No. 22-3160

IN THE

United States Court of Appeals for the Tenth Circuit

KAREN COUNTRYMAN-ROSWURM,

Plaintiff-Appellee,

v.

RICHARD MUMA,

Defendant-Appellant.

On Appeal from the
United States District Court for the District of Kansas

Case No. 2:21-cv-02489-DDC-ADM
The Honorable Daniel D. Crabtree

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Plaintiff-Appellee Karen Countryman-Roswurm ("Dr. Countryman-Roswurm") filed this lawsuit against Wichita State University ("WSU") and five current and former WSU officials ("Individual Defendants"),[1] including current WSU President, Dr. Richard Muma ("Dr. Muma"). Appellant App 7-147. Dr. Muma is the Appellant in this appeal.

The district court has federal question jurisdiction over this case under 28 U.S.C. § 1331 because Dr. Countryman-Roswurm brought claims against the Individual Defendants under 42 U.S.C. § 1983, as well as claims against WSU under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681). On August 2, 2022, the district court granted in part and denied in part a motion to dismiss filed by WSU and the

[1] Richard Muma (then-Interim Provost of WSU; current President of WSU); Andrew Hippisley (current Dean of WSU's College of Liberal Arts & Science of WSU); Kyoung Lee (current Director of WSU's School of Social Work); Fred Besthorn (tenured professor & Department Chair of WSU's School of Social Work); and Kaye Monk-Morgan (former VP for WSU's Strategic Engagement).

Individual Defendants. Att. 1-41.[2]

The district court's ruling on Dr. Muma's motion to dismiss included a denial of qualified immunity. Att. 23-26. That ruling is subject to immediate interlocutory appeal under the collateral order doctrine. *See generally Mitchell v. Forsyth*, 472 U.S. 511 (1985). Dr. Muma timely filed his notice of appeal on August 22, 2022. Appellant App. 300-306.

STATEMENT OF ISSUES

I. Whether the district court erred in denying qualified immunity to Dr. Muma on Dr. Countryman-Roswurm's § 1983 claim alleging violation of her equal protection rights.

[2] The "Attachments" required by 10th Cir. R. 28.2(A) are attached hereto with a table of contents and are consecutively paginated. References to the Attachments are cited herein as "Att."

STATEMENT OF THE CASE

I. Factual Background[3]

In early 2013, Dr. Countryman-Roswurm began working as a full-time assistant professor in WSU's School of Social Work within the College of Arts and Sciences. Appellant App. 10, ¶ 32. Then-Dean Ron Matson approached Dr. Countryman-Roswurm and suggested she open a "center" at WSU to focus on her work regarding human trafficking. Appellant App. 10, ¶ 33. Shortly thereafter, Dr. Countryman-Roswurm became the Executive Director of WSU's Center for Combating Human Trafficking ("CCHT"). Appellant App. 10, ¶ 34. Dr. Countryman-Roswurm's employment agreement provided that she would serve as a professor in the School of Social Work and as the CCHT's Executive Director. Appellant App. 11, ¶¶ 36-39.

Dr. Countryman-Roswurm claims that in early 2013, she was told that Fred Besthorn, a WSU tenured professor and Department Chair of the School of Social Work, made "sexually harassing comments" and "negative sex-based comments" about her appointment as the CCHT's

[3] As is required at this procedural stage, Dr. Muma sets forth the facts as pleaded by Dr. Countryman-Roswurm and assumes them to be true only for purposes of this appeal.

Executive Director. Appellant App. 12, ¶¶ 44-47. According to Dr. Countryman-Roswurm, these comments by Dr. Besthorn reflected that he believed she had engaged in sexual conduct in exchange for becoming the CCHT's Executive Director. Appellant App. 12, ¶ 48.

Although Dr. Countryman-Roswurm ultimately achieved tenure, she believes these comments and attitudes stemming from Dr. Besthorn impacted her career through negative performance reviews from faculty and disregard of her work CCHT's Executive Director by others in the Social Work Department, including Dr. Besthorn and Dr. Kyoung Lee. Appellant App. 17-24, ¶¶ 92, 106-07, 112-13, 119-22, 127, 130, 141, and 146-47. Dr. Countryman-Roswurm's allegations suggest that faculty, such as Dr. Besthorn, were jealous or frustrated about her dual appointment as a faculty member and CCHT Executive Director. Appellant App. 17, ¶ 89, 97.

In December 2018, Dr. Countryman-Roswurm filed a formal complaint with WSU's Office of Institutional Equity and Compliance ("OIEC")[4], reporting she was experiencing discrimination, harassment,

[4] In accordance with 34 CFR § 106.8, the OIEC is designated with the duties and responsibilities of institutional equity and compliance, including monitoring and oversight of overall implementation of Equal

and retaliation by Dr. Besthorn and Dr. Lee. Appellant App. 28, ¶¶ 183-85. Dr. Countryman-Roswurm admits that an OIEC representative interviewed her twice following her complaint. Appellant App. 28, ¶ 188. But ultimately, she was dissatisfied with the OIEC's response to her formal complaint. Appellant App. 29, ¶ 190-91. In addition to filing a formal complaint with the OIEC, Dr. Countryman-Roswurm claims she spoke to several WSU officials, including Andrew Hippisley, Dr. Muma, and Dr. Lee (as well as various other unnamed parties), about her concerns of discrimination and harassment. Appellant App. 16-36, ¶¶ 81, 82, 85, 87, 100, 115, 136, 194, 215, 234, 250.

In August 2019, Dr. Countryman-Roswurm emailed then-Interim WSU President Andrew Tompkins about her concerns, and Dr. Tompkins referred her email to the OIEC. Appellant App. 36-37, ¶¶ 253-54. An OIEC representative met with Dr. Countryman-Roswurm in September 2019. Appellant App. 37, ¶ 256. While

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Opportunity Law and Title IX compliance at the university, including coordination of training, education, communication and administration of grievance procedures for faculty, staff, students and other members of the university community.

admitting the OIEC conducted an investigation,[5] she was again dissatisfied with the OIEC's response and investigation of her complaint. Appellant App. 37-40, 257, 268, 270, 278, and 287. She asserts that "upon information and belief," the OIEC conducted what she deems a "limited investigation." Appellant App. 37, ¶¶ 256-61.

Additionally, in September 2019, Dr. Countryman-Roswurm met with Dr. Tompkins and Regent Jon Ralph, at which time they discussed the possibility of moving the CCHT off campus. Appellant App. 37, ¶ 262. Following this meeting, Dr. Tompkins emailed Dr. Countryman-Roswurm requesting that she decide whether to move the CCHT off campus by October 25, 2019. Appellant App. 38, ¶ 267. Dr. Countryman-Roswurm claims she made no decision "because the OIEC investigation into her complaints was still being conducted." Appellant App 38, ¶ 268. She then asserts the CCHT was closed against her will on October 3, 2020. Appellant App. 47, ¶ 350. Although the CCHT closed, Dr. Countryman-Roswurm remains employed by WSU. Appellant App. 47, ¶ 351-52.

[5] Pursuant to 34 CFR § 106.45(b)(1), an institution is obligated to follow a grievance process, which includes the objective evaluation of all relevant evidence, upon receiving a formal complaint of sexual harassment.

II. Procedural History

On October 25, 2021, Dr. Countryman-Roswurm filed a Complaint in the United States District Court for the District of Kansas. Appellant App. 6-147. She seeks relief against WSU under Title VII of the Civil Rights Act of 1964 (Title VII), Title IX of the Education Amendments of 1972 (Title IX), and the Kansas Act Against Discrimination (KAAD), as well as against the Individual Defendants under 42 U.S.C. § 1983. Appellant App. 6-7. As relevant to this appeal, Dr. Countryman-Roswurm generally alleges that Dr. Muma knew about the harassment and discrimination she allegedly experienced over the years, failed to take remedial action, and even attempted to deter her from further pursuing her complaints. Appellant App. 107-09. Relying on the general concept that awareness of sexual harassment may be a violation of the Equal Protection clause of the Fourteenth Amendment, she asserts it is clearly established that Dr. Muma violated this right by "acquiescing" to the alleged harassment. *Id.*

On January 18, 2022, the Defendants moved to dismiss, with the Individual Defendants also asserting qualified immunity. Appellant App. 148-83. Dr. Countryman-Roswurm opposed, claiming her equal

protection claim is premised not only on supposed acquiescence by Dr. Muma but also on a retaliation theory. Appellant App. 208-10. The Defendants replied, with Dr. Muma explaining that dismissal is warranted as to any of Dr. Countryman-Roswurm's theories. Appellant App. 244-49.

On August 2, 2022, the district court entered its order on Defendants' motion to dismiss. Att. 1-41. The district court dismissed—in full—four of the five Individual Defendants, explaining that Dr. Countryman-Roswurm failed to plead a cause of action against them and, separately, that they were entitled to qualified immunity. But the district court parted ways with respect to Dr. Muma, concluding he is not entitled to qualified immunity. Att. 25. That conclusion is error and is the subject of his appeal.

SUMMARY OF THE ARGUMENT

The district court erred in its analysis of both prongs of the qualified immunity analysis, each of which independently warrants reversal.

First, the district court erroneously concluded that Dr. Countryman-Roswurm stated an equal protection claim against Dr.

Muma. Specifically, the district court relied on time-barred allegations to conclude that Dr. Countryman-Roswurm plausibly stated a constitutional violation, therefore prevailing on the first prong of the qualified-immunity inquiry. No case law or authority supports using allegations outside the applicable statute-of-limitations period to sustain a § 1983 claim against an individual defendant. The Complaint lacks allegations describing any deliberate actions (or inactions) by Dr. Muma within the limitations period amounting to a constitutional violation.

Second, the district court erroneously concluded this alleged constitutional violation was "clearly established." Despite Dr. Countryman-Roswurm's failure to meet her burden to identify cases from this Court or the Supreme Court with particularized and similar factual scenarios resulting in constitutional violations, the district court relied on "rights" articulated only at high levels of generality in cases highly distinguishable from this one. Consistent Supreme Court precedent confirms this is error.

This Court should reverse the district court's Order in part and remand the case with instructions to dismiss the remaining claim against Dr. Muma based on qualified immunity.

ARGUMENT

I. Standard of Review.

A. Procedural standard.

Dr. Muma appeals the district court's partial denial of his motion to dismiss based on qualified immunity. Whether Dr. Countryman-Roswurm has alleged a violation of her clearly established constitutional rights sufficient to overcome qualified immunity "is an issue of law reviewable on interlocutory appeal." *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011).

This Court reviews de novo the denial of a motion to dismiss based on qualified immunity. *Id.* In evaluating this type of motion, this Court uses "the *Iqbal*/*Twombly* standard to determine whether Plaintiff stated a plausible constitutional violation." *Frey v. Town of Jackson, Wyo.*, 41 F.4th 1223, 1232 (10th Cir. 2022) (citing *Brown*, 662 F.3d at 1162-63). Thus, all well-pleaded factual allegations are accepted and viewed in the light most favorable to Dr. Countryman-Roswurm. *Id.* She must have pleaded sufficient facts to "nudge[] [her] claims across the line

from conceivable to plausible." *Brown*, 662 F.3d at 1163 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Allegations that are '"merely consistent with" a defendant's liability' stop short of that line." *Frey*, 41 F.4th at 1232-33 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Notably, "labels, conclusions, formulaic recitations of elements, and naked assertions will not suffice." *Id.* at 1233. "An allegation is conclusory if it states an inference without underlying facts or if it lacks any factual enhancement." *Id.* (citing *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021)). "Conclusory allegations are 'not entitled to the assumption of truth.'" *Id.* (quoting *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012)). This Court "disregard[s] conclusory statements and look[s] to the remaining factual allegations to determine whether a plaintiff stated a plausible claim." *Id.* (citing *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019)).

B. Substantive qualified immunity standard.

"Government defendants sued under § 1983 in their individual capacities have qualified immunity: 'government officials are not subject to damages liability for the performance of their discretionary

functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Brown*, 662 F.3d at 1164 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993)).

"When a defendant raises qualified immunity in his motion to dismiss, we engage in a two-part analysis." *Frey*, 41 F.4th at 1232 (citing *Brown*, 662 F.3d at 1164). This Court "must decide (1) whether the plaintiff plausibly alleged a violation of a constitutional right, and (2) if so, whether that right was clearly established at the time of the alleged violation." *Id.* Courts "may address either prong first to achieve 'the fair and efficient disposition of each case.'" *Id.* (citing *Brown*, 662 F.3d at 1164).

Finally, for claims asserted under § 1983, *Iqbal* "reinforced" this Court's consistent jurisprudence that it is "particularly important" for a complaint to "make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Brown*, 662 F.3d at 1163 (quoting *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011)).

II. The District Court Improperly Denied Qualified Immunity to Dr. Muma On Dr. Countryman-Roswurm's Equal Protection Claim.

The district court erred in its analysis of both prongs of the qualified immunity analysis, each of which independently warrants reversal.

A. Dr. Countryman-Roswurm failed to plead a violation of her equal protection rights.

In Dr. Countryman-Roswurm's 918-paragraph Complaint, only a handful of paragraphs reference Dr. Muma, yet those allegations purportedly provide the factual basis for her § 1983 claim against him. In summary, Dr. Countryman-Roswurm claims that (1) from 2013 to 2018, (2) in a meeting with Dr. Muma in February 2019, and (3) in November 2019, she reported to Dr. Muma workplace harassment and discrimination she was supposedly experiencing, and he then supposedly took no action in response.

First, Dr. Countryman-Roswurm broadly alleges, "From 2013 until 2018 (when Dr. Matson retired), Plaintiff reported the harassing and discriminatory comments Dr. Besthorn was making, and the discriminatory treatment she was experiencing, to her supervisors (including but not limited to: Dr. Bolin, Dr. Matson, Dr. Muma and Dr.

Vizzinni)." Appellant App. 16, ¶ 81. Dr. Countryman-Roswurm does not allege when she reported to Dr. Muma; what she reported to Dr. Muma; how often she reported to Dr. Muma; or what Dr. Muma did (or did not do) in response to any of those unidentified reports from 2013 to 2018. *Id*.

Second, Dr. Countryman-Roswurm alleges that in February 2019—when the University's investigation into her harassment allegations was already underway—she met with Dr. Muma to "seek assistance" with "discrimination, harassment, hostility, and retaliation" she was allegedly experiencing. Appellant App. 32, ¶ 215. Dr. Countryman-Roswurm claims that, in response, Dr. Muma told her that WSU would not resolve her concerns and that if she continued to raise these concerns, her comments could be considered defamatory. Appellant App. 33, ¶ 226. The allegations regarding the supposed February 2019 meeting are contained in paragraphs 215-227 of the Complaint. Appellant App. 32-33.

Third, Dr. Countryman-Roswurm claims she spoke to Dr. Muma in November 2019, alleging, "In or about November 2019, Plaintiff again informed Dr. Muma and Dr. John Tomblin of her continued

concerns of harassment and hostility." Appellant App. 40, ¶ 288. Dr. Countryman-Roswurm does not state what she told Dr. Muma, nor does she allege what deliberate, intentional actions (or inaction) Dr. Muma took in response to her concerns supposedly raised in November 2019. *Id*. Instead, she claims *WSU* retaliated against her after she discussed her problems with Dr. Muma, broadly alleging: "In response, Plaintiff was informed that **WSU** would be ending her employment as the Executive Director of the CCHT by no longer honoring her employment contract/paying her CCHT salary effective December 31, 2019." Appellant App. 40, ¶ 289 (emphasis added).

Based on these factual allegations, the district court rejected Dr. Muma's assertion of qualified immunity. As explained in detail below, the district court erred in doing so for several reasons. To begin, the relevant statute of limitations bars any claims arising from any alleged constitutional violations before October 25, 2019 (two years before the filing date). Initially, the district court recognized this when discussing the merits of Dr. Countryman-Roswurm's claims, confirming that most allegations were outside the statute of limitations. Att. 22. But when the district court reached the qualified-immunity analysis, the court

relied on those same allegations to deny qualified immunity. That, alone, is a reversible error.[6]

When properly considering only the factual allegations after October 25, 2019, Dr. Countryman-Roswurm comes nowhere near pleading a constitutional violation *by Dr. Muma* (much less one that is clearly established). Indeed, the only factual allegation within the statute of limitations is the single, generic allegation about a November 2019 meeting. But Dr. Countryman-Roswurm does not include any allegations about Dr. Muma's response to that meeting—no allegations about deliberate action, inaction, "acquiescence," or otherwise. Attempting to obscure this deficiency, she uses passive voice and generic allegations to claim she "was informed" that **WSU** was ending her employment as CCHT Executive Director without identifying who made that decision or even who informed her of it. These passive-voice allegations and generic allegations against a state defendant *generally* (as opposed to the specific individual defendant at issue) are insufficient to defeat qualified immunity. *Brown*, 662 F.3d at 1163 (quoting *Kansas*

[6] *See Herrera v. City of Espanola*, 32 F.4th 980, 991-92 (10th Cir. 2022) ("Whether a court properly applied a statute of limitations and the date a statute of limitations accrued under undisputed facts are questions of law we review de novo.") (internal citations and quotations omitted).

Penn, 656 F.3d at 1215); *see also Pahls v. Thomas*, 718 F.3d 1210, 1225-26 (10th Cir. 2013).

Finally, even if this Court disagrees with Dr. Muma's arguments, Dr. Countryman-Roswurm still failed to plead a sufficient constitutional violation to overcome the first prong of the qualified immunity inquiry. For example, even assuming it was proper to consider events outside the two-year statute of limitations, the case law does not establish that *Dr. Muma* had any constitutional obligation or duty to take any further action when Dr. Countryman-Roswurm admits she made formal complaints to the OIEC (as she should have) and the University responded and investigated her complaints. The action Dr. Countryman-Roswurm wanted from Dr. Muma was occurring;[7] she simply disagreed with OIEC's response. Likewise, even if this Court were to find that *Dr. Muma* "ended her employment as the CCHT Executive Director" in retaliation (despite the lack of any allegation saying so), the right to be free from retaliatory conduct for complaining about discrimination or harassment under Title VII has never been

[7] Indeed, the matter was already referred to the employee designated and authorized to comply with equal opportunity law and Title IX compliance at the University. *See* 34 CFR § 106.8, § 106.45.

recognized as a constitutional right sufficient to sustain a § 1983 claim. For each of these reasons, the district court erred on the first prong of the qualified immunity analysis.

1. The district court erred in basing its qualified immunity analysis on allegations outside the statute of limitations.

At the pleading stage, a claim fails on the statute of limitations if the "allegations on the face of the complaint surrounding the date of accrual make clear that the right sued upon has been extinguished." *Herrera* 32 F.4th at 991-992. A two-year statute of limitations governs Dr. Countryman-Roswurm's equal protection claim against Dr. Muma. *See Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008) (for § 1983 claims, the court discerns the statute of limitations "from the personal-injury statute of the state in which the federal district court sits."); *Lee v. Reed*, 221 F. Supp. 3d 1263, 1269 (D. Kan. 2016) (citing Kan. Stat. Ann. § 60-513(a)(4)) (In Kansas, "the statute of limitations period for personal injury actions is two years."). Accordingly, all claims arising from the alleged constitutional violations Dr. Muma committed before October 25, 2019, are time-barred and, therefore, cannot possibly state an actionable claim sufficient to withstand the first prong of

qualified immunity.

When discussing the statute of limitations, the district court began by correctly noting that Dr. Countryman-Roswurm's claim against Dr. Muma is timely only if the alleged acts occurred after October 25, 2019. Att. 22. The court also correctly recognized that "the bulk of plaintiff's allegations against [Dr. Muma] occurred beyond the limitations period." Att. 23. So far, so good. Indeed, as discussed above, the vast majority of Dr. Countryman-Roswurm's allegations about Dr. Muma are about 2013-2018 (¶ 81) or about a meeting in February 2019 (¶¶ 215-227), all of which are outside the statute of limitations; the only timely allegation that remained was Dr. Countryman-Roswurm's assertion about a discussion with Dr. Muma in November 2019.

Accordingly, one would expect the district court to follow its reasoning and analyze Dr. Muma's entitlement to qualified immunity based on ***only*** the timely allegations. But that isn't what the district court did. Instead—despite having just explained that nearly all allegations about Dr. Muma were outside the statute of limitations—the court permitted Dr. Countryman-Roswurm to rely *almost entirely* on allegations from the February 2019 meeting as the basis for her § 1983

claim against Dr. Muma:

> Dr. Muma even acknowledged that he had received harassment complaints from others about Dr. Besthorn. *Id.* at 28 (Compl. ¶ 225). But, he encouraged plaintiff to "set [her harassment complaints] aside moving forward," and told her "it's gonna be better for you . . . to let go of it." *Id.* (Compl. ¶ 221). In plaintiff's view, Dr. Muma, "clearly articulated" that WSU would not resolve her complaints. *Id.* (Compl. ¶ 224). In fact, plaintiff alleges, Dr. Muma echoed Dr. Besthorn's harassing comments and "suggested that he believed [p]laintiff had been having a sexual relationship with Dr. Matson." *Id.* (Compl. ¶ 223). Sometime later, he emailed plaintiff that "should she continue to assert" her claims, WSU could consider her comments "defamatory." *Id.* (Compl. ¶ 226).

Att. 23-24.

The Complaint makes clear that these allegations cited by the district court, paragraphs 215-227, occurred in February 2019 and were outside the limitations period. *See* Appellant App. 30-33 (¶ 215, ("**In or about February 2019**, Plaintiff met with Dr. Rick Muma . . ."); ¶ 217 ("**During this meeting** . . ."; ¶ 218 ("In discussing Plaintiff's employment **during the meeting** . . ."); ¶ 220 ("However, **during the same conversation, and subsequently in email** . . ."); ¶ 221 ("Dr. Muma specifically stated **during the meeting**…); ¶ 222 (Dr. Muma's comments **during the conversation**…); ¶ 223 ("**During this same conversation** . . .").

The district court erred by relying on alleged conduct outside the limitations period to conclude that Dr. Countryman-Roswurm stated a constitutional violation and therefore prevailed on the first prong of the qualified-immunity inquiry.[8] No case law or authority permits Dr. Countryman-Roswurm to use time-barred allegations as the basis for her constitutional violation. The law is clear that when analyzing the first prong of the qualified immunity inquiry, courts are to conduct a traditional *Iqbal/Twombly* analysis to determine whether the plaintiff has sufficiently stated a constitutional claim. *See Frey*, 41 F.4th 1223 at 1232 ("This Court uses "the *Iqbal/Twombly* standard to determine whether Plaintiff stated a plausible constitutional violation") (internal

[8] To be clear, Dr. Muma is not raising any separate statute-of-limitations defense in this appeal. The district court already recognized that "a bulk of plaintiff's allegations against [Dr. Muma] occurred beyond the limitations period," and, as detailed above, Plaintiff asserted only one timely allegation involving Dr. Muma. Att. 23. Thus, this portion of Dr. Muma's argument presents this Court with the pure legal question of whether that sole timely allegation about Dr. Muma constitutes an adequately pled constitutional violation sufficient to withstand the first prong of the qualified-immunity analysis.

Additionally, as discussed *infra* § II.A.2., even if *all* allegations (timely and not) about Dr. Muma are considered, Dr. Countryman-Roswurm still failed to plead an equal protection claim. Finally, as discussed *infra* § II.B., Dr. Countryman-Roswurm failed to meet her burden to demonstrate a clearly established constitutional violation, again irrespective of which allegations are considered.

citations and quotations omitted). And the law is equally clear that a claim outside the statute of limitations based on the Complaint fails at the pleading stage. *See, e.g.*, *Herrera*, 32 F.4th at 991-992 (holding dismissal at the Rule 12(b)(6) stage based on the statute of limitations is appropriate when the date of accrual is undisputed). In other words, if any of the February 2019 allegations upon which the district court relied actually constituted a constitutional violation, then that violation occurred in February 2019, outside the statute of limitations.[9]

The only allegation about Dr. Muma in the limitations period states: "In or about November 2019, Plaintiff again informed Dr. Muma and Dr. John Tomblin of her continued concerns of harassment and hostility." Appellant App. 40, ¶ 288. That plainly does not plead a

[9] The two-year statute of limitations for Dr. Muma's supposed inaction or acquiescence to the claimed harassment accrued in February 2019, which is why the district court correctly concluded that most of the allegations regarding Dr. Muma are outside the statute of limitations. *See Herrera*, 32 F.4th at 990 ("The standard rule that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.") (internal citations and quotations omitted); *Lamebull v. City and County of Denver*, 22-1009, 2022 WL 2951689, at *1 (10th Cir. July 26, 2022) ("A § 1983 claim accrues when the plaintiff knows or has reason to know of the injury which is the basis for the action.") (internal citations and quotations omitted). Here, Dr. Countryman-Roswurm did not file her Complaint until October 25, 2021, and thus the alleged conduct occurring in February 2019 is time-barred. Att. 22.

constitutional violation. Dr. Countryman-Roswurm does not allege what Dr. Muma deliberately and intentionally did or (did not do) after she supposedly raised concerns to him in November 2019. To the extent that Dr. Countryman-Roswurm contends that Dr. Muma "acquiesced" the complained-of conduct by telling her to "set aside" her complaints or suggesting she would face negative actions if she continued to pursue her complaints, those separate allegations occurred in February 2019, outside the statute of limitations period; those allegations, therefore, cannot be the basis for her claim against Dr. Muma. The scope of Dr. Countryman-Roswurm's claim against Dr. Muma is limited to allegations occurring after October 25, 2019. And when reviewing all allegations about Dr. Muma in the Complaint post-dating October 25, 2019 (a single one), Dr. Countryman-Roswurm fails to plausibly establish that Dr. Muma himself took deliberate, intentional "complete inaction" or "acquiescence" within the statute of limitations.

Moreover, even when the district court discussed the sole factual allegation within the statute of limitations (in just a single sentence, notably), the court erred there too. The district court said: "Finally, and perhaps most significantly, plaintiff alleges that she once again

reported to Dr. Muma in November 2019, and, in response, *he informed her* WSU would end her employment as CCHT's Executive Director." (emphasis added). Att. 24. Not so. Dr. Countryman-Roswurm never asserts that Dr. Muma informed her that WSU would be "ending her employment as CCHT Executive Director," [10] nor does she identify who informed her. And perhaps even more consequential, nowhere in her Complaint does she allege that Dr. Muma's own individual actions resulted in the closing of the CCHT. Such lack of specificity is insufficient to plausibly state a constitutional violation under § 1983.

As previously explained, Dr. Countryman-Roswurm must "make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Brown*, 662 F.3d at 1163. "When various officials have taken different actions with respect to a plaintiff, the plaintiff's facile, passive-voice showing that [her] rights 'were violated' will not suffice." *Pahls*,718 F.3d at 1225-26. "[I]t is incumbent upon a plaintiff to 'identify *specific* actions

[10] To clarify, the CCHT was closed on October 3, 2022, but Dr. Countryman-Roswurm's employment with WSU did not "end." Dr. Countryman-Roswurm admits she remains employed by WSU. Appellant App. 47, ¶ 351-52.

taken by *particular* defendants' in order to make out a viable § 1983 . . . claim." *Id.* (quoting *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998)). Here, Dr. Countryman-Roswurm fails to plausibly establish what personal actions by Dr. Muma amounted to a constitutional violation during the limitations period.

The district court began its analysis correctly by confirming that the bulk of Dr. Countryman-Roswurm's allegations fall outside the statute of limitations. But it erred by then relying on those same allegations to rule that Dr. Countryman-Roswurm pleaded an equal protection claim against Dr. Muma. Further, when discussing the only timely allegation, the district court compounded its error by attributing conduct to Dr. Muma, which not even Dr. Countryman-Roswurm suggests he is responsible for.

Dr. Countryman-Roswurm failed to meet her burden to satisfy the first prong of the qualified-immunity inquiry, and this Court should reverse the order accordingly.

2. None of Dr. Countryman-Roswurm's allegations about Dr. Muma state a violation of her equal protection rights.

As discussed, the district court erred by basing its analysis on alleged acts outside the statute of limitations period. The Complaint lacks allegations describing any deliberate actions (or inactions) by Dr. Muma within the statute of limitations period. And thus, Dr. Countryman-Roswurm fails to plausibly state a constitutional violation to overcome the first prong of the qualified-immunity analysis. This Court's inquiry should end here. But even if this Court were to determine that Dr. Countryman-Roswurm's allegations before October 15, 2019, somehow support that Dr. Muma committed a constitutional violation within the limitations period (which no authority permits the district court to do so), her claim still fails.

While case law supports the general notion that a supervisor's "complete inaction" or "acquiescence" to claimed harassment may amount to supervisory liability under § 1983, that is not what Dr. Countryman-Roswurm alleges. She admits in the Complaint that when she spoke to Dr. Muma in November 2019 about her concerns about workplace harassment, she had already filed a formal complaint with the OIEC alleging the same, met with an OIEC representative, and the OIEC investigated accordingly. Appellant App 37-40, ¶¶ 256-61, 268,

270, 278, and 287. Federal regulations mandate educational institutions like WSU to investigate and follow a specific grievance process upon receipt of a formal complaint of sexual harassment. *See* 34 CFR 106.045(b)(1). That is precisely what happened here—Dr. Countryman-Roswurm concedes she had already previously relayed her concerns to the OIEC, and they were being responded to. No case law supports the contention that a supervisor's failure to respond to complained-of harassing/discriminatory conduct amounts to a constitutional violation when the person/entity responsible for instituting corrective measures knows the concerns and takes responsive action.[11] *See Woodward v. City of Worland,* 977 F.2d 1392, 1399 (10th Cir. 1992) ("The Supreme Court has made it clear that liability under § 1983 must be predicated upon a 'deliberate' deprivation of constitutional rights by the defendant.") (internal citations omitted).

While Dr. Countryman-Roswurm claims she was not satisfied with the OIEC's response and Dr. Muma failed to take some further action, such alleged conduct is not a violation of Dr. Countryman-

[11] Moreover, "action" by Dr. Muma would have been precisely what was already happening—referral to an employee designated and authorized to comply with equal opportunity law and Title IX compliance at the University. *See* 34 CFR § 106.8, § 106.45.

Roswurm's constitutional rights. Compare *Jones v. Wichita State Univ.*, 528 F. Supp. 2d 1196, 1222 (D. Kan. 2007) (this Court determined a plaintiff's contention that the defendant improperly investigated the complaints, which was insufficient to establish that the defendant violated her constitutional rights), with *Fye v. Oklahoma Corp. Com'n,* 175 Fed. App'x. 207, 211 (10th Cir. 2006) (failure to investigate specific report of conduct amounting to badgering employee to recount "salacious details" of a former report of harassment could amount to the necessary "inaction"); *Johnson v. Martin,* 195 F.3d 1208, 1219-20 (10th Cir. 1999) (supervisor liability requires actual knowledge and "complete inaction"). Furthermore, to the extent that Dr. Countryman-Roswurm claims Dr. Muma "should have" taken some further action (which her Complaint never alleges or identifies), mere negligence is insufficient to establish supervisory liability. *Johnson*, 195 F.3d at 1219.

Further, if this Court disagrees with Dr. Muma's argument and concludes that the district court was correct to state that *Dr. Muma* ended Dr. Countryman-Roswurm's employment as the CCHT Director in retaliation to her raising supposed harassment and discrimination concerns, she still cannot establish a constitutional violation. The right

to be free from retaliatory conduct for complaining about discrimination, harassment, and retaliation under Title VII is not recognized as a constitutional right (let alone a "clearly established" constitutional right) sufficient to sustain a § 1983 claim. This Court and lower courts have affirmatively held that a plaintiff may ***not*** pursue a § 1983 claim for retaliatory conduct taken against him or her for opposing, reporting, or complaining about unlawful discrimination under Title VII. *See e.g.*, *Long v. Laramie County Community College Dist.*, 840 F.2d 743, 752 (10th Cir. 1988) (a plaintiff alleging an employer's retaliation following complaints of sexual harassment could not bring "such a theory of liability for retaliatory conduct . . . within § 1983."); *Delatorre v. Minner*, No. 01-4065-SAC, 2002 WL 226383, at *5 (D. Kan. Jan. 14, 2002) ("[N]o court has recognized a claim under the equal protection clause for retaliation following complaints of racial discrimination.") (internal citations and quotations omitted); *Sims v. Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 120 F. Supp. 2d 938, 959 (D. Kan. 2000) ("[R]etaliation claims growing out of complaints of employment discrimination have not been recognized under the Equal Protection Clause of the Fourteenth Amendment.").

Accordingly, even if this Court disagrees with Dr. Muma's arguments in Section I.A.1, he is still entitled to qualified immunity on the first prong of the qualified immunity analysis.

B. Dr. Countryman-Roswurm did not allege a clearly established constitutional violation.

This Court may analyze the two prongs of qualified immunity in either order, *Frey*, 41 F.4th at 1232, and Dr. Countryman-Roswurm also failed to meet her burden on the second prong—to show that the right allegedly violated is clearly established. "Clearly established" means that at the time of the challenged conduct, the law was "sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal citations and quotations omitted). It must have been "beyond debate" based on the law existing at the time of the conduct that the defendants' actions were unconstitutional. *Id.*

The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018). In other words, it is insufficient for Dr. Countryman-Roswurm to simply claim that the general concept of "complete inaction" and/or "acquiescence" to known sexual harassment

is clearly established. She must point to cases from this Court or the Supreme Court identifying particularized and similar factual scenarios resulting in constitutional violations. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) ("[T]he clearly established law must be 'particularized' to the facts of the case."); *see also Frey*, 41 F.4th at 1235 ("Clearly established law can come from a Supreme Court or Tenth Circuit decision on point, or from the clearly established weight of authority from other courts.") (internal quotation marks and citations omitted). "Plaintiff bears the burden to show the law was clearly established." *Frey*, 41 F.4th at 1235 (citing *Mglej v. Gardner*, 974 F.3d 1151, 1159 (10th Cir. 2020)).

The Supreme Court has been particularly exacting in enforcing the requirement that courts do not define "clearly established" rights at a high level of generality. Indeed, just last term, the Supreme Court summarily reversed two circuit decisions unanimously on precisely this basis. *City of Tahlequah, Okla. v. Bond*, 142 S. Ct. 9, 11-12 (2021) (per curiam); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7-9 (2021) (per curiam).

Despite Dr. Countryman-Roswurm's burden to demonstrate that the relevant rights were clearly established, her brief to the district

court did not cite a single case to suggest that her pleaded facts constituted a clearly established violation of her equal protection rights. Appellant App. 184-227. To be clear, it is not Dr. Muma's burden to show that the constitutional violations asserted are *not* clearly established. Dr. Countryman-Roswurm failed to come forward with citations to cases from any court, much less from this Court or the Supreme Court, demonstrating that the legal theories she pleaded constitute clearly established constitutional violations.

And the district court's attempt to relieve her of that burden fares no better. In a single sentence, the district court concluded that Dr. Muma violated a clearly established law. Att. 24. The district court did precisely what the Supreme Court prohibits: identify the right at issue at the highest level of generality, declare it clearly established, and not discuss the factual circumstances of any of the cited cases. *Id.* The district court relied on case law supporting the general proposition that "complete inaction" after becoming aware of harassing conduct violates clearly established law. *Id.* But it improperly did so without analyzing any of the facts in those cases.

As an initial matter, respectfully, reciting quotes stating that a general principle of law "has been clearly established since at least 1992" is insufficient under the Supreme Court's current jurisprudence. *See* Att. 21. (quoting *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238 (1999)). The case the district court quotes for that proposition, *Murrell*, was itself decided in 1999, well before the Supreme Court's recent litany of cases demanding a particularized factual analysis. *See White*, 137 S. Ct. at 552 ("[T]he clearly established law must be 'particularized' to the facts of the case."); *Wesby*, 138 S. Ct. at 589 (requiring a "high degree of specificity"); *Kisela*, 138 S. Ct. at 1152 (explaining that the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality.").

Had the district court conducted the required particularized analysis, it would have demonstrated that none of the cases cited are sufficient to show a clearly established constitutional violation in the factual circumstance presented here.[12] Most significantly, none of the

[12] Tellingly, not even the district court attempted to assert that "retaliation" is clearly established as a constitutional violation. As discussed above, this Court's authority establishes it is not. *See Long*, 840 F.2d 743, 752; *Delatorre v. Minner*, 01-4065-SAC, 2002 WL 226383 at *5; *Sims.*, 120 F. Supp. 2d at 959. Accordingly, the balance of this

cases cited by the district court involve the circumstance present here: the educational institution is *already aware and investigating* (per federal regulations) when the complaint is made to the individual defendant. That unique and constitutionally significant fact here defeats the second prong of qualified immunity. Indeed, this distinction, along with others discussed below, demonstrates that none of the cases cited by the district court are "particularized" to the facts of this case in the manner required by the Supreme Court. *See White*, 137 S. Ct. 548 at 552; *Wesby*, 138 S. Ct. at 589; *Kisela*, 138 S. Ct. at 1152.

First, the district court cited *Johnson v. Martin*, 195 F.3d 1208 (10th Cir. 1999). *Johnson* involved a § 1983 equal protection claim brought by nonemployee citizens of the City of Muskogee against the city's former building codes department director (James Martin), alleging that he sexually harassed them, and against the city officials (Gary Garvin and John Williamson), alleging that they failed to take adequate remedial action. *See Johnson*, 195 F.3d 1208. Multiple plaintiffs in *Johnson* complained of Mr. Martin's sexually harassing conduct to Mr. Garvin and Mr. Williamson. *Id. at* 1212-13. No

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discussion analyzes only the alleged equal protection violation based on "complete inaction" or "acquiescence" to known harassment.

investigation was ever conducted by Mr. Garvin, Mr. Williamson, any city official, or any city entity. *Id.* And the city itself was not aware of the allegations regarding Mr. Martin. *Id.* This Court affirmed that neither Mr. Graven nor Mr. Williamson were entitled to qualified immunity, as the record demonstrated that Mr. Garvin took no remedial action; and while Mr. Williamson referred the complaints regarding Mr. Martin to the head of Mr. Martin's department, he did not know whether the head of Mr. Martin's department was responsible for investigating, or otherwise conducted any investigation or took any action against Mr. Martin. *Id.* at 1220.

Similarly, the second case cited by the district court, *Fye v. Oklahoma Corp. Comm.*, 175 Fed. Appx. 207 (10th Cir. 2006), involved an equal protection claim claim brought by a state agency employee (Pamela Fye). Specifically, Fye made a sexual harassment claim against her former direct supervisor and the acting General Administrator (Tom Daxon), as well as a claim against the Oklahoma Corporation Commissioner (Denise Bode) alleging failure to take remedial action in the face of actual knowledge of sexual harassment. *See Fye*, 175 Fed. Appx. 207. When Daxon became the OCC's acting General

Administrator, he asked Bode whether discrimination or sexual harassment was an issue within OCC. *Id.* at 211. In response, Bode referred him to Fye, because Fye had previously complained about sexual harassment by a former General Administrator, and Bode had responded promptly to that complaint. *Id.* Daxon persistently asked Fye about this prior incident despite Fye's contention that she was uncomfortable discussing it. *Id.* Fye reported Daxon's persistent behavior to Bode, but Bode took no responsive action. *Id.* This Court held that denial of qualified immunity to Bode was proper based on her failure to act on Fye's complaint, given that Bode had promptly investigated Fye's prior sexual harassment complaint. *Id.* at 211-12.

These cases relied upon by the district court are significantly distinguishable from the particular facts presented in Dr. Countryman-Roswurm's lawsuit. Both *Johnson* and *Fye* involve a supervisor's failure to take remedial action to challenged harassment when there was ***no*** pending investigation or action whatsoever within the institution. And in both cases, the state agency/employer was not separately aware of the alleged harassment when the alleged report was made to the individual defendant. Here, of course, Dr. Countryman-Roswurm

admitted not only that the proper office within WSU was aware of her allegations, but also that they were taking action on them at the time of her alleged discussion with Dr. Muma. No case law of which Dr. Muma is aware establishes a constitutional violation in that circumstance.

Dr. Countryman-Roswurm failed to meet her burden to demonstrate that her alleged constitutional violations were clearly established. The district court erred in concluding otherwise based on "rights" articulated at high levels of generality in cases highly distinguishable from this one. Accordingly, Dr. Muma is entitled to qualified immunity on the second prong of the qualified immunity inquiry as well.

CONCLUSION

This Court should reverse the district court's Order in part and remand the case with instructions to dismiss the remaining claim against Dr. Muma based on qualified immunity.

STATEMENT REGARDING ORAL ARGUMENT

Given the district court's improper reliance on time-barred allegations and failure to conduct a particularized factual analysis in deciding whether Dr. Muma is entitled to qualified immunity—and the importance of this issue implicating individual liability of Dr. Muma—Dr. Muma respectfully suggests that oral argument would be beneficial to the Court.

October 24, 2022

Respectfully submitted,

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I hereby certify that on October 24, 2022, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification to all counsel and parties receiving electronic notice.

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