IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KYLEE MCLAUGHLIN	)	
	)	
Plaintiff,	)	
v.	)	
	)	Case No. CIV-21-0539-HE
THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a constitutional state agency, LINDSEY GRAY-WALTON, in her official and individual capacities, and KYLE WALTON, in his official and individual capacities,	)	
	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS LINDSEY GRAY-WALTON AND KYLE WALTON

Defendants Lindsey Gray-Walton ("Coach Walton") and Kyle Walton, in their individual capacities (collectively, the "Defendants"), hereby submit this Reply Brief in support of their Motion to Dismiss ("Reply") and state:

The best summary of Plaintiff's contorted view of the law is her assertion that being labeled racist and homophobic is the same as being called "the n-word." Dkt. 16 n.23. That is not hyperbole, Plaintiff cites that and other racial discrimination cases for her claim:

> [23] The law review article gathers a collection of cases where plaintiffs prevailed with race-related IIED claims. In *Alcorn v. Anbro Engineering, Inc.*, 468 P.2d 216, 218-219 (Cal. 1970), the California Supreme Court held that the particular harms of racism, paired with the power differential between plaintiff and defendant, were sufficient to uphold the complaint. In *Contreras v. Crown Zellerbach*, 565 P.2d 1173, 1176-77 (Wash. 1977), the Washington Supreme Court specifically stated that racial slurs from a former employer were outrageous enough to maintain the tort of outrage. In *Turley v. ISG Lackawanna, Inc.*, 960 F. Supp. 2d 425, 433-34 (W.D.N.Y. 2013), the sole African American employee at a steel plant was subjected to racial insults, intimidation, and degradation over a period of more than three years. In *Brown v. Manning*, 764 F. Supp. 183, 184-86 (M.D. Ga. 1991), the owner of a damaged car sued an insurance investigator for assault and intentional infliction of emotional distress after he used the n-word against him. In *Dominguez v. Stone*, 638 P.2d 423, 424 (N.M. Ct. App. 1981), a city councilman stated that "plaintiff was not suited for her employment because she was a Mexican." In that case, the Court of Appeals of New Mexico overruled the lower court's grant of summary judgment to defendant, determining that the jury could decide whether defendant's conduct was sufficiently extreme and outrageous. *Id.*

Id. (highlighting added). Aside from this absurdist reading of racial discrimination law, Plaintiff's Response to Defendants' Motion to Dismiss (the "Response") largely asserts conclusions unsupported by her allegations and fails to articulate facts that meet the elements of each cause of action. More specifically, Plaintiff's reliance on "facile, passive-voice" throughout her Response and Amended Complaint reference conduct that is, ultimately, unattributable to Defendants, which constitutes a failure to state a claim. *Wilson v. Jackson Cty. Courthouse Altus Oklahoma*, No. CIV-17-535-M, 2017 WL 4077333, at *2 (W.D. Okla. June 30, 2017) ("Likewise insufficient is a plaintiff's more active-voice yet undifferentiated contention that 'defendants' infringed his rights."). Additionally, in Reply to the Response, the Court should note: (1) There are insufficient allegations against Kyle Walton for him to remain a defendant; (2) Plaintiff concedes numerous arguments that are fatal to the Amended Complaint; (3) Plaintiff fails to overcome qualified immunity by showing Defendants knew they were acting unreasonably due to clearly established law at the time; and, (4) The Defendants cannot be alleged to act in their individual and official capacities at the same time. Defendants' Motion to Dismiss should be granted.

I. THE ALLEGATIONS AGAINST KYLE WALTON DO NOT SUPPORT ANY CAUSE OF ACTION AGAINST HIM.

The facts asserted against Kyle Walton do not support any causes of action alleged against him. *Compare* Dkt. 9 at 1-5 *with* Dkt. 16 n. 3. Even the Plaintiff's summary of the Amended Complaint does not provide facts to support the elements required:

[3] Here is what the Complaint has alleged in regards to Kyle Walton:
¶7. At all times relevant to this Complaint, Defendant Kyle was and now is an O.U. Women's Volleyball Assistant Coach, the husband of Defendant Gray-Walton, and resides in Norman, Oklahoma.
¶31. On June 11, 2020, Plaintiff was asked by Defendant Kyle to give her opinion on the video, which she did by stating that she agreed 100% that slavery was wrong and the slaves were mistreated; and that statistics showed that. Plaintiff also expressed her opinion toward the end of the video that it was slanted "left" and that it took some shots at what President Trump said and compared it with beatings of [b]lacks [in] the 1960's. Plaintiff responded with appropriate non-racists comments that represented her opinions.
¶32. Pressed for more input, Plaintiff offered comments directly from the movie that [b]lack incarceration was higher than other racial groups while representing a smaller overall percentage of the population. She stated that they were incarcerated mostly for marijuana and drugs.
¶33. Plaintiff did as Defendant Kyle instructed and on June 11, 2020, she and other teammates met in a small pod to discuss this video and to play games.
¶43. On June 15, 2020, Defendants Walton, Kyle, and assistant coach Jake Barreau, and the Psychological Research Organization ("PRO") representative, Delores Christensen, and a DEI member representative and all incoming seniors on the volleyball team met regarding Plaintiff's statements set out in paragraph 31 and 32, and during this meeting Plaintiff's character was attacked and she was called a racist and homophobe. Plaintiff was continuously attacked by players and coaches []. Defendant Walton said, "We can't save you when you get into the real world, when you leave here." Defendant Kyle said, "Not sure I can coach you anymore." Teammate Keyton Kinley said, "[Y]ou shouldn't like a post without asking us first." Keyton Kinley further commented on Sanaa Dotson['s] social media post referencing Kylee as a racist – "if the shoe fits." Plaintiff attempted to apologize to the Zoom meeting group if it had offended them; however, apologies were not accepted by the group because it was not said with enough "feeling."

Dkt. 16 n. 3. Rather than articulate how the allegations support the necessary elements, Plaintiff asserts that it is enough that Kyle Walton "was the individual who set in motion a series of events resulting in the infringement of Plaintiff's constitutional and statutory rights." Dkt. 16 at 5. But even taking that warrantless claim as true, Plaintiff functionally and only alleges that "but for" Kyle Walton's conduct neither tortious harm nor a Constitutional violation would have occurred, which is insufficient to even sustain a claim for negligence. *Garrett v. Bryan Cave LLP*, 211 F.3d 1278 (10th Cir. 2000) ("Oklahoma law requires proof of 'but for' and 'proximate' causation to sustain a claim for negligence."). Moreover, Plaintiff's theory that Kyle Walton can be jointly liable with

Coach Walton for conduct without meeting the elements required—again, because his conduct was tangentially related to any alleged tort or Constitutional violation—would usurp Oklahoma's abolition of joint and several liability, as "the liability for damages caused by two or more persons shall be several only." Okla. Stat. tit. 23, § 15. Simply put, Plaintiff is required to prove the elements against Kyle Walton support a cause of action and several damages; but even if the allegations related to him were taken as true Plaintiff has failed to state a claim.

II. PLAINTIFF FAILS TO BOLSTER HER ALLEGATIONS' SHORTCOMINGS AGAINST COACH WALTON.

Throughout the Motion, Defendants note numerous critical failings of the allegations against Coach Walton, which are unaddressed in Plaintiff's Response. Regarding false light, for example, Plaintiff states: "the Complaint reference multiple statements by Coach Walton to other individuals portraying Plaintiff as unfit for the volleyball program because of her purportedly racist views." Dkt. 16 at 18. That is untrue. The Amended Complaint makes no allegation of such statements. Undeniably, there are allegations of Plaintiff not fitting the team culture and being perceived as racist and homophobic by her teammates, but those are wholly different than this newly characterized allegation in Plaintiff's Response. Moreover, Plaintiff concedes that under Oklahoma law, false light must reference the public at large and any comments to the volleyball team—due to its limited attendance—is, by definition, not the public at large. In fact, there is no allegation the public at large was even aware of these allegations until Plaintiff filed her inflammatory Amended Complaint. Plaintiff also concedes that there was no allegation

related to actual malice/knowledge of falsity, *i.e.*, there is no allegation—aside from conclusory statements—that Coach Walton knew Plaintiff was not racist or homophobic prior to allegedly making a statement.

Relating to intentional infliction of emotional distress, Defendants reiterate that Plaintiff's reliance on cases where plaintiffs were subjected to racism is clearly inapplicable to being labeled a racist. Racism is subjecting one to abject and ridicule due to the alienable characteristics of their skin and culture; inversely, people discriminate against others based on race by their own volition. If anything, Plaintiff's case citations demonstrate that the other volleyball players subjected to Plaintiff's racist comments could maintain a claim for IIED that would actually state a claim for relief. It is also telling that despite Plaintiff's string cite for racial discrimination supporting IIED, she cannot find a case where being called racist or homophobic was considered severe enough to support an emotional distress claim anywhere in the country.

As for interference with prospective economic interest and contractual relations, Plaintiff's Response concedes that prospective professional employment is too speculative to support a claim. Moreover, Plaintiff had the option to maintain her scholarship, the only arguable property interest involved in the claim. Finally, Plaintiff concedes she had no right to play—she could have been benched for any number of reasons. This Court should not establish a contractual right for players to be put on the field.

III. PLAINTIFF'S RESPONSE DEMONSTRATES THE LAW CONCERNING PLAINTIFF'S SPEECH WAS NOT CLEARLY ESTABLISHED DURING ANY ALLEGATIONS IN THE COMPLAINT.

First and foremost, Plaintiff concedes that to overcome qualified immunity she must demonstrate that the Constitutional violation was clearly established at the time the alleged conduct occurred such that a reasonable actor (coach) would be aware of it. Dkt. 9 at 10-11. However, to demonstrate that point, Plaintiff relies on *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021). *Mahanoy* certainly stands for the proposition that a high schooler could not be removed from her cheer squad for posting a video critical of her high school online. *Id.* But there are two issues with Plaintiff's use of *Mahanoy*. First, the decision was not published until June 26, 2021—almost a year following all allegations within the Complaint. Consequently, it would not be possible for Defendants to have a "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson v. Callahan*, 555 U.S. 223, 244, 129 S. Ct. 808, 822, 172 L. Ed. 2d 565 (2009).

Additionally, even following *Mahanoy*, it is not clear now that the conduct at issue was prohibited. Plaintiff here is a collegiate athlete who received a scholarship for her performance and ability to make her team as whole perform better. Unlike a high school student, she had no general right to attend the University of Oklahoma or take part on the team, instead it was the result of a highly competitive cross-national search for players. For those reasons, and many more, Justice Alito correctly noted:

> This case does not involve speech by a student at a public college or university. For several reasons, including the age, independence, and living arrangements of such students,

> regulation of their speech may raise very different questions from those presented here. I do not understand the decision in this case to apply to such students.

Mahanoy Area Sch. Dist., 141 S. Ct. at 2049 (J. Alito Concurring).

Aside from *Mahanoy,* Plaintiff relies on numerous cases from outside the Tenth Circuit to assert for the proposition that "freedom of speech on campus is a well-recognized right." Dkt. 16 at 16. Defendants do not argue with that general statement of law, but the Tenth Circuit requires more for a clearly established right:

> The district court's discussion of the second qualified immunity prong consisted only of the general statement that "it is clearly established that a public employer cannot retaliate against an employee for exercising their First Amendment right to free speech." Dist. Ct. Op. at 17. Mr. Knopf relies on the district court's statement and similarly argues that at the time of his dismissal, it was clearly established that a public employer cannot retaliate against an employee for speaking on matters of public concern. See Aplee. Br. at 26. But these are general statements of law. As the Supreme Court has cautioned, we must not "define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742, 131 S.Ct. 2074. These statements merely repeat the generic Garcetti/Pickering standard— "the First Amendment protects a public employee's right ... to speak as a citizen addressing matters of public concern." Garcetti, 547 U.S. at 417, 126 S.Ct. 1951. Instead, for Mr. Knopf to meet his burden, "the clearly established law must be particularized to the facts of the case." White, 137 S.Ct. at 552 (quotations omitted).

Knopf v. Williams, 884 F.3d 939, 946–47 (10th Cir. 2018). To that point, Plaintiff's burden is to convince the Court that precedent was "beyond debate" such that Defendants must have known they were acting unreasonably at the time. *Id.* at 949. But the argument in the Motion demonstrates that is simply not the case, and the Amended Complaint should be dismissed.

IV. PLAINTIFF DOES NOT DISTINGUISH BETWEEN CONDUCT IN DEFENDANTS' OFFICIAL AND INDIVIDUAL CAPACITIES.

Within the Response, Plaintiff state Defendants were "acting outside the scope of their employment by grossly violating Plaintiff's rights." Dkt. 16 at 2-3. Clearly Plaintiff wants to avoid the Governmental Tort Claims Act, and the immunity given to state officials, by asserting that Defendants were outside their official capacities; but Twenty pages later, Plaintiff asserts it can maintain a claim under 70 O.S. § 2120 as Defendants were "acting in their official capacities." *Id.* at 23. While Plaintiff certainly could allege certain acts of Defendants were within one capacity, while other acts where in another, but here Plaintiff has alleged all conduct is attributable to both official and individual capacities of Defendants. That cannot be the case.[1] Either the conduct by Defendants was within their

[1] "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. *See, e.g., Ex parte New York*, 256 U.S. 490, 500–502, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. For this reason, an arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself. *E.g., Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429–430, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). Similarly, lawsuits brought against employees in their official capacity "represent only another way of pleading an action against an entity of which an officer is an agent," and they may also be barred by sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 165–166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (internal quotation marks omitted). The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Dugan v. Rank*, 372 U.S. 609, 611, 620–622, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. *Hafer,* 502 U.S., at 25, 112 S.Ct. 358. The real party in interest is the government entity, not the named official. *See Edelman v. Jordan*, 415 U.S. 651, 663–665, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). "Personal-capacity suits, on the other hand, seek to

official capacities and the University is potentially liable under § 2120, or Defendants were acting outside their official capacities and the University is not responsible for their conduct. If Plaintiff opts to pursue her claims against the University, then the Waltons should be dismissed.

CONCLUSION

Defendants respectfully request the Court dismiss the Amended Complaint.

Respectfully submitted,

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impose individual liability upon a government officer for actions taken under color of state law." *Hafer*, 502 U.S., at 25, 112 S.Ct. 358 (emphasis added); see also id., at 27–31, 112 S.Ct. 358 (discharged employees entitled to bring personal damages action against state auditor general); *cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). '[O]fficers sued in their personal capacity come to court as individuals,' *Hafer*, 502 U.S., at 27, 112 S.Ct. 358 and the real party in interest is the individual, not the sovereign. The identity of the real party in interest dictates what immunities may be available." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290–91, 197 L. Ed. 2d 631 (2017).

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2021, I electronically transmitted the attached document to the Clerk of Court using the Electronic Case Filing System for filing. Based on the records currently on file in this case, the Clerk of Court will transmit a Notice of Electronic Filing to those registered participants of the ECF System.

s/ *Michael Burrage*