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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

**MOTION FOR PARTIAL DISMISSAL OF
PLAINTIFF'S AMENDED COMPLAINT**

NORTHERN KENTUCKY UNIVERSITY, *et al.*

DEFENDANTS

*** **

Defendants Northern Kentucky University, Geoffrey S. Mearns, Kathleen Roberts, and Ann James ("Defendants"), by and through counsel, move the Court for partial dismissal of Plaintiff's Amended Complaint. In support of their Motion for Partial Dismissal, said Defendants file simultaneously herewith their Memorandum in Support of their Motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2016 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing, if applicable, to the following:

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ROBERTS, AND ANN JAMES

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PARTIAL DISMISSAL BY DEFENDANTS
NKU, MEARNS, ROBERTS AND JAMES**

NORTHERN KENTUCKY UNIVERSITY, *et al.*

DEFENDANTS

*** **

Come Defendants, Northern Kentucky University (“NKU”), Geoffrey S. Mearns, Kathleen Roberts, and Ann James, by and through counsel, and respectfully submit this Memorandum of Law in support of their Partial Motion to Dismiss.¹

INTRODUCTION

Plaintiff is an NKU student who alleged that another student “sexually assaulted” her during the fall 2013 semester. *See* First Am. Compl., ¶ 67. Her lawsuit and claims, however, are directed to subsequent actions by NKU and its current or former officials in responding to her claim of sexual assault and enforcing resulting sanctions. This Court recently granted Plaintiff’s Motion for Leave to File an Amended Complaint and deemed her tendered First Amended Complaint to be filed of record. *See* Order (Sept. 9, 2016 (RE #61)). The First Amended Complaint “supersedes an earlier complaint for all purposes” to become Plaintiff’s operative pleading. *Calhoun v. Bergh*, 769 F.3d 409, 410 (6th Cir. 2014).

¹ Defendant Les Kachurek is now represented by separate counsel. *See* Order (Sept. 2, 2016) (RE #68). Although Plaintiff’s First Amended Complaint is unclear whether Defendant Kachurek is being sued both individually and officially, an official capacity suit is functionally a suit against NKU. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985)(“Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent.”)(internal citations omitted). This Partial Motion to Dismiss as to NKU applies equally to Defendant Kachurek, Geoffrey S. Mearns, Kathleen Roberts, and Ann James to the extent that Plaintiff brings suit against them officially.

Given the effect and substance of Plaintiff's First Amended Complaint, the following claims are now before the Court:

- Count I alleging a federal Title IX claim against NKU only;
- Count II alleging a federal 42 U.S.C. § 1983 substantive due process claim against all Defendants
- Count III alleging a federal Title IX retaliation claim against NKU only;
- Count IV alleging a federal Title IX retaliation claim against Les Kachurek only;
- Count V alleging a federal 42 U.S.C. § 1983 First Amendment claim against Geoffrey S. Mearns and Les Kachurek only;
- Count VI alleging a Kentucky common law defamation claim against Les Kachurek only;
- Count VII alleging a Kentucky common law defamation claim against all Defendants; and
- Count VIII purporting to seek punitive damages pursuant to KRS 411.184 against all Defendants.

See First Am. Compl., ¶¶ 112-171.

These Defendants deny any liability to Plaintiff and move to dismiss Counts II, III, V, VII, and VIII pursuant to Rule 12(b)(6) for failure to state a claim against them. Since Defendant Kachurek is now represented by separate counsel, this Motion to Dismiss neither includes Counts IV and VI against him only nor the extent of Counts II, V, VII, and VIII that are against him in part. While NKU further denies any liability as to Count I, the Motion to Dismiss does not extend to that claim because materials outside of the record may be needed to litigate that issue, which would not comply with the Rule 12(b)(6) standard of review.²

Much of the substance of Plaintiff's First Amended Complaint is inaccurate, baseless or mischaracterizes the facts, and Defendants specifically deny same. However, only for purposes of this Motion to Dismiss, these Defendants accept Plaintiff's allegations as true to the extent required by the Rule 12(b)(6) review standard. Defendants reserve the right to contest such allegations as necessary at later stages of this case.

² If the Court grants this motion in full, all that will remain against any of the Defendants who bring the instant motion is Count I. In the interest of judicial economy and on the basis of other pertinent grounds, the University has filed a separate motion for leave to answer Count I after the instant motion for partial dismissal has been decided.

PLAINTIFF'S ALLEGATIONS

Plaintiff alleged she was “sexually assaulted” during the fall 2013 semester. *See* First Am. Compl., ¶ 67. She reported the incident through NKU’s counseling services at end of the spring 2014 semester, where she met with Gabby Molony (now Dralle), Director of the Norse Violence Prevention Center at NKU, and Ann James, then the NKU Title IX Coordinator.³ *See id.*, ¶ 68. Following an investigation, the Student Conduct Board convened a hearing panel on May 29, 2014 to determine whether the accused student had violated provisions of the NKU Code of Student Rights and Responsibilities specifically regarding non-consensual sexual intercourse. *See id.*, ¶ 71. Both Plaintiff and the accused student were permitted to testify, and responded to questions from the panel members.

Plaintiff further alleges that on June 2, 2014, the hearing panel issued its decision, which found the accused student to be in violation of University policy and imposed the following sanctions:

1. Suspension in Abeyance

Start Date: Monday, June 02, 2014

When a suspension is held in abeyance, the student may remain at the University provided they observe the conduct regulations at all times and comply with all education sanctions. Any further violation of the Code of Student Rights and Responsibilities would result in suspension or expulsion. This sanction is in effect as long as you are a student at Northern Kentucky University.

2. Trespassed from University Housing

³ The timing when Plaintiff reported the incident, although unidentified by her pleading, was approximately nine months after the incident, during the spring 2014 semester. Plaintiff’s First Amended Complaint alleges that NKU officials advised her to pursue the issue within the “university system” instead of contacting police and further references NKU’s website that encourages students to contact the Norse Violence Prevention Center. *See* First Am. Compl., ¶¶ 68-70. However, Plaintiff’s reference to the selective website content takes it out of context. That same section of the website also advises: “Individuals may choose to take action under criminal statutes and/or University policies. The criminal and administrative (Title IX) processes are separate, but can be pursued concurrently.” *See* <http://titleix.nku.edu/reporting.html> (last visited September 15, 2016); *see also Kreipke v. Wayne State University*, 807 F.3d 768, 774 (6th Cir. 2015)(recognizing that the Rule 12(b)(6) evaluation “may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant’s motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein”).

Start Date: Monday, June 02, 2014

He is not to enter any University Housing owned property or building beginning June 2, 2014 through January 1, 2015. If he violates this sanction, he may be charged for Criminal Trespass.

3. Administrative relocation

When he returns to NKU as a student in the spring of 2015, he is trespassed from all University Housing property in the Leon Boothe Residential Village, including Norse Commons, Kentucky Hall, Commonwealth Hall, Norse Hall, University Suites and Woodcrest Apartments. He may reside in Callahan Hall or Northern Terrace but not in any other residential facilities.

4. Educational sanction

Complete by: Friday, January 30, 2015

When he returns to NKU in the spring of 2015, he must meet with Ann James on or before January 30, 2015 to receive instructions on his educational sanction requirements.

5. No Contact Order

A no contact order has been issued between James Johnson and Doe until further notice. Contact consists of in person contact as well as any correspondence via phone, email, or other electronic medium such as social networking sites. Contact through a third party is also not permitted.

See id., ¶ 72. Although both Plaintiff and the accused student received written notice of their right to appeal the sanctions, neither of them elected to do so. Plaintiff's lawsuit primarily concerns actions by NKU and its current or former officials that followed the hearing and sanctions against the accused student.

In February of 2015, Plaintiff reported to NKU administration that the accused student had allegedly been in her dormitory building months earlier during the prior semester. *See id.*, ¶ 77. Her report, however, was based on mere "suspicion" and there was no positive identification of the accused student being there on which NKU could take action. *See id.* Plaintiff further complained that the accused student dated another female who lived in her dormitory and intimidated her. *See id.* This appears to refer to one verbal disagreement not between the accused

and Plaintiff but rather between Plaintiff and the accused student's girlfriend that started in the Norse Commons dining hall and continued into the dormitory.⁴

Also in 2015, Plaintiff reported seeing the accused student in her assigned Norse Commons cafeteria. *See id.*, ¶ 82. When NKU's other dining hall in Callahan Hall had closed for renovation, the accused student was allowed to eat in the Norse Commons cafeteria, which then was the only other university food establishment offering complete day/week access under the University meal plan for campus housed students. While there was delay in notifying Plaintiff of this fact, this was the first instance in which Plaintiff observed the accused student in the Norse Commons cafeteria and the accused student's hours of access were restricted to exclude those times identified by Plaintiff for her use. *See Exhibit 1 - revised sanction.*

At the start of the fall 2015 semester, in response to a complaint by Plaintiff that the accused had, as part of his job duties, assisted with Freshman Move-in at the Residential Village, the accused's student's sanctions were "clarified" to state as to his "Administrative Relocation" as follows:

3. Administrative Relocation and notice of trespass

When you return to NKU as a student in the spring of 2015, you are trespassed from all University Housing property (indoors and outdoors) in the Leon Boothe Residential Village, including Norse Commons, Kentucky Hall, Commonwealth Hall, Norse Hall, University Suites and Woodcrest Apartments. You are not permitted to be **in or around** any of these buildings in the Boothe Residential Village unless you have **written** permission from a staff member in the Office of Student Conduct, Rights and Advocacy. You may reside in Callahan Hall or Northern Terrace but not in any other residential facilities. This sanction is in effect as long as you are a student at Northern Kentucky University.

Exhibit 2 – clarified sanction]. Subsequently, as referenced in Plaintiff's First Amended Complaint, on seven occasions (during the course of the entire 2015 fall semester) NKU granted

⁴ Although not specified by Plaintiff's First Amended Complaint, this matter was also investigated and all of the involved students were issued no contact orders by the NKU administration. *See Exhibit 3 – emails re no contact order.*

limited permission to the accused student to attend university functions in Norse Commons or the adjacent intramural fields. *See* First Am. Comp., ¶¶ 86 – 93. For each of these limited school events, Plaintiff was given advance notice of the dates and times, which her First Amended Complaint does not dispute.

Plaintiff further complains that the accused student was “permitted to remain a member” of his fraternity and work in the campus rec center. *See id.*, 98, 107. None of the accused student’s sanctions, however, prevented such activities. Plaintiff’s First Amended Complaint also references one receipt of a “SnapChat” notice from the accused student’s telephone. While Plaintiff alleges that the accused student was not punished, NKU investigated and determined that it had been an automated action by the SnapChat application and not any directed action on the part of the accused student.

In September, 2015, Plaintiff organized an event on the NKU campus to protest sexual assault on campus and her perception of the University’s response. *See id.*, ¶ 101. In advance of the protest, and in an effort to insure Plaintiff and other protesters were allowed to proceed without incident, then NKU Police Chief Les Kachurek sent an email to his officers and his supervising dean to inform them of the planned protest and to make sure they understood what constitutional rights were involved in the event.⁵

Finally, Plaintiff alleges she was “threatened” by the undersigned in the context of FRE 408 communications with Plaintiff’s counsel. The alleged threat is the subject of Count III of

⁵ Contrary to Plaintiff’s assertion, the demonstration was peaceful throughout. Plaintiff’s First Amended Complaint also repeatedly asserts that two of the accused student’s friends had informed Chief Kachurek that the rape had in fact happened, which is inaccurate. *See* First Am. Compl., ¶¶ 11, 102, and 104. Kachurek testified in his deposition, filed of record, that the friends confirmed to him that an *adjudication* of the incident had occurred. Finally, Plaintiff’s pleading also makes reference to alleged sexual misconduct involving other students. Although these Defendants deny how Plaintiff has characterized those matters, they are irrelevant for purposes of this Motion to Dismiss.

Plaintiff's original and amended complaints, for which a partial summary judgment motion is already pending that further addresses the details of that incident.

RULE 12(b)(6) REVIEW STANDARD

In evaluating a Rule 12(b)(6) motion, the Court has to “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008). However, the factual allegations “must be enough” that the right to relief is “above the speculative level” and is “plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the complaint pleads facts “merely consistent with” liability, it “stops short of the line between possibility and plausibility of entitlement to relief.” *Id.* “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Furthermore, the Court is “not bound to accept as true a legal conclusion couched as factual allegation.” *Twombly*, 550 U.S. at 555.

ARGUMENTS

- I. Any Section 1983 action against NKU or President Mearns, Kachurek, Roberts, and James in their official capacities in Count II or Count V of Plaintiff's First Amended Complaint fails to state a claim and should be dismissed as barred by the Eleventh Amendment.**

Count V of Plaintiff's First Amended Complaint asserts a Section 1983 First Amendment claim against Defendants Kachurek and President Mearns only, while Count II asserts a Section 1983 substantive due process claim against all Defendants. Yet, the Eleventh Amendment bars all suits by private litigants in federal court against states and their agencies. *See Alabama v. Pugh*, 438 U.S. 781, 781 (1978) (“[T]he Eleventh Amendment prohibits federal courts from

entertaining suits by private parties against States and their agencies.”). The Eleventh Amendment bar also applies to state agents sued in their official capacity. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985)(“This bar remains in effect when State officials are sued for damages in their official capacity.”).

Kentucky’s public universities, including NKU, are treated as agencies of the state entitled to Eleventh Amendment protection. *See Bernard v. Northern Kentucky University*, CIV.A. 11-65-DLB-JGW, 2012 WL 1571184, at *4 (E.D. Ky. May 3, 2012); *see also Martin v. Univ. of Louisville*, 541 F.2d 1171, 1174 (6th Cir. 1976); *Robinson v. Eastern Ky. Univ.*, 475 F.2d 707, 711 (6th Cir. 1973); *Depperman v. Univ. of Ky.*, 371 F.Supp. 73, 77 (E.D. Ky. 1974); KRS 44.073(1)(“For purposes of KRS 44.072 state institutions of higher education under KRS Chapter 164 are agencies of the state”). Although Plaintiff’s First Amended Complaint does not specify whether President Mearns, Kachurek, Roberts, and James have been sued in their official capacities or individually, NKU’s Eleventh Amendment protection applies equally to any purported official capacity claim against them. *See Graham*, 473 U.S. at 169. The alleged actions of these Defendants, as asserted within the Amended Complaint, are actions clearly taken within the scope of their official duties and capacities.

Finally, Eleventh Amendment immunity is subject to exceptions but none of them apply to Plaintiff’s Section 1983 claims in Count II and Count V. First, Eleventh Amendment immunity may be waived by the state or abrogated by Congress. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). However, the Sixth Circuit has previously recognized within the Section 1983 context that Kentucky has not waived Eleventh Amendment immunity. *See Grinter v. Knight*, 532 F.3d 567, 572 (6th Cir. 2008). And the Supreme Court has previously found no abrogation of Eleventh Amendment immunity by Section 1983. *See Quern*

v. *Jordan*, 440 U.S. 332, 342-43 (1979). Second, prospective injunctive relief may also be an exception to Eleventh Amendment immunity. *See Ex parte Young*, 209 U.S. 123 (1908). Yet, the prayer for relief in Plaintiff's First Amended Complaint neither identifies nor seeks such redress.

Since potential exceptions to Eleventh Amendment immunity are inapplicable here, any Section 1983 action against NKU or President Mearns, Kachurek, Roberts, and James in their official capacities asserted by Count II or Count V of Plaintiff's First Amended Complaint fails to state a claim and should be dismissed as barred by the Eleventh Amendment.⁶

II. Any Section 1983 action against NKU or President Mearns, Kachurek, Roberts, and James in their official capacities fails to state a claim and should be dismissed because the Section 1983 "person" requirement cannot be satisfied.

Section 1983 authorizes redress for federal constitutional deprivations by any "person" acting under color of law. However, the Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Eleventh Amendment immunity and the Section 1983 person requirement are related but "separate issues." *Id.* at 66-67. The Section 1983 person requirement is thus an alternative, independent basis for dismissal of Count II and Count V as against NKU or President Mearns, Kachurek, Roberts, and James sued in their official capacities.

III. Any Section 1983 claim in Count II against President Mearns, Roberts, and James if sued individually fails to state a claim and should be dismissed as barred by qualified immunity because Plaintiff's First Amended Complaint does not plausibly allege any constitutional deprivation or violation of clearly established law.

Due to Eleventh Amendment immunity and the Section 1983 "person" requirement, Plaintiff's Section 1983 claim in Count II is cognizable only against President Mearns, Roberts,

⁶ Sixth Circuit precedent is unclear whether the Eleventh Amendment bar should be evaluated through Rule 12(b)(1) as a jurisdictional issue instead of Rule 12(b)(6). *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 527 n. 13 (6th Cir. 2004). Regardless which Rule 12(b) subsection applies, a motion to dismiss referencing the Eleventh Amendment is sufficient to invoke that defense. *See id.*

and James in their individual capacities. However, the elements of a Section 1983 claim within the individual capacity context are additionally unmet and subject to dismissal. Section 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred.” *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979). “To successfully state a claim under 42 U.S.C. § 1983, a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law.” *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir.1994). The only alleged constitutional deprivation identified by Count II is Plaintiff’s “substantive due process right to bodily integrity.” *See* First Am. Compl., ¶ 124.⁷

Section 1983 liability is also subject to federal qualified immunity. “The concern of qualified immunity is to acknowledge that reasonable mistakes can be made” by public officials. *Humphrey v. Mabry*, 482 F.3d 840, 847 (6th Cir. 2007)(quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)). It affords “ample room for mistaken judgment” and protects “all but the plainly incompetent or those who knowingly violate the law.” *Id.* (quoting *Scott v. Clay County*, 205 F.3d 867, 873 n. 9 (6th Cir. 2000) and *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The qualified immunity analysis has two steps: (1) Were Plaintiff’s constitutional rights violated; and (2) If so, were those rights clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). This Court has discretion to decide which step to consider first. *Id.* at 236. Dismissal of Count II is appropriate as to President Mearns, Roberts, and James if sued in their individual capacities

⁷ Count II further alleges that Defendants’ conduct violated her “liberty interest” and “shock[ed] the contemporary conscious.” *See* First Am. Compl., ¶¶ 125-26. These additional allegations are consistent with and correspond to her substantive due process claim because bodily integrity is a type of liberty interest subject to a shocks the conscious standard. *See Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996)(“Their claims are premised on the alleged violation of a constitutionally protected liberty interest, within the meaning of the Fourteenth Amendment, in their personal bodily integrity.... We first note that, despite the plaintiffs’ suggestions to the contrary, we have no doubt that the ‘shocks the conscience’ standard is applicable here.”).

based on qualified immunity because Plaintiff's First Amended Complaint does not plausibly allege any constitutional deprivation or violation of clearly established law as to her substantive due process right to bodily integrity.

The Sixth Circuit has recognized a fundamental right to bodily integrity within the context of "sexual abuse" that was *physical* in nature. *See Doe v. Claiborne County, Tenn. By and Through Claiborne County Bd. of Educ.*, 103 F.3d 495, 507 (6th Cir. 1996). Since *Doe*, however, no Sixth Circuit precedent has found bodily integrity deprivations from *non-physical* forms of sexual abuse. Furthermore, multiple District Court opinions from within this Circuit have both observed that distinction and refused to extend bodily integrity deprivations to non-physical forms of sexual abuse, such as bullying or verbal taunting. *See Doe v. Big Walnut Local School Dist. Bd. of Educ.*, 837 F. Supp. 2d 742, 751-52 (S.D. Ohio 2011) ("The Sixth Circuit's conclusion that a sexual assault clearly implicates the fundamental right to 'bodily integrity' does not extend to 'verbal taunting' or bullying."); *Marcum ex rel. C.V. v. Board of Educ. of Bloom-Carroll Local School Dist.*, 727 F. Supp. 2d 657, 673-74 (S.D. Ohio 2010) ("[T]he Court finds that Defendants are entitled to summary judgment as a matter of law on Plaintiffs' claim of a substantive due process violation premised on Defendants' alleged failure to protect C.V. from verbal taunting by her classmates.").

The only alleged physical invasion of Plaintiff's bodily integrity was the purportedly non-consensual sex between her and another student during the 2013 fall semester. *See* First Am. Compl., ¶ 67. Any Section 1983 liability based on that alleged non-consensual sex is, however, time-barred. The applicable statute of limitations for Section 1983 claims must be borrowed from state law because Congress did not provide a federal statute of limitations. *See Bonner v. Perry*, 564 F.3d 424, 430 (6th Cir. 2009). Since Section 1983 claims "are best characterized as personal

injury actions,” the Supreme Court has held that the “personal injury statute of limitations should be applied to all § 1983 claims.” *Owens v. Okure*, 488 U.S. 235, 240-41 (1989). For Section 1983 actions arising in Kentucky, the one-year limitation period for personal injury actions found in KRS 413.140(1)(a) applies. *See Bonner*, 564 F.3d at 430-31 (citing *Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990)). Plaintiff filed her lawsuit in January 2016, which was well beyond one year from the alleged non-consensual sex during the 2013 fall semester.

Although the alleged non-consensual sex is untimely for Section 1983 purposes, Plaintiff later reported the incident to NKU officials, which led to an investigation and hearing as required by Title IX that resulted in “sanctions” against the other student. *See* First Am. Compl., ¶¶ 71-72. Count II of Plaintiff’s First Amended Complaint is based on the purported “failure to enforce” the sanctions imposed during the Title IX process. *See id.*, ¶¶ 122-23. However, Plaintiff has not and cannot allege having suffered any subsequent *physical* sexual abuse from the purported non-enforcement during the post-sanction timeframe. Indeed, the post-sanction interaction identified by Plaintiff’s First Amended Complaint is non-physical in nature from having had to “see her attacker on a regular basis.” *See id.*, ¶¶ 118. Count II also identifies no physical invasion of her bodily integrity and only seeks damages for non-physical types of injuries, such as fear, anxiety, and emotional distress or trauma. *See id.*, ¶¶ 127.

The guidance from *Doe* and *Marcum* indicate that the non-physical interaction as alleged by Plaintiff is insufficient to rise to the level of a substantive due process bodily integrity deprivation, which has only been recognized by the Sixth Circuit for sexual abuse that was physical in nature. *See Doe*, 837 F. Supp. 2d at 751-52; *Marcum*, 727 F. Supp. 2d at 673-74. Although *Doe* and *Marcum* are not binding upon this Court, those two published decisions are well-reasoned and should be followed here. At a minimum, the two decisions demonstrate that

the law was not clearly established regarding that issue for qualified immunity purposes. For those two reasons, dismissal of Count II is appropriate as to President Mearns, Roberts, and James in their individual capacities because Plaintiff's First Amended Complaint does not plausibly allege any constitutional deprivation or violation of clearly established law as to her substantive due process right to bodily integrity based on non-physical interaction or injuries.

IV. Any Section 1983 First Amendment claim in Count V against President Mearns if sued individually fails to state a claim and should be dismissed because Plaintiff's First Amended Complaint does not plausibly allege any First Amendment deprivation or violation of clearly established law within the context of Section 1983 supervisory liability standards.

Plaintiff asserts Count V only against President Mearns and then NKU Police Chief Kachurek. Since Count V alleges a Section 1983 First Amendment claim, any official capacity claim against either of them is subject to dismissal based on the Eleventh Amendment and Section 1983 person requirement as previously discussed. However, dismissal is also appropriate as to President Mearns individually because Plaintiff's First Amended Complaint does not plausibly allege that Section 1983 supervisory liability standards can be satisfied here.

Plaintiff's Count V First Amendment claim stems from a "gathering of mostly women to discuss sexual violence issues on campus" or protest. *See* First Am. Compl., ¶ 101, 151. Her First Amended Complaint alleges that her free speech rights were "chilled" following that event by a "threatening email" concerning the protest and by a police dog that police officers brought to the gathering. *See id.* President Mearns, however, neither published the purportedly threatening email nor attended the gathering with a police dog. Rather, Plaintiff's First Amended Complaint indicates that NKU police had arrived at the gathering with the police dog and that then NKU Police Chief Kachurek had authored and disseminated the purported "threatening email." *See id.*, ¶¶ 101-02.

Given the lack of personal involvement by President Mearns, Plaintiff's First Amendment claim as to him appears to be based solely on his supervisory position. Section 1983 individual liability, however, cannot be imposed based on respondeat superior principles and requires "proof of personal involvement." See *Grinter v. Knight*, 532 F.3d at 575 ("Because § 1983 liability cannot be imposed under a theory of *respondeat superior*, proof of personal involvement is required for a supervisor to incur personal liability."). Within the Section 1983 supervisory context, the "minimum" personal involvement standard can only be satisfied where the "supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Id.* (internal quotation omitted); see also *Meeks v. Schofield*, 625 F. App'x 697, 702 (6th Cir. 2015)(applying Section 1983 supervisory liability standard to First Amendment claim).

Plaintiff's First Amended Complaint neither references nor satisfies the Section 1983 supervisory liability standard. At most from a supervisory standpoint, the allegations of Count V try to attack President Mearns because he took no after-the-fact disciplinary action against then NKU Police Chief Kachurek and because he believed Chief Kachurek's purportedly threatening email had been "well intended." See First Am. Compl., ¶¶ 148-49. However, Plaintiff's focus on *after-the-fact* actions or beliefs is misplaced. Sixth Circuit precedent looks for *prior, repeated* constitutional violations from which to infer an implicit authorization, approval, or acquiescence for committing an alleged later violation. Compare *Peatross v. City of Memphis*, 818 F.3d 233, 243 (6th Cir. 2016)(denying motion to dismiss supervisory claim in police shooting case where pleading alleged 18 shootings or deaths in prior 12 months). A first-time incident does not fit within that paradigm.

Coleman v. Wirtz, 745 F. Supp. 434 (N.D. Ohio 1990) underscores the distinction. That case involved an altercation between a teacher (Coleman) and principal (Wirtz). Although the teacher had also sued the school superintendent (Tutela) based on Section 1983 supervisory liability, the Court dismissed the supervisory claim because the allegations were misdirected to after-the-fact actions instead of prior constitutional violations. The Court specifically held:

There are no allegations of widespread, prior constitutional violations by subordinates. Tutela's alleged actions occurred *after* the Wirtz assault and battery; there are no allegations that he implicitly authorized, approved, or knowingly acquiesced in Wirtz' behavior *prior* to Wirtz' attack. Thus, as a matter of law, there cannot be supervisory liability under § 1983.

Id. at 444 (emphasis both in original and added). The same outcome equally applies here as to President Mearns. Plaintiff's First Amended Complaint alleges no prior First Amendment free speech violations and improperly tries to attack President Mearns based on his after-the-fact response to the actions of NKU police and then NKU Police Chief Kachurek.

While any First Amendment violation is denied, Plaintiff's First Amended Complaint does not plausibly allege Section 1983 supervisory liability against President Mearns for the reasons stated above and Plaintiff's First Amendment claim should be dismissed as to him. At a minimum, President Mearns is alternatively entitled to dismissal of that claim based on qualified immunity because there has been no violation of clearly established law under the allegations of this case.

V. Count III alleging Title IX retaliation against NKU duplicates the same claim and issue from Plaintiff's earlier pleading and is already subject to a pending partial motion for summary judgment.

NKU incorporates by reference the pending partial motion for summary judgment as to the issue encompassed by Count III of Plaintiff's First Amended Complaint and moves to dismiss Count III for those reasons.

VI. Plaintiff's state law breach of contract claim in Count VII should be dismissed because: (1) it is not actionable against President Mearns, Kachurek, Roberts, and James if sued in their individual capacities; (2) it is barred by the Eleventh Amendment as to NKU or the other Defendants if sued officially; and (3) the allegations fail to state a claim as to contract damages.

Count VII of Plaintiff's First Amended Complaint alleges breach of contract against all Defendants based on terms from NKU's Code of Student Rights and Responsibilities. *See* First Am. Compl., ¶¶ 11-21, 164-68. NKU denies that Plaintiff's First Amended Complaint has identified any enforceable contract or contract terms. However, even if the alleged contract terms invoked by Plaintiff are enforceable, Plaintiff's conclusory allegations and attempt to sue NKU officers or agents should be dismissed because it is contrary to Kentucky law and cannot satisfy the Rule 12(b)(6) plausibility standard. *See, e.g., Potter v. Chaney*, 290 S.W.2d 44, 46 (Ky. 1956) ("It is, of course, fundamental that an officer of a corporation will not be individually bound when contracting as an agent of that corporation within the scope of his employment."); *see also* KRS 164.350 (describing public university government as "body corporate") and KRS 164.290 (including NKU within public universities subject to KRS Chapter 164).

Furthermore, any state law breach of contract claim against NKU in federal court or its agents sued officially is barred by the Eleventh Amendment. *See Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520-21 (6th Cir. 2007) ("The Supreme Court has squarely held that pendent state law claims against state officials in their official capacity are barred by the Eleventh Amendment.") (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117-21 (1984)). Eleventh Amendment immunity applies in this case "even though there would otherwise be supplemental jurisdiction." *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 438 (6th Cir. 2000) (citing *Pennhurst*, 465 U.S. at 123).

Plaintiff's state law breach of contract theory is alternatively subject to dismissal because the allegations of her First Amended Complaint fail to state a claim as to contract damages. A breach of contract claim is ill-suited here because Plaintiff's damages are in the nature of a personal injury action. Kentucky law, however, has long limited contract damages to "pecuniary" losses. *See Robinson v. Western Union Tel. Co.*, 68 S.W.656, 658 (1902)("[T]he declared object of awarding [contract] damages is to give compensation for *pecuniary* loss...")(emphasis added); *see also Atia v. Delta Airlines, Inc.*, 692 F. Supp. 2d 693, 704 (E.D. Ky. 2010)(recognizing that non-economic damages for emotional injury resulting from breach of contract cannot be recovered)(citing *Prather v. Providian Nat. Bank*, No.2006-CA-000630-MR, 2007 WL 1784084, at *3 (Ky.Ct.App. June 8, 2007)). Plaintiff's First Amended Complaint identifies no alleged pecuniary losses and only makes broad, unspecified reference to having been "damaged" in general. *See* First Am. Compl., ¶ 168. Such conclusory allegations as to damages are insufficient to satisfy the Rule 12(b)(6) plausibility standard. *See Ashcroft v. Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

VII. Plaintiff's state law punitive damage claim in Count VIII should be dismissed as barred by the Eleventh Amendment as to NKU and its agents if sued officially and because Plaintiff otherwise has alleged no state law tort or statutory action to authorize recovery of punitive damages against NKU or President Mearns, Roberts, and James if sued in their individual capacities.

Count VIII of Plaintiff's First Amended Complaint seeks punitive damages based on KRS 411.184. The previously invoked Eleventh Amendment principles to bar any breach of contract claim in federal court against NKU or its agents if sued officially applies equally to state law punitive damages.

More fundamentally, KRS 411.184 and its companion punitive damage statute KRS 411.186 have been held to “apply only to those cases in which punitive damages are already authorized by common law or by statute.” *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 139 (Ky. 2003). For NKU and President Mearns, Roberts, and James, Plaintiff’s First Amended Complaint asserts no state statutory action against them and the only state common law claim as to those Defendants is alleged breach of contract. Yet, Kentucky law does not authorize punitive damages for breach of contract actions and requires separate tortious conduct. *See Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 486 (Ky. App. 1978)(“Kentucky has long followed the general rule that punitive damages ordinarily are not recoverable for a breach of contract.... Nevertheless, this rule permits a plaintiff to recover punitive damages if the breach of contract also involved tortious conduct.”). The only common law *tort* asserted by Plaintiff’s First Amended Complaint, however, is defamation against then NKU Police Chief Kachurek. Plaintiff has accordingly pled no state statutory or common law claim authorizing punitive damages against NKU or President Mearns, Roberts, and James if sued in their individual capacities.

CONCLUSION

For the reasons stated above, Defendants’ Motion to Dismiss should be granted as to Counts II, III, V, VII, and VIII pursuant to Rule 12(b)(6) for failure to state a claim against them.

Respectfully Submitted,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

/s/ Joshua M. Salsburey

Katherine M. Coleman (KBA#84089)

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2016 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing, if applicable, to the following:

Kevin L. Murphy
Steven A. Taylor
Murphy Landen Jones PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
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Attorney for Defendant Kachurek

/s/ Joshua M. Salsburey

ATTORNEY FOR DEFENDANTS

June 2, 2014

[REDACTED]

This letter is regarding a report stating that you were allegedly involved in a Northern Kentucky University campus policy violation. Specifically, I am in receipt of an incident report regarding your involvement in an alleged violation of the Northern Kentucky University *Housing Policies* and the *Student Code of Conduct*, which prohibits the following behaviors:

Offenses against persons include but are not limited to: Engaging in sexual misconduct- Non-consensual sexual intercourse - Any sexual intercourse, however slight, with any object, by a person to another person that is without consent and/or by force.

A university hearing regarding these alleged violations was held on May 29, 2014. After reviewing the incident reports and information gathered at the hearing, the hearing panel has found you in violation of the prohibited behavior. The following sanctions have been assigned:

1. Suspension in Abeyance

Start Date: Monday, June 02, 2014

When a suspension is held in abeyance, the student may remain at the University provided they observe the conduct regulations at all times and comply with all education sanctions. Any further violation of the Code of Student Rights and Responsibilities would result in suspension or expulsion. This sanction is in effect as long as you are a student at Northern Kentucky University.

2. Trespassed from University Housing

Start Date: Monday, June 02, 2014

You are not to enter any University Housing owned property or building beginning June 2, 2014 through January 1, 2015. If you violate this sanction, you may be charged for Criminal Trespass.

3. Administrative relocation

When you return to NKU as a student in the spring of 2015, you are trespassed from all University Housing property in the Leon Boothe Residential Village, including Norse Commons, Kentucky Hall, Commonwealth Hall, Norse Hall, University Suites, and Woodcrest Apartments. You may reside in Callahan Hall or Northern Terrace but not in any other residential facilities.

[REDACTED]'s sanctions have been amended so that he is allowed to be in Norse Commons but not any other residential facilities in the residential village (Norse Hall, Kentucky and Commonwealth Halls, Woodcrest Apartments and University Suites). This is due to the closing of the dining hall in Callahan Hall- his only option for dining is Norse Commons since that

facility closed on March 7, 2015. He is allowed to be in Callahan (where he lives) and Northern Terrace.

- I have asked [REDACTED] not to be in Norse Commons during the following times:
9:30-10:30 am
6:00-7:00 pm
9-10:30 pm

4. Educational Sanction

Complete by: Friday, January 30, 2015

When you return to NKU in the spring of 2015, you must meet with Ann James on or before January 30, 2015 to receive instructions on your educational sanction requirements.

5. No Contact Order

You are not to have ANY contact with [REDACTED] until further notice. Contact consists of in person contact as well as any correspondence via phone, email, or other electronic medium such as social networking sites. Contact through a third party is also not permitted.

You have a right to appeal your sanctions pursuant to the procedures set forth in the Code of Student Rights and Responsibilities which can be found on-line at www.nku.edu/~deanstudents/. An appeal must meet one or more of the following grounds to be considered:

1. A significant procedural error was made during the disciplinary process, including but not limited to failure to hold an administrative meeting, notice of the alleged violation, and/or no opportunity to present evidence.
2. A sanction was not appropriate to the violation, and/or the sanctions were grossly disproportionate.
3. A finding was not supported by evidence, and/or significant information is presented on appeal that was not available at the time of the hearing or could not have been obtained despite the student's exercise of reasonable diligence which materially affects the finding sanctions.

Accordingly, you need to address your appeal to Dr. Peter Gitau, Vice President of Student Affairs. You have five (5) working days upon receipt of this letter to submit a written appeal to wajpej@nku.edu. The Dean will forward your file to Dr. Gitau who has the sole discretion to decide whether to review the appeal or send it to an appeal panel for review within five (5) working days of receipt of the appeal unless extenuating circumstances apply.

If you have any questions regarding the appeal process, contact the Dean of Students Office at 859-572-5147.

Sincerely,

Dr. Jeffrey Waple
Dean of Students
Northern Kentucky University

NKU-002182

██████████ sanctions- clarification

August 27, 2015

1. Suspension in Abeyance

Start Date: Monday, June 02, 2014

When a suspension is held in abeyance, the student may remain at the University provided they observe the conduct regulations at all times and comply with all education sanctions. Any further violation of the Code of Student Rights and Responsibilities would result in suspension or expulsion. This sanction is in effect as long as you are a student at Northern Kentucky University.

2. Trespassed from University Housing

Start Date: Monday, June 02, 2014

You are not to enter any University Housing owned property or building beginning June 2, 2014 through January 1, 2015. If you violate this sanction, you may be charged for Criminal Trespass.

3. Administrative relocation and notice of trespass

When you return to NKU as a student in the spring of 2015, you are trespassed from all University Housing property (indoors and outdoors) in the Leon Boothe Residential Village, including Norse Commons/Norse Commons Circle, Kentucky Hall, Commonwealth Hall, Norse Hall, University Suites, and Woodcrest Apartments. You are not permitted to be in or around any of these buildings in the Boothe Residential Village unless you have written permission from a staff member in the Office of Student Conduct, Rights and Advocacy. You may reside in Callahan Hall or Northern Terrace but not in any other residential facilities. This sanction is in effect as long as you are a student at Northern Kentucky University.

5. No Contact Order

You are not to have ANY contact with ██████████ until further notice. Contact consists of in person contact as well as any correspondence via phone, email, or other electronic medium such as social networking sites. Contact through a third party is also not permitted.

PRODUCED PURSUANT AND SUBJECT TO APO ENTERED 6/9/16 [D.E. 18], ORDER ENTERED 6/28/16 [D.E. 19], AND 7/13/16 MINUTE ENTRY ORDER [D.E. 23]

From: [REDACTED]
Sent: Tuesday, May 05, 2015 12:37 AM
To: Ann James
Subject: Re: Follow up

Thank you.

From: Ann James <jamesa3@nku.edu>
Sent: Monday, May 04, 2015 11:05 AM
To: [REDACTED]
Subject: Follow up

Hi [REDACTED],

I wanted to follow up with you regarding our conversation last week. I am going to be meeting with [REDACTED] and [REDACTED] this week to discuss the incident in Norse Commons. I am also still working with housing on your options for living arrangements for next year and will update you as soon as I can.

I have issued a no contact order to [REDACTED] and wanted to put the same in writing to you. It is our practice to make no contact orders reciprocal and does not reflect any wrongdoing on your part in any way.

You are to have no contact with [REDACTED] from this point forward as long as you are a student here. No contact means that you cannot speak to her in person, by phone, or through the use of technology (i.e. text message), social media or through a third party. This same no contact order is being communicated with [REDACTED] as she is also to have no contact with you.

If you have any questions or concerns, please let me know.

Thanks,
Ann

Ann James
Associate Dean of Students
Deputy Title IX Coordinator
Northern Kentucky University
jamesa3@nku.edu
859-572-5147 (o)
859-572-6173 (f)

PRODUCED PURSUANT AND SUBJECT TO APO ENTERED 6/9/16 [D.E. 18], ORDER ENTERED 6/28/16 [D.E. 19], AND 7/13/16 MINUTE ENTRY ORDER [D.E. 23]

From: [REDACTED]@mymail.nku.edu>
Sent: Monday, May 04, 2015 4:21 PM
To: Ann James
Subject: Re: Meeting request

Good afternoon,
I am available tomorrow in the morning or after 2:30pm. I just thought about it and remembered that I totally forgot to email you my writing of the occurrences. However I am willing to speak with you about that tomorrow. I understand the no contact order and there should not be any problems concerning it.

Have a great day,
[REDACTED]

Sent from my iPhone

On May 4, 2015, at 10:03 AM, "Ann James" <jamesa3@nku.edu> wrote:

Good morning [REDACTED]
I would like to meet with you today or tomorrow to talk more about the incident in Norse Commons last week. Can you please send me your availability for today and tomorrow?
Also, I wanted to put in writing the no contact order that I talked with you about last week. You are to have no contact with [REDACTED] from this point forward as long as you are a student here. No contact means that you cannot speak to her in person, by phone, or through the use of technology (i.e. text message), social media or through a third party. This same no contact order is being communicated with [REDACTED] as she is also to have no contact with you.
Thank you,
Ann

Ann James
Associate Dean of Students
Deputy Title IX Coordinator
Northern Kentucky University
jamesa3@nku.edu
859-572-5147 (o)
859-572-6173 (f)

FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

ORDER

NORTHERN KENTUCKY UNIVERSITY, *et al.*

DEFENDANTS

*** **

This matter having come before the Court on the Motion of Defendants Northern Kentucky University, Geoffrey S. Mearns, Kathleen Roberts and Ann James for partial dismissal of Plaintiff's Amended Complaint and being otherwise sufficiently advised, said Defendants' Motion is hereby GRANTED.