Complaint fail to support such an allegation.

Governmental action has been invalidated on the ground that a secular purpose was lacking, "but only when [the Court] has concluded there was no question that the . . . activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (holding that inclusion of nativity scene in holiday display did not violate Establishment Clause).

Ms. Hensley's Complaint is devoid of *factual* allegations to support an inference that her transfer was motivated by a non-secular purpose. Ms. Hensley was transferred because she reneged on an agreement, negotiated over a period of months to resolve a complaint of unconstitutional conduct by Ms. Hensley, to sign a letter to students' parents. That decision re-ignited a tense situation that the school system thought it had put behind it, as evidenced by Dr. Parker's letter. *See* Defendants' Motion to Dismiss, Exhibit 2.

In evaluating whether the governmental action has the effect of advancing religion, the court looks to whether, "irrespective of the actual purpose, the practice under review conveys a message of endorsement" of religion. *Lynch* at 690, 1368. Ms. Hensley's Complaint fails to allege facts to support any claim that her transfer conveys the school system's endorsement of religion. She does not allege that she was transferred because she refused to promote a religious viewpoint, either in the letter to students' parents or in her classroom. While Ms. Hensley alleges that Mr. Stott, in his April 4, 2005 letter, *suggested* that she stop teaching evolution, she taught evolution during the fall 2005 semester. (¶30). Given the facts outlined in Ms. Hensley's Complaint, there is no credible claim that the decision to transfer her constituted an endorsement of religion.

Finally, there is no factual allegation that would indicate that Ms. Hensley's transfer fosters excessive governmental entanglement with religion. *See Lambeth v. Bd. of Commissioners of Davidson*

Co., 407 F.3d 266 (2005), cert. denied, 126 S.Ct. 647 (2005). Excessive entanglement is "characterized by 'comprehensive, discriminating, and continuing state surveillance' " of religious exercise. Id. at 273 (citing *Lemon* at 612-13). Given that Ms. Hensley does not allege that the school system is requiring anyone to engage in religious exercise, much less religious exercise that the government would be required to monitor, Ms. Hensley has failed to state any claim under the third prong of the *Lemon* test.

Because Ms. Hensley has clearly failed to state *any* of the required elements for violation of her state constitutional religious liberty rights, her claims brought under Article I, §13 of the North Carolina Constitution should be dismissed.

IV. MS. HENSLEY'S REMAINING STATE CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED BECAUSE SHE HAS NO PROPERTY INTEREST IN A PARTICULAR POSITION.

Ms. Hensley's remaining state constitutional claims, alleging violations of the right to enjoy the fruits of her labor and the "law of the land" clause, should be dismissed, because Ms. Hensley has not been deprived of the fruits of her labor or of a protected property interest. *See Schaefer v. Co. of Chatham*, 337 F.Supp.2d 709 (2004), *see also Winbush v. Winston-Salem State Univ.*, 165 N.C.App. 520, 598 S.E.2d 619 (2004).

In *Schaefer*, the plaintiff asserted a violation of her right to enjoy the fruits of her labor when she was terminated from her position as a librarian. *Schaefer* at 730. The Court held that the constitutional provision "does not, however, create an interest in a particular job that would give rise to a constitutional claim, because employment contracts in North Carolina are generally terminable at will." *Id.* In other words, the constitutional right to enjoy the fruits of one's labor does not create a property interest where one does not already exist.

Admittedly, Ms. Hensley's position is not terminable at will; as a tenured public school teacher in North Carolina, she has a protected property interest in continued employment. *See Crump v. Bd. of Educ. of Hickory Administrative Sch. Unit*, 326 N.C. 603, 614, 392 S.E.2d 579, 584 (1990). However, that

interest is created by the statutory regime that outlines the procedures required when a public school teacher is subject to dismissal, demotion, or suspension without pay. *Id.*, *see also* Gen. Stat. §115C-325 et. seq.

Ms. Hensley was not suspended, dismissed or demoted, which is defined as "reduc[ing] the salary of a person who is classified or paid by the State Board of Education as a classroom teacher or as a school administrator." Gen. Stat. §115C-325(a)(4). In *Winbush*, the petitioner, originally hired to serve as a coach, was reassigned to work as the intramural coordinator. *Winbush* at 524, 622. In reversing the superior court's ruling that the petitioner was discharged or demoted in violation of state statute, the Court stated that the property interest in continued employment created by the State Personnel Act "does not extend to the right to possess or retain a *particular* job or to perform *particular* services." *Id.* (emphasis added).

Likewise, Ms. Hensley does not allege that she has been either dismissed or demoted. Because Ms. Hensley has no protected property interest in a particular position and she remained employed after her transfer, her claims that the Board and Dr. Parker violated her rights to enjoy the fruits of her labor and her rights under the law of the land clause should be dismissed.

V. MS. HENSLEY'S STATE CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED BECAUSE STATE LAW PROVIDES AN ADEQUATE REMEDY.

While Ms. Hensley has not stated any state constitutional claims, even if she had, those claims should be dismissed because state law provides an adequate remedy. See *Corum v. Univ. of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992), *cert. denied*, 506 U.S. 985 (1992).

In *Corum*, the North Carolina Supreme Court held that plaintiffs cannot bring direct claims under the state constitution when state law provides an adequate remedy. *Id.* State law provides Ms. Hensley with an adequate remedy to challenge the Superintendent's decision to transfer her. *See* Gen. Stat. 115C-45. Under state law, persons aggrieved by a final administrative decision shall have an appeal to the local

board of education when that decision is challenged on the grounds that it violates federal or state law. Gen. Stat. 115C-45(c)(2). Appeals of right brought under Gen. Stat. 115C-45(c)(2) may be further appealed to the state superior court on the grounds, among others, that the board's decision is in violation of constitutional provisions, as Ms. Hensley alleges in her Complaint. The standard for judicial review in Gen. Stat. 150B-51, the Administrative Procedure Act, governs appeals from decisions of city or county boards of education. *Warren v. New Hanover Co. Bd. of Educ.*, 104 N.C.App. 522, 528, 410 S.E.2d 232, 236 (1991) (decided pursuant to former Gen. Stat. 115C-305.

North Carolina decisions establish that the review provided under the Administrative Procedure Act is an adequate state remedy that precludes a direct constitutional claim. *See, e.g., Swain v. Elfland*, 145 N.C.App. 383, 391, 550 S.E.2d 531, 536 (2001) (holding that discharged employee had an adequate remedy for state constitutional free speech claim where he raised issue in administrative hearing); *Ware v. Fort*, 124 N.C.App. 613, 619, 478 S.E.2d 218, 222 (1996) (holding that plaintiff had an adequate state remedy where he could have sought judicial review of a university personnel decision under the Administrative Procedure Act), *Hawkins v. State*, 117 N.C.App. 615, 629, 453 S.E.2d 233, 241 (1995) (holding that plaintiff could not bring state constitutional due process claim because state law provided adequate remedy in the form of administrative review).

Were Ms. Hensley permitted to bring direct constitutional claims, rather than availing herself of the remedy provided in Gen. Stat. 115C-45, she would be afforded greater latitude than teachers who face serious sanctions such as dismissal, demotion, or suspension. See Gen. Stat. 115C-325. In those cases, teachers are required to appeal the personnel decision to the Board of Education, and if they wish to pursue further appeals, file an action for judicial review in superior court within 30 days of notice of the decision. *Church v. Madison Co. Bd. of Education*, 31 N.C.App. 641, 645, 230 S.E.2d 769, 771 (1976) (dismissing complaint filed in superior court because plaintiff failed to avail herself of Board hearing and judicial review, in case decided under predecessor statute to Gen. Stat. 115C-325).

Ms. Hensley had an adequate remedy for her state constitutional claims; therefore, those claims should be dismissed.

VI. MS. HENSLEY'S TITLE VII CLAIM OF RELIGIOUS DISCRIMINATION WARRANTS DISMISSAL UNDER RULES 12(b)(1) AND 12(b)(6).

A. Ms. Hensley's Complaint fails to allege essential elements of a claim of religious discrimination under Title VII.

Title VII is not a "bad acts" statute. *Holder v. City of Raleigh*, 867 F.2d 823, 828 (4th Cir. 1989). An employer's actions towards an employee may be unwise, unjustified, or reprehensible. However, they are not unlawful under Title VII unless motivated by a discriminatory animus based on race, color, religion, sex or national origin. *Id*. Nor do Title VII actions have special status under the rules of civil procedure with respect to pleading requirements. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150 (1984). "[V]ague and conclusory" allegations are insufficient to satisfy the notice pleading requirements of the Federal Rules of Civil Procedure. *See e.g. United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 860 (1975). While Ms. Hensley's Complaint includes many allegations, it fails to state facts sufficient to support a claim for any form of religious discrimination under Title VII.

The elements of a prima facie religious accommodation claim are (1) the plaintiff has a bona fide religious belief that conflicts with an employment requirement, (2) that she informed the employer of this belief, and (3) that she was disciplined for failure to comply with a conflicting employment requirement. *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996), cert. denied, 522 U.S. 813 (1997); *Baltgalvis v. Newport News Shipbuilding, Inc.*, 132 F. Supp 2d 414, 417-18 (E.D.Va. 2001).

> "Religion," for discrimination law purposes, means a sincere and meaningful belief in God, or such a belief that occupies in the life of the possessor a place parallel to that filled by God in the lives of believers in God. It does not include such political or social views as the racist beliefs of the Ku Klux Klan or of segregationist schools, but it may include a sincere profession of atheism.
>
> Larson, *Employment Discrimination* § 54, at 54-1 (2d. ed. 1999).

See also, United States v. Seeger, 380 U.S. 163 (1965) and adoption of EEOC Dec. No. 71-779. Claims

of discrimination under Title VII require plaintiffs to allege and prove that the defendants took "adverse employment action" against them. *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999); *James v. Booz-Allen & Hamilton, Inc.*, 368 F. 3d 371 (4th Cir. 2004), *cert. denied*, 543 U.S. 959 (2004).

To establish a prima facie case of disparate treatment based on religion, Ms. Hensley must show: (1) she is a member of a protected class; (2) she suffered an adverse employment action (such as discharge); (3) at the time of the adverse employment action, she was performing at a level that met the employer's legitimate job expectations; and (4) her position remained open or was filled by a similarly qualified applicant outside the protected class. *Baquir v. Principi*, 434 F.3d 733, 742 (4th Cir. 2006), cert. denied, 127 S.Ct. 659, 166 L.Ed.2d 512 (2006); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001).

Ms. Hensley's Complaint fails to allege facts sufficient to support the essential elements under either form of religious discrimination. First, as to the essential elements for a religious accommodation claim, Ms. Hensley alleges no bona fide religious belief. Instead, Ms. Hensley alleges that she was the "target" of discriminatory animus because she "did not deny that her religious beliefs did not include a view that homosexuality was a sin." (¶78).

> To gain protection**,** the individual must invoke more than a mere ancillary connection to religion. . . . What matters is the individual's religious *belief***,** not a conflict between the individual's *conduct* and the religious beliefs of others. The plaintiffs in *McCrory v. Rapides Regional Medical Center* argued that they were discharged in violation of Title VII because their supervisor's religious belief proscribing extramarital relationships conflicted with their private right to have such relationships. However, the Fifth Circuit held that Title VII prohibits discrimination based upon an individual's own religious beliefs and not those of his or her employer.
>
> Lindeman, B., and Grossman, P., *Employment Discrimination Law* 222-23 (1996) discussing *McCrory, supra*, 635 F. Supp. 975, 979 (W.D. La.), *aff'd mem.*, 801 F.2d 396 (5th Cir. 1986).

Without alleging a religious belief or that she informed her employer of such a belief, Ms. Hensley alleges

"hostility to the perceived religious views of the plaintiff." These ephemeral references to homosexuality, sin, and the juxtaposition of unstated beliefs fail to meet the essential elements of a claim of religious discrimination.

The allegations in her Complaint also reveal that even the references she claims were made regarding homosexuality, sin and sexual orientation could not have formed the basis for a decision to reassign her, as they were not made until *after* the decision had been made regarding her reassignment. According to the Complaint, "[o]n or about October 24, 2005, defendant Parker decided to remove Ms. Hensley from her teaching position." (¶32). Ms. Hensley does not allege that any reference to sexual orientation was made until on or about November 29, more than a month after Dr. Parker is alleged to have made the transfer decision.

Turning to a claim of disparate treatment, Ms. Hensley fails to allege she is a member of a protected class. Ms. Hensley identifies no protected class to which she claims membership or the facts supporting her membership in such a class. Ms. Hensley alleges no facts to support a claim that defendants were motivated in any way by her religious beliefs. Ms. Hensley makes the conclusory allegation that her employer took "adverse employment action" against her "because plaintiff's religious views were juxtaposed to the religious tenants [sic] of John and Jane Doe and plaintiff's employers." (¶80).

Ms. Hensley alleges no adverse employment action, but only a re-assignment from one teaching position to another, without any allegation of a reduction in wages or benefits or other alterations to the conditions of employment sufficient to constitute an adverse employment action. *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 1997). "[A]bsent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position." *Holland v.*

Washington Homes, 487 F. 3d 208, 219 (4th Cir. 2007); *Boone* at 256-57.

Other courts have likewise held that a transfer, even to a smaller, less desirable location, is not an adverse employment action sufficient to state a claim under Title VII when there is no decrease in compensation, job title, or benefits. *Taylor v. Virginia Dept. of Corrections*, 177 F. Supp. 2d 497, 504 (E.D. Va. 2001)(plaintiff was transferred to a smaller facility and this transfer "undoubtedly resulted in a corresponding reduction in the scope of his responsibilities such as the number of subordinates he was to supervise," but because his title remained the same and his pay was not reduced, this "consequence is hardly sufficient to constitute adverse action under any reasonable interpretation"); *Johnson v. Quin Rivers Agency*, 140 F. Supp. 2d 657, 664 (E.D. Va. 2001) (former employee failed to establish that her transfer to another office was adverse employment action where her title remained the same and she received no reduction in salary or benefits).

Even a generous reading of Ms. Hensley's Complaint does not disclose allegations that rise to the level of an adverse employment action. Ms. Hensley fails to allege that she suffered any decrease in compensation or that she was assigned a change in job title. Ms. Hensley held the same position at the time that she resigned as she held when she was hired. (¶¶6, 41). No mention of loss of wages or benefits is made except in connection with the position outside Johnston County that she accepted after voluntarily resigning from her South Campus position. Only with respect to that position does she allege that the "new position *will* result in lower wages and fewer employee benefits than the career teaching position she held with the Johnston County School System." (¶47). As the Fourth Circuit has held, allegations suggesting a change in job assignment, without allegations of decrease in compensation, job title, level of responsibility, or opportunity for promotion, are insufficient to create a claim for relief under Title VII. As such, Ms. Hensleys' claim should be dismissed for failure to state a claim.

Finally, although Ms. Hensley includes a bald allegation that her job performance was satisfactory (¶81), much of the Complaint is devoted to allegations of how her employer, as well as persons other than her employer, deemed her performance to be flawed. (¶¶18, 24-28, 32-39). Alleged disagreements between an employer and employee about the satisfactoriness of the employee's performance are not sufficient to sustain a discrimination claim. *See Hawkins v. PepsiCo., Inc.* 203 F.3d 274 (4th Cir. 2000) *cert. denied,* 531 U.S. 875 (2000). "It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *Hawkins, supra,* quoting *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996).

B. Ms. Hensley's Complaint fatally diverges from her EEOC charge, raising allegations of discriminatory animus not raised with the EEOC, warranting dismissal under Rules 12(b)(1) and 12(b)(6).

Ms. Hensley properly alleges that she filed an EEOC charge in her Complaint, and attaches as Exhibit B to her Complaint a copy of her Notice of Right to Sue. While the Notice is apparently provided to allege compliance with prerequisites for bringing an action, the charge of discrimination may also be helpful in examining the prerequisites for bringing the action and the permissible scope of the action. (A copy of Ms. Hensley's EEOC charge is attached to the Defendants' Motion to Dismiss as Exhibit 3.) According to the Notice of Right to Sue, the EEOC terminated its processing of the charge and issued a right to sue letter because more than 180 days had passed since the filing of the charge.

As stated above, the EEOC charge is a necessary element of a Title VII Complaint. By providing the EEOC charge, the defendants assist the Court in making the elementary determination of whether a claim has been stated. *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 499 (5th Cir. 2000). One court has observed that "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Associated v. Zenith Data Systems,* 987 F.2d 429, 431 (7th Cir. 1993). Although Ms. Hensley chose not to attach a copy of the EEOC charge to the Complaint, the charge is referred to and relied upon by the Ms.

Hensley in her Complaint. (¶45).

A person who complains of a Title VII violation is required to file an administrative charge with the EEOC and allow the agency an opportunity to act on the charge. *See Davis v. North Carolina Department of Correction*, 48 F.3d 134, 137 (4th Cir. 1995). The aggrieved party may invoke the jurisdiction of the federal district court only after the EEOC has notified the party of its decision to dismiss or its inability to bring a civil action within the requisite time period. *See Id.* at 137-38. "This exhaustion requirement is meant to preserve judicial economy by barring claims that have not been sufficiently investigated following an EEOC complaint." *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 239 (4th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000). Furthermore, "allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charges, as surely would an initial failure to file a timely EEOC charge." *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 127 (7th Cir. 1989). The allegations in the EEOC charge "generally operate to limit the scope of any subsequent judicial complaint." *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962-63 (4th Cir. 1996).

Ms. Hensley's Complaint diverges from her charge of discrimination, but lends little to the statement of a claim. Neither document contains an allegation of discriminatory conduct tied to religion.

In her EEOC Charge, Ms. Hensley alleged as follows:

> On December 1, 2005 I was transferred from my position at NJMS to another campus because I would not acquiesce to a particular religious point of view by eliminating the lessons on evolution from my 8th grade science curriculum. In addition, my employer's decision to transfer me was done in order to show support to a particular religious segment of our community.

In her Complaint, however, the Ms. Hensley unveils a sexual component to her action:

> Plaintiff was the target of discriminatory animus because it was believed by her employer, and plaintiff did not deny, that plaintiff's religious beliefs did not include a view that homosexuality was a sin. Plaintiff's employer directly questioned plaintiff about her sexual orientation. (¶¶78-79).

Neither is sufficient to state a claim for religious discrimination under Title VII. The dissonance

between Ms. Hensley's charge of discrimination and the allegations in her Complaint signal not only the absence of a claim, but a strained attempt to supplement earlier deficiencies with more inflammatory accusations. Neither the words "homosexuality," "sin," or "sexual orientation" nor any theory associated with discriminatory animus based on such beliefs appear in the charge of discrimination.

The EEOC charge defines the scope of the Ms. Hensley's right to institute a civil action in that the "scope of the civil action is confined only by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination." *Bryant v. Bell Atlantic Maryland, Inc.*, 288 F.3d 124, 132 (4th Cir. 2002)(*quoting Chisolm v. United States Postal Serv.*, 665 F.2d 482, 491 (4th Cir. 1981). The more specific the original charge, the less likely expansion into other areas will be allowed. *See e.g. Kizer v. Curators of Univ. of Mo.*, 816 F. Supp. 548, 551-52 (E.D. Mo. 1993) (plaintiff's charge of certain discriminatory acts could not support allegations in her Complaint of other significant discriminatory acts). Courts have dismissed complaints that allege constructive discharge when the charge alleged age and race discrimination in promotion denials. *Doyle v. Sentry Ins.*, 877 F. Supp. 1002, 1007 (E.D. Va. 1995).

Ms. Hensley's failure to allege a bona fide religious belief that conflicts with an employment requirement or to allege that she is a member of a protected class and suffered defeats any Title VII claim of religious discrimination. Ms. Hensley's belated attempts to identify a belief in her Complaint that was absent from her EEOC charge is outside the scope of the charge, insufficient to state a claim, and is outside the jurisdiction conferred by the exhaustion of remedies with the EEOC . Ms. Hensley's Title VII claim is fatally flawed and must be dismissed in its entirety.

VII. MS. HENSLEY FAILS TO ALLEGE FACTS SUFFICIENT TO SUPPORT HER CLAIM FOR A VIOLATION OF THE AMERICANS WITH DISABILITIES ACT AND THAT CLAIM SHOULD BE DISMISSED UNDER RULE 12(b)(6).

To establish a prima facie case of failure to accommodate under the ADA, a plaintiff must show: (1) that she is an individual who has a disability within the meaning of the statute; (2) that the employer had notice of her disability; (3) that with reasonable accommodation she could perform the essential functions of her job; and (4) that the employer refused to make such accommodations. *Rhoads v. FDIC*, 257 F.3d 373, 387 n. 11 (4th Cir. 2001), *cert denied*, 535 U.S. 933 (2002).

Likewise, to make out a constructive discharge in violation of the ADA, a plaintiff must show that (1) she is within the ADA's protected class; (2) she was discharged; (3) at the time of her discharge, she was performing the job at a level that met her employer's legitimate expectations; and (4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. *Rhoads*, 257 F.3d at 387, n. 11. *Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 702 (4th Cir.2001). In addition, where Plaintiff's claim is for constructive, as opposed to actual, discharge, plaintiff must also prove that the defendant deliberately made her working conditions intolerable to induce her to quit. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1353-54 (4th Cir.1995). Ms. Hensley's allegations fail to satisfy these elements.

Ms. Hensley has alleged a life-long hearing impairment for which she previously requested no accommodation to perform the essential functions of her job as a teacher. (¶8). Ms. Hensley's ADA claim presumes that employers are required to accept the accommodation requested by an employee, without regard to other accommodations that may more specifically address the professed limitations of the disability. Ms. Hensley asked that defendants select a position "more accommodating to" her hearing impairment than the one to which she had been assigned. Ms. Hensley's articulation of her request is inadequate to state an ADA claim. Even if Ms. Hensley's assertions were accurate, they would not be sufficient to state a claim under the ADA because employers are not required to automatically adopt the

"more accommodating" or more preferred accommodation of the employee. On the contrary, the ADA leaves much discretion in the hands of the employer regarding what constitutes a reasonable accommodation.

The ADA does not mandate preferential treatment of an employee by virtue of her handicap and does not impose a duty to provide every accommodation requested. *Gaines v. Runyon,* 107 F.3d 1171, 1178 (6th Cir.1997). The Fourth Circuit has stated that " '[a]n employer is not obligated to provide an employee the accommodation he or she requests or prefers; the employer need only provide some reasonable accommodation.' " *See Crawford v. Union Carbide Corp.,* 202 F.3d 257 (4th Cir.1999) (per curiam) (unpublished table decision)(quoting *Baert v. Euclid Beverage, Ltd.,* 149 F.3d 626, 633 (7th Cir.1998)), cert. denied, 530 U.S. 1234 (2000); *see also, Wright v. N. C. State Univ.,* 169 F. Supp. 2d 485, 490 (E.D.N.C. 2000).

In providing an accommodation, an employer has the ultimate discretion to choose between effective accommodations, and may choose the accommodation that is easier to provide. 29 C.F.R. 1630.9 Appendix III. The reasonableness of an accommodation is assessed objectively, and is not viewed subjectively from the concerns of either party. *Williams v. Channel Master Satellite Sys.,* Inc., 101 F.3d 346, 350 (4th Cir.1996)), cert. denied, 520 U.S. 1240 (1997).

Among the flaws in Ms. Hensley's ADA allegations is the failure to identify the limitations she faced in connection with performing the essential functions of her job at South Campus. On the contrary, it is suggested in the Complaint that Ms. Hensley may have considered herself overqualified for the position at South Campus. (¶42). Consequently, apart from reassignment according to her preference, Ms. Hensley fails to allege other reasonable accommodations that would address her unspecified limitations. The position the Ms. Hensley held was a teaching position and the position to which she was reassigned was likewise a teaching position. Apart from the bald assertion that other assignments might be "more" accommodating, the Ms. Hensley fails to identify any essential functions of the job at South Campus that

differed from her previous position or accommodations other than her preferred reassignment that might be appropriate. Ms. Hensley does allege that there appeared to be fewer students for which she was responsible in the reassigned position at South Campus. (¶42).

Though Ms. Hensley acknowledges early in her Complaint that although she has had a hearing impairment since birth, for five years "she was able, despite her impairment, to teach science without an accommodation by her employer." (¶8). Ms. Hensley alleges she began teaching in 1983, had been teaching in Johnston County since 1994, and for the five years preceding her Complaint taught eighth grade science. Ms. Hensley fails to allege any requested accommodations for any of the years since 1983 or in connection with any of the subjects taught prior to the year 2000.

Without allegations of how her impairment limited her ability to perform the essential functions of her job, notification of such particulars provided to the employer, or a refusal on the part of the employer to discuss available options that would be targeted to such limitations, Ms. Hensley's allegations fail to state a claim. Ms. Hensley's ADA claim should be dismissed for failure to plead facts sufficient to state the essential elements of an ADA cause of action.

VIII. PUNITIVE DAMAGES ARE NOT AVAILABLE AND ANY CLAIM FOR SUCH DAMAGES SHOULD BE DISMISSED.

Ms. Hensley appends a claim for punitive damages to her Title VII and ADA claims. In the absence of statutory provisions to the contrary, municipal corporations are immune from punitive damages, regardless of the type of function being performed. *Long v. City of Charlotte*, 306 N.C. 187, 206-07, 293 S.E.2d 101, 113-114 (1982). School boards are municipal corporations and are covered by this rule. *See Sides v. Cabarrus Memorial Hosp., Inc.*, 22 N.C App. 117, 120, 205 S.E.2d 784,786-87, *modified on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1974). The prohibition against punitive damages from municipal corporations extends to its officials being sued in their official capacities. *Guy v. Jones*, 747 F. Supp. 314, 316 (E.D.N.C. 1990); *see Hare v. Butler*, 99 N.C. App. 693, 701, 394 S.E.2d 231 (1990).

Even as to Ms. Hensley's claims for punitive damages against Dr. Parker in his individual capacity, the law does not allow claims for punitive damages to stand alone. In order to state a claim for punitive damages, a plaintiff first must state an underlying claim. *Jones v. Gwynne*, 312 N.C. 393, 405, 323 S.E.2d 9 (1984); *Worthy v. Knight*, 210 N.C. 498, 187 S.E.2d 771 (1936). Without this, the punitive damages claim automatically fails without question or further consideration. *Id.* As discussed above, Ms. Hensley fails to make out any prima facie case on any of the torts she alleges. As her claims fall, so do her claims for punitive damages.

IX. MS. HENSLEY'S CLAIMS AGAINST DR. PARKER IN HIS INDIVIDUAL CAPACITY ARE BARRED BY QUALIFIED IMMUNITY.

Ms. Hensley's claims against Dr. Parker in his individual capacity are barred by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Government officials are entitled to qualified immunity from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (1982). Qualified immunity "protects . . . officials from 'bad guesses in gray areas' and ensures that they are liable only 'for transgressing bright lines.'" *Wilson v. Collins*, 141 F.3d 111, 114 (4th Cir. 1998), aff'd 526 U.S. 603 (1999).

The Fourth Circuit has noted that "the purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury." *Slattery v. Rizzo*, 939 F2d 213, 216 (4th Cir. 1991). When determining whether a government official is entitled to qualified immunity, the court must "(1) identify the right allegedly violated, (2) determine whether the constitutional right violated was clearly established at the time of the incident, and (3) evaluate whether a reasonable [official] would have understood that the conduct at issue violated the clearly established right." *S.P. v. City of Takoma Park*, 134 F. 3d 260 (4th Cir. 1998) To defeat a qualified immunity defense, a plaintiff "must show that the right allegedly violated was

'clearly established' in more than just a general sense." *Id.* at 266. It is not enough to assert that "free speech" is a clearly established right; the plaintiff must demonstrate that the *particular actions* of the individual defendants were unlawful under the law established at the time of the incident. *Id. (emphasis added).*

Because Ms. Hensley has failed to allege the violation of any clearly established federal constitutional right, her claims against Dr. Parker in his individual capacity are barred by qualified immunity.

CONCLUSION

For the foregoing reasons, Ms. Hensley has failed to state actionable claims for violations of her free speech, equal protection, or state constitutional claims, nor for her Title VII and ADA claims. In addition, to the extent Ms. Hensley has stated any cognizable state constitutional claims, they must be dismissed because state law provides an adequate remedy. Finally, Ms. Hensley has failed to state any claim for punitive damages, and her claims against Dr. Parker in his individual capacity are barred by qualified immunity. Therefore, the defendants respectfully request that the court grant defendants' motion to dismiss as to each of Ms. Hensley's claims.

Respectfully submitted this 30th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2007 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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H

Crawford v. Union Carbide Corp.
C.A.4 (W.Va.),1999.
NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a " Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Fourth Circuit.
Elizabeth CRAWFORD, Plaintiff-Appellant,
v.
UNION CARBIDE CORPORATION, Defendant-Appellee,
andAetna U.S. Healthcare, Party in Interest.
No. 98-2448.

Argued Oct. 6, 1999.
Decided Dec. 14, 1999.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., District Judge. (CA-96-281-2).

Daniel Mark Press, Chung & Press, P.C., McLean, Virginia, for appellant.
Victoria Jean Sopranik, Jackson & Kelly, Lexington, Kentucky, for appellee.
On brief Frederick S. Mittelman, Arlington, Virginia, for appellant. Roger A. Wolfe, Erin Magee Condaras, Jackson & Kelly, P.L.L.C., Charleston, West Virginia, for appellee.

Before MURNAGHAN, WILKINS, and TRAXLER , Circuit Judges.

OPINION

PER CURIAM.
*1 Elizabeth Crawford appeals an order of the district court granting summary judgment in favor of Union Carbide Corporation (Union Carbide) on her claims of discrimination brought pursuant to Title I of the Americans with Disabilities Act (ADA), *see* 42 U.S .C.A. §§ 12111-12117 (West 1995), and § 504 of the Rehabilitation Act of 1973, as amended, *see* 29 U.S.C.A. § 794 (West 1999). [FN1] Because we conclude that the district court correctly determined that Crawford is not entitled to relief, we affirm.

FN1. For ease of reference, and because the two statutes generally are construed to impose the same requirements, *see Baird v. Rose,* No. 98-2064, 1999 WL 739413, at *4 (4th Cir. Sept. 22, 1999), we refer to the ADA and Rehabilitation Act collectively as "the ADA."

I.

Crawford began working for Union Carbide at its facility in the Kanawha Valley of West Virginia in 1980. In the early 1980s, Crawford assumed the position of environmental laboratory technician. She developed skin allergies in 1983, and as a result could no longer work in an environment in which she would be directly exposed to chemicals. Union Carbide accommodated Crawford by transferring her to a senior engineering information technician position, the particular responsibilities of which the company tailored for Crawford. As a senior engineering information technician, Crawford spent most of her time working on material safety data sheets (MSDSs). Her other responsibilities included managing the chemical data sheets system and assigning fire and stability ratings for Union Carbide chemicals.

In 1986, Crawford developed asthma. There is no indication in the record that either her allergies or her asthma interfered with her job performance or that she received any unsatisfactory job performance evaluations.

At some point in late 1993 or very early 1994,

Union Carbide decided to alter the way in which the MSDSs were developed. Rather than have employees at different Union Carbide facilities work on discrete sections of an MSDS for a single chemical, the company created an MSDS/Label Skill Center at its Bound Brook, New Jersey site. At the new Skill Center, one employee would be responsible for all of the information on the MSDS for a single chemical. The change was pursued for reasons of efficiency and economy.

Because the primary responsibilities of her job would be performed at the new Skill Center and because her other duties were insufficient to support a full-time job, Crawford's department lost funding for her position. Crawford was informed on January 27, 1994 that her job was being eliminated.[FN2] She offered to transfer to New Jersey, but Union Carbide rejected the offer. [FN3] The company attempted to find Crawford another suitable position at the Kanawha Valley facility, but the parties dispute the intensity of this effort.

FN2. Union Carbide wrote a letter to Crawford dated March 31, 1994, formally notifying her that her position had been " designated as surplus." J.A. 251. The letter stated that "if you are not placed in another job by May 31, 1994, you will be laid off for lack of work as of that date." *Id.* The letter described the company's Enhanced Separation Program. To be eligible for the Program, Crawford would have had to have signed a release stating that she would not sue the company for any employment-related claims, including discrimination. Crawford refused to sign the release.

FN3. The parties do not dispute that Crawford was unable to work at the Bound Brook facility due to her disabilities. However, although Union Carbide appeared to concede at oral argument that Crawford would have been transferred to New Jersey but for her disabilities, the record indicates that all of the Skill Center positions were filled with individuals already working at the New Jersey site. Resolution of this factual question is not necessary to our disposition of this appeal, however.

Union Carbide officials first considered Crawford for a position as a process group assistant. She interviewed for the position with Thomas Maliszewski on March 4, 1994. However, Maliszewski determined that Crawford was not qualified for the position and therefore did not offer it to her. Although Crawford asserts in her brief that she was qualified for the position, she admitted in district court that she was not so qualified.[FN4]

FN4. Crawford failed to respond to Union Carbide's request for her to admit that she was not qualified for the process group assistant position. By failing to respond, Crawford is deemed to have admitted that she was not qualified. *See* Fed.R.Civ.P. 36(a).

***2** The company also identified a Grade 4 polyolefins records clerk position as a possibility for Crawford. This position "involved strictly office work consisting of looking up records, changing manuals, coordinating records and creating and shipping out manuals." J.A. 124. During an interview for the position, Crawford "voiced concerns about the lifting aspect of the job" and indicated her belief that she was overqualified for the position. *Id.* Craig Morkert, an employee of Union Carbide's Human Resources Department, offered Crawford the position, and the company even offered to maintain Crawford's then-present salary although the new position otherwise would have entailed a decrease in pay. The company claims that it advised Crawford it would accommodate her lifting restrictions.

On March 28, 1994, Crawford; her physician, Dr. L. Blair Thrush; and Union Carbide's Kanawha Valley Medical Director, Dr. Donald F. Teter, participated in a brief conference call in which they discussed the records clerk position. Thrush concluded, based on that call and statements made to him by Crawford, that she "probably could not"

perform the records clerk duties. J.A. 138. However, Thrush subsequently admitted that he had not inspected the worksite, that he "didn't know that much about the job," J.A. 139, and that in order to render an authoritative medical opinion regarding Crawford's ability to perform the duties of the position he would have had to have known more about the situation. Teter, in contrast, had examined the worksite and duties and determined that Crawford "was medically capable of performing the job with appropriate accommodations." J.A. 126.

On April 12, 1994, Crawford wrote to Morkert expressing her frustration over the elimination of her position and the offer of the records clerk position. Crawford wrote that the records clerk position was "utterly beneath [her] qualifications" and that the offer "deeply offend[ed]" her. J.A. 146. She further stated that "[u]ntil you can answer my concerns more fully or demonstrate to my reasonable satisfaction that there is no other position within Union Carbide that better suits my talents, education and skills, I simply decline to accept your degrading offer." J.A. 147.

Also on April 12, 1994, Thrush wrote a letter to Teter in which Thrush stated that Crawford's asthma was worsening, and that
[i]t is certainly my IMPRESSION that from an occupational point of view she is extremely limited. She needs to be in an environment that is essentially free of air pollutants such as heavy dust, chemicals or heavy dirt, including paper dust. I also think that any physical exertion other than desk work would be a problem for her.

J.A. 131. Thrush did not refer to any particular employment position or duties. He mentioned that he had urged Crawford to apply to Social Security for disability benefits.

Crawford formally rejected Union Carbide's offer of the records clerk position on April 18, 1994 in a memo that stated, in its entirety, "At the recommendation of my physician, L. Blair Thrush, and as explained in my correspondence to C. Morkert dated April 12, 1994, I decline to accept the position of Grade 4 Polymers Engineering Records Center Clerk." J.A. 230.

***3** In a subsequent letter to Morkert, dated May 18, 1994, Crawford described the rejection as follows:
As you know I have turned down the [records clerk] position as I have been advised by my physician that such employment would be detrimental to my health. In essence, the ... job offer is to me no offer at all as it fails to accommodate my health much less my skill.

J.A. 128.

In spite of her assertion that the position was beneath her, Crawford maintains that she would have accepted the records clerk position if Union Carbide had agreed to accommodate her disabilities by not requiring her to lift heavy boxes and by equipping the worksite with air filters. She contends, however, that the company effectively denied her requests for such accommodations by failing to respond to them.

During her deposition, Crawford stated that she verbally communicated her requests and that she thought she put them in writing to R.D. Kennedy, the Chief Executive Officer of Union Carbide. The record contains no evidence of such a written request; the record does contain a copy of an April 12, 1994 letter from Crawford to Kennedy, but in this written communication Crawford did not mention a request for accommodations for her disabilities. In response to a deposition question as to the specific accommodations verbally requested, Crawford stated that "[t]he accommodations that were requested was [sic], 'I can't lift these heavy boxes, I need some help, and this room is awfully dirty.' " J.A. 63. Crawford was also asked during her deposition, "[D]id you express ... that you would take this job if these specific accommodations that you had requested were granted?" J.A. 65. Crawford answered, "I was asking for the accommodations, so that was to be insinuated, that if the accommodations were made I would do the job." *Id.* Crawford was also asked whether Union Carbide had denied her request for accommodations; she replied, "They didn't do it. There again, they were operating in a mode where if I'd ask questions or say something, they would ignore me." J.A. 64. Union Carbide maintains that the company told Crawford that it would

accommodate her need for assistance with lifting. The company asserts, however, that Crawford failed to communicate a request for an air filter.

April 21, 1994, was the last day Crawford actually performed work at Union Carbide. Union Carbide maintains that it continued to look for a suitable position for Crawford until May 31, 1994, when she was removed from the payroll. However, the company asserts that nothing within Crawford's range of qualifications and physical capabilities became available. Crawford contends that there were positions for which she was qualified and which she could have performed with reasonable accommodations, but the company did not consider her for them.

Crawford's health deteriorated after April 21, 1994. She maintains that the stress related to her employment situation was a major factor that exacerbated her asthma. In fact, Crawford's deposition testimony was that she was not capable of working after April 21, 1994.

***4** Crawford filed this action on March 29, 1996. As relevant to this appeal, Crawford alleged: (1) that Union Carbide failed to agree to her requests for reasonable accommodations which would have made it possible for her to perform the duties of the records clerk position; and (2) that the company failed to consider her for other positions that were available during the relevant time period.

Upon completion of discovery, Union Carbide moved for summary judgment. The district court granted the motion on the basis that Crawford had failed to establish that she could perform the essential functions of the records clerk position, or any other position, as of May 31, 1994, "the date on which her employment was terminated." J.A. 345. The court therefore concluded that Crawford was not a "qualified individual with a disability" eligible for relief under the ADA.

II.

On appeal, Crawford maintains that a genuine issue of material fact exists as to whether she was a qualified individual with a disability as of May 31, 1994. She also argues that the district court erroneously selected May 31, 1994 as the relevant date for purposes of determining whether she was a qualified individual with a disability. We review the grant of summary judgment de novo, viewing the disputed facts in the light most favorable to Crawford and drawing all reasonable inferences in her favor. *See Figgie Int'l, Inc. v. Destileria Serralles, Inc.,* 190 F.3d 252, 255 (4th Cir.1999).

The ADA prohibits discrimination against a " qualified individual with a disability" with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C.A. § 12112(a). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.A. § 12111(8). To establish a violation of the ADA, Crawford must show (1) that she has a disability; (2) that she is an otherwise qualified individual; and (3) that she has suffered unlawful discrimination based on her disability.[FN5] *See Tyndall v. National Educ. Ctrs., Inc.,* 31 F .3d 209, 212 (4th Cir.1994). One form of discrimination prohibited by the ADA is failing to make a reasonable accommodation. *See* 42 U.S.C.A. § 12112(b)(5). However, "[a]n employer is not obligated to provide an employee the accommodation he or she requests or prefers; the employer need only provide some reasonable accommodation." *Baert v. Euclid Beverage, Ltd.,* 149 F.3d 626, 633 (7th Cir.1998).

> FN5. The parties do not dispute that Crawford was disabled for ADA purposes. We note that although the standard for establishing liability under § 504 of the Rehabilitation Act is slightly different than under the ADA, *see Baird,* 1999 WL 739413, at *4-*5, that difference is not relevant to this appeal.

Crawford argues that a genuine issue of material

fact exists as to whether she was a qualified individual with a disability as of May 31, 1994. We disagree. During her deposition, Crawford was asked by her attorney whether she was capable of working after April 21, 1994. Obviously, a witness giving deposition testimony is free to phrase an accurate and truthful response as she desires; such freedom is probably most evident in an exchange between a party and her own attorney. We therefore deem it critical that Crawford's response to this question was a simple "[n]o." J.A. 224. Although Crawford now argues that she meant that she was unable to work without reasonable accommodations, she did not say that. By analogy to the "well established" principle that a "genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct," *Halperin v. Abacus Tech. Corp.,* 128 F.3d 191, 198 (4th Cir.1997) (internal quotation marks omitted), we are unwilling to accept Crawford's invitation to read into her own testimony something that simply is not there.[FN6]

> FN6. By reference to the same principle, we see no need to address Crawford's contention that the district court erred in discounting her physician's May 12, 1994 letter because it was not sworn. Assuming arguendo that we properly could consider the letter, it conflicts with Crawford's own sworn statement. Accordingly, it is insufficient to create a genuine issue of fact.
>
> Crawford also argues that, in determining whether she was a qualified individual with a disability as of May 31, 1994, the district court erred in failing to take into account Crawford's assertion that the decline in her health after April 21, 1994 was due to the stress of her employment situation. The cause of Crawford's physical condition on May 31, 1994 is not relevant to a determination of whether she was then capable, with or without reasonable accommodation, of working.

***5** Crawford also argues that the district court erred by assessing whether she was a qualified individual with a disability as of May 31, 1994 because she contends that the acts of discrimination occurred prior to that date. She suggests three alternative times for assessing her status under the ADA: as of January 27, 1994, because that is when she was informed that her position was being eliminated; after the records clerk position was offered but prior to April 21, 1994, because that is when Union Carbide effectively denied reasonable accommodations; or as of April 21, 1994, because that is the last day Crawford worked at Union Carbide and is therefore the actual date of her termination.

Even if Crawford were correct that her status as a qualified individual with a disability should have been evaluated as of a date prior to May 31, 1994, and even if she were adjudged to possess that status as of some prior date, summary judgment is nevertheless appropriate because no reasonable jury could find that Union Carbide's actions with respect to the records clerk position violated Crawford's rights under the ADA. First, there is no genuine issue of material fact as to whether Union Carbide offered to accommodate Crawford's lifting restrictions. Although the wiser course may have been for the company to document that its offer of the records clerk position included a lifting accommodation, and although the parties do not agree that the company clearly verbalized its agreement to Crawford, the chain of events described in the record requires a conclusion as a matter of law that the offer included the lifting accommodation: during the job interview Crawford clearly stated the need for an accommodation in the form of lifting assistance, and she subsequently was offered the position. These circumstances do not support an inference that the offer did not include the lifting accommodation.

We emphasize that the following chain of events is *not* presented by this record: employee interviews for position, employee is offered position, employee then requests accommodation, employer is silent. In such a situation liability may attach to the employer's failure to respond to the request for an accommodation. *See, e.g., Hunt-Golliday v. Metropolitan Water Reclamation Dist.,* 104 F.3d

1004, 1012 (7th Cir.1997) (stating that "[a]fter an employee's request, both parties bear responsibility for determining what accommodation is necessary" (emphasis omitted)); *Taylor v. Principal Fin. Group, Inc.,* 93 F.3d 155, 165 (5th Cir .1996) (explaining that "the employee's initial request for an accommodation ... triggers the employer's obligation to participate in the interactive process of determining one"). We simply hold that when, as here, the company is aware of an accommodation request when it extends an offer of employment, the only reasonable inference is that the offer includes the accommodation. Here, Crawford admits that the company never expressly refused to accommodate her lifting restrictions, and the record does not indicate that she made any attempt to clarify that the offer did not include the accommodation requested. Especially given the surrounding circumstances-that Union Carbide had accommodated Crawford's disabilities for the preceding ten years, had attempted to find her a replacement job when hers was eliminated for reasons completely unrelated to her disability, and even had offered to maintain her salary at its then-present level-we conclude that the record does not support a reasonable inference that the lifting accommodation was denied. *See Beck v. University of Wis. Bd. of Regents,* 75 F.3d 1130, 1135-37 (7th Cir.1996) (affirming summary judgment in favor of employer when facts indicated that employer had history of accommodating employee's disability and employee was primarily responsible for breakdown in communications concerning reasonable accommodation).

***6** Second, with respect to the air filter accommodation, there is no more than a scintilla of evidence that Crawford ever requested such an accommodation. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986) (stating that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to defeat summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff"). As support for her assertion that she requested an air filter accommodation, Crawford points to her comment that "this room is awfully dirty," J.A. 63 (internal quotation marks omitted), and the April 12, 1994 letter from Thrush to Teter. We conclude that neither of these pieces of evidence is adequate to create a genuine issue of material fact.

Crawford's comment that "this room is awfully dirty " is so vague that no reasonable jury could conclude that it was a request for an accommodation. [FN7] Nor does the April 12, 1994 letter from Thrush to Teter constitute a request for an air ventilation accommodation. While the letter did state that Crawford needed "to be in an environment that is essentially free of air pollutants such as heavy dust, chemicals or heavy dirt, including paper dust," J.A. 131, it did not mention the records clerk position or worksite (or any other employment position, worksite, or duties), nor did it identify any mechanism, such as an air filter, that would be necessary to assure a dust-free environment. In fact, Crawford's deposition testimony was that she had never discussed the possibility of accommodations for the records clerk position with Thrush, and Thrush admitted during his deposition that he had not inspected the worksite, "didn't know that much about the job," J.A. 139, and could not render an authoritative medical opinion on whether Crawford would be able to perform the duties of the position without additional information. As Crawford never communicated a request for an air filter accommodation, Union Carbide cannot be responsible for failing to provide one.[FN8] *See Taylor,* 93 F.3d at 165 (stating that "[i]f the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one").

FN7. Although the record makes abundantly clear that Crawford was willing and able to communicate other concerns to company officials in writing, there is no evidence that she requested any accommodations in writing.

FN8. Because we conclude that Union Carbide satisfied any duty it may have had to accommodate Crawford by offering her the records clerk position with the lifting accommodation, we need not address Crawford's allegation that the company violated her rights under the ADA by

failing to consider her for other positions. *See Baert,* 149 F.3d at 633.

III.

In sum, we conclude that the district court correctly determined that Crawford was not a qualified individual with a disability as of May 31, 1994. And, even if Crawford was a qualified individual with a disability for purposes of the records clerk position, Union Carbide satisfied its obligations under the ADA by offering her the records clerk position with the only accommodation requested-lifting assistance. Accordingly, we affirm the order of the district court granting summary judgment to Union Carbide.

AFFIRMED

C.A.4 (W.Va.),1999.
Crawford v. Union Carbide Corp.
202 F.3d 257, 1999 WL 1142346 (C.A.4 (W.Va.))

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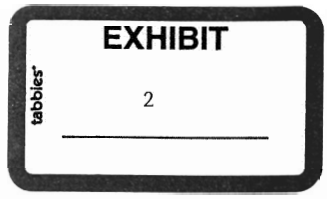

Westlaw.

54 Fed.Appx. 379, 2002 WL 31875539 (C.A.4 (Va.))
(Cite as: 54 Fed.Appx. 379)

H

McWaters v. Cosby
C.A.4 (Va.),2002.
This case was not selected for publication in the Federal Reporter.UNPUBLISHEDPlease use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

United States Court of Appeals,Fourth Circuit.

Paulette N. **MCWATERS**, Plaintiff-Appellee,
v.
Robert R. **COSBY**, in his official capacity as a member of the Board of Supervisors of Powhatan County, and in his personal capacity, Defendant-Appellant,
andJohn F. Rick, in his official capacity as County Attorney for Powhatan County, Virginia and in his personal capacity; Stephen F. Owen, in his official capacity as County Administrator for Powhatan County, Virginia and in his personal capacity; Roy J. Harrison, in his official capacity as a member of the Board of Supervisors of Powhatan County, and in his personal capacity; T.J. Bise, in his official capacity as a member of the Board of Supervisors of Powhatan County, and in his personal capacity; Edmund C. Burruss, in his official capacity as a member of the Board of Supervisors of Powhatan County, and in his personal capacity; Margaret H. Manning, in her official capacity as a member of the Board of Supervisors of Powhatan County, and in her personal capacity, Defendants.
Wayne W. Wasson, Movant.

Paulette N. **McWaters**, Plaintiff-Appellee,
v.
John F. Rick, in his official capacity as County Attorney for Powhatan County, Virginia and in his personal capacity; Stephen F. Owen, in his official capacity as County Administrator for Powhatan County, Virginia and in his personal capacity; Roy J. Harrison, in his official capacity as a member of the Board of Supervisors of Powhatan County, and in his personal capacity; T.J. BISE, in his official capacity as a member of the Board of Supervisors of Powhatan County, and in his personal capacity; Edmund C. Burruss, in his official capacity as a member of the Board of Supervisors of Powhatan County, and in his personal capacity; Margaret H. Manning, in her official capacity as a member of the Board of Supervisors of Powhatan County, and in her personal capacity, Defendants-Appellants,
andRobert R. **Cosby**, in his official capacity as a member of the Board of Supervisors of Powhatan County, and in his personal capacity, Defendant.
Wayne W. Wasson, Movant.

Nos. 02-1430, 02-1436.

Argued Dec. 5, 2002.
Decided Dec. 27, 2002.

Member of county board of supervisors brought civil rights action against various county defendants, alleging that they violated her constitutional rights by instituting an investigation into only her travel expenditures and by refusing to reimburse her for legal expenses that she incurred while defending herself during the investigation. The United States District Court for the Eastern District of Virginia, 195 F.Supp.2d 781,Robert E. Payne, J., denied defendants' motions to dismiss based on qualified immunity, and they appealed. The Court of Appeals held that: (1) claim that defendants had violated board member's equal protection rights did not state valid equal protection claim, given that even a cursory review of the facts as alleged in board member's own complaint suggested numerous rational bases for defendants' actions, and (2) First Amendment retaliation claim had to fail because board member could not show that a reasonable officer in defendants' positions would have known that he was violating federal law.

Reversed.

West Headnotes
[1] Civil Rights 78 ⚿1395(8)

78 Civil Rights
78III Federal Remedies in General
78k1392 Pleading

78k1395 Particular Causes of Action
78k1395(8) k. Employment Practices. Most Cited Cases
(Formerly 78k235(3))
Section 1983 claim by member of county board of supervisors, alleging that various county defendants had violated her equal protection rights by instituting investigation into only her travel expenditures and then refusing to reimburse her legal fees after no criminal charges were brought forth, did not state valid equal protection claim, where even a cursory review of the facts as alleged in board member's own complaint suggested numerous rational bases for defendants' actions, including that board member's reimbursement requests were the largest and triggered the most public scrutiny, and that defendants might have refused her reimbursement request simply because they decided, in their discretion, to conserve county funds. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

[2] Civil Rights 78 ⚿1376(10)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(10) k. Employment Practices. Most Cited Cases
(Formerly 78k214(4))
Although county board member's allegations that county defendants took adverse action her in order to chill her outspoken but protected speech were sufficient to state § 1983 First Amendment retaliation claim, claim had to fail based on qualified immunity because she could not show that a reasonable officer in defendants' positions would have known that he was violating federal law; the First Amendment rights asserted by board member were not clearly established, given that case was atypical in that board member was elected public official, rather than a rank-and-file public employee, and board member was no longer a public employee when county board denied her request for reimbursement of legal fees. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

***380** Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge. (CA-01-726-3).

ARGUED: Robert A. Dybing, Shuford, Rubin & Gibney, Richmond, Virginia; Jeff Wayne Rosen, Pender & Coward, P.C., Virginia Beach, Virginia, for Appellants. Patrick Michael McSweeney, McSweeney & Crump, P.C., Richmond, Virginia, for Appellee. **ON BRIEF:** John A. Gibney, Jr., Shuford, Rubin & Gibney, Richmond, Virginia; Lisa Ehrich, Pender & Coward, P.C., Virginia Beach, Virginia; Henry M. Massie, Jr., Taylor & Walker, P.C., Richmond, Virginia, for Appellants. Betty S.W. Graumlich, John L. Marshall, Jr., McSweeney & Crump, P.C., Richmond, Virginia, for Appellee.

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.
Reversed by unpublished PER CURIAM opinion.

OPINION

PER CURIAM.
****1** Paulette McWaters, a former member of the Powhatan County Board of Supervisors (the "Board "), brought an action under 42 U.S.C. § 1983 against the Board and certain other Powhatan County officials***381** alleging violations of her equal protection and First Amendment rights. Her claims arise out of two events, an investigation of her travel expense reimbursement requests and a subsequent decision not to reimburse her for legal fees she incurred in the course of the investigation. The defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) and asserted qualified immunity. The district court denied both the 12(b)(6) motion and the qualified immunity defense, deciding that the allegations in McWaters' complaint, if proven, would establish a violation of clearly established law. We disagree. McWaters' complaint does not establish an equal protection violation, and she cannot show that the defendants violated clearly established law with respect to her First Amendment claim. Accordingly, we reverse the district court's order denying qualified immunity.

I.

The facts, as alleged in McWaters' complaint, are these. McWaters was a member of the Board from 1996 through January 2000, at which point she was replaced by defendant T.J. Bise who currently sits on the Board. Defendant John F. Rick is the County Attorney of Powhatan County and has served in that capacity since 1997. Defendant Stephen F. Owen is the County Administrator of Powhatan County and has served in that capacity since 1993. Defendants Roy J. Harrison, Robert R. Cosby, Edmund C. Burruss, and Margaret H. Manning are members of the Board and have served in that capacity at all times relevant to this case.

McWaters alleges that during the 1996-2000 Board term, the Board members were divided on the issue of financial management of the Powhatan County School District. McWaters was a consistent and outspoken critic of the School Board and the District Superintendent of Schools on that issue. She was also critical of other members of the Board.

In 1998, McWaters and Manning attended a National Association of Counties ("NACO") conference in Portland, Oregon. McWaters and Manning submitted several travel expense reimbursement requests to Powhatan County after attending the conference. The Board approved and authorized payment for McWaters' and Manning's expenses at the 1998 NACO conference.

At an October 11, 1999, meeting of the Board, Denise Eyles, an employee of the Powhatan County School District, addressed the Board during its public comment period and rebuked McWaters for spending County money on travel to various conferences. Eyles confined her criticism to McWaters because her travel expenses in the aggregate were greater than the expenses of any other Board member and because McWaters had been a persistent critic of the Powhatan County School District and its spending practices. Eyles' criticisms made their way into two newspaper articles, one in the *Powhatan Today* and the other in the *Richmond Times-Dispatch,* which ran later that month.

**2 At McWaters' request, Owen sent her a letter on October 25, 1999, wherein he stated that he was not "aware of any improper reimbursements." J.A. 13. After sending that letter, Owen reported that he had developed doubts about certain reimbursement requests submitted by McWaters for the 1998 NACO conference. Without first contacting McWaters or consulting with the Board, Owen asked Rick to investigate the matter. Owen did not ask Rick to investigate any of the other Board members, and no others were investigated.

*382 Rick immediately began his investigation and notified the Chairman of the Board, Cosby, of what he was doing. Ultimately, the investigation into the reimbursements found no criminal violation. In defending herself during the investigation, McWaters incurred $21,153.94 in legal expenses, which she formally requested the Board to reimburse.[FN1] On August 14, 2001, Owen advised McWaters that he was denying her request for reimbursement on the advice of Rick that reimbursement for such expenses was not authorized by state law.

> FN1. According to Virginia law,
> If any officer or employee of any locality is investigated ... on any criminal charge arising out of any act committed in the discharge of his official duties, and no charges are brought ... the governing body of the locality may reimburse the officer or employee for reasonable legal fees and expenses incurred by him in defense of the investigation ..., the reimbursement to be paid from the treasury of the locality.
> Va.Code Ann. § 15.2-1521.

McWaters brought suit under section 1983, alleging that the investigation and subsequent refusal to reimburse amounted to a denial of her equal protection and First Amendment rights. She sued all defendants in their official as well as their individual capacities. The defendants moved to dismiss under Rule 12(b)(6) for failure to state a claim and asserted qualified immunity. The district court denied the motion and rejected the qualified immunity defense. *See McWaters v. Rick,* 195 F.Supp.2d 781 (E.D.Va.2002). The defendants appealed.

II.

The defendants contend that the district court erred by denying them qualified immunity. Because the defendants' assertion of qualified immunity arises in conjunction with a motion to dismiss, we take the facts as alleged in McWaters' complaint as true. *See McVey v. Stacy,* 157 F.3d 271, 276 (4th Cir.1998). We review the district court's denial of qualified immunity *de novo. See id.* at 276. We consider first whether the facts as alleged by McWaters state a constitutional violation. *See Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If so, we proceed to consider whether the right was clearly established; that is, whether a reasonable officer in the respective defendants' positions would have known that he was violating federal law. *Id.* at 201-02.

A.

[1] The defendants first challenge the legal sufficiency of McWaters' equal protection claim. McWaters alleged in her complaint that the defendants violated her equal protection rights by " intentionally treat[ing][her] differently from others similarly situated without any rational basis for the difference in treatment," J.A. 19, in the course of (a) investigating only her in the first instance and (b) refusing to grant her request for reimbursement of legal fees.

The first question is of course whether the facts alleged by McWaters establish an equal protection violation. She argues that her allegation is sufficient under *Village of Willowbrook v. Olech,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). In *Olech,* the Supreme Court upheld the viability of a so-called "class of one" theory and concluded that an allegation that one " has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" was sufficient to state a claim for an equal protection violation. *Id.* at 564. The Court clarified that the irrationality allegation was separate from the actual ***383** subjective motivation of the Village of Willowbrook. *Id.* at 565 (stating that the irrationality allegation was sufficient "quite apart from the Village's subjective motivation").

****3** While McWaters' complaint dutifully asserts irrationality, even a cursory review of the facts *as alleged in her complaint* demonstrates that she has not shown a violation of her equal protection rights, because numerous rational bases for the defendants' actions suggest themselves even from these facts. For example, the defendants may have chosen to investigate only McWaters because her reimbursement requests were the largest and triggered the most public scrutiny, both through the Eyles accusation and the subsequent newspaper articles. And the defendants might have refused her reimbursement request simply because they decided, in their discretion, to conserve county funds.

Because the rational basis inquiry is separate from the subjective motivation inquiry, the defendants are not required to show that they actually were acting on those rational bases. "[T]he State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (internal quotation marks omitted). Since McWaters' complaint does not negative the facts that support the rational bases noted above-indeed, it alleges them-it follows that she has failed in her burden of asserting irrationality. Thus, all of the defendants are entitled to qualified immunity on the ground that McWaters has not pled a violation of her rights under the Equal Protection Clause.

B.

[2] The defendants also insist that they are entitled to qualified immunity as to McWaters' First Amendment claim. McWaters alleged in her complaint that the investigation and refusal to reimburse
were motivated and activated by [her] outspoken

criticism of other members of the Board of Supervisors, as well as the management of the Powhatan County School District and Owen himself, during [her] term of office as a member of the Board of Supervisors. The investigation of [McWaters] was intended to punish her for her criticism and to discourage her from publicly expressing her views.

J.A. 19-20. She asserted that this conduct violated her First Amendment right to be free from retaliatory government action.[FN2]

> FN2. McWaters has not stated a claim against the Board members themselves for retaliatory action with respect to the investigation. Defendants Cosby, Burruss, Harrison, Manning, and Bise cannot be liable for the investigation because, as stated in McWaters' complaint, they did not initiate the investigation, J.A. 13, and, under Virginia law, it appears that the only means by which they could have stopped the investigation was by revoking McWaters' reimbursements. *See* Va.Code Ann. § 15.2-1245(B). Thus, McWaters' quarrel with respect to the investigation is at most with defendants Owen and Rick.

The first question is, once again, whether McWaters has successfully pled a violation of federal law. We conclude, for substantially the same reasons given by the district court, that McWaters has pled a First Amendment violation. *See McWaters,* 195 F.Supp.2d at 794-805. The district court's reasoning was quite thorough, and we will not repeat it here. Suffice it to say that McWaters' allegations that the defendants took adverse action against her with the purpose of chilling her protected ***384** speech are sufficient to state a First Amendment retaliation claim.

We disagree, however, with the district court's conclusion that the First Amendment right asserted by McWaters was clearly established. As the district court acknowledged at the beginning of its analysis, "[i]t is not entirely clear which retaliation test applies under these circumstances and, to complicate matters, courts have not been entirely consistent in their analytical approach." *Id.* at 796. Such a conclusion as to the state of the law should normally require a grant of qualified immunity. Moreover, not only is the law unclear in this area, but the application of the law to the facts is often difficult to predict. As we have said, "particularly in First Amendment cases, where a sophisticated balancing of interests is required to determine whether the plaintiff's constitutional rights have been violated, only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected." *McVey,* 157 F.3d at 277 (internal quotation marks omitted).

****4** In this case, we cannot say that a reasonable officer would have known what retaliation test would apply, and accordingly whether his actions were in violation of the law. McWaters points to no cases which are factually analogous. Her case is atypical, in part, because she is an elected public official, rather than a rank-and-file public employee. *See McWaters,* 195 F.Supp.2d at 796 ("The public employee cases decided by the Fourth Circuit do not involve public employees who also are members of a governing body of a local government entity."). As an elected public official, the First Amendment interests implicated are different from those of an ordinary civil servant and local officials are not required to perfectly predict what a court will later determine those interests to entail. Further compounding the confusion as to the applicable legal standard, McWaters was not a public employee at the point at which the Board denied her reimbursement request. Under these circumstances, even though McWaters has alleged a First Amendment violation, her claim ultimately must fail because she cannot show that a reasonable officer in the defendants' positions would have known that he was violating federal law.

CONCLUSION

For the reasons stated herein, the district court erred in denying the defendants qualified immunity, and accordingly the judgment is reversed.

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(Cite as: 54 Fed.Appx. 379)

REVERSED.

C.A.4 (Va.),2002.
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