UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JENNIFER ELLER

Plaintiff,

v.

PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS, PRINCE GEORGE'S COUNTY BOARD OF EDUCATION, and MONICA GOLDSON in her official capacity

Defendants.

Case Number: 18-cv-03649-TDC/TJS

PLAINTIFF JENNIFER ELLER'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

For over five years, Plaintiff Jennifer Eller, a highly regarded English teacher in the Prince George's County Public School system ("PGCPS"), suffered a constant stream of insults, threats, and physical violence in the workplace from co-workers and students because she is a transgender woman. Ms. Eller endured this hostile work environment for so long because she loved being an educator and hoped that she could work with Defendants to change a system that failed to equip its staff and students with the knowledge they needed to work and learn alongside transgender people. But Ms. Eller's diligent efforts to bring the harassment she and other transgender members of the PGPCS community faced to the attention of Defendants, and to convince her supervisors to make efforts to stop the hostility she suffered and implement training and policy changes, were ignored. To make matters worse, Defendants retaliated against Ms. Eller through both overt action and through years of cruel indifference, stripping away her joy of teaching. Both the hostile work environment and this retaliation contributed to Ms. Eller's constructive discharge.

The record in support of Ms. Eller's claims is compelling, undisputed, and voluminous. Contemporaneously generated documents and the testimony of Defendants' employees confirm that a large number of co-workers and students harassed Ms. Eller because she is a transgender woman, from misgendering and transphobic epithets to assault.[1] Defendants did not respond to these repeated incidents in a way that would prevent the mistreatment from continuing. Though the harassment was well-documented and systemic, Defendants admit that they did not provide staff and students any training on how to interact with the transgender individuals in their schools. This hostile work environment resulted in Ms. Eller's post-traumatic stress disorder ("PTSD") and emotional distress, which lead to intensive psychiatric care and is confirmed by medical records and expert testimony. There is no genuine issue of material fact that would prevent summary judgment in Ms. Eller's favor on her hostile work environment or constructive discharge claims.

[1] To misgender is to "[r]efer to (someone, especially a transgender person) using a word, especially a pronoun or form of address, that does not correctly reflect the gender with which they identify." Misgender, Oxford University Press, www.lexico.com/en/definition/misgender (accessed Apr. 26, 2021).

Defendants' Motion for Summary Judgment, by contrast, fails as a matter of law and is unsupported by the evidence. Indeed, Defendants make only a half-hearted attempt to move on the underlying merits of Ms. Eller's claims, instead swiping weakly at the edges—relying on snippets of testimony concerning immaterial facts and abrogated case law. Their legal arguments also fail because they ignore equitable tolling, and other relevant doctrines. The evidence supporting Ms. Eller's claims is substantial. But even if the Court were to determine the record was insufficient to establish Ms. Eller's rights to recover as a matter of law, at a minimum it demonstrates questions of fact justifying the denial of Defendants' motion.

Accordingly, the Court should enter summary judgment in Ms. Eller's favor on her hostile work environment and constructive discharge claims (Counts II-V) and deny Defendants' Motion for Summary Judgment. The Court should also grant summary judgment in Ms. Eller's favor on four of Defendants' affirmative defenses as they are rooted in the same failed arguments Defendants offer concerning Ms. Eller's claims. This will narrow the issues remaining for trial.

BRIEF FACTUAL BACKGROUND[2]

Jennifer Eller is a transgender woman; her gender identity is female, but she was assigned the sex of male at birth. Joint Record ("JR") 393 ¶ 4, Ex. 15. From 2008 to 2017, Ms. Eller worked as an English teacher at PGCPS. JR 777 ¶ 2, Ex. 51. PGCPS is governed by the Prince George's County Board of Education ("BOE") and led by Chief Executive Officer Monica Goldson (collectively, Ms. Goldson and BOE are "Defendants").[3] Ms. Eller ultimately left her employment with PGCPS after years of verbal and physical harassment because of her transgender status.

From 2008 to 2011, Ms. Eller worked as an English teacher at Kenmoor Middle School. *Id*. In Spring 2011, Ms. Eller informed school officials that she would be socially transitioning to begin presenting and living as the woman that she is. *E.g.*, JR 70-71 at 271:19-273:12, Ex. 1. While Ms. Eller did not expect every individual at PGCPS to immediately accept her, respect her

[2] Ms. Eller refers to the Joint Statement of Facts, submitted at the end of briefing pursuant to the Case Management Order, for a comprehensive recitation of the facts supporting her Motion.

[3] It is undisputed that BOE is an education program that receives federal financial assistance, subject to Title IX. JR 721-22 ¶ 11, Ex. 46 (PGCPS Response to RFA No. 11).

gender identity, and use appropriate pronouns, she did expect support from Defendants, including training and resources that could educate her co-workers and students about how to interact respectfully with transgender individuals. JR 396-97 ¶ 15, Ex. 15. That did not happen. Following her social transition, co-workers, students, and parents harassed Ms. Eller. Co-workers at Kenmoor Middle School asked about the medical details of her transition, and students referred to Ms. Eller as a "fag," "gay," "homo," "tranny," and other slurs. *E.g.*, JR 428-30, Ex. 16; JR 397-99 ¶¶ 16-24, Ex. 15. Students, parents, co-workers, and supervisors misgendered her. Ms. Eller reported all of this to her supervisors. *E.g.*, *Id.*; JR 465, Ex. 31; JR 778 ¶ 6, Ex. 51.

Ms. Eller then transferred to Friendly High School, but the environment there was no better. From 2011 to 2016, Ms. Eller endured unrelenting verbal and physical harassment at the hands of students, teachers, and parents. *E.g.*, JR 400-06 ¶¶ 31-38, Ex. 15. Students who used slurs and misgendered Ms. Eller assaulted her and threatened worse physical violence and rape. *E.g.*, JR 402 ¶ 35, Ex. 15. Other students asked insulting questions, such as: "do you have a dick," "do you bleed," and "have you cut it off?" JR 432, Ex. 17. Students and co-workers also used slurs to refer to Ms. Eller, such as "tranny," "he-she," "chick with dick," "shemale," and "it." JR 437, Ex. 18. Both co-workers and students continuously misgendered her through the use of male pronouns and titles and made demeaning comments about her appearance. JR 433, Ex. 17. Ms. Eller reported this to her supervisors, and repeatedly sought their assistance with both case-by-case and proactive measures to stop harassment. JR 409, 412-414 ¶¶ 42-43, 51-56, Ex. 15.

In February 2015, Ms. Eller filed an internal report of discrimination based on repeated behavior by an Assistant Principal at Friendly High School. JR 94-95, Ex. 2; JR 414 ¶ 57, Ex. 15. On June 3, 2015, she filed a Charge of Discrimination with the EEOC against Defendants for sex discrimination. JR 96-98; Ex. 3.

In 2016, Ms. Eller transferred to James Madison Middle School where students and co-workers again repeatedly and continuously misgendered her, called her a "sham," and threatened her with violence and the burning of her house. JR 416-417 ¶ 64, Ex. 15. Again, she reported this to supervisors. *Id.* at ¶ 66.

Through more than five years of harassment, administrators failed to address these matters, notwithstanding Ms. Eller's repeated and continuous pleas for help. *E.g.*, JR 399-400, 408-12, 417-18 ¶¶ 25-27, 40-50, 66-69, Ex. 15. Instead, she was met with retaliatory actions that further isolated Ms. Eller from the support she needed in the face of such unrelenting harassment. *E.g.*, JR 418-23 ¶¶ 70-81, Ex. 15. Both the harassment and lack of care by supervisors weighed heavily on her. JR 423 ¶ 82, Ex. 15. In October 2016, Ms. Eller had no choice but to take a medical leave of absence and be admitted to an outpatient hospitalization due to the PTSD, distress, and psychological harm caused by the hostile work environment. JR 110-12, Ex. 8; JR 761-71, Ex. 49. Ms. Eller ultimately was compelled to resign in August 2017. JR 425 ¶ 89, Ex. 15.

On September 26, 2017, the EEOC issued a Letter of Determination finding reasonable cause to believe that Ms. Eller "was subjected to harassment, based upon her sex and gender identity, and unequal terms and conditions of employment, in retaliation for engaging in protected activity, in violation of Title VII … ." JR 792, Ex. 53. The EEOC also found that:

> [Ms. Eller] was subjected to an environment that contained frequent comments about her sex and surgical status; and in which she was routinely misgendered and subjected to sex stereotypes. [Ms. Eller] sustained such treatment from students, parents, staff, and administration. The evidence further revealed that Respondent was aware of the conditions to which [Ms. Eller] was subjected throughout the period in question and failed to take effective corrective action.

Id. On August 31, 2018, Ms. Eller received a Notice of Right to Sue from the United States Department of Justice ("DOJ"). JR 795, Ex. 54. Ms. Eller filed this action on November 28, 2018 and her First Amended Complaint ("FAC") on December 20, 2018. ECF 1, 4.

LEGAL STANDARD

"The party seeking summary judgment bears the initial burden of demonstrating that there is no genuine issue of material fact." *Sedar v. Reston Town Ctr. Prop., LLC*, 988 F.3d 756, 761 (4th Cir. 2021). "A fact is 'material' if proof of its existence or non-existence would affect disposition of the case under applicable law. An issue of material fact is 'genuine' if the evidence offered is such that a reasonable jury might return a verdict for the non-movant." *Wai Man Tom v. Hosp. Ventures LLC*, 980 F.3d 1027, 1037 (4th Cir. 2020) (citation omitted). "[T]he mere

existence of a scintilla of evidence" in favor of the non-movant's position is insufficient to withstand summary judgment. *Sedar*, 988 F.3d at 761 (quotation omitted). "Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion." *Wai Man Tom*, 980 F.3d at 1037. However, "[t]he court may grant summary judgment only if it concludes that the evidence could not permit a reasonable jury to return a favorable verdict." *Sedar*, 988 F.3d at 761. "Therefore, courts must view the evidence in the light most favorable to the nonmoving party and refrain from weighing the evidence or making credibility determinations." *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018).

ARGUMENT

This Court should conclude—on a largely uncontradicted record—that Ms. Eller was subject to severe and pervasive harassment that amounted to a hostile work environment because of her sex and transgender status, and that this harassment is imputable to Defendants. Such a determination would be consistent with the EEOC's findings. In fact, this Court has the benefit of a much more significant body of evidence than what the EEOC had at its disposal[4] Documents and emails created contemporaneously with the harassment, deposition testimony, declaration testimony, and expert testimony, all establish that Ms. Eller should be granted summary judgment on her hostile work environment and constructive discharge claims.

Defendants do not—and cannot—deny that students, parents, co-workers and supervisors engaged in the acts described by Ms. Eller. Nor do they—or can they—deny that Ms. Eller repeatedly brought those instances to the attention of her supervisors. Nor do they challenge the timeliness of Ms. Eller's Title VII or Section 1983 hostile work environment claims. Their best effort to refute Ms. Eller's claims on the merits relies on testimony that she was "beloved" by students and staff, which disproves neither the harassment nor Defendants' lack of action to fix it. Defendants' discussion of retaliation relies on abrogated authority that too-narrowly defined

[4] This robust body of evidence exists despite the fact that Defendants lost relevant evidence. *See* ECF 83, 84. As noted below, the Court should adopt the Magistrate Judge Sullivan's recommendation in that Order when evaluating the record. *See infra* at 19 & n.8.

materially adverse actions and ignores the cumulative effect of their retaliatory actions and Ms. Eller's constructive discharge. And for those claims that Defendants do argue are untimely, they ignore the fact that the claims were equitably tolled for the duration of Ms. Eller's psychiatric treatment for the PTSD caused by Defendants' actions.

Finally, summary judgment should be granted in Ms. Eller's favor on several of Defendants' affirmative defenses that lack any support in the record.[5]

I. Ms. Eller Is Entitled to Summary Judgment on Her Hostile Work Environment and Constructive Discharge Claims.

A hostile environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (cleaned up). Thus, to prevail on a Title VII claim that a workplace is hostile, "a plaintiff must show that there is (1) unwelcome conduct; (2) that is based on the plaintiff's sex…; (3) which is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer." *Okoli v. City of Balt.*, 648 F.3d 216, 220 (4th Cir. 2011) (cleaned up). Title IX and the Maryland Fair Employment Practices Act ("FEPA") claims contain analogous elements. *See Jennings v. U.N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Schwenke v. Ass'n of Writers & Writing Progs.*, No. 20-cv-1234, 2021 WL 22422, at *3 (D. Md. Jan. 4, 2021).

A. Ms. Eller Experienced Unwelcome Harassment Based on Her Sex and Transgender Status.

1. The Harassment That Ms. Eller Experienced Was Unwelcome.

"The first element of a hostile environment claim, unwelcome conduct, is not a high hurdle." *Strothers v. City of Laurel, Maryland*, 895 F.3d 317, 328 (4th Cir. 2018). "[A]n employee can demonstrate that certain conduct is unwelcome simply by voicing her objection to the alleged

[5] Defendants argue that Prince George's County Public Schools is not a legal entity capable of suing and being sued, but admit the BOE is properly named as a defendant. Defs.' Mot. at 5-6. Ms. Eller does not contest this point, and voluntarily dismisses non-entity Prince George's County Public Schools as a defendant, subject to any admissions by PGCPS being imputed to the BOE.

harasser or to the employer." *Id.* at 328-29. Where an employee repeatedly voices complaints of harassment to supervisors and co-workers and informs them that he or she finds the harassment objectionable, this element is satisfied. *See, e.g.*, *id.*; *EEOC v. Central Wholesalers, Inc.*, 573 F.3d 167, 175 (4th Cir. 2009); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 314 (4th Cir. 2008).

There can be no dispute that Ms. Eller was the subject of unwelcome discriminatory conduct based on her transgender status and that she repeatedly voiced her complaints about that conduct to her supervisors and co-workers. She reported the continuous harassment by students, parents, and co-workers over the course of five years, detailing individual incidents and asking for follow-up action from administrators in emails, conversation, and PS-74 forms, which were used at PGCPS to document student misbehavior. *E.g.*, JR 429, Ex. 16; JR 124-125, Ex. 17 (reporting harassment by three students in Oct. 2013); JR 441, Ex. 20 (reporting harassment in March 2015); JR 443, Ex. 21 (reporting harassment in June 2015 and asking to be updated regarding disciplinary action taken); JR 445, Ex. 22; JR 447, Ex. 23 (reporting numerous incidents of micro-aggressions and misgendering that she had experienced between August 2015 and October 2015); JR 400-408 ¶¶ 31-39, Ex. 15; JR 706-07, Ex. 42; JR 709-711, Ex. 43.[6] Ms. Eller complained that "[m]ost teachers d[id] not correct students or intervene to help [her] when they s[aw] these things occurring." JR 477, Ex. 18. These repeated pleas to PGCPS administrators to take action to remedy the hostile conduct of students, staff, and parents establish unwelcome conduct.

2. The Harassment Was Based on Ms. Eller's Sex and Transgender Status.

"An employee is harassed or otherwise discriminated against 'because of' his or her gender if, 'but for' the employee's gender, he or she would not have been the victim of discrimination." *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 331 (4th Cir. 2011). "[I]t is impossible to discriminate against a person for being … transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020). Ms. Eller's work environment

[6] While Ms. Eller's numerous reports of harassment are supported by both testimony and a large number of emails, additional emails reporting such harassment were lost following application of Defendants' routine email deletion policies, ECF No. 83 at 12-14, and failure to institute a litigation hold, *id.* at 16.

became hostile only after she transitioned and began presenting as the woman she is. After that, students, staff, and parents subjected Ms. Eller to transphobic epithets, misgendering, and hostility.

First, students, co-workers, and parents called Ms. Eller a variety of slurs, asked inappropriate questions, and made insulting comments, all expressly related to her sex and transgender status. "[T]he use of sexually degrading, gender-specific epithets … has been consistently held to constitute harassment based upon sex.'" *Central Wholesalers, Inc.*, 573 F.3d at 175 (citation omitted); *see also Samuels v. Two Farms, Inc.*, No. DKC 10–2480, 2012 WL 261196, at *8 (D. Md. Jan. 27, 2012) (harassing party employed sex-specific and derogatory terms, such as discussion of body parts, derogatory phrases, and crude sex-based questions).

The record is replete with examples of slurs and express transphobic questions and comments against Ms. Eller. *See* JR 398-408 ¶¶ 20, 31, 35, 38, Ex. 15; JR 429-30, Ex. 16; JR 432-35, Ex. 17; JR 437, Ex. 18; JR 449, Ex. 24; JR 451, Ex. 25; JR 447, Ex. 23; JR 402 ¶ 35, Ex. 15 (parent complained that there was a "tranny" in the classroom). This behavior only became worse over time and continued through at least 2016. *E.g.*, JR 408 ¶ 38, Ex. 15 (student in May 2016 told Ms. Eller "If my opinion is you a boy then you is a boy" and "He can't just change in sex"); JR 454, Ex. 26 (student referred to Ms. Eller in May 2016 as a "he-she"). The degrading remarks directed at Ms. Eller clearly constitute sex-based harassment based on her transgender status.

Second, students, staff, and parents also repeatedly misgendered Ms. Eller. "[F]ailure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment." *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *11 (E.E.O.C. Apr. 1, 2015); *see also Jameson v. Donahoe*, EEOC DOC 0120130992, 2013 WL 2368729, at *2 (E.E.O.C. May 21, 2013) (similar). Ms. Eller was constantly and intentionally called "mister," "sir," "him," and "he" by students and co-workers. JR 439, Ex. 19; JR 456, Ex. 27; JR 459, Ex. 28; JR 3-84 at 324:15-325:14, Ex. 1. One student remarked to Ms. Eller, "Your sign's wrong! It should say MISTER." JR 406 ¶¶ 38(i), Ex. 15. An Assistant Principal repeatedly called Ms. Eller "him," "sir," and "mister" in the presence of other staff, compelling Ms. Eller to file a Discrimination or Harassment Incident Report. JR 404 ¶ 37, Ex. 15; JR 461, Ex. 29. PGCPS's persistent failure to

recognize Ms. Eller's legal first name and disassociate her prior, male name, on email and calendar services exacerbated the misgendering that occurred. JR 412 ¶ 49, Ex. 15; JR 445, Ex. 22. This repeated misuse of pronouns by students and faculty constitutes sex-based harassment.

Finally, other harassment did not explicitly reference Ms. Eller's transgender status but in context, based on the source, were related to that status. For example, Ms. Eller reported that she had been physically threatened by students in the halls, and one student, who in other contexts misgendered her and made derogatory comments, told her "you best watch yourself. JR 437, Ex. 18; JR 403 ¶ 36(c), Ex. 15; *see also* JR 447, Ex. 23 (offensive remarks); JR 463, Ex. 30 (same).

B. The Harassment Was Severe and Pervasive.

Discriminatory harassment is sufficiently "severe or pervasive" where the victim "subjectively perceive[s] the environment to be abusive," and where "a reasonable person would find [the environment] hostile or abusive." *Id.* at 21; *see also Perkins v. Int'l Paper Co.*, 936 F.3d 196, 208 (4th Cir. 2019). A plaintiff may, but is not required to, establish that the environment is "psychologically injurious." *Harris*, 510 U.S. at 22. This "element is properly viewed in the disjunctive, requiring only that a plaintiff prove the harassment was severe *or* pervasive." *Harris v. Mayor & City Council of Baltimore*, 429 F. App'x 195, 202 n.7 (4th Cir. 2011) (emphasis in original). Nevertheless, here, co-workers, students, and parents subjected Ms. Eller to harassment that was both severe *and* pervasive.

1. The Harassment Ms. Eller Suffered Was Severe.

Throughout her transition and after, Ms. Eller was subjected to epithets in the workplace of unusual severity. Students and parents repeatedly called Ms. Eller transphobic, sex-based epithets. *See supra* at Section I.A.2; JR 398 ¶ 20, Ex. 15; JR 401-08 ¶¶ 31-39, Ex. 15; JR 416 ¶ 64, Ex. 15; JR 432, Ex. 17. Co-workers dehumanized and harassed Ms. Eller by repeatedly misgendering her and making derogatory comments about her transgender status. *See supra* at Section I.A.2; JR 94-95, Ex. 2; JR 398-99, ¶ 23, Ex. 15; JR 402, ¶ 34, Ex. 15; JR 465, Ex. 31.

The objective severity of the harassment should be judged from the perspective "of a reasonable person in the plaintiff's position" and after considering "all the circumstances," *Oncale*

v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (cleaned up). "That determination is made by looking at all the circumstances, which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc) (cleaned up). This inquiry "is not, and by its nature cannot be, a mathematically precise test." *Harris*, 510 U.S. at 22.

A transgender woman being called a "tranny," a "thing," a "freak," a "he/she," a "shemale," and a "sham," among other epithets, is sex-based harassment. Under any standard, being subjected to such odious epithets is considered sufficiently severe to alter Ms. Eller's workplace conditions for the worse. "[A] single verbal (or visual) incident can … be sufficiently severe to justify a finding of a hostile work environment." *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *see also Boyer-Liberto*, 786 F.3d at 280 (two uses of racial epithet "were severe enough to engender a hostile work environment"); *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1253–54 (11th Cir. 2014) (concluding that supervisor's carving of racial epithet in work environment with the Black plaintiff "was an isolated act, [but] it was severe").

As the Fourth Circuit has recognized, "[n]ames can hurt as much as sticks and stones." *Sunbelt Rentals*, 521 F.3d at 318. Like the use of the n-word and other odious racial epithets at issue in *Ayissi-Etoh*, *Boyer-Liberto*, and *Spriggs*, the use of the sex-based epithets against a transgender woman go far beyond "mere offensive utterances." They are meant to dehumanize a person who is transgender and invalidate their very identity and being. "[I]t is degrading and humiliating in the extreme." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001).

Likewise, the continuous misgendering of a transgender person is meant to undermine and invalidate that person's identity. As Dr. Ettner, a licensed clinical and forensic psychologist with expertise in gender dysphoria testified, repeated misgendering "undermine[s] an individual's core identity and psychological health." JR 551, ¶ 42, Ex. 36. The EEOC has recognized that "[p]ersistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work

environment." *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, at *11 (EEOC Apr. 1, 2015). Here, Ms. Eller was not only subject to continuous misgendering, but she also witnessed the misgendering of transgender students and her supervisor ultimately disciplined Ms. Eller for standing up to a teacher who misgendered a student.

Finally, although physical threats or force are not required to establish severity, *Sunbelt Rentals, Inc.*, 521 F.3d at 318, here, students also subjected Ms. Eller to physical harassment and threats of violence on account of her transgender status. For example, a student who had verbally harassed Ms. Eller, shoved her; the principal discouraged Ms. Eller from filing a PS-74 form about the incident, stating that any students who may like Ms. Eller would turn against her. JR 401, ¶ 32, Ex. 15; JR 81-82 at 316:8-317:5, Ex. 1. Another student and his friends told Ms. Eller in the school parking lot that they would "rape" her and make her "their girlfriend." JR 402, ¶ 35, Ex. 15. Yet another student physically assaulted Ms. Eller by intentionally stepping on her foot and pressing down until she screamed in pain while using a slur as he did so. JR 402, ¶ 36, Ex. 15; JR 84 at 325:7-9, Ex. 1. And in October 2016, one student who had repeatedly misgendered Ms. Eller over the prior weeks threatened to burn down her house and told her that she was not really a person and so it did not matter if he hurt her. JR 417, ¶ 64(f), Ex. 15.

The harassment experienced by Ms. Eller was objectively severe. The transphobic, sex-based epithets hurled at Ms. Eller by themselves are sufficient to warrant a finding of a hostile work environment, but when these are viewed in conjunction with the other harassing conduct she experienced, including misgendering, threats of violence, and actual violence, any reasonable jury would conclude the harassment Ms. Eller experienced was severe.

2. The Harassment Ms. Eller Suffered Was Pervasive.

The harassing incidents Ms. Eller experienced, viewed in isolation, are enough to have transformed the workplace into a hostile or abusive one. However, no factfinder can ignore "the habitual use of epithets here or view the conduct without an eye for its cumulative effect." *Sunbelt Rentals*, 521 F.3d at 318. This includes "instances where the environment was pervaded with discriminatory conduct 'aimed to humiliate, ridicule, or intimidate,' thereby creating an abusive

atmosphere." *Id.* at 316 (quoting *Jennings*, 482 F.3d at 695).

The evidence lays out the unrelenting, routine, and humiliating transphobic, sex-based harassment that Ms. Eller repeatedly experienced at the hands of co-workers, students, and parents over five years. JR 397-418, Ex. 15. As soon as Ms. Eller transitioned and began presenting as the woman that she is in May 2011, she was subjected to discriminatory and harassing conduct. In May 2011, several co-workers at Kenmoor Middle School misgendered Ms. Eller and asked about the medical details of her transition. JR 397-99, ¶¶ 18, 23, Ex. 15; JR 465, Ex. 31. Students used insulting transphobic epithets to refer to her. JR 429, Ex. 16.

The harassment continued unabated throughout the remainder of Ms. Eller's tenure at PGCPS. At Friendly High School, students directed explicit epithets, misgendering using male pronouns and honorifics, and questions about genitals at Ms. Eller. JR 400-08, ¶¶ 31-38, Ex. 15; JR 432, Ex. 17; JR 437, Ex. 18. In evidence are examples from every semester of Ms. Eller's tenure at Friendly High School. JR 400-08, ¶¶ 30-38, Ex. 15. This hostile work environment was exacerbated by Ms. Eller's co-workers and students' parents. For example, "[r]eferring to [Ms. Eller], the head football coach, Peter Quaeway, told his students "just stay away from *it* and leave *it* alone." JR 700, ¶ 6, Ex. 41 (emphasis added). In addition, Assistant Principal Robinson who had oversight over the English Department of which Ms. Eller was a member, repeatedly misgendered Ms. Eller throughout her time at the school, including in front others. JR 94-95, Ex. 2; JR 404, ¶¶ 36(e), 37(b), Ex. 15; JR 470, Ex. 33. Similarly, Ms. Eller had to confront another teacher, Ms. Claggett, over the teacher's continued misgendering of a transgender male student. JR 406-07, ¶ 38(j), Ex. 15; JR 467-68, Ex. 32. Ms. Claggett responded by saying that calling the student by his chosen name would be a "slap in my God's face" and that she would not "push the Transgender Agenda." *Id.* Instead of ensuring that transgender members of the school community are not misgendered, Defendants disciplined Ms. Eller for standing up for a transgender student. JR 18 at 62:1-63:2, Ex. 1; JR 194 at 248:14-20, Ex. 10. Parents referred to Ms. Eller as a "tranny" or a "pedophile" or asked what was under her skirt, even in the presence of Ms. Eller's co-workers, who would leave such harassment unaddressed. JR 402, 404, ¶¶ 35, 37(a), Ex. 15. This

harassment, including express slurs and repeated misgendering, continued during the 2016-2017 school year at James Madison Middle School. JR 416-17, ¶ 64, Ex. 15.

Viewed objectively, the pattern of transphobic, sex-based harassment that Ms. Eller endured for over five years from students, co-workers, and parents "was 'persistent, demeaning, unrelenting, and widespread.'" *Sunbelt Rentals, Inc.*, 521 F.3d at 316 (quoting *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997)). In other words, it was pervasive enough to constitute a hostile work environment.

3. The Harassment Was Subjectively and Objectively Abusive or Hostile.

The harassment Ms. Eller experienced was abusive and hostile. Ample evidence shows her repeated attempts to get Defendants to address the harassment, as it made it impossible for her to do her work and left her feeling, humiliated, distressed, embarrassed, and traumatized.

For example, in 2011, two co-workers discussed Ms. Eller at the teacher's lounge and in her earshot, one saying that Ms. Eller "thinks he's a girl" and another responding "I know. It's disgusting." JR 465, Ex. 31. Ms. Eller left, feeling "uncomfortable" and "humiliated" "without doing the work [she] came there to do," (i.e. photocopies). *Id.* By 2013, "the continued sexual harassment and threats" she was experiencing were "exhausting" her and she was "filled with anxiety" when coming to work, as "it can be difficult to find the strength to come in and face the harassment." JR 437, Ex. 18. In 2015, Ms. Eller was "at the end of [her] ability to function efficiently as a teacher in this hostile environment." JR 470, Ex. 33.

In 2016, following years of transphobic, sex-based harassment, Ms. Eller ultimately was forced to take a medical leave of absence and be hospitalized as a direct result of the hostile work environment she experienced. JR 110-12, Ex.8; JR 762, 765-71, Ex. 49. Indeed, "the harassment, verbal and physical abuse [Ms. Eller] sustained during her employment for several years, resulted in post-traumatic stress disorder, specifically complex post-traumatic stress disorder. And … the post-traumatic stress disorder is chronic." JR 869 at 67:16-22, Ex. 60. *See also* JR 491 at 67:5-7, Ex. 35 ("Ms. Eller suffers from trauma, and she suffers from—it appears that she suffers from

PTSD, which we would consider to be chronic.").[7] "The ceaseless harassment, discrimination and humiliation [Ms. Eller] was subjected to completely eroded her coping strategies and resilience, and resulted in the irremediable damage of what has now become chronic PTSD." JR 558, ¶ 68, Ex. 36. Defendants' expert, Dr. Cephas, agreed that the harassment Ms. Eller has reported (if true) would have caused her emotional distress. JR 515 at 162:5-13, Ex. 35 ("If what she is saying happened happened, we can see why she would have emotional distress."); *see also* JR 423, 425, ¶¶ 82, 90, Ex. 15; JR 560, ¶ 74, Ex. 36.

The harassment Ms. Eller suffered was distressing, humiliating, and embarrassing, ultimately leading to her feeling stigmatized and feeling a loss of dignity. JR 397, ¶ 16, Ex. 15 Ms. Eller dutifully reported many instances of harassment she experienced to her supervisors and school administrators, to little avail, and noted how she found the harassment to be objectionable. A reasonable jury would find Ms. Eller's repeated and continuous reporting of the harassment she experienced to be sufficient to show that she perceived it to be sufficiently abusive or hostile. *See Central Wholesalers*, 573 F.3d at 176; *Spriggs*, 242 F.3d at 185-86.

Lastly, any reasonable person in Ms. Eller's position would have perceived her work environment to be hostile or abusive. Ms. Eller was resilient, attempting for years to remedy the hostile work environment she experienced, including by suggesting trainings and making herself available to the administration to foster a more inclusive and welcoming environment. A reasonable jury would find the years of repeated, continuous, and relentless misgendering and transphobic, sex-based harassment of Ms. Eller as "particularly offensive" to transgender people. *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 332 (4th Cir. 2003); *see also Spriggs*, 242 F.3d at 185 ("frequent and highly repugnant insults were sufficiently severe or pervasive (or both)."

[7] Dr. Cephas does not contradict Dr. Ettner's assessment as to the cause of Ms. Eller's PTSD, rather Dr. Cephas expresses a lack of knowledge or certainty as to the cause of Ms. Eller's PTSD. JR 513-14 at 157:20-158:3, Ex. 35 ("No, I cannot say with medical certainty that it is not caused, but that's why I'm saying it's complex."). Nor does he dispute that a diagnosis of complex PTSD may result from being subjected to repeated verbal harassment or epithets; rather he just notes that it is not a definition within the DSM-5. JR 500 at 105:7-11, Ex. 35. Complex PTSD is a routine and longstanding diagnosis that the World Health Organization's International Classification of Diseases (ICD-11) recognizes. JR 553, ¶ 47, Ex. 36.

C. The Hostile Work Environment Is Imputable to Defendants.

The fourth factor in establishing a hostile work environment claim is that the unwelcome conduct be "imputable to the employer." *Okoli*, 648 F.3d at 220. The hostile and abusive environment perpetuated by both fellow staff and students throughout Ms. Eller's employment by PGCPS can be imputed to Defendants.

1. Assistant Principal Robinson's Conduct Is Directly Imputable to Defendants

Assistant Principal Robinson's contribution to the hostile work environment through her persistent misgendering of Ms. Eller during her time at Friendly High School is directly imputable to Defendants. As the administrator in charge of the English department during the 2014-2015 school year, Robinson served as a "supervisor" to Ms. Eller. JR 103, Ex. 5; JR 280 at 97:10-13, Ex. 12; JR 614, Ex. 37. "[A]n employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance v. Ball State Univ.*, 570 U.S. 421, 450 (2013). A tangible employment action constitutes a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 431. As the English department administrator, Ms. Robinson had direct oversight over Ms. Eller by performing reviews of her lesson planning and teaching, the contents of which would directly impact an English teacher's employment status. JR 103, Ex. 37; JR 797, Ex. 55 (reassignment of Ms. Eller's teacher evaluation to Robinson).

Whenever a "supervisor" engages in harassment that does not result in a tangible employment action, an employer can mitigate or avoid liability by showing "(1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided." *Vance*, 570 U.S. at 430.

Defendants cannot make such a showing. Ms. Eller attempted to take advantage of corrective opportunities by filing a Discrimination or Harassment Incident Report with

Defendants' Equal Employment Opportunity ("EEO") Office within one week after the February 2015 incident where Ms. Robinson repetitively misgendered Ms. Eller. JR 102, Ex. 5. The Letter of Determination issued by the EEO Office after investigating the incident recommended that Ms. Robinson should receive "professional counsel and/or discipline" and that "during the 2015-2016 academic year both Friendly High School students and staff receive diversity and sensitivity training." JR 104, Ex. 5. Yet, Defendants took no action in response to the Letter. JR 189-190 at 228:15-231:15 (acknowledging he could not recall taking any action on this Letter with regard to Ms. Robinson); JR 662 at 185:3-11, Ex. 38 (acknowledging Defendants never implemented additional diversity and sensitivity training at Friendly High School). Thus, Defendants failed to exercise reasonable care to prevent and address the harassment.

In the event that Assistant Principal Robinson is considered only a "co-worker" and not a "supervisor" under *Vance*, her conduct is still imputable to Defendants if they "knew or should have known about the harassment but failed to control the 'working conditions.'" *Vance*, 570 U.S. at 424. The Letter of Determination established Defendants' knowledge and their lack of action evinces a failure to control the "working conditions." Indeed, the continuous and severe harassment persisted after the Letter was issued, through to November 2016. *See supra* 3-4.

2. Defendants Are Liable for the Conduct of Ms. Eller's Co-Workers.

"An employer is liable for harassment by the victim's co-workers [] if it knew or should have known about the harassment and failed to take effective action to stop it." *Sunbelt Rentals, Inc.*, 521 F.3d at 319. There can be no dispute that Defendants were aware of the harassment by Ms. Eller's co-workers and administrators: Ms. Eller assiduously reported the repeated incidents of harassment to them. *E.g.*, JR 414-15 ¶¶ 57-60, Ex. 15; JR 614, Ex. 37; JR 780 ¶ 12, Ex. 51.

But Defendants failed to take effective action to remedy the harassment. Despite extensive discovery, there is no evidence of any discipline or corrective action being instituted against a co-worker of Ms. Eller for their harassment. To the contrary, when Ms. Eller confronted a fellow teacher for misgendering a transgender student, it was Ms. Eller and not the other teacher who was disciplined. JR 18 at 62:1-63:2, Ex. 1; JR 194 at 248:14-20, Ex. 10; JR 421 ¶ 78, Ex. 15.

While Ms. Eller made repeated requests for training for her co-workers and students to address and prevent the harassment, Defendants ignored it. Indeed, to this day, Defendants have not done so, as multiple current PGCPS administrators and Defendants themselves confirmed. *E.g.*, JR 329 at 97:3-12, Ex. 13; JR 276 at 81:7-11Ex. 12; JR 279 at 95:5-8 Ex. 12; *see also, e.g.*, JR 719-21 ¶¶ 4, 8, 10, Ex. 46.

The one time any semblance of a training took place was a single, ineffective presentation in 2015, years after Ms. Eller had first requested one. JR 691-92 ¶ 5, Ex. 39; JR 696 ¶ 5, Ex. 40; JR 702 ¶ 23, Ex. 41. And after her co-workers reacted negatively to the presentation, rather than repeat and confirm its messaging, Principal Adams cut short the presentation. JR 691-92 ¶ 5, Ex. 39; JR 703 ¶¶ 26-27, Ex. 41. Officer Irene Burks, who conducted the training, "did not feel that [her] presentation had a positive impact nor did [she] feel like things would improve for Ms. Eller based on the negative reactions of some staff members." JR 691-92 ¶ 5, Ex. 39; *see also* JR 702-03 ¶¶ 24-25, Ex. 41. A single belated, presentation interrupted by a supervisor cannot constitute effective action to address and prevent the harassment.

Moreover, even to this day, Defendants' nondiscrimination policy fails to make mention of sexual orientation or gender identity. JR 799, Ex. 56. The absence of a policy directed at preventing harassment based on a protected characteristic (i.e., gender identity or transgender status) by an employer expected to maintain such a policy, especially after being on actual notice of incidents of harassment on such basis, should reflect a lack of reasonable care in taking effective action to stop the conduct. *Cf. EEOC v. Ecology Servs., Inc.*, 447 F. Supp. 3d 420, 452 (D. Md. 2020) (noting that the "distribution of an anti-harassment policy" may provide "compelling proof" that an employer has "exercised reasonable care in preventing and correcting harassment"). To be sure, "[t]he mere existence of an anti-harassment policy does not allow [an employer] to escape liability." *Sunbelt Rentals, Inc.*, 521 F.3d at 320. "While the adoption of an effective anti-harassment policy is an important factor in determining whether it exercised reasonable care, the policy must be effective in order to have meaningful value." *Id.* (cleaned up). Defendants never meaningfully updated any policies or training materials related to non-discrimination of

transgender individuals from 2011 to 2016. *E.g.*, JR 640 at 96:7-11, Ex. 38.

3. Defendants Are Liable for the Hostile Work Environment Created by the Students and Parents.

The severe and pervasive harassment Ms. Eller was repeatedly subjected to by PGCPS students and parents because of her transgender status is imputable to Defendants. An employer is liable under Title VII for third parties creating a hostile work environment under a negligence standard. *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 422-23 (4th Cir. 2014). Student-on-teacher harassment has repeatedly been identified as a basis for a hostile work environment claims. *See, e.g., Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) (in Title VII context, school district could be liable to teacher if they "knew he was being harassed and failed to take reasonable measures to prevent it" (citation omitted)); *Webster v. Chesterfield Cty. Sch. Bd.*, No. 3:20-CV-344-HEH, 2020 WL 6064352, at *3 (E.D. Va. Oct. 14, 2020).

In this context, the plaintiff must show "that the school board either provided no reasonable avenue of complaint or knew of the harassment and failed to take appropriate remedial action." *Peries v. New York City Bd. Of Educ.*, No. 97 CV 7109(ARR), 2001 WL 1328921, at *6 (E.D.N.Y. Aug. 6, 2001). To establish the latter, "[a] complete failure to act by the employer is not required; an employer may not insulate itself entirely from liability by taking some token action in response to intolerable conditions." *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1133 (4th Cir. 1995). "In other words, the employer's response must be reasonably calculated to end the intolerable working environment." *Id.* Defendants failed to meet that burden.

First, Defendants were aware of the harassment and discriminatory conduct faced by Ms. Eller. *See supra* Section I.A.1; JR 719, ¶ 5, Ex. 46; JR 778-81, ¶¶ 5-7, 9-12, 14-16, Ex. 51. Ms. Eller also repeatedly requested proactive action to improve the discriminatory environment she faced. JR 787, Ex. 52; JR 77 at 297:16-299:5, Ex. 1; JR 713, Ex.44; JR 715, Ex. 45. By 2013, Ms. Eller had already noted that despite being "in contact with [her] principal about these issues since … 2011 . . . nothing happen[ed]." JR 437, Ex. 18.

Second, despite having full knowledge of Ms. Eller's struggles with transphobic

harassment by students and parents, and armed with her suggestions for how to mitigate against this environment, Defendants failed to take appropriate remedial action.

Defendants failed to enact appropriate discipline on individual students. Ms. Eller seldom was informed whether discipline was imposed on a student who harassed her, and never received any of the PS-74 forms, completed by the administrator investigating the incident, that would have confirmed what, if any, discipline had been assigned. JR 412-14 ¶¶ 51-56, Ex. 15. With only a handful of exceptions captured in emails, there is no evidence of what, if any, discipline Defendants imposed on these students. Administrators could not recall any particular discipline. *E.g.*, JR 282-83 at 107:21-112:15, Ex. 12; JR 176-78 at 174:22-175:21, 180:11-182:4, Ex. 10; JR 245 at 129:13-130:18, Ex. 11. And as Magistrate Judge Sullivan held, Defendants lost the PS-74 forms, having failed to follow their own retention policy and never issuing a litigation hold. *See* ECF 83 at 8-9, 14-20, ECF 84. The Court should adopt Magistrate Judge Sullivan's recommendation concerning that spoliation.[8]

What evidence there is shows that supervisors repeatedly downplayed students' slurs, derogatory comments, and threats against Ms. Eller, despite the intensity, frequency, and threatening nature of the conduct. They characterized it as merely "disrespect," rather than other categories of misconduct which carry higher potential discipline under the Student Code of Conduct, like "sexual harassment," "threats," or "serious bullying." JR 170 at 153:5-17, Ex. 10; JR 172-73 at 159:18-163:20, Ex. 10 (form for reporting harassment was limited to student victims, and that such behavior towards teachers would be classified as disrespect); JR 441, Ex. 20. JR 272 at 65:2-7, Ex. 12 (opining that misgendering of a transgender teacher would not constitute "bullying, harassment or intimidation"). Defendants failed to even prohibit harassment by a

[8] Magistrate Judge Sullivan recommended that a factfinder be instructed that "Defendants bear the sole responsibility for the loss of" PS-74 forms, which "would have described the harassment that Ms. Eller experienced" and "whether the students responsible for the harassment were disciplined and what kind of discipline was imposed." ECF 84. The Order also recommend that the Court "preclude Defendants from (1) arguing that the lost or destroyed PS-74 forms corroborated Defendants' version of events regarding the type of discipline imposed on students that harassed Plaintiff, and (2) offering any evidence about the contents of the PS-74 forms not already produced in discovery." *Id.*

student against a teacher based on their gender identity in the Student Code of Conduct. JR 648 at 127:11-128:12, Ex. 38. In all but a handful of incidents, the discipline imposed on the students who harassed Ms. Eller amounted to no more than a verbal warning or a "conversation" with an administrator, themselves untrained regarding sensitivity to transgender individuals. JR 700 ¶ 7, Ex. 41; JR 233 at 81:4-16, Ex. 11.

Because Ms. Eller's supervisors had actual knowledge of the harassment she faced and implemented no training, programming, or policies that could have remediated the hostile work environment, a reasonable jury would have to find that Defendants were, at the very least, negligent in taking effective action to stop the harassment by the students.

4. Defendants Are Liable for the Systemic Nature of the Hostile Environment Faced by Transgender PGCPS Community Members.

Moreover, Defendants are also liable based on the systemic nature of the hostile environment Ms. Eller faced over five years and in three different schools within the PGCPS system. Other transgender members of the PGCPS community, including students, experienced the same harassment. *E.g.*, JR 703-04 ¶¶ 28-33, Ex. 41 (detailing harassment of transgender students at Friendly High School, which lead to one of the students leaving the school altogether).

Ms. Eller is not bringing a pattern-or-practice case. But an assessment of whether Defendants have taken remedial action "reasonably calculated to end the intolerable working environment," *Amirmokri*, 60 F.3d at 1133, necessarily entails an evaluation of whether Defendants sought to address what, by all accounts, is a system-wide problem. "When harassing behavior occurs frequently enough and is both common and continuous, a company can reasonably be said to be on 'notice' of a severe and pervasive problem of sexual harassment that constitutes a hostile environment." *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1074 (C.D. Ill. 1998). "An employer can be said to be negligent for company-wide sexual harassment when it … does not take steps to address the problem on a company-wide basis." *Id.* at 1075.

"Public schools are a system. … Every problem that arises under [them] is likely to have, in some sense, systemic roots." *L.L. By & Through B.L. v. Tenn. Dep't of Educ.*, No. 3:18-CV-

754, 2019 WL 653079, at *7 (M.D. Tenn. Feb. 15, 2019). Defendants failed to enact system-wide actions to address the system-wide harassment towards transgender members of the school community, including Ms. Eller.

D. The Hostile Environment Ms. Eller Experienced Was So Intolerable, That Any Reasonable Person Would Have Felt Compelled to Resign.

"To establish a hostile-environment constructive discharge claim, a plaintiff must show the requirements of both a hostile work environment and a constructive discharge claim." *Evans v. Int'l Paper Co.*, 936 F.3d 183, 192 (4th Cir. 2019).[9] Ms. Eller was subjected to a hostile work environment. *See supra* Section I.A-C. To establish a constructive discharge, Ms. Eller need only further demonstrate "that she was discriminated against by her employer to the point where a reasonable person in her position would have felt compelled to resign and that she actually resigned." *Evans*, 936 F.3d at 193 (cleaned up)). "In assessing intolerability, the frequency of the conditions at issue is important. The more continuous the conduct, the more likely it will establish the required intolerability." *Id.* at 193 (citation omitted). For example, subjecting an employee to almost daily epithets about his Iranian descent and attempting to embarrass him in public was sufficient for "[a] reasonable trier of fact [to] find these conditions intolerable," particularly, where "[t]he constant stress created by this atmosphere caused [the employee] to get an ulcer and eventually to resign." *Amirmokri*, 60 F.3d at 1132.

Ms. Eller faced routine and continuous sex-based epithets and misgendering on a continuous and persistent basis. *See supra* at 8-9. The harassment was relentless. It was not limited to isolated incidents in between long periods of time. To the contrary, it occurred frequently and continuously, more than weekly, for over five years. It followed Ms. Eller across three different schools within the PGCPS system. The harassment was so intolerable that Ms. Eller developed PTSD and had to take a medical leave of absence, seek extensive psychological

[9] This Court has previously construed a complaint as alleging a constructive discharge claim even where the claim was not expressly asserted where the language in the complaint was readily susceptible to such an interpretation. *See Breck v. Maryland State Police*, No. CV TDC-16-2075, 2017 WL 2438767, at *3 (D. Md. June 5, 2017) (Chuang, J.)

treatment, and ultimately resign on August 18, 2017. JR 423-25 ¶¶ 82-89, Ex. 15.

Defendants' actions cannot be excused merely because Ms. Eller worked for years under these intolerable conditions. The critical question is whether a reasonable person would have felt compelled to resign. Ms. Eller changed schools twice in an effort to escape the abuse. But ultimately, "[t]he ceaseless harassment, discrimination, and humiliation [Ms. Eller] was subjected to completely eroded her coping strategies and resilience, and resulted in the irremediable damage of what has now become chronic PTSD." JR 558 ¶ 68, Ex. 36. Based on the undisputed evidence, any reasonable jury would conclude that Ms. Eller was constructively discharged under conditions so intolerable a reasonable person would have felt compelled to resign.

II. Defendants Are Not Entitled to Summary Judgment on Any Claim.

A. Ms. Eller's Claims Are Timely.

Defendants do not challenge the timeliness of Ms. Eller's Title VII hostile work environment and constructive discharge claim. Moreover, Ms. Eller's Title IX, FEPA, and County Code hostile work environment claims are not time-barred: Defendants ignore that Ms. Eller pled timely constructive discharge claims under Title IX, FEPA, and the County Code, which did not accrue until August 2017. And equitable tolling applies, making Ms. Eller's Title IX, FEPA, and County Code hostile work environment claims timely. Finally, Defendants are incorrect to contend that certain allegations of retaliation were not timely administratively exhausted within 300 days under Title VII.

Defendants' timeliness arguments ignore the relevant facts: Ms. Eller experienced continuous harassment from May 4, 2011 through November 9, 2016.[10] JR 397-424 ¶¶ 17-38, 63-65, 84, Ex. 15; JR 735, Ex. 48. While employed, she filed her EEOC complaint on June 3, 2015, but following worsening conditions and retaliation (which led to an amended charge being filed

[10] Defendants contend that the last discriminatory act alleged by Ms. Eller took place on October 6, 2016. Defs. Mot. at 8. However, on or around November 9, 2016, Ms. Eller had to return to PGCPS during her leave of absence to complete paperwork related to her leave and heard students in the hallway stating, "There is the man in the dress." JR 735, Ex. 48. This act contributed to the hostile work environment that Ms. Eller faced prior to her forced resignation.

on April 29, 2016), she was forced to take a leave of absence on October 18, 2016. JR 423 ¶ 82, Ex. 15. During her leave, she received intensive outpatient psychiatric care from November 2, 2016 through December 16, 2016, and she was ultimately compelled to resign on August 18, 2017 due to the hostile work environment she had faced. *Id.* ¶¶ 84-89. On August 31, 2018, Ms. Eller received a Notice of Right to Sue, JR 794-95, Ex. 54, promptly filed this action on November 28, 2018, and filed an amended complaint on December 20, 2018. Based on this timeline, Defendants cannot plausibly argue that any claim in the First Amended Complaint ("FAC") is time-barred.

1. Ms. Eller's Title IX, FEPA, and County Code Constructive Discharge Claims Are Timely.

Ms. Eller alleges timely constructive discharge claims under Title IX, Maryland FEPA, and the Prince George's County Code. *See supra* at 21-22 & n.9; FAC ¶ 147 ("The persistent discrimination, harassment, and hostile work environment that Ms. Eller endured was so severe or pervasive that it led to her constructive termination by forcing her to resign her employment as a teacher at Prince George's County Public Schools."); FAC ¶ 163 (Title IX); FAC ¶ 177 (Maryland's FEPA);[11] FAC ¶ 192 (Prince George's County Code).

Constructive discharge claims do not accrue until the date of actual resignation. *See Green v. Brennan*, 136 S. Ct. 1769, 1777 (2016) ("only at that point—and not before—does [a plaintiff] have a 'complete and present' cause of action."); *Breck*, 2017 WL 2438767, at *3 (same). Ms. Eller asserted those claims in late 2018, well within two years of the date of Ms. Eller's forced resignation on August 18, 2017.

2. Equitable Tolling Applies, Making Ms. Eller's Title IX, FEPA, and County Code Hostile Work Environment Claims Timely.

In any event, Ms. Eller's non-Title VII hostile work environment statutory claims are timely under the equitable tolling doctrine. Equitable tolling applies where a plaintiff shows: (1) that she has been pursuing her rights diligently, and (2) that some extraordinary circumstance stood in her way and prevented timely filing. *Edmonson v. Eagle National Bank*, 922 F.3d 535, 548 (4th

[11] *E.g.*, *Hawkins v. PNC Bank*, No. DKC 19-0884, 2019 WL 2579001, at *1 (D. Md. June 24, 2019) (recognizing a cause of action for constructive discharge under Maryland's FEPA).

Cir. 2019). The doctrine "focuses on whether there was excusable delay by the plaintiff" and is appropriate where "due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Edmonson*, 922 F.3d at 548. Equitable tolling "does not assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing." *Id.* (citation omitted).

Here, it would be unconscionable to enforce any two-year limitations period under Title IX, FEPA, and Prince George's County Code for at least the 60 days immediately following Ms. Eller being forced to go on a medical leave of absence, including the 45 days that Ms. Eller spent in outpatient psychiatric hospitalization at Georgetown University Hospital from November 2, 2016 through December 16, 2016. Defendants' hostile work environment forced Ms. Eller to take a leave of absence in order to complete an outpatient psychiatric program at Georgetown University Hospital. While there, she was diagnosed with PTSD, depression, and anxiety from the abuse, discrimination, and retaliation she experienced as an employee of Defendants. JR 40, Ex. 1; JR 730-60, Ex. 48. During that time, Ms. Eller's stress caused her to experience repeated nightmares, fatigue, lack of sleep, nausea, dizziness, swelling of her feet and legs, and dehydration. JR 424 ¶ 85, Ex. 15; JR 730-60, Ex. 48. Worse, Ms. Eller experienced severe psychological disconnection, becoming mentally absent when triggered by stress, and unable to relate to others. JR 424 ¶ 85, Ex. 15. Indeed, Ms. Eller was unable to interact directly with anyone other than her partner and her assigned nurse. *Id.* She would have been unable to pursue, let alone actively engage in, the prosecution of her claims during that time.

Equitable tolling is appropriate in instances of psychiatric hospitalization due to PTSD. *See, e.g.*, *Bassett v. Sterling Drug, Inc.*, 578 F. Supp. 1244, 1248 (S.D. Ohio 1984) (period for filing an EEOC charge may be tolled for that period of time during which the claimant was institutionalized); *United States v. Sosa*, 364 F.3d 507, 513 (4th Cir. 2004) (equitable tolling based on mental condition is appropriate under exceptional circumstances such as institutionalization) (citing *Grant v. McDonnell Douglas Corp.*, 163 F.3d 1136, 1138 (9th Cir. 1998)).

Following her outpatient treatment, Ms. Eller remained in a fragile condition, requiring

continued therapy, and was unable to engage with others or return to any employment for more than 50 additional days, until February 10, 2017 when she obtained part-time employment at Target. JR 425-26 ¶¶ 90-92, Ex. 15. The statute of limitations should therefore be tolled during the immediate weeks following her medical leave, including the time Ms. Eller spent at Georgetown University Hospital recovering from the severe trauma she had experienced.

Notably, Ms. Eller was diligent in pursuing her rights once released from Georgetown University Hospital's care and able to resume more typical social interaction. After filing her EEOC Charge, and prior to the filing of the Complaint, Ms. Eller and her legal counsel engaged in extensive discussions with Defendants in an attempt to reach a resolution without resorting to litigation. Defendants ultimately did not agree to any of the solutions proposed by Ms. Eller, forcing Ms. Eller to file this lawsuit. Ms. Eller promptly filed this lawsuit after receiving a Notice of Right to Sue on August 31, 2018.

Ms. Eller experienced discriminatory acts through November 9, 2016 and filed her FEPA and County Code claims on November 28, 2018. If a two-year limitations period applies, her claims would be timely if tolled for only a fraction of the 45 days in outpatient psychiatric care.

Ms. Eller's Title IX claims were first asserted in the FAC filed on December 20, 2018. Again, if a two-year period applies, these claims are timely if tolled for only a few additional days beyond her psychiatric care, when she was still in a fragile state. In any event, should the court toll Ms. Eller's claims for only the 45 days she remained in the outpatient hospitalization, the Title IX claims arise out of the same facts as Ms. Eller's other claims and thus relate back to the date of Ms. Eller's original November 28, 2018 complaint under Federal Rule of Civil Procedure 15(c). *See, e.g.*, *Maggio v. City Univ. of New York*, No. 05-cv-4211-BMC-KAM, 2006 WL 8439323, at *2 (E.D.N.Y. Oct. 26, 2006), *report and recommendation rejected on other grounds*, 2006 WL 8439324 (E.D.N.Y. Nov. 14, 2006).

Finally, under the continuing violation doctrine, all of the acts contributing to the hostile work environment that Ms. Eller faced in PGCPS from 2011-2016 are timely. *See Booth v. County Executive*, 186 F. Supp. 3d 479, 485 (D. Md. 2016) (Chuang, J.).

3. Plaintiff's Claims for Retaliation Under Title VII Are Not Time-Barred for Failure to Timely Exhaust Administrative Remedies.

Defendants acknowledge that Ms. Eller filed a Charge of Discrimination with the EEOC on June 3, 2015 detailing acts of discrimination and an Amended Charge on April 29, 2016 alleging acts of retaliation that occurred after the initial filing. Defs. Mot. at 13-14. However, Defendants mistakenly contend that Ms. Eller's allegations that she was retaliated against when she was removed from her Advanced Placement classes on June 11, 2015 were not timely administratively exhausted because it occurred more than 300 days prior to the Amended Charge. *See id.*

Ms. Eller was under no obligation to administratively exhaust claims of retaliation that stemmed from her filing of her EEOC Charge. *See Reedjospeph-Minkins v. DC Gov't Dept of Youth Rehabilitation Servs.*, No. ELH-17-45, 2018 WL 3049509, at *13 (D. Md. June 20, 2018) ("A claim of retaliation for filing an EEOC charge may be raised for the first time in federal court and need not be administratively exhausted." (citing *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992))); *Breck*, 2017 WL 2438767, at *4 (same). Here, Ms. Eller filed her Charge of Discrimination on June 3, 2015 and timely served Notices of Claim on June 4, 2015 with the County Attorney for Prince George's County and the Maryland State Treasurer. JR 415 ¶ 61, Ex. 15. Just days later, Ms. Eller was informed that she was being removed from teaching her Advanced Placement classes. *Id.* ¶¶ 72-77. This act of retaliation directly following Ms. Eller's filing of an EEOC charge, was not subject to an administrative exhaustion requirement.

Moreover, this was not the end of Defendants' retaliatory activity; as discussed below, the removal from teaching AP classes was part of a succession of events that cumulatively support a retaliation claim, including baseless letters of counsel, spurious disciplinary action, and decreasing willingness to discipline students or engage Ms. Eller on efforts that could ameliorate her hostile work environment. *See infra* at 30-32. These events extended through the remainder of 2015 and into 2016, leading up to Ms. Eller's constructive discharge in August 2017. *See id.* All of these actions also stem from Ms. Eller's EEOC Charge filing. But even if they did not, all those that postdate July 4, 2015 occurred within 300 days of the Amended Charge.

B. Sufficient Evidence Supports Ms. Eller's Hostile Work Environment Claims, and Bars Summary Judgment in Defendants' Favor.

There is no doubt that the evidence fails to provide a basis for summary judgment in Defendants' favor on Ms. Eller's hostile work environment claims. Indeed, Defendants do not deny that Ms. Eller faced discrimination, that it was unwelcome or based on her sex and transgender status. Rather, their sole argument is that the harassment Ms. Eller faced was not sufficiently severe and pervasive. *See* Defs. Mot. at 17-18.

Defendants' only supporting evidence is testimony by certain administrators that Ms. Eller was "beloved by her students" and that her complaints were "anomalies." *Id.* Despite the thousands of documents and hundreds of pages of testimony in this case, Defendants can cite to only one page from each of four witness's depositions to support their position. *Id.* This "limited testimony," devoid of specific supporting facts is "conclusory," and insufficient to support summary judgment in Defendants' favor. *See Wai Man Tom*, 980 F.3d at 1042. These generic platitudes offered by some PGCPS administrators cannot contradict the specific and substantial body of documentary and testimonial evidence showing that a number of students, faculty, staff, and parents subjected Ms. Eller to frequent harassment over the course of many years.

No authority requires that a plaintiff show that more than 50%, or even a significant fraction, of those she interacted with at her workplace harassed her in order to prove a hostile work environment. Indeed, many hostile work environment claims focus on the actions of just one or a handful of bad actors. The evidence shows that Ms. Eller experienced frequent and severe harassment more than enough to create a hostile work environment.

C. The Evidence of Retaliation Is Sufficient to Provide a Factfinder a Reason to Enter Judgment in Ms. Eller's Favor.

The Court also should deny Defendants' Motion with regard to Ms. Eller's claims of retaliation, Counts VI-IX. Defendants' Motion, on the other hand, relies on abrogated law, ignores the cumulative effect of their retaliatory actions and Ms. Eller's constructive discharge, and fails to identify a body of undisputed evidence that would prevent a factfinder from concluding Ms. Eller had established each element of her claims of retaliation.

Courts evaluate a Title VII retaliation claim using a burden-shifting framework:

> [A] plaintiff bears the initial burden of establishing a prima facie case of retaliation. Once this burden is carried, the burden shifts to the defendant, who is obliged to articulate a legitimate, non-retaliatory justification for the adverse employment action. If the defendant carries this burden, the onus is on the plaintiff to then demonstrate that the non-retaliatory reason advanced by the defendant is a mere pretext.

EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005) (cleaned up). A plaintiff's prima facie case of retaliation must establish that (1) that [s]he engaged in protected activity, (2) that the employer took a materially adverse action against h[er] and (3) there is a causal connection between the protected activity and the adverse action." *Perkins*, 936 F.3d at 213.

Ms. Eller has established all three elements of her prima facie case and Defendants have failed to offer a non-pretextual reason for their actions. At a minimum, there is a genuine dispute of material fact precluding summary judgment on each element.

1. Ms. Eller Engaged in Protected Activity Through Both Informal and Formal Complaints of Harassment.

Defendants do not deny that Plaintiff engaged in protected activity, but they have a too-narrow view of what qualifies. Defendants focus only on Plaintiff's EEOC Charge of Discrimination, which is indeed one form of protected activity. *See* Defs. Mot. at 18-20.

But "[p]rotected activity" consists of "oppos[ing] any practice made an unlawful employment practice" under Title VII, such as a hostile work environment. 42 U.S.C. § 2000e-3. Protected activity is not limited to filing formal charges or complaints of discrimination, but may also include "staging informal protests and voicing one's own opinions in order to bring attention to an employer's discriminatory activities," as well as "complain[ts] ... about suspected violations." *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543-44 (4th Cir.2003).

As discussed above, Ms. Eller was subject to numerous instances of harassment due to her transgender status, and she complained of these incidents to her supervisors and pleaded with them to do more to address harassment when it occurred and prevent it from happening it in the future. *See supra* at 2-3, Sections I.A, I.B.3, I.C.2-3. When these complaints and pleas for assistance

continued to be met with indifference, Ms. Eller directed complaints to other supervisors, including through complaints to the Instructional Director who supervised Principal Adams, and Ms. Davis, a central office administrator. JR 399, 422 ¶¶ 23(d), 81, Ex. 15; JR 446, Ex. 23; JR 708, Ex. 43. This, too, was protected activity. Ms. Eller filed a formal internal complaint against Assistant Principal Robinson in February 2015; this resulted in a Letter of Determination in June 2015 recommending certain remedial action to address Ms. Robinson's behavior never implemented by Defendants. *See supra* at Section I.C.1. Ms. Eller also complained to Principal Adams regarding another teacher's intentional misgendering of a transgender student. *See supra* at 16-17.

2. Defendants Subjected Ms. Eller to Materially Adverse Actions.

For a defendant's action to be materially adverse for the purposes of a retaliation claim, it must be of such a nature that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006). "Accordingly, retaliatory actions need not 'affect the terms and conditions of employment' to come within Title VII's prohibition." *Strothers*, 895 F.3d at 327 (quoting *Burlington*, 548 U.S. at 64); *see also Sharpe v. Prince George's Cty. Gov't*, No. CV TDC-17-3799, 2021 WL 928177, at *17 (D. Md. Mar. 11, 2021) (a retaliatory action "need not meet the more stringent definition of an 'adverse employment action' required for a discrimination claim"). Furthermore, *Burlington* recognized that "[c]ontext matters" in retaliation cases. 548 U.S. at 69.

> Thus, rather than considering each alleged adverse employment action in isolation, courts may consider the cumulative effect of several allegedly retaliatory acts … and may consider whether based upon the *combined effect* of … alleged events, a reasonable worker could be dissuaded from engaging in protected activity."

Dyer v. Oracle Corp., No. PWG-16-521, 2016 WL 7048943, at *6 (D. Md. Dec. 5, 2016) (cleaned up); *see also Smith v. Vilsack*, 832 F. Supp. 2d 573, 585-86 (D. Md. 2011) (same). In *Dyer*, for example, the court held that while individual events did not give rise to a materially adverse action, a jury could conclude that the succession of events following the employee's complaints of harassment would dissuade an employee from reporting harassment. 2016 WL 7048943, at *6.

Defendants' more stringent standard relies on cases predating and abrogated by *Burlington*. It is no longer the case, as Defendants contend, that a retaliation claim must be based in an action "affect[ing] the terms, conditions, or benefits of plaintiff's employment." Defs. Mot. at 18 (citing *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001); and *Boone v. Goldin*, 178 F.3d 253, 255-56 (4th Cir. 1999)). This Court and others have recognized that *Burlington* rejected that standard. *See Edwards v. Montgomery Coll.*, No. CV TDC-17-3802, 2018 WL 4899311, at *10 (D. Md. Oct. 9, 2018) (rejecting defendants' citation to *Boone* for standard to evaluate retaliation claim); *Wyckoff v. Maryland*, No. CV JKB-07-58, 2008 WL 11509349, at *2 (D. Md. Oct. 9, 2008) (noting *Von Gunten*'s standard no longer applies to claims of retaliation).

This misstatement of the governing standard leads Defendants to ignore context and focus on just a few of the individual retaliatory actions alleged in the Complaint, each standing alone: Defendants' removal of Ms. Eller from teaching Advanced Placement classes in June 2015, letters of counsel entered into her employee file, and spurious disciplinary action taken against her. *See* Defs. Mot. at 18-19. Relying on the pre-*Burlington* standard, Defendants attempt to support their request for summary judgment by contending that none of these actions affected the "terms and conditions" of Ms. Eller's employment. *Id.*

Under the correct legal standard, not only are Defendants' acts individually materially adverse, but their deterrent effect is even more obvious when viewed together. The cumulative effect of Defendants' actions would dissuade a reasonable employee from complaining of discrimination. After years of complaints of harassment, Ms. Eller found that her supervisors became increasingly overtly hostile and grossly insensitive to the continued hostile work environment to which she was subjected. These actions and inactions escalated over time:

- Defendants relocated Ms. Eller to a classroom further away from administrative support, and her intercom calls for help with disciplinary issues would often be ignored. JR 418-19 ¶¶ 70-71, Ex. 41; JR 90 349:21-350:19; Ex. 1.
- Defendants removed Ms. Eller from teaching Advanced Placement English classes, the very same classes which Principal Adams and others had acknowledged were the ones

most supportive of Ms. Eller, in contrast to the students in her other classes. JR 419-21 ¶¶ 72-77, Ex. 15; JR 701-02, ¶¶ 17-20, Ex. 41; JR 710, Ex. 43.

- Defendants issued a "Letter of Counsel" to chastise Ms. Eller for addressing a co-worker's refusal to use a transgender student's correct pronouns and name. That colleague was not reprimanded of disciplined in any way; to the contrary, that teacher was assigned to replace Ms. Eller in teaching the AP English. JR 421 ¶ 78, Ex. 15; JR 704, ¶ 33, Ex. 41; JR 18 62:1-63:2; JR 466, Ex. 32; JR 194 248:14-20, Ex 10.
- Principal Adams tried to get Ms. Eller's position "reduced," removing her from teaching at Friendly High School. JR 836-38 at 132:6-17, 141:14-20, Ex. 58; JR 850, Ex 59.

Each of these incidents was retaliatory alone, but there can be no denying their cumulative effect in the context of the supervisors' decreasing willingness to even speak with Ms. Eller about the harassment she faced as a transgender woman. Early in Ms. Eller's tenure, supervisors in the central office and Principal Adams would at least respond in some way to acts of harassment and listen to requests for diversity training, but as the years went on, they became less responsive to complaints of discrimination and stopped engaging Ms. Eller on the possibility of training. JR 422-23 ¶ 81, Ex. 15. Principal Adams never took any action to discipline Assistant Principal Robinson pursuant to the Letter of Determination that Defendants had issued, nor did any other supervisor. *See supra* Section I.C.1. Ms. Eller eventually became dissuaded from reporting harassment to Principal Adams at all, given his indifference. But she found the same indifference from Instructional Director Fossett, who never responded to her emails detailing near-daily harassment she faced. JR 422-23 ¶ 81, Ex. 15. And when she transferred to a new school that she hoped would present a more welcoming environment, her new principal could find no support from central office administrators when Ms. Eller's requested that training be implemented, and the assistant principal told Ms. Eller, in responded to her reports of harassment, that she should "grow a thicker skin" and "stop proselyting" to students about sensitivity and inclusivity for transgender individuals. JR 418 ¶ 69, Ex. 15.

Cumulatively, these actions and failure to act caused Ms. Eller to feel hopeless that any

complaint would ever result in an amelioration of conditions for her and other transgender members of the PGCPS community. This retaliatory behavior not only discouraged Ms. Eller from reporting harassment, but forced her to take medical leave, check into outpatient care for psychiatric hospitalization, and resign from her position—a constructive discharge. JR 422-25 ¶¶ 81-89, Ex. 15.

3. Defendants' Actions Were Caused by Ms. Eller's Efforts to Call Attention to the Hostile Work Environment They Had Created.

For her prima facie case, a plaintiff need not "show that their protected activities were but-for causes of the adverse action," but must make "some showing of causation," such as demonstrating that the "employer either understood or should have understood the employee to be engaged in protected activity" and that "the employer took adverse action against the employee soon after becoming aware of such activity." *Perkins*, 936 F.3d at 214.

To refute causation, Defendants merely state Principal Adams had no knowledge of the EEOC Charge when he took action against her. Mot. at 19-20. Even assuming that is true, Principal Adams, and Defendants generally, undisputedly had knowledge of Ms. Eller's other protected actions, including numerous complaints of harassment throughout the years.

The timing could not be clearer from the evidence: Ms. Eller's complaints about harassment and demands for training to correct the hostile work environment occurred throughout her tenure post-transition, including in the period prior to and while Defendants' retaliatory overt actions and inattention to Ms. Eller's work environment escalated in 2014, 2015, and 2016. Ms. Eller filed her February 2015 complaint against Assistant Principal Robinson, which resulted in a June 2015 Letter of Determination that Principal Adams ignored. Also in June 2015, Ms. Eller filed her EEOC Charge and Principal Adams removed Ms. Eller from AP English teaching responsibilities. In the fall of 2015, Instructional Director Fossett ignored every email that Ms. Eller sent to him about the hostile work environment at Friendly High School. The lack of concern that Ms. Eller faced every time she complained of harassment continued in the fall of 2016, when she moved to James Madison Middle School.

At a minimum, there is sufficient evidence of Defendants' awareness of Ms. Eller's protected activities and the proximity in time between those activities and their retaliatory actions that would preclude ruling on summary judgment in Defendants' favor.

4. Defendants Have Not Presented Non-Pretextual, Non-Retaliatory Reasons for Their Actions.

Defendants have also failed to support their motion for summary judgment by suggesting any non-retaliatory reason for their adverse actions. A defendant can meet its burden by offering evidence to support that a legitimate, non-retaliatory reason was the actual reason for the adverse action. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). If the defendant makes such a showing, the burden then shifts back to the plaintiff to show that the stated reason was pretextual and that retaliation was the "actual reason" for the materially adverse action. *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 253-54 (4th Cir. 2015).

Here, because Plaintiff does not seek summary judgment on her retaliation claims, she need not demonstrate that Defendants' reasons for their adverse actions are pretextual. But more importantly, Plaintiff *could not* make such a showing because Defendants provide no non-retaliatory reason for their actions. Instead, all Defendants argue is that Ms. Eller's "disagree[ment] with Principal Adams's actions" is insufficient to support a retaliation claim. Defs. Mot. at 20. But they articulate no reason, retaliatory or not, for Defendants' many adverse actions. Moreover, Defendants suggest no reason why they, for years, ignored Ms. Eller's pleas for training that could prepare teachers and students to work and learn with a transgender woman.

D. By Suing Defendant Goldson in Her Official Capacity for Injunctive Relief, Ms. Eller Has Alleged a Viable Claim Under Section 1983.

Defendants argue that Ms. Eller's equal protection claim should be dismissed under the theory Goldson, who is sued in her official capacity as Chief Executive Officer, is not a "person" under 42 U.S.C. § 1983 and thus is not amenable to suit. Defs. Mot. at 6-7. Defendants are mistaken. "[A] state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as

actions against the State." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *see also Rosenfeld v. Montgomery Cty. Pub. Sch.*, 41 F. Supp. 2d 581, 587 (D. Md. 1999) (similar).

Here, Goldson is being sued only in her official capacity and Ms. Eller is only claiming declaratory and injunctive relief under her equal protection claim. The caption and the content of the FAC make that clear. *See* FAC ¶¶ 120, 138. Nothing more is needed.

E. Plaintiff Did Not Have to Provide an Expert on Anti-Bias Training Because This Is a Remedy for the Court to Decide.

The determination of whether an equitable remedy is warranted in an employment discrimination case is a matter for the court, and not the jury. The court has wide discretion in fashioning such a remedy to make the plaintiff whole. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1978); *Franks v. Bowman Transp. Co.*, 424 U.S. 477 (1976); *Brinkley-OBU v. Hughes Training Inc.*, 36 F.3d 336 (4th Cir. 1994). Both Title VII and Title IX allow for the award of equitable and monetary relief. *See Franklin v. Gwinnett Cnty. Public Schools*, 503 U.S. 60 (1992).

Defendants' argument ignores the fact that plaintiff is seeking appropriate training as an equitable remedy. In such a situation, no expert testimony is required and plaintiff need not call such a witness at trial. *Cf. Warren v. The County Comm'n of Lawrence Cnty. Ala.*, 826 F. Supp. 2d 1299 (N.D. Ala. 2011) (expert witness not required for front pay as a remedy). If the trial court, following a verdict, is considering ordering training as an equitable remedy, it can decide at that juncture whether it wishes to hear from an appropriate expert as to the scope of any such training. *See Richardson v. Axion Logistics, LLC*, 2016 WL 3034483 (M.D. La. 2016) (plaintiff's expert not allowed to testify before jury as to calculations of back pay and front pay but rather court retains authority to consider need for such testimony for hearing after trial); *see also Tinsley v. City of Charlotte*, 2019 WL 187044 (W.D.N.C. 2019). The Court has broad discretion in deciding whether to admit expert testimony, *Friendship Heights Assoc. v. Vlastimil Koubek*, 785 F.2d 1154, 1159 (4th Cir. 1986), but it is premature to address that issue now in the context of a summary judgment motion on the underlying merits of the case.

It is difficult to understand Defendants' argument that expert testimony would be required

on this issue even if it were before the jury, which it is not. Here, Defendants did not provide *any* transgender-specific diversity training and no expert is needed to explain why training might help address bias issues. An expert also is not required to establish why training on issues such as appropriate pronoun usage might have made the workplace less hostile for Ms. Eller. Thus, Fed. R. Civ. P. 37(c)(1) is inapposite and Defendants' preclusion request should be rejected.

III. Ms. Eller Is Entitled to Summary Judgment on Several Affirmative Defenses.

Finally, in order to narrow the issues to be tried, this Court should grant Ms. Eller summary judgment on certain affirmative defenses asserted by Defendants.

First, Defendants' affirmative defenses based in the statute of limitations and a purported failure to exhaust administrative remedies are unsupported by controlling law and the facts. *See supra* at Section II.A; ECF 22 at 18 (Aff. Def. 3, 4).

Second, Ms. Eller's claims are based in statutes and the federal Constitution, all of which provide exceptions to Maryland's common law employment at-will doctrine. *See, e.g., Harris v. Hous. Auth. of Baltimore City*, No. CIV. WDQ-14-3395, 2015 WL 5083502, at *7 (D. Md. Aug. 26, 2015). Thus, Defendants' reliance on that doctrine, ECF 22 at 18 (Aff. Def. 5), is misplaced. Ms. Eller does not seek relief outside of these recognized exceptions.

Finally, Defendants' invocation of Ms. Eller's "voluntary resignation," *id.* (Aff. Def. 6), provides no defense where the evidence overwhelmingly supports that her resignation was the result of the extreme emotional stress that Defendants' hostile work environment and retaliatory actions had created. *See supra* at Sections I.D, II.C.

CONCLUSION

For the foregoing reasons, Ms. Eller respectfully requests that the Court grant her summary judgment as to Counts II-V, which assert a hostile work environment and constructive discharge, as well as Defendants' third through sixth affirmative defenses. The Court should also deny Defendants' Motion for Summary Judgment in its entirety, except that Ms. Eller consents in the dismissal of the non-entity Prince George's County Public Schools.

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Respectfully submitted,

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