CASE NO. 22-3160

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

BRIEF OF PLAINTIFF-APPELLEE

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Oral Argument is requested.

November 23, 2022

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF THE CASE

a. Procedural History.

On October 25, 2021, Plaintiff/Appellee Dr. Karen Countryman-Roswurm (hereinafter "Dr. Countryman-Roswurm") filed a Complaint in the United States District Court for the District of Kansas. (App. 6-120)[1]. The Complaint seeks relief against multiple defendants—including Defendant Wichita State University (hereinafter "Defendant WSU") and (relevant to this action) Defendant/Appellant Dr. Richard Muma (hereinafter "Defendant Muma")—and under multiple theories, including under 42 U.S.C. § 1983. (App. at 6-7).

On January 18, 2022, all of the Defendants collective filed their Partial Motion to Dismiss for Failure to State a Claim, making a number of different argument for why parts of the Complaint should be dismissed. (App. 148-183). Among those theories, Defendant Muma asserted a defense of qualified immunity against Dr. Countryman-Roswurm's Section 1983 claim. (App. 173-174). Dr. Countryman-Roswurm filed her Memorandum in Opposition to the Motion explaining why Defendant Muma was not entitled to qualified immunity. (App. 208-210). Defendant Muma (and the other Defendants) filed a reply. (App. 249).

[1] Appellee acknowledges that Appellant's appendix contains all of the documents relevant to this interlocutory appeal. All citations to the record will be to that appendix, using "App." and appendix page number (as labeled by Appellant).

On August 2, 2022, the district court entered its order on the Motion. (App. 259-299). The district court denied the motion to the extent Defendant. Muma was asserting a claim of qualified immunity, concluding he is not entitled to it. (App. 281-282).

b. Relevant Facts

Dr. Countryman-Roswurm experienced years of harassment because of her sex, race, and/or religion, including repeated accusations (primarily by Dr. Fred Besthorn), that she had only received her split-position role, as both professor and as head of the Center for Combating Human Trafficking ("CCHT") because she had had sex with her supervisor. (App. 11-17 ¶ 43-91; App. 20 ¶ 109-111). Dr. Countryman-Roswurm was also subjected to falsely negative performance reviews by Dr. Besthorn and Dr. Kyoung Lee, and they otherwise sought to sabotage her career, which arose from their animus towards her because of her sex, race, and/or religion. (App. 17-24 ¶ 92-98, 106-108, 112-114, 117-135, 137-145; App. 31-32 ¶ 205, 211-214). Throughout the process, Dr. Countryman-Roswurm was repeatedly warned not to make formal complaints about the harassment, which could hurt her career. *See* (App. 16 ¶ 83; App. 20 ¶ 116; App. 23, ¶ 136). Dr. Countryman-Roswurm was subjected to additional harassment by Dr. Andrew Hippisley. (App. 26-31 ¶ 162-182, 194-204, 206-210; App. 34-35, ¶ 231-237).

Despite repeated threats against doing so, Dr. Countryman-Roswurm made a formal complaint in December 2018. (App. 28 ¶ 183). In or around January 2019, Dr. Countryman-Roswurm was interviewed by Defendant WSU's Office of Institutional Equity and Compliance ("OIEC") in response to the complaint. (App. 29 ¶ 188). Shortly thereafter, OIEC decided not to investigate Dr. Countryman-Roswurm's allegations, sending letters to those who had harassed her telling them there would be no investigation. (App. 29 ¶ 190-193). Dr. Countryman-Roswurm reported a May 2019 incident to OIEC, but it declined to investigate that as well. (App. 25 ¶ 241).

Dr. Countryman-Roswurm met with Defendant Muma in February of 2019. (App. 32 ¶ 215). She made Defendant Muma aware of the harassment she was facing, repeatedly asking him for help with it. (App. 32 ¶ 216, 217). During the meeting and in emails afterwards, Defendant Muma strongly cautioned Dr. Countryman-Roswurm against continuing to pursue her complaints of discrimination and harassment, telling her she had to "let go of it" and even threatening that if she continued to report the discrimination and harassment to which she had been subjected, those statements would be considered "defamatory" and that she would face consequences if she continued to pursue the allegations. (App. 32-33 ¶ 220-222, 226). Defendant Muma "clearly articulated that Dr. Countryman-Roswurm's concerns regarding discrimination and harassment were

simply never going to be resolved by Defendant WSU." (App. 33 ¶ 224). He also made comments suggesting that Dr. Countryman-Roswurm had a sexual relationship with Dr. Matson. (*Id.* ¶ 223).

Defendant Muma's warning became a reality when Dr. Countryman-Roswurm's salary as the executive director of the CCHT was eliminated, and the CCHT was shut down effective October 2, 2020. (App. 34-35 ¶ 227-230).

In September 2019, Dr. Countryman-Roswurm was in a meeting with Defendant Muma, at which point he gave her a non-disclosure agreement which sought to silence her regarding the discrimination and harassment she had faced, and which she refused to sign. (App. 39-40 ¶ 279-283). Dr. Countryman-Roswurm contacted Defendant Muma yet again in November 2019, again informing him of her continued concern over the harassment and discrimination. (App. 40 ¶ 288). "In response, Dr. Countryman-Roswurm 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." (*Id.* ¶ 289).

SUMMARY OF THE ARGUMENTS

Dr. Countryman-Roswurm's Complaint states a cognizable violation of the equal protection clause against Defendant Muma. She pled that she was subject to sexual harassment that violated her equal protection rights and that Dr. Muma not only acquiesced to such harassment, he supported it. Defendant Muma's arguments regarding the statute of limitations ignore the relevant standard which the district court used to properly reject those arguments at this state. And his arguments against Dr. Countryman-Roswurm's having pled facts supporting a constitutional violation are unpersuasive as they either misstate the facts or mischaracterize the law.

Finally, the constitutional violation pled by Dr. Countryman-Roswurm were clearly established at the time Defendant Muma committed them. Case law in the Tenth Circuit has long established both liability for sexual harassment and supervisor liability for deliberate indifference. Defendant Muma's attempt to distinguish that case law amounts to an improper insistence on an identical set of facts.

ARGUMENT

I. Standard of Review

a. Procedural Standard

Defendant Muma appears to be appealing only the district court's denial of his motion to dismiss to the extent it was "based on qualified immunity." Such a

"denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable final decision." *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011) (internal quotations omitted). Such a decision is reviewed de novo. Id. (quoting *Peterson v. Jensen*, 371 F.3d 1199, 1201-02 (10th Cir.2004)). In so doing, "all well-pleaded factual allegations in the . . . complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *Id.* (quoting *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir.2006)). A plaintiff must plead "sufficient factual matter, accepted as true," which "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1163 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)).

b. Substantive standard for qualified immunity

Individual government employee defendants (including Defendant Muma) in Section 1983 cases may attempt to assert qualified immunity. Qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). As a result, qualified immunity is denied when a plaintiff's pleadings (interpreted in accordance with *Twombly*

standards) meet a two-part test, showing: "(1) the defendant violated a federal statutory or constitutional right and (2) the right was clearly established at the time of the defendant's conduct" *Ullery v. Bradley*, 949 F.3d 1282, 1289 (10th Cir. 2020).

II. The district court properly denied Defendant Muma qualified immunity

In his sole issue in his interlocutory appeal, Defendant Muma seeks to overturn the district court's denial of his motion to dismiss to the extent he made a claim of qualified immunity. Because the district court property denied the motion, this Court should affirm.

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

Dr. Countryman-Roswurm's Complaint states a cognizable violation of the equal protection clause by Defendant Muma. "It is well established in [the Tenth Circuit] that sexual harassment by a state actor can constitute a violation of the equal protection clause." *Murrell v. School District No. 1, Denver, Colo.*, 186 F.3d 1238, 1249 (10th Cir. 1999). Moreover, "a governmental official or supervisory employee may be held liable under section 1983 upon a showing of deliberate indifference to known sexual harassment," which is shown when "a supervisor or employer participates in or *consciously acquiesces* in sexual harassment by an outside third party or by co-workers." *Id.* at 1250 (internal quotations omitted) (emphasis in original).

Defendant Muma's conduct went beyond acquiescence, to active participation in the sexual harassment of Dr. Countryman-Roswurm. He warned Dr. Countryman-Roswurm against pursuing her complaints of discrimination and harassment, threatening that if she continued to report she would face consequences. (App. 32-33 ¶ 220-222, 226). Such threats were a constant part of the harassment she faced. *See* (App. 16 ¶ 83; App. 20 ¶ 116; App. 23, ¶ 136). Defendant Muma also made comments suggesting that Dr. Countryman-Roswurm had a sexual relationship with Dr. Matson. (*Id.* at ¶ 223). Such false allegations where a primary part of the ongoing harassment she faced. (App. 11-17 ¶ 43-91; App. 20 ¶ 109-111). Thus, Defendant Muma not only acquiesced to the sexual harassment, he participated in it.

Plainly, Dr. Countryman-Roswurm has pled an actionable claim for a violation of the equal protection clause against Defendant Muma. Despite this, Defendant asserts that Dr. Countryman-Roswurm has failed to meet this burden. Its arguments on the subject are unpersuasive.

1. Dr. Countryman-Roswurm's allegations are not barred by the statute of limitations

In his first argument, Defendant Muma suggests that the vast majority of Dr. Countryman-Roswurm's allegations against him should have been disregarded by the district court for allegedly falling outside of the statute of limitations. In doing so, Defendant attempts to both assert a statute of limitations claim and to assert it is

not doing so. Because the trial court properly disregarded the statute of limitations argument, Defendant assertions here are without merit.

As the district court recognized, such dismissal is proper (as it relates to timeliness) only where "the dates given in the complaint *make clear* that the right sued upon has been extinguished (App. 281) (quoting *Herrera v. City of Espanola*, 32 F.4th 980, 991 (10th Cir. 2022)). It further recognized that, in this case, Dr. Countryman-Roswurm alleged conduct in at least November 2019, which is plainly within the statute of limitations. (*Id.*) (citing Complaint ¶ 288-289).

Defendant Muma claims that he is "not raising any separate statute-of-limitations defense in this appeal." (Appellant Brief at 21 n.8). But he plainly is raising a statute of limitations argument, plainly arguing that certain portions of Dr. Countryman-Roswurm's claim are untimely, and therefore should not be considered when deciding whether plaintiff has stated a claim for which relief can be granted. (*Id.* at 18-25). Defendant Muma cites no authority supporting the proposition that he can use the statute of limitations to exclude the portion of the Complaint from qualified immunity analysis without raising a statute of limitations defense. The case he cites for the proposition does not support his argument; indeed, the case was cited by the district court in ruling that dismissal based on statute of limitations was inappropriate. *Compare* (*Id.* at 22) *with* (App. 281) (both citing *Herrera*, 32 F.4th 980).

Moreover, despite Defendant Muma's unsupported assertion to the contrary, well-settled authority permits Dr. Countryman-Roswurm to bring her action based on events from before October 25, 2019. Two doctrines, applicable to Dr. Countryman-Roswurm's claims, make application of the statute of limitations improper: the continuing violation doctrine and the repeated violation doctrine. The continuing violation doctrine "applies when the plaintiff's claim seeks redress for injuries resulting from a series of separate acts that collectively constitute one unlawful act," in which case "if any acts occurred within the statute of limitations, the entire course of conduct can be pursued in the action." *Herrera*, 32 F.4th at 993 (internal quotations omitted). The Tenth Circuit has recognized that this doctrine applies in the context of Section 1983 cases. *Id.* at 994.

Here, Defendant Muma's acquiescence to, and support of, the ongoing sexual harassment to which she was being subjected, are a series of separate acts (and omissions) that collectively constitute one unlawful act. Defendant Muma was well-aware of not only the harassment to which Dr. Countryman-Roswurm had been subjected, but also that others had complained about Dr. Besthorn. (App. 33 ¶ 225). Despite this, he took no action to stop the harassment, effectively acquiescing to it. Each day that Defendant Muma went to work without addressing the unconstitutional harassment was another act of acquiescence, extending past October 25, 2019, and making all of it actionable.

Even if Defendant Muma were to argue that his conduct did not constitute a continuing violation of Dr. Countryman-Roswurm's rights, the repeated violation doctrine would apply to make dismissal improper. That doctrine "divides what might otherwise represent a single, time-barred cause of action into several separate claims, at least one of which accrues within the limitations period prior to suit" which, in turn, allows a plaintiff to recover for "that part of the injury the plaintiff suffered during the limitations period." *Herrera*, 32 F.4th at 993 (internal quotations omitted). If the continuing violation doctrine does not apply, the repeated violation doctrine will. Under that doctrine, Defendant Muma's acquiescence to the harassment Dr. Countryman-Roswurm faced following her November 2019 reporting would be a separate, actionable act for which she could bring a claim. Even then, Defendant Muma's conduct from before that time would be relevant, and support Dr. Countryman-Roswurm's allegations of unconstitutional conduct. If nothing else, they serve as important background evidence of his knowledge of the discrimination and his intent to acquiesce thereto. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (explaining this in the context of Title VII).

Defendant Muma's assertion that the statute of limitations bars most of the allegations against him are without merit, either in fact or in law, and cannot support his assertion that the trial court erred in granting him qualified immunity.

2. Defendant Muma's actions violated Dr. Countryman-Roswurm's equal protection rights

As Dr. Countryman-Roswurm explained, above, her Complaint states facts supporting a claim for a violation of her equal protection rights against Defendant Muma under a supervisor liability theory, due to his participation in or conscious acquiescence to the sexual harassment. *Murrell*, 186 F.3d at 1250. Defendant Muma's arguments to the contrary are unpersuasive, because they misstate the law, misstate the facts, or both.

First, Defendant Muma mischaracterizes the relevant facts. He asserts that, when Dr. Countryman-Roswurm met with him, she had filed a complaint with the OIEC, met with a representative, and "the OIEC investigated accordingly." (Appellant Brief at 26) (citing App. 37-40, ¶ 256-61, 268, 270, 278, 287). In fact, when Dr. Countryman-Roswurm filed a complaint with the OIEC in December 2018, "it refused to conduct an investigation into Dr. Countryman-Roswurm's complaints." (App. 28-29, ¶ 183, 190). Later, Dr. Countryman-Roswurm sent an email to President Tompkins regarding the discrimination and harassment, which he forwarded to OIEC. (App. 36-37, ¶ 253-254). The OIEC then conducted a sham investigation, in which it "manipulated and disregarded information obtained which corroborated Dr. Countryman-Roswurm's allegations." (App. 37, ¶ 255-261).

He then attempted to characterize Dr. Countryman-Roswurm's complaint as mere dissatisfaction with OIEC's response, and a vague complaint that Defendant

Muma "failed to take some further action." (Appellant Brief at 27). Again, this grossly mischaracterizes the pleadings. As explained above, Defendant Muma acquiesced to, and even participated in, the sexual harassment.

Next, Defendant Muma cites regulations about the reporting of sexual harassment on campuses. (*Id.*) (citing 34 CFR 106.45(b)(1)[2]). Such arguments are completely meritless. First, that regulation was not effective at the time of the sham investigations conducted by OIEC. The OIEC refused to investigate Dr. Countryman-Roswurm's complaints in December 2018. (App. 28-29, ¶ 183, 190). It conducted its sham investigation, in and around September 2019. (App. 37, ¶ 255-261). And Dr. Countryman-Roswurm met with Defendant Muma in February 2018 and November 2018. (App. 32 ¶ 215; App. 40 ¶ 288). The regulation Defendant Muma cites were not even published as a Final Rule in May of 2020. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,575-78 (May 19, 2020). They did not become effective until August 14, 2020. *Id.* at 30,026. Thus, Defendant Muma's assertion that they somehow controlled his conduct at the relevant time is meritless. Moreover, even if they had been in effect, Defendant

[2] Appellant's brief actually cites "34 CFR 106.045" which, as far as Plaintiff's review of the Code of Federal Regulations reveals, does not exist. However, based upon Defendant's subsequent citation to 34 CFR 106.45, Plaintiff presumes this to be a typographical error.

Muma cites no authority for the proposition that these regulations supersede his obligations under 42 U.S.C. § 1983.

Similarly unpersuasive is Defendant Muma's citation to case law. For example, he cites *Jones v. Wichita State Univ.* for the proposition that "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." (Appellate Brief at 28) (citing 528 F.Supp.2d 1196, 1222 (D. Kan. 2007)). In fact, the District of Kansas (the court which decided the case) held that the plaintiff did not allege that the defendant "engaged in sexual harassment, knowingly tolerated it or failed to investigate her complaints." *Jones*, 528 F.Supp.2d at 1222. Here, as explained above, Dr. Dr. Countryman-Roswurm has alleged that Dr. Muma knowingly tolerated the discrimination against her. Moreover, while the only failure of the defendant in *Jones* was that he "did not interview one of the witnesses who [the plaintiff] described," Dr. Muma not only completely failed to take any steps to investigate the harassment (knowing the OEIC investigation would yield no results), he actively discouraged Dr. Countryman-Roswurm from pursuing that investigation.

Defendant Muma's assertion that Dr. Countryman-Roswurm has failed to plead a violation of her equal protection rights rests entirely on a mischaracterization of the contents of her Complaint, and of the surrounding law. When properly

evaluated, it is clear that she pled exactly such a claim, and the District Court properly denied Defendant Muma sovereign immunity.

b. Dr. Countryman-Roswurm alleged a clearly established constitutional violation

Defendant Muma also argues that any constitutional violation by Defendant Muma does not meet the requirement of being "clearly established" in order to avoid qualified immunity. To distinguish the case law that clearly establishes liability in these circumstances, Defendant Muma attempts to distinguish this case based upon the existence of an investigation by Defendant WSU. But these arguments are without merit.

In claims under Section 1983, individual defendants such as Defendant Muma are entitled to qualified immunity unless their alleged conduct "violated clearly established constitutional rights." *Murrell*, 186 F.3d at 1251. The law is clearly established where there is "a Supreme Court or other Tenth Circuit decision on point, or the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains." *Id.* (quoting *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir.1992)). In the Tenth Circuit, it has been clearly established "since . . . 1989 . . . that sexual harassment . . . can violate the Fourteenth Amendment right to equal protection of the laws" and supervisory liability has been clearly established since "at least 1992." *Id.* (internal quotations omitted).

Defendant Muma focuses on recent decision by the United States Supreme Court holding that the "clearly established" analysis cannot be done at "high level of generality." (Appellant Brief at 31) (citing *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)). Defendant Muma argues that the district court applied the cases it analyzed at too high a level of generality because, unlike this case, they "there was no pending investigation or action whatsoever within the institution" and "the state agency/employer was not separately aware of the alleged harassment." (*Id.* at 36).

This Court has recently rejected an attempt to draw such a fine distinction based on a minor change in fact. *Sturdivant v. Fine*, 22 F 4th 930, 938-39 (10th Cir. 2022) (the Supreme Court has "recognized that 'a case directly on point' is unnecessary if the constitutional right is 'beyond debate'"). The holding in *Murrell*, is not the kind of general rule against which the Supreme Court's recent precedent warns; rather, it puts public officials like Defendant Muma on notice that allowing sexual harassment to go unchecked on their watch will subject them to liability.

Additionally, the existence of a pending investigation bears on the *Murrell* standard. A supervisory employee does not consciously acquiesce to harassment he believes will be remedied by an investigation, and such an investigation can be one way for a supervisory employee to not acquiesce to harassment. However, this is a

question of fact, and (applying the relevant standard), the facts do not support the investigation curing Defendant Muma's acquiescence to the harassment.

Defendant Muma asserts, with no citation to the record, that 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 Defendant Muma." (Appellant Brief at 37). This is true only to the extent that by "taking action" Defendant Muma means conducting a sham investigation in which it "manipulated and disregarded information obtained which corroborated Plaintiff's allegations" and "manipulated the evidence it obtained in order to ensure it would not be required to find in favor of Plaintiff." (App. 37, ¶ 255-261). It also ignores the fact that Defendant Muma "clearly articulated that Plaintiff's concerns regarding discrimination and harassment were simply never going to be resolved by Defendant WSU." (App. 33, ¶ 224). The existence of a sham investigation that Defendant Muma knew would never be resolved in Dr. Countryman-Roswurm's favor does not defeat the assertion that he consciously acquiesced to the harassment. And the standard applied by the trial court is not at too high a level.

Dr. Countryman-Roswurm has shown that Defendant Muma violated a clearly established right, and therefore is not entitled to qualified immunity.

CONCLUSION

For all of these reasons, Dr. Countryman-Roswurm asks this Court to affirm the district court's denial of Defendant Muma's motion to dismiss, and to remand this case with instructions that it proceed with discovery and trial.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the novel issue presented, counsel believes oral argument may be helpful to the Court.

Date: November 23, 2022

Respectfully submitted,

By: /s/ *Alexander L. Edelman*

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CERTIFICATE OF COMPLIANCE

I, Alexander Edelman, hereby certify that:

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By: /s/Alexander L. Edelman
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLEE'S BRIEF was furnished through (ECF) electronic service to the following on this 22nd day of November, 2022:

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