

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA**

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HEATHER KEARNEY,

Plaintiff,

v.

WESTERN CAROLINA UNIVERSITY and  
THE UNIVERSITY OF NORTH CAROLINA

Defendants.

Case No. \_\_\_\_\_

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**COMPLAINT AND JURY DEMAND**

**COMES NOW** the Plaintiff, Heather Kearney, by and through the undersigned counsel, and for her cause of action states the following:

**INTRODUCTION**

1. In May of 2019, Plaintiff Heather Kearney (hereinafter “Plaintiff” or “Coach Kearney”) was hired by Western Carolina University (“WCU”) via a contract negotiated in good faith with WCU Athletic Director Randy Eaton. Coach Kearney then worked for WCU for over a month until a group of former student athletes, none of whom had ever attended WCU, raised complaints about Coach Kearney and her assistant coach. These complaints were a repeat of complaints made *five years earlier* when Coach Kearney had coached at Appalachian State University (ASU). Those old complaints were previously vetted by ASU and were complaints forged from gender stereotypes. Gender stereotypes cause athletes and administrations to differentially evaluate female coaches doing their job compared to male coaches. When received by WCU, the Athletic Director and in-house counsel for WCU again vetted these old complaints

from ASU and, recognizing that they were without merit, recommended to the Board of Trustees (the “Board”) that Coach Kearney’s contract be signed and that she be retained as head coach.

2. During the internal review of the complaints by WCU, Coach Kearney, through counsel, informed WCU administration and the Board that gender bias and stereotypes were affecting the formation of those old complaints and the resurgence of these complaints five years later.

3. WCU was provided with the following information:

- a. Women acting in a leadership/head coaching role are at high risk that normal coaching behavior will be misinterpreted, exaggerated, and/or labeled as abusive when it is clearly not.
- b. Coach Kearney was not engaging in coaching methods that were outside of professional standards or any different than men were using both at ASU and WCU. AD Eaton had, in fact, already vetted Coach Kearney prior to offering her the job and found no concerns for the *five years she had coached at other institutions prior to WCU*.
- c. If there was any remaining concern, then there were simple ways to check for gender bias to ensure that Coach Kearney was not terminated because of her gender and her career as a NCAA Division I head basketball coach not destroyed.
- d. WCU could double check the coaching methods used by other male coaches.
- e. WCU was also informed that gender stereotypes create an exaggerated response to female complaints and a *muted response to male complaints*. This gendered response places both male and female athletes at risk. WCU ignored this risk.
- f. Prior to filing this lawsuit Coach Kearney made efforts to educate and inform WCU and the Board of Governors for North Carolina of the negative effects of gender stereotypes on female coaches, on both male and female athletes and on coaching generally. Coach Kearney sought to prevent harm without being forced to file suit.

4. WCU ignored this information and rejected Coach Kearney’s negotiated contract and summarily fired her, despite her rights to an investigation as a current employee and rights to remain employed for up to a year.

5. At the time of her termination, Coach Kearney had been coaching the basketball program for over a month with no issues or concerns.

6. It would have been a simple matter, and one consistent with Coach Kearney's rights as an employee of WCU, to permit her to remain employed while WCU took steps to review the complaints and investigate the concerns of gender bias and Title IX implications raised by Coach Kearney. WCU refused to make any such efforts, and Coach Kearney was terminated.

7. Prior to filing this lawsuit, Coach Kearney instructed her counsel to make efforts, spanning almost an entire year, to educate and inform WCU and the Board of the negative effects of gender stereotypes on female coaches, on male and female athletes, and on coaching generally.

8. Coach Kearney now brings this action against WCU for gender discrimination and retaliation in her employment in violation of her rights under federal law (Title VII and Title IX). Plaintiff also brings claims under state law for breach of contract, wrongful discharge in violation of public policy, and estoppel.

9. Coach Kearney brings these claims to recover damages (lost wages and emotional distress) and to enforce equitable relief. Equitable relief includes reinstatement to her prior head coaching position at WCU and changes to the policy and practice of WCU to reduce the impact of gender stereotypes that place female coaches and male/female athletes at risk.

10. This action is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (hereinafter "Title VII") and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (1982) (hereinafter "Title IX").

11. Title VII protects employees from gender-based discrimination in the terms and conditions of their employment.

12. Title IX prohibits sex discrimination in education and related activities, and it applies to claims of sex discrimination in certain employment, including coaches, administrators, and academics. 20 U.S.C. § 1681; 34 C.F.R. part 106, Subpart E.

#### **JURISDICTION AND VENUE**

13. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1367, and 42 U.S.C. § 2000e-5(f)(3).

14. Venue exists in this Court, as the events giving rise to this lawsuit occurred in Cullowhee, Jackson County, North Carolina.

15. Coach Kearney timely filed a discrimination charge against Defendant WCU on December 16, 2019, with the Equal Employment Opportunity Commission (EEOC).

16. The charge alleged, inter alia, that Defendants discriminated against her and terminated her employment due to her gender and in retaliation for reporting gender discrimination.

17. The EEOC issued a Notice of Right to Sue dated January 29, 2020. This action is being brought within 90 days from the issuance of the Notice of Right to Sue. **(Exhibit A)**.

#### **PARTIES**

18. Plaintiff Heather Kearney is a female and resident of Conway, South Carolina.

19. Coach Kearney is a former employee of Defendant WCU, in Jackson County, North Carolina.

20. Defendant WCU is a constituent institution of Defendant The University of North Carolina (“UNC”).

21. Defendant UNC is a body politic and corporation authorized and existing under the authority of N.C.G.S. § 116-3 and the laws of the State of North Carolina, which body is capable under the law of being sued in this Court, and said board being charged under N.C.G.S. § 116-11

with the responsibility for the general determination, control, supervision, management, and governance of all the affairs of its constituent universities, including ASU and Defendant WSU.

### **STEREOTYPE AND BIAS RISK; STATUTORY PROTECTIONS**

#### **Risks of Gender Stereotypes**

22. A female is expected to behave in a manner that is consistent with societal stereotypes about females.

23. Societal expectations of females include that they identify with the role of family caretaker/nurturer, not the role of “leader,” such as a head coach.

24. The role of leader, or head coach, was designed and remains defined as a “male-type” task. Coaching behavior is, therefore, supposed to be consistent with our expectations of how a male should behave, not a female. The fact that leader/head coach positions remain associated with male-type tasks or behavior as results from stereotypes is confirmed by social science.<sup>1</sup>

25. These expectations or stereotypes about the roles of females create what is called a “lack of fit” or “role incongruity” when women hold high-level positions such as administrator or head coach.

26. This lack of fit leads students, parents, and administrators to evaluate the behavior of female coaches differently than they evaluate the behavior of male coaches. This risk of gender stereotyping also exists regardless of whether the athlete is male or female.<sup>2</sup>

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<sup>1</sup> Burton, Laura J., *Underrepresentation of Women in Sport Leadership: A Review of Research*, Sport Mgmt. Rev., Elsevier, vol. 18(2), pp. 155–165 (2014).

<sup>2</sup> “Qualitative research has reported that 8 out of 12 collegiate female athletes (basketball, softball, golf, cross-country, track and field and soccer) also preferred a male coach.” Fisher *et al.*, *Attitudes Toward and Preferences for Male and Female Personal Trainers*, International Journal of Exercise Science, Vol. 6(4) p. 257 (2013). See also Fasting, K. & Pfister, G., *Female and male coaches in the eyes of female elite soccer players*. Eur. Physical Educ. Rev. 6(1); 91–110 (2000); Frankl, D. & Babbitt, D.G., *Gender bias: a study of high school track and field athletes’ perceptions of hypothetical male and female head coaches*. J. Sport Behavior

27. As a result of stereotypes, a female coach who behaves in a stereotypically feminine manner is blamed for being too soft as a coach. A female coach who behaves in the manner in which we expect head coaches to behave (i.e., male-type tasks and behavior) is often blamed for being too harsh.

28. Males are not similarly evaluated based on this double standard.

29. The double standards, “lack of fit” or stereotypes, often result in student-athlete complaints against female coaches.

30. These student-athlete complaints occur despite the fact that the female coaches are not coaching any differently, and certainly no more harshly, than male coaches.

### **Segregation of Women’s Sports/Leadership Roles As Evidence of Stereotype**

31. Women remain, disturbingly, effectively segregated in college athletics.

32. Statistics show that 75% of athletic directors are male, 97% of men’s teams are coached exclusively by men, and men serve as head coaches of 55% of women’s teams.<sup>3</sup>

33. Appalachian State University (ASU) was the starting point of the gendered complaints that affected Coach Kearney more than 5 years ago when she served as the women’s assistant basketball coach at ASU.

34. Even today (April 2020), ASU recruits and hires only males to coach men’s programs while also permitting males to coach almost half of the women’s teams.

35. At WCU, which later relied on those biased complaints to terminate Coach Kearney, men are also exclusively recruited and hired to coach men’s teams both as head coaches

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21; 396–407 (1998); Frey, M., Czech, D.R. *et al.*, *An exploration of female athletes’ experiences and perceptions of male and female coaches*, *The Sport J.* 9(4) (2006).

<sup>3</sup> As of 2014, the data showed that 57.1% of women’s teams are coached by males and 97% of men’s teams are coached by males. 77.7% of athletic directors are male. Acosta and Carpenter, *Women in Intercollegiate Sport* (2014).

and even for all assistant coaching positions. Women are permitted to coach only 42% of women's teams (men are head coaches on 58% of women's teams), and men also hold 66% of assistant coaching jobs on women's teams.

36. The gender segregation in college athletics is not “separate but equal,” but rather a one-way segregation that gives men exclusive, complete access to coaching men, and disproportionate access to coaching women.<sup>4</sup>

37. Regardless of physical differences between male and female athletes, there is no reason (other than gender stereotypes) for a university to exclusively recruit and hire men to coach men while permitting men to hold coaching positions on women's teams.<sup>5</sup>

38. Continued, one-way segregation of women is strong evidence of gender stereotypes within each university and, if not addressed, will continue to exacerbate existing gender stereotypes that harm women like Coach Kearney.<sup>6</sup> It is prohibited by Title IX. *See* 34 C.F.R. § 106.51(a).

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<sup>4</sup> “Imposing sex segregation on sports is problematic for many reasons. Sex segregation reflects and reinforces a binary view of both sex and gender unsupported by science. It communicates that women are physically unable to compete against men, even though research indicates considerable variation among individual athletes and different sports, and further reveals that attributes other than sex are often more important determinants of athletic ability. It reinforces unfounded gender stereotypes that harm both women and men. And sex segregation uncritically prioritizes athletic activities involving strengths typically associated with male bodies, without requiring us to ask why we view these strengths as the most important in the first place.” Leong, *Against Women's Sports*, Washington University Law Review, Vol 95:1 (2018).

<sup>5</sup> “Based on our results and other findings (e.g., Berri et al. 2009) that have examined the impact of head coaches on teams' and players' performances, it appears that both men and women are readily equipped for success in the coaching profession (and in some cases, women coaches have been more successful than the male coaches they replace; Aicher and Sagas 2010). As such, our results imply that the absence of women coaches for men's teams is not grounded in any objective or reliable evidence.” Darwin, L., Pegoraro, A., & Berri, D., *Are Men Better Leaders? An Investigation of Head Coaches' Gender and Individual Players' Performance in Amateur and Professional Women's Basketball*, Sex Roles, 78:455–66 (2018).

<sup>6</sup> “Cunningham and Sagas (2008) found not only that women have less access to positions as head coaches, but also that when women are able to obtain these positions, they are not treated with the same level of respect that their male colleagues are afforded. Processes such as these reinforce the subconscious formation of leadership stereotypes and serve to perpetuate sport as a gendered space. These stereotypes often exist despite a lack of evidence and objective measurements of coaching performance.” *Id.*

### **Gendered Socialization Differences**

39. Gendered socialization refers to the differences in how we raise young men and women to report their emotional responses to perceived risks of emotional or physical harm.

40. We socialize young women to report emotion and risk more openly to each other, to parents, and to other third parties, while we socialize young men to refrain from reporting such emotions or risks.

41. The differences in the amount, type, or manner of reporting feelings or emotional risk does not mean men and women feel emotion differently.

42. The socialized difference in how men and women report emotion also does not mean men are emotionally stronger or women weaker.

43. Men and women feel emotion (fear, worry, insecurity, threat) in similar ways, but they are socialized to express that emotion differently.

44. Male and female athletes will often choose to express feelings (fear, concern, worry, doubt, insecurity, etc.) that are a normal part of being a young adult and/or a collegiate athlete in different ways, even if the emotions they feel, as men and women, are the same.

45. As a result of these gendered socialization differences, coaches of female programs receive more student-athlete complaints compared to coaches of male programs, regardless of whether the coaches are behaving any differently toward the athletes than coaches of male programs.

46. WCU, as with most universities, has experienced these differences in the number and manner of how athletes on male teams complain compared to female teams.

47. WCU, as with most universities, has several outlets for student athletes to report concerns about coaching, including all-sport surveys, exit interviews, a formal student-grievance

process, and informal verbal or written complaint channels (e.g. reports to other coaching staff, administration, academic advisors, etc.).

48. As a result of gendered socialization, educational institutions also respond differently to student athletes based on their gender. They will often only respond to complaints made in a certain way or using a certain vehicle—written or emailed complaints or other methods used more often by women. Universities often will not review, react or respond to the manner of complaints used more often by males—such as all-sport surveys or complaints to counselors or academic advisors.

49. As a result of the gendered approach to student complaints, universities often coddle and patronize concerns raised by female athletes, while ignoring or overlooking male athletes who raise complaints about legitimate concerns.

50. A female coach who engages in normal coaching behavior will be evaluated differently (and less favorably) than any male coach who engages in that same normal coaching behavior.

51. A female athlete who has an emotional response to normal coaching behavior is more likely to report this response to parents or to administration, and the university is more likely to react to that report by taking action that will undermine the female coach.

52. Athletes who report normal coaching behavior will often label that behavior as harmful by using words like, bully, abuse, isolation, fear, harassment or pressure.

53. The labels used by athletes who report normal coaching behavior of female coaches are most often reflecting the differential evaluation of the female coach's behavior, not reporting objectively problematic coaching methods.

54. When a report is made about the behavior of a female coach, it is more likely that a university will fault the female coach than it would fault a male coach for engaging in the same behavior.

55. Because of gender stereotypes and gendered socialization, a university (through administrators, investigators, or Board members) will fault the female coach in at least two ways.

- a. The university will fault the female coach for the *mere fact that the athletes claim to be harmed or feel negative emotion*.
- b. The university will more quickly, and with less evidence, fault the female coach for any mistake, act of poor judgment or out-of-context comment.

56. The result is that a complaint applying a label to a female coach (e.g., “bully”) becomes more easily believed and more easily results in blame/fault placed on the female coach with less evidence.

57. Complaints about the behavior of Coach Kearney and her assistant were created in part because of gendered socialization and in part because of the differential gendered expectations placed on them as female coaches.

58. Any of these biases and stereotypes—relying on biased student-athlete complaints against coaches, treating the complaints of female athletes differently than those made by male athletes, or holding female coaches to double standards—are forms of gender discrimination that violate the purpose and scope of Title VII and Title IX.

59. If any complaints about Coach Kearney or her assistant were the result of gender differences in how athletes complain or gender stereotypes, that cannot form a basis to evaluate or terminate them from their employment.

## **Title IX Imbalances/Lack of Compliance as Evidence of Gender Stereotypes**

60. Per their EADA reports, both ASU and WCU are out of compliance with Title IX.

61. In 2017, at Appalachian State University there was a 10.71% participation gap, meaning that in order to maintain the number of male athletes Appalachian had in 2017, the university needed to add 141 meaningful athletic participation opportunities for women to be in compliance with Title IX under prong one of the participation test. In 2018, that gap was 10.9%, meaning the University needed to add 149 meaningful athletic participation opportunities for women

62. In 2017, at Western Carolina there was a 10.87% participation gap, meaning that in order to maintain the number of male athletes Western Carolina had in 2017, the university needed to add 109 meaningful athletic participation opportunities for women to be in compliance with Title IX under prong one of the participation test. In 2018, that gap rose to 11.11%, meaning the University needed to add 105 meaningful athletic participation opportunities for women.

63. The purpose of Title IX was to address the long-standing negative consequences from gender socialization and gender stereotypes – how we expect women to behave in sport.

64. The failure to comply with Title IX contributes to athlete dissatisfaction and is further evidence that gender stereotypes existed at ASU and WCU.

## **Interrelation of Relevant Statutes**

65. Title VII forbids discrimination because of sex against any individual in hiring or “with respect to [their] compensation, terms, conditions, and privileges of employment . . . .” 42 U.S.C. § 2000e2(a)(1). Title VII also makes it an unlawful practice for an employer “to limit, segregate, or classify . . . employees . . . in any way which would deprive or tend to deprive any

individual of employment opportunities or otherwise adversely affect [their] status as an employee . . . .” 42 U.S.C. § 2000e2(a)(2).

66. Title IX prohibits sex discrimination in educational programs and activities receiving federal financial assistance, and also applies to a claims of sex discrimination in employment.

67. Title IX applies to the employment of coaches, administrators, and academics and states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]” 20 U.S.C. § 1681.

68. Title IX regulations specific to employees were promulgated by Congress. See 34 C.F.R part 106, Subpart E. *See also N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 512 (1982) (noting that “subpart E regulations promulgated in connection with Title IX are valid”).

69. The U.S. Department of Education also adopted guidance interpreting Title IX to cover and protect employees of educational institutions. See Title IX Resource Guide, available at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

70. Title IX’s legislative history makes clear that Title IX’s gender discrimination prohibition applies to the employment of coaches, administrators, and academics. *See Simpson, Lynda Guild, Sex Discrimination in Employment under Title IX*, U. Chi. L. Rev. Vol. 48: Issue 2, Article 8.<sup>7</sup> *See also* 14 C.F.R. § 1253.500(a) and 34 C.F.R. § 106.51(a) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-

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<sup>7</sup> Available at: <https://chicagounbound.uchicago.edu/uclrev/vol48/iss2/8>.

time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.”).

71. Title IX regulations make clear that Title IX’s gender discrimination prohibition applies to Defendant’s employment decisions including, but not limited to, decisions regarding hiring, promotion, consideration for and award of tenure, demotion, rates of pay or any other form of compensation, and changes in compensation. 14 C.F.R. § 1253.500(b)(1)–(10), 34 C.F.R. § 106.51(b)(1)–(10).

72. Courts have held that subjecting an individual to sex stereotyping constitutes sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). The Supreme Court explained: In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be, for example, aggressive, has acted on the basis of gender.<sup>8</sup>

73. Sex stereotyping also violates Title IX’s prohibition of discrimination on the basis of sex. (U.S. Depart. of Justice – Title IX Legal Manual).

### **STATEMENT OF FACTS**

#### **Employment History of Heather Kearney**

74. Coach Kearney has been coaching basketball for two decades, having served in the following positions: 1999–2000: Graduate Assistant Coach at Slippery Rock University; 2000–2009: Assistant/Associate Head Coach/Head Coach at California University of Pennsylvania; 2009–2014 as Associate Head Coach-Appalachian State University; 2015-2017 as Associate Head Coach-Coastal Carolina University; and 2017–2019 as Associate Head Coach-High Point University.

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<sup>8</sup> Gender stereotyping has been fully recognized in the Fourth Circuit: *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 303-04 (4th Cir. 2019) recognizing sex stereotyping and applying the *Price Waterhouse*.

75. During those periods of employment, Coach Kearney learned her profession by engaging in job duties/coaching methods that included: teaching/training, counseling/advising, general program management, budget management, fundraising, public relations, and recruiting.

76. Coach Kearney learned the job duties and coaching methods necessary to work with student athletes, and she learned how to engage in those coaching methods in a professional and appropriate manner.

77. While employed as a coach, Coach Kearney did not employ coaching methods that were harsher or more punitive than male coaches.

78. Coach Kearney did not employ coaching methods or language choices that were any different than those used by males. If anything, she employed coaching methods that were more conservative and less likely to stress athletes, not more.

79. During her career, Coach Kearney worked around hundreds of athletes, parents, fellow coaches, and administrators. Had her behavior been out of bounds, over the line, or in violation of any university policy or professional standard, she would have been observed and documented by the many witnesses to her coaching methods.

80. On May 16, 2019, Coach Kearney was hired as the head coach for women's basketball at Western Carolina University.

81. Coach Kearney was offered her position by Athletic Director Randy Eaton, who negotiated and then offered Coach Kearney a five-year contract.

82. Both Coach Kearney and AD Eaton signed the contract but, according to UNC Policy Manual § 1100.3, "the terms and conditions of the contract" had to be approved by the WCU Board of Trustees (the "Board").

83. That approval was normally pro-forma and so Coach Kearney began coaching at WCU while awaiting contract approval by the Board.

84. Coach Kearney hired Darcie Vincent, who had been the head coach at ASU when Kearney served as ASU's assistant coach, to be her assistant coach at WCU.

85. Coach Vincent, like many female coaches, had been subjected to biased student-athlete complaints at ASU.<sup>9</sup>

86. Coach Kearney was notified by AD Eaton that former ASU student athletes had sent a letter regarding the ASU allegations from five years earlier to WCU's Board of Trustees, Chancellor, and Athletic Director.

87. Those athletes never attended WCU and had no personal knowledge of Coach Kearney's coaching methods or behaviors during the four years prior to her coaching at WCU.

88. At the time she was notified of these former student complaints, Coach Kearney had received no complaints from any current athletes actually attending WCU. Coach Kearney had done not one thing wrong nor violated any rule or policy of WCU and was meeting all expectations at WCU.

89. As a result of these former complaints, the AD Eaton and in-house counsel at WCU took steps to review the available documents and speak to persons at ASU to confirm that any complaints made at ASU were fully investigated and there was no finding or claimed behavior that would warrant termination of employment at WCU.

90. After their further investigation, AD Eaton and in-house counsel recommended to the Board that Coach Kearney be retained as head coach and the contract be approved.

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<sup>9</sup> We file this complaint based on gender, but both Coach Vincent and Coach Kearney are gay women. At least some of the complaints at ASU were motivated by the fact that Coach Vincent (and Coach Kearney) are openly gay women and, therefore, did not fit gender stereotypes.

91. Coach Kearney and Coach Vincent are gay and, as such, are at an even higher risk of complaints based on stereotypes.

92. The complaint letter mentioned that Coach Kearney and Coach Vincent were at one time a “conjugal couple” and alleged their loyalty was to each other rather than to the university or students.

93. One or more of the students who complained were clearly bothered by Coach Kearney’s sexual orientation—that she did not fit the stereotype that women are to only be in relationships with men, not other women.

94. Coach Kearney informed WCU prior to her termination that there were indications that one or more of the athletes who complained about the coaches at ASU had issues with the sexual orientation/gender of Coaches Kearney and Vincent and that these former complaints were motivated in part by gender stereotypes.

95. Coach Kearney, through her legal counsel, provided an explanation of the science showing that these complaints were the result of gender bias and asked for a full investigation before any decision was made to terminate her employment.

96. Regardless of information provided by Coach Kearney, the Board and WCU are generally aware that gender stereotypes exist and can affect women in leadership positions, as this has been widely established for decades.<sup>10</sup>

97. WCU was, or should have been, aware of gendered differences in how male and female students report issues to administration.

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<sup>10</sup> Hoyt, C., Simon, S., & Reid, L., *Choosing the best (wo)man for the job: The effects of mortality salience, sex, and gender stereotypes on leader evaluations*, *The Leadership Quarterly* 20(2), 233–46 (2009) (“The scientific study of sex differences in leadership began in the 1970s and remains a vigorous area of research. One facet of this research that generates consistent and robust findings is the prejudice against female leaders that results from the incongruity between gender stereotypes and the leadership stereotype.”).

98. WCU uses student surveys and exit interviews and should recognize there are differences in how males and females may choose to report issues with coaching, training, or their experience in college athletics.

99. Both AD Eaton and in-house counsel knew or should have known of the risks of double standards on female coaches and the gendered differences in how often and in what matter females make complaints compared to males.

100. The Board ignored AD Eaton's recommendation to retain Coach Kearney, ignored the information on the impact of gender stereotypes, and ignored its duty to conduct a full and fair investigation to ensure that there was no bias (gender or otherwise) affecting the complaints about Coach Kearney and her assistant coach.

101. After the Board refused to approve the contract, Coach Kearney initially remained an employee of WCU, but ultimately a decision was made to summarily terminate her employment despite the fact that Coach Kearney had contractual rights to remain employed for at least up to one year from the date she was hired.

102. Coach Kearney also raised concerns about gender discrimination and the impact of Title IX on the complaints and yet, these unverified student-athlete complaints—which in large part focused on Coach Vincent and/or failed to attribute conduct or statements to either coach—were used as the reason to refuse to approve Coach Kearney's contract and as the reason to summarily terminate her on June 21, 2019, prior to the expiration of her year of employment.

103. Coach Kearney was not terminated based on a single word, act, or coaching method she had used while employed at WCU.

104. Additionally, Coach Kearney was not terminated based on a single word, act, or coaching method she used during the intervening four years between her assistant coaching position at ASU and her head coaching job at WCU.

### **Failure to Follow Policy, Investigate, and Prevent Impact of Biased Complaints**

105. WCU has policies that prohibit discrimination and protect employees from the effects of gender bias, gender stereotypes, and retaliation under Title VII and Title IX.<sup>11</sup>

106. WCU understands and agrees that women, like Coach Kearney, have a right to engage in the same job duties and/or use similar coaching methods as used by males.

107. WCU is required by university policy and federal and state law to treat male and female athletes equally.

108. WCU cannot, for example, require male athletes to submit to more severe foul language, punitive rules, management of weight/fitness, physically or emotionally stressful coaching methods, etc., than are applied to female athletes.

109. WCU cannot have different coaching standards for males and females based on gender stereotypes regarding the amount of emotional or physical stress that an athlete can “take” when there is no objectively recognizable difference between them.

110. WCU can account for objective physical differences in the process of physical training of athletes (e.g., weightlifting), but the university cannot make gender-stereotyped assumptions about what emotional or physical stress a woman can accept compared to a man.<sup>12</sup>

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<sup>11</sup> <https://www.wcu.edu/discover/leadership/office-of-the-chancellor/legal-counsel-office/university-policies/numerical-index/university-policy-53.aspx>, and <https://www.wcu.edu/discover/leadership/office-of-the-chancellor/legal-counsel-office/university-policies/numerical-index/university-policy-77.asp>.

<sup>12</sup> While it is unlikely that WCU would have any formal policy that suggests it should manage women and men differently or coach women and men differently, any such policy, (formal or otherwise) would be the antithesis of Title IX which was put in place exactly to overcome such stereotyped views of women as athletes.

111. WCU has a policy that requires a full and fair investigation into complaints made against employees and specifically when complaints are made against employees by non-students or non-employees of WCU.

1. Complaints from Applicants, EHRA Non-Faculty Employees, Faculty, Students, Agents and Visitors Against Other Employees, Agents or Visitors (See Below for Complaints from Applicants to SHRA Positions)

(a) Initiating Section V.B.1 Complaints:

Complaints should be reported, preferably in writing, to the Title IX Coordinator at 520 HFR Administration Building, Cullowhee, NC, 28723. The Title IX Coordinator may be reached by telephone at (828) 227-7116. Complaints should be made within fifteen (15) calendar days of the conduct giving rise to the complaint to ensure a prompt and complete investigation; however, the University reserves the right to initiate investigations and take action at any time depending on the nature of the alleged conduct.

The Title IX Coordinator shall investigate thoroughly and impartially all complaints within forty-five (45) calendar days from the receipt of complaints. The Title IX Coordinator may seek the assistance of other University officials, including the deputy Title IX Coordinators, in situations where there may be actual or perceived conflicts of interest or as otherwise may be **necessary to ensure timely, impartial, and complete investigations.**

112. Here, the complaints of the students who had never attended WCU were not referred to the proper process or department. The complaints were handled internally by the AD and/or in-house counsel.

113. While the AD and in-house counsel ended up clearing Coach Kearney and recommending that she be retained, the failure to process the complaints through the university policy created a higher risk that gender stereotypes would impact the process.

114. At the time of the review of the complaints, both the AD and in-house counsel already knew, or were made aware of the gendered differences in how athlete complaint and of gender stereotypes, when they received information from Coach Kearney's counsel.

### **Male Coaches at WCU Engage in Similar Coaching Methods and Are Retained**

115. WCU employs several male coaches that have been coaching over several years and who have engaged in coaching methods and behavior that would be, at best, similar to, or at worst, more punitive than any coaching methods used by Coach Kearney.

116. Coach Kearney was not permitted to coach in the same manner as male coaches and coaches of WCU men's teams including but not limited to: men's baseball coach since 2007 Bobby Moranda; men's/women's cross country coach since 2019 Jesse Norman; men's football coach since 2011 Mark Speir; men's track and field coach since 2019 Jesse Norman; men's basketball coach since 2018 Mark Prosser; women's tennis coach since 2018 Bret Beaver; women's softball coach since 2011 Jim Cift; and women's soccer coach since 2012 Chad Miller.

117. WCU and the Board have never asked questions or investigated independent sources that would confirm how the male coaches are, in fact, coaching their male and female athletes.

118. Given that it is typical for student athletes to complain about their coaches, it is likely that these long-term male coaches have received student-athlete complaints, yet they were not investigated (without an opportunity to rebut the complaints) and summarily terminated—in stark contrast to Coach Kearney.

119. Given the tenure of this group of long-term male coaches, each was permitted to coach their athletes, manage their programs, and dismiss athletes if necessary, and yet none of them have been terminated regardless of the number or seriousness of student-athlete complaints received concerning their coaching.

120. Neither WCU nor the Board examine the source of complaints or concerns raised by male athletes, which would likely reveal that male coaches at WCU are using the same coaching methods as Coach Kearney.

121. Neither WCU nor the Board examine the indicators of stress on athletes coached by male coaches. Indicators of stress include academic success, transfer requests, cuts from the roster, exit interviews, all-sport student surveys, and information on the numbers of males seeking mental health counseling.

122. Nevertheless, the Board summarily rejected the employment contract of a female based on stale complaints that, at best, were based on gender stereotypes that had been vetted and cleared by both ASU and WCU employees.

123. The Board ignored objective information showing that Coach Kearney's coaching methods were perfectly appropriate and relied instead on five-year-old, biased complaints.

### **Effects of Gender Bias and Socialization on Student-Athlete Complaints**

124. Had WCU followed its internal investigation policy by requiring that the non-students submit their complaints via that process and submit to questions, and then provided Coach Kearney an opportunity to respond, all of the allegations against Coach Kearney would have been shown to be (a) demonstrably false or out of context, (b) affected by bias, and/or (c) invalid in the sense that they were complaints about normal and acceptable coaching behavior.

125. Allegations that are demonstrably false included claims of NCAA violations such as exceeding CARA limits, involving ineligible players, and falsification of wage records.

126. Many of the allegations merely used vague labels (e.g., the coach "bullied," or "targeted," or "intimidated" players).

127. Other allegations appeared to be specific, but were the product of gender stereotypes and the operation of bias that affects the perception of behavior, the interpretation of that behavior, and even the discussion or transmission of that behavior between student athletes, to parents, and to administration.

128. There are common complaints made by student athletes toward female coaches that include claims of discussions about weight/fitness or claims of “pressure to play injured”.

129. Both of these examples are quite common and are the result of the female coach not engaging on these issues or responding to these issues in a manner more consistent with her expected role of nurturer or caretaker. The response of the female coach does not “fit” the expectations of how she, as a female, is supposed to respond on these issues.

130. A normal conversation about fitness or the need to get to the doctor for injury, is then converted into labels or suggestions of improper motive such as here “forcing players to sign weight-loss contracts” or “blatant disregard for trainer advice or pressuring athletes to play injured.”

131. Other examples of how gender bias and stereotypes result in more complaints against female coaches include instances in which the bias and stereotypes:

- (a) *convert a normal conversation or inoffensive comments taken out of context into perceived insults, instructions, or allegations of bad behavior* (e.g., an athlete *feels* “stupid” after making a mistake and then it is reported that the coach called the athlete “stupid” when, in fact, no such statement was made).
- (b) *exaggerate the weight or meaning placed on behavior* of a female coach when that coach does say something off color exactly like male coaches do (e.g., an athlete *feels* far more attacked by a female coach telling her “don’t be stupid” than she would feel had a male coach told him or her “don’t be stupid”).
- (c) *exaggerate normal coach–player conversations* about losing a starting position, playing time, or scholarships into an act of abuse or wrongful behavior.
- (d) *create connections between independent events* such as connecting the need for counseling or taking medication or recovery from injury, with separate events such as requesting a workout or denying playing time. (e.g., the fact that a player needs

- counseling for a host of personal reasons is blamed on the coach, or the fact that a player takes longer to recover from an injury that anyone hopes, is connected to a later/harder workout)
- (e) create assumptions of unethical or even illegal behavior based on no facts or facts taken out of context. (e.g., it is common for a female coach to be accused of NCAA violations or worse, even though there are no facts whatsoever to justify the allegation)
  - (f) cause athletes to label normal coaching behavior as “bullying” or “abuse” without regard to whether that behavior would warrant such a label. (e.g., a hard workout after a loss or a direct conversation after the lack of effort by an athlete becomes “abuse” when these actions are simply normal coaching methods/decisions)

132. The above examples are how gender stereotypes work on actual decisions and are reflected in many of the allegations made by the former ASU athletes.

133. The above examples of how gender stereotypes work are not limited to athletes or parents, but are often present in advisors, counselors, administrators or board members.

134. WCU knew or should have known that the allegations were driven by gender stereotypes based on the information readily available to any university or provided by Coach Kearney and her counsel.

135. WCU knew that one purpose of its internal policy of investigation is to reduce the risk that stereotypes will affect complaints about a student or an employee.

136. A thorough and unbiased investigation (e.g., interviewing each former athlete who signed the letter of complaint, determining what exactly they heard or saw the coaches say or do, comparing the reported behavior and language with that of male coaches, etc.) would have revealed the allegations to be either false, exaggerated, taken out of context, influenced by gender, and/or not a violation of rules or university policy.

137. The Board failed to conduct an unbiased investigation and in fact, ignored the limited investigation performed that cleared Coach Kearney and supported her continued employment.

138. At the time of her termination, WCU was aware that Coach Kearney was following all university policies, was coaching the student athletes in a manner that was consistent with professional standards and university policy, and had engaged in no behavior that would justify her termination under University policy.

139. The Board, AD Eaton, and any investigator could attend any practice and observe first-hand that Coach Kearney's behavior was objectively acceptable and standard.

140. WCU knew or should have known that the allegations were without merit and driven by gender bias based on information provided to the AD and in-house counsel.

141. To the extent that WCU refused to sign Coach Kearney's contract and refused to continue her employment because she or her counsel reported gender discrimination, gender stereotypes, or violations of Title IX, such actions constituted retaliation in violation of Title VII and Title IX.

142. As a result of the fact and manner of her termination, Coach Kearney lost the benefits of her first Division I head coaching position, including lost income and benefits during the term of her contract and the benefit of experience and building her reputation that would lead to future opportunities.

143. Coach Kearney also has endured emotional distress resulting from her termination, continuing unemployment, and the likely permanent loss of her coaching career.

#### **COUNT I – FEDERAL CLAIMS**

##### **Gender Discrimination and Retaliation in Violation of Title VII and Title IX**

144. Coach Kearney re-alleges all preceding paragraphs as if fully set forth herein.

145. Coach Kearney has satisfied all conditions precedent for bringing suit under Title VII and Title IX.

146. Under the provisions of Title VII, it is unlawful for an employer to discriminate against an employee on the basis of sex.

147. Under the provisions of Title IX, it is unlawful for an employer to discriminate against an employee on the basis of sex.

148. At all material times, Defendants were Coach Kearney's "employer" within the meaning of Title VII and Title IX as Coach Kearney was either employed at-will, or pursuant to a one-year verbal contract or was employed pending the pro-forma approval of a five-year written contract.

149. Defendants discriminated against Coach Kearney on the basis of gender in violation of Title VII and Title IX.

150. Defendants also violated Title IX because they failed to ensure equal treatment for female athletes, female programs, and by extension, female coaches of female athletes and female programs.

151. Defendants' failure to fully comply with Title IX is also evidence of gender discrimination and gender stereotypes that support the claims under Title VII.

152. Defendant's failure to take affirmative steps to remove other barriers to equality, including the effective segregation of the employment, is evidence of the presence of gender stereotypes.

153. In addition to pursuing her individual rights, Coach Kearney seeks equitable relief to reduce the risks of gendered socialization harming female athletes and male athletes.

154. Female athletes are entitled to a competitive experience equal to that of male athletes. The termination of a female coach for engaging in coaching methods that are the same as those used by male coaches undermines that competitive experience.

155. Male athletes are entitled to have their concerns about improper coaching noticed and investigated despite the fact that males are less comfortable making complaints about their coaches or their experience.

156. Because UNC's constituent schools are members of the NCAA, they are bound by Title IX and maintain records of the athletic experience including all-sport surveys, exit interviews, the numbers of athletes who seek mental health counseling, the academic performance of athletes, and the numbers of athletes who leave the team or transfer to another school.

157. WCU also has policies that permit athletes to report concerns to the Title IX Coordinator, HR, an academic advisor, or a counselor.

158. WCU has indications that male athletes attending WCU have experienced negative physical and emotional responses to the coaching methods of male coaches. These indicators include, but are not limited to:

- a. Complaints presented through all-sport surveys, exit interviews, to academic advisors or mental health counselors.
- b. The number of males who seek mental health counseling.
- c. The lower academic success of some male teams or male athletes.
- d. The pressure to play in pain or risk future injury on male teams.

159. The evidence of gendered socialization and gender stereotypes at WCU makes it likely that all these indicators of stress on male athletes are being ignored.

160. The Board refused to approve the contract of a female coach based on complaints that were (a) from five years prior, (b) from students who did not even attend WCU, (c) previously investigated by another university in the NC system, and (d) vetted by in-house counsel for WCU.

161. Upon information and belief, WCU's failure to conduct a proper and unbiased investigation of the allegations made against Coach Kearney is motivated, at least in part, by Coach Kearney's sex. *Menaker v. Hofstra Univ.*, 935 F.3d 20 (2d Cir. 2019).

162. Coach Kearney reported to the AD and to the Board that her gender was a factor in the complaints and in Defendants' response to those complaints.

163. Coach Kearney's complaint of gender discrimination was not investigated and also motivated the Board's decision to not sign her contract and instead terminate her employment prior to the end of one year.

164. On information and belief, in discriminating against Coach Kearney, Defendant acted with malice or in reckless disregard of Coach Kearney's rights and would be subject to punitive damages.

165. As a result of Defendant's conduct, Coach Kearney suffered loss of employment, loss of wages and benefits, emotional pain and suffering, anxiety, humiliation, embarrassment, inconvenience, damage to her reputation, loss of career, and out-of-pocket expenses.

166. The actions of Defendants require the imposition of specific equitable and injunctive relief necessary to enforce the mandates of Title VII and Title IX including, but not limited to:

- a. Reinstatement of Plaintiff to her position as head coach, or front pay;
- b. The appointment of a special master to examine how complaints/concerns of student-athletes are received (verbal, email, all-sport survey, exit interview) and to ensure that all concerns of both men and women are processed equally.
- c. The design and use of a student athlete grievance protocol for current athletes and a mandatory injunction requiring that complaints about current employees from non-employees be processed according to WCU's policy on investigations.

- d. Training for the coaches and staff of the athletic department on the risks of gendered socialization and stereotypes;
- e. Training on gender bias for current and incoming student athletes and their parents; and
- f. Such other and further relief as the Court deems necessary to effectuate the purposes of Title VII and/or Title IX.

**WHEREFORE**, Coach Kearney requests reinstatement; lost wages and benefits; compensatory damages for loss of employment, loss of wages and benefits, emotional pain and suffering, mental anguish, humiliation, embarrassment, inconvenient and damage to her reputation, and out-of-pocket expenses; punitive damages, equitable relief; any other relief the Court deems just and necessary to make Plaintiff whole and effectuate the purposes of Title VII and Title IX; prejudgment and post-judgment interest as allowed by law; attorneys' fees; expert witness fees; and costs.

## **COUNT II – STATE LAW CLAIMS**

### **Breach of Contract**

167. Coach Kearney re-alleges all preceding paragraphs as if fully set forth herein.

168. Coach Kearney negotiated a contract of employment with WCU, UNC's constituent school, through its authorized agent, AD Eaton. A copy of the contract is attached as **Exhibit B**.

169. Under North Carolina law, AD Eaton has a right to hire employees for up to one year, but the terms and conditions of contracts beyond one year must be approved by the Board.

170. AD Eaton was authorized to make an offer of employment for up to one year based on the terms negotiated.

171. Based on AD Eaton's authorization to make offers of employment for up to one year, Coach Kearney was hired to be the coach for the upcoming 2019–2020 basketball season,

processed as an employee, and began work as a head coach, being paid according to the terms and conditions as explained in her written contract of employment.

172. Defendants paid Coach Kearney wages with full benefits and made tax withholding as the employer.

173. WCU provided Coach Kearney access to an office, to campus, and all facilities as it would any normal employee.

174. Based on this offer of employment and resulting period of employment, at all material times, Defendant was an “employer” and Coach Kearney was an “employee” under both federal law and the laws of North Carolina, and she was protected from discrimination.

175. Plaintiff was hired to coach the women’s basketball team for the 2019–2020 season. The offer of employment, even if limited to one year, was otherwise defined by the terms of the written contract negotiated and agreed to by Coach Kearney and AD Eaton, the terms of which included termination only for just cause. Defendants had a duty of good faith and fair dealing in performing their obligations under the employment agreement.

176. Defendants breached the contract of employment and their duty of good faith and fair dealing when they fired Coach Kearney without cause on June 21, 2019, in violation of laws and university policies.

177. Regardless of Coach Kearney’s contractual rights based on her written contract and the verbal contract of employment of up to one year, she was an employee of Defendants with rights to the same policies and practices provided to all other employees.

178. Rights of employees include the right not to be terminated based on gender or in retaliation for reporting potential discrimination as well as the need for a full and fair investigation pursuant to WCU policies.

179. The Board's refusal to approve the full terms of the contract did not invalidate AD Eaton's authority to hire Coach Kearney to coach the 2019–2020 basketball season, for which he hired Plaintiff.

180. AD Eaton's authority provided Coach Kearney with a one-year contract of employment, which WCU breached when it summarily terminated her on June 21, 2019.

181. Had Coach Kearney remained employed at WCU, this would have provided her with time to defend herself and convince the to reconsider their decision to not approve the five-year contract.

182. Coach Kearney performed all of her obligations under the contract and was performing satisfactorily at the time her employment was terminated.

183. Plaintiff has been damaged by the loss of income and benefits caused by Defendants' breach of her employment agreement and the duty of good faith and fair dealing.

### **Wrongful Discharge in Violation of Public Policy**

184. Coach Kearney re-alleges all preceding paragraphs as if fully set forth herein.

185. The public policy of North Carolina, as expressed in N.C G.S. § 143-422.2, is “to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of . . . sex . . . by employers which regularly employ 15 or more employees.”

186. Plaintiff's termination also violated the established public policy of North Carolina as expressed in other statutes and regulations, including but not limited to:

- a. N.C.G.S. § 116-11(1), requiring the Board to administer programs providing state or federal aid to institutions or students pursuant to the requirements of the state and federal statutes;

- b. N.C.G.S. § 116-300, prohibiting constituent schools from shielding individuals from ideas and opinions they find unwelcome, disagreeable, or deeply offensive;
- c. UNC Policy Manual § 100.1.1, subsection 103 requiring employment at the University on the basis of merit without unlawful discrimination on the basis of sex or sexual orientation;
- d. UNC Policy Manual § 1100.1(10), requiring the university to conform to NCAA standards;
- e. UNC Policy Manual § 1100.3, requiring compliance with NCAA rules and promoting “sufficient institutional control of the program free from undue influence of outside sources,” and limiting Board of Trustees’ approval to the terms and conditions of the coaching contract.

187. Plaintiff was retaliated against and wrongfully discharged from her employment because of her sex and for exercising her right to register a complaint about violations of Title IX and Title VII and university policies, in violation of North Carolina’s public policy.

188. As a direct result of Defendant’s actions, as described herein, Plaintiff has suffered damages including lost wages and benefits, anxiety, and mental anguish.

189. Defendants actions as herein described were malicious and in willful and wanton disregard of Plaintiff’s rights.

### **Estoppel**

190. Coach Kearney re-alleges all preceding paragraphs as if fully set forth herein.

191. It was common university practice and common business practice for the Athletic Director to negotiate and approve employment contracts of coaches.

192. AD Eaton believed, based on that common practice, that his hiring decision and offer of employment of an additional four years (beyond the one year of authorized employment)

would be approved by the Board. He made the representation of long-term employment intending that Plaintiff rely on those representations, which she did, to her detriment.

193. AD Eaton conveyed the offer of employment to Coach Kearney and was aware that she was giving up her prior position of employment and relocating from a substantial distance in reliance upon the offer of employment.

194. Coach Kearney was aware that the Board had to approve the terms and conditions of the contract, but she believed in good faith that this review was limited to financial and compensatory aspects of the contract, and given that her contract contained no unusual or unreasonable terms, the approval was pro-forma.

195. The delay in the formal approval of the Board was due to no fault of Coach Kearney and was the result of internal delay, confusion, and/or political disagreements.

196. As of May 16, 2019, Plaintiff had performed all acts necessary to enter the contract and became bound by its terms at Defendants' discretion. In fact, had Plaintiff attempted to withdraw from the contract after May 16, 2019, she would have been subject to a sizeable, punitive liquidated damages penalty.

197. Defendants had a duty of good faith and fair dealing to exercise their discretion to approve the terms and conditions of Plaintiff's contract in a fair, reasonable, timely, and non-arbitrary manner.

198. To the extent that Defendants required Board authorization, they should be estopped from relying on that as a defense to the five-year term of the contract given that Coach Kearney relied to her detriment on the promises of employment and the approval of the Board provided by WCU, and the board withheld its approval contrary to University policies, in an

arbitrary fashion, and in breach of its duty of good faith and fair dealing achieving the ends of the contract.

199. Had Coach Kearney been permitted to remain employed at WCU for at least the one-year period, she could have established her status as a Division I head coach and begun searching for work elsewhere.

200. As a result of Defendants' actions—both in refusing to approve her contract and also in summarily terminating her before the end of her one-year period of employment, Coach Kearney's ability to coach at the Division I level has been completely destroyed.

201. As a result of Defendants' conduct, Coach Kearney has suffered loss of employment, loss of wages and benefits, emotional pain and suffering, humiliation, embarrassment, inconvenience, damage to her reputation, loss of career, and out of pocket expenses.

**WHEREFORE**, Coach Kearney requests reinstatement; lost wages and benefits; compensatory damages for loss of employment, loss of wages and benefits, emotional pain and suffering, humiliation, embarrassment, inconvenient and damage to her reputation, and out-of-pocket expenses; punitive damages, equitable relief; any other relief the Court deems just and necessary to make Plaintiff whole; prejudgment and post-judgment interest as allowed by law; attorneys' fees; expert witness fees; and costs.

**JURY DEMAND**

COMES NOW the Plaintiff, Heather Kearney, and hereby requests a trial by jury in the above-captioned matter.

This, the 24<sup>th</sup> day of April, 2020.

/s/ Thomas Newkirk

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