THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Judge

Appellate Case No. 2022-000044
Court of Common Pleas Case No. 2020-CP-10-02726

OLIVIA M. THOMPSON, PH.D., M.P.H.,

Appellant,

v.

COLLEGE OF CHARLESTON; COLLEGE OF CHARLESTON FOUNDATION, INC.; FRANCES C. WELCH, PH.D., M.A.; GODFREY A. GIBBISON, PH.D., M.S.; AND CHRISTOPHER R. TOBIN,

Defendants,

v.

Of whom COLLEGE OF CHARLESTON AND FRANCES C. WELCH, PH.D., M.A. are Respondents.

PETITION FOR REHEARING

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Pursuant to SCACR 221(a), Appellant Olivia M. Thompson, Ph.D., M.P.H.'s ("Thompson") respectfully petitions this Court for a rehearing of its opinion filed on August 30, 2023.

Thompson respectfully submits the Court overlooked or disregarded uncontroverted evidence in the record making a *prima facie* showing Thompson will suffer irreparable harm, she is likely to succeed on the merits, and she lacks an adequate remedy at law if Respondents College of Charleston ("CofC") and Frances C. Welch, Ph.D., M.A. ("Dr. Welch") are not preliminary enjoined from violating the terms of the written Memorandum of Understanding ("MOU") they entered with Thompson concerning her faculty appointment at the CofC.

Thompson is likely to prevail on her claim the MOU is a binding contract because it contains all material terms which the parties had mutually promised to each other. The MOU nowhere states any terms are left for future resolution or that the parties must execute a more formal agreement before a binding contract is reached—*i.e.*, the MOU *is* the final expression of the parties' agreement.

Thompson will also suffer irreparable harm if Respondents are not enjoined from breaching the MOU during this action because a monetary award at the end of the case will not provide an adequate legal remedy. Thompson will be deprived of the agreed-upon benefits of her contract during the pendency of this action—*e.g.*, that her faculty appointment be in the CofC's School of Humanities and Social Sciences ("HSS"), that her faculty office be in the CofC's Joseph P. Riley, Jr. Center for Livable Communities ("Riley Center"), and that her faculty report or supervisor be Dr. Kendra Stewart. It will be difficult to calculate or compensate with money the losses Thompson will suffer because of Respondents' breaches of these provisions. How will a jury calculate the amount of money to award to Thompson because she was moved to HSS, her faculty office was moved away from the Riley Center, and her faculty report was moved away from Dr. Stewart in breach of the MOU? Neither Respondents nor this Court's Opinion attempt to answer this question.

Because Thompson will not be in HSS, her faculty office will not be in the Riley Center, and her faculty report will not be Dr. Stewart during this action if a preliminary injunction is denied, and any judgment at the end of this case could not *retroactively* reinstate her to HSS, return her to the Riley Center, or make Dr. Stewart her faculty report, and it will be difficult to calculate a monetary awards to compensate for these losses, the legal remedy is inadequate and the harm to Thompson's is irreparable.

This Court also erred as a matter of law by affirming the Circuit Court's findings that Thompson supposedly "presented no evidence to show that she should have obtained [the chairperson] position" and that the MOU's "terms do not evidence an intent to be contractually bound" when those findings are unsupported by any evidence in the record. See Opinion ¶ 3.

I. The Opinion Erroneously Held that Thompson Did Not Establish a Likelihood of Success on the Merits Sufficient to Justify the Issuance of a Preliminary Injunction.

Under South Carolina law, a party seeking to obtain injunctive relief generally must demonstrate that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. FOC Lawshe Ltd. Partnership v. International Paper Co., 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

Thompson need not prove an "absolute legal right" when seeking a preliminary injunction. She merely must present a "reasonable question" or "fair question" as to the existence of such a right. AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505, 509 (Ct. App. 2009); Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005). Courts

have broadly construed this element and a litigant is required to do little more than make a *prima facie* showing. County of Richland v. Simpkins, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002).

This Court's Opinion held "Thompson failed to demonstrate irreparable harm, a likelihood of success, and an inadequate remedy at law" sufficient to justify the issuance of a preliminary injunction. See Opinion ¶ 2. Specifically, the Court said that "Thompson failed to demonstrate that she would succeed on the merits because she has not provided any evidence [the MOU] between herself and Respondents was an enforceable contract." See Opinion ¶ 2. While the Court's Opinion makes cryptic references to cases holding that for a contract to be binding, material terms cannot be left for future agreement, that all parties must be obligated under a contract for it to be enforceable, and that the consideration for a contract cannot consist of the doing of an act which the moving party was in any event required to do as a matter of law or existing contract, the Opinion nowhere explains how or why Thompson supposedly failed to present a "reasonable question" or "fair question" that the MOU satisfies any of these requirements. As examples, the Opinion fails to give any explanation as to what material terms the MOU purportedly left for future agreement, which parties supposedly were not obligated under the MOU, and why the MOU apparently consists of the doing of an act which Thompson was already required to do. Thompson—and anyone else reading the Opinion—is left to speculate as to the basis for the Court's Opinion.

Importantly, the Court's Opinion disregards the *only* evidence that was presented to the Circuit Court on these matters. In the Circuit Court, Thompson offered her sworn affidavit, her verified or sworn motions, and her verified or sworn complaint, which is equivalent to an affidavit. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433, 437-38 (2003); Carmichael v. Oden, 2009 WL 9524614, *5 (S.C. Ct. App. 2009). In contrast, Respondents did not offer *any* affidavit, sworn

testimony, or evidence in the Circuit Court. They relied exclusively on their lawyer's arguments, which are not evidence. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

Under South Carolina law, "[a] contract is formed between two people when one gives the other sufficient consideration either to perform or refrain from performing a particular act." Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003). It is well-settled that "[m]utual promises… constitute a good consideration." Evatt v. Campbell, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959). Thompson's evidence in the Circuit Court shows that she, the CofC, and Dr. Welch all executed a written MOU dated July 17, 2014, which sets forth the mutual promises they exchanged. This MOU was signed by Thompson, Glenn McConnell (the CofC's then-President), Dr. George Hynd (the CofC's then-Provost), Dr. Jerry Hale (Dean of the CofC's HSS), and Dr. Welch (Dean of the CofC's School of Education, Health, and Human Performance ("EHHP"). The MOU also explicitly state its terms were "agree[d] to" by Thompson and each of the CofC officials. (R_071). The CofC's highest ranking officials all agreed to the MOU containing detailed stipulations "regarding *the change in the faculty appointment* of Dr. Olivia M. Thompson." (R_071-072) (emphasis added).

The MOU then sets out in considerable detail exactly what Thompson, the CofC, and Dr. Welch had mutually agreed upon. Under the MOU's express terms, Thompson, the CofC, and Dr. Welch all "agreed to" take certain detailed actions involving Thompson and her faculty appointment, including the following:

- To transfer and move Thompson from the CofC's EHHP and place her into the CofC's HSS, which removed Thompson from under Dr. Welch's supervision and placed her under the supervision of Dr. Hale.

- To move Thompson's tenure-track faculty line, faculty office, and administrative location to the CofC's Riley Center at 176 Lockwood Boulevard, Charleston.

- To have Thompson report directly to Dr. Kendra Stewart "who will serve in the functional role as [Thompson's] department chair" and who will be responsible for "conducting [Thompson's] annual evaluations."

- Thompson's "basic teaching responsibilities" will be that she teaches three courses a semester.

- "All policies and procedures relative to [Thompson's] tenure and promotion (as outlined in [the CofC's Faculty Administration Manual or "FAM"] and appropriate official communications) will need to be followed."

(R_071-072). The MOU also includes Thompson's express agreement "to all of the stipulations noted above in regard to [her] faculty line being transferred from the [EHHP] to the [HSS]." (R_072).

The MOU clearly memorializes a mutual exchange of promises among Thompson, the CofC, and Dr. Welch concerning the changes to be made to Thompsons's faculty appointment. The simple fact Thompson, the CofC, and Dr. Welch styled or labeled their agreement a "Memorandum of Understanding" does not control its enforceability. The use of mere labels such as "letter of intent" or "memorandum of understanding" is not controlling on the question of whether a binding contract exists. Burbach Broad. Co. of Delaware v. Elkins Radio Corp., 278 F.3d 401, 406 (4th Cir. 2002). Instead, the law holds an informal agreement is a binding contract when the parties intended to be bound by its terms. Oeland v. Kimbrell's Furniture Co., 210 S.C. 223, 227, 42 S.E.2d 228, 228-29 (1947); Aperm of S. Carolina v. Roof, 290 S.C. 442, 446-48, 351 S.E.2d 171, 173-74 (Ct. App. 1986); Sadighi v. Daghighfekr, 66 F. Supp. 2d 752, 762 (D.S.C. 1999). In this case, the MOU clearly evinces an intent by the parties to reach a mutually binding agreement.

The CofC's own official policies support this result. Those policies define the MOU as a contract. (R_298-303). The policies include Official Policy 2.3.1.1, which specifically addresses the nature and extent of the CofC's "contracting authority … and how it may be exercised" and states

that "[t]he term 'Contract' means all types of agreements (regardless of content or what they may be called) where there is a mutual exchange of promises or undertakings" and *"[c]ontracts may include, but are not limited to: … Memoranda of Understanding or Memoranda of Agreement …*." (R_298-303) (emphasis added). This official policy certainly is evidence the parties intended for the MOU to constitute a binding contract.

The MOU itself also states that "[a]ll policies and procedures relative to [Thompson's] tenure and promotion (as outlined in the [CofC's Faculty Administration Manual] or FAM and appropriate official communications) will need to be followed." (R_072). In other words, the MOU incorporates by reference the provisions of the CofC's FAM, which impose additional obligations and requirements upon the CofC with respect to tenured faculty members like Thompson.

In this case, the MOU clearly was supported by mutual consideration. The MOU explicitly states the mutual agreement between Thompson, the CofC, and Dr. Welch, *inter alia*, that Thompson's faculty appointment was to be changed to HSS, her faculty office was to be moved to the Riley Center, her faculty report was to be changed to Dr. Stewart, and Thompson would be required to teach three courses a semester. The MOU sets forth in considerable detail a mutually agreed upon change to the terms of Thompson's employment.

Additionally, the MOU was not simply the doing of an act which Thompson was already required to do. To the contrary, as part of the MOU, Thompson and the CofC were agreeing to do things they were not otherwise obligated to do. Prior to the MOU, Thompson was not obligated to agree to any of these changes to her faculty appointment and assignment. Respondents has never offered any testimony or evidence to the contrary. This Court's apparent finding that Thompson did not give any consideration for the MOU is flatly contradicted by the facts in the record.

Thompson's MOU with the CofC does not leave any material terms open or for future agreement. The MOU nowhere says any other terms will need to be resolved by future agreement or that the parties still need to agree upon any terms in the future. It nowhere states or implies the parties contemplated executing a more formal document in the future or that such a formal document was needed before a binding agreement was reached. Rather, by its terms, the MOU is a self-contained agreement containing no language indicating the parties intended not to be bound by the agreement until a more formal document was signed. The MOU was and is the parties' final expression of their agreement. The MOU is a binding contract.

While the MOU itself does not state a specific duration or a termination date, this term is supplied by the MOU's incorporation of the CofC's FAM.[1] As noted above, the MOU expressly incorporates the FAM and mandates that "[a]ll policies and procedures relative to [Thompson's] tenure and promotion (as outlined in [the FAM] and appropriate official communications) will need to be followed." (R_072). Thompson is a tenured faculty member of the CofC. Section VII.C.1 of the FAM governs the conditions under which a tenured faculty member's contract or faculty appointment can be altered or terminated. Thompson's verified Complaint specifically alleges the CofC did not follow the FAM when Dr. Welch unilaterally transferred Thompson's faculty appointment on August 29, 2019, in breach of the MOU. (R_034 ¶41; R_047-049 ¶92, 97-99).

South Carolina law holds a contract which provides it will terminate upon the occurrence of a specific event is not deemed perpetual or indefinite in duration and is not terminable at will. Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 392, 503 S.E.2d 184, 188 (Ct. App. 1998). A future specific event, and not just a calendar date, will qualify as a termination date. Id. at

392, 503 S.E.2d at 187-88; see also Premier Holdings, LLC v. Barefoot Resort Golf Club II, LLC, No. 2008-UP-336, 2008 WL 9843982, at *2 (S.C. Ct. App. July 2, 2008) ("[T]he requirement of a specific duration for the enforcement of a contract is not limited solely to a calendar date, but may be provided upon the occurrence of a specific event.").

In Prestwick Golf, this Court held that an agreement involving golf tee-time schedules was not perpetual in duration when the evidence showed the agreement would end once the membership of the club reached 550 memberships, if and whenever that occurred. 331 S.C. at 392, 503 S.E.2d at 187. The Court held that "[j]ust because the rights of the parties were keyed to membership levels rather than calendar time does not mean that the schedule should be considered an indefinite period." Id. at 392, 503 S.E.2d at 187-88. Similarly, in Premier Holdings, the owner of the Barefoot golf course entered an agreement giving the plaintiff control of tee times for the golf course. In a subsequent breach of contract case brought by the plaintiff, the owner argued the agreement "was not an enforceable contract because it lacked material terms, specifically, a contract duration." 2008 WL 9843982 at *1. This Court rejected this argument and held "the duration of the contract was 'for as long as' [the plaintiff] continued doing business at Barefoot." Id.; Dobyns v. S.C. Dep't of Parks, Recreation & Tourism, 325 S.C. 97, 100, 480 S.E.2d 81, 83 (1997) (tenants' right to renew lease was not perpetual when it was agreed they could renew their leases so long as they live).

In the present case, the MOU was to continue in effect provided Thompson's contract was not terminated or altered in accordance with the provisions in the CofC's FAM. The FAM, which is part of Thompson's contract with the CofC as a tenured professor, includes specific provisions governing the termination or alteration of her contract. Under the FAM, Thompson's contract with

[1] The FAM is considered part of Thompson's Complaint because it is incorporated therein by reference. See S.C. R. CIV. PRO. 10(c); Carolina First Corp. v. Whittle, 343 S.C. 176, 190 n.7, 539

the CofC continues until either she retires or she is terminated for "adequate cause." The FAM mandates that termination of a tenured faculty member for cause shall be preceded by written notification of the proposed dismissal. By setting forth the circumstances governing the termination of Thompson's contract as a tenured faculty member—either Thompson's retirement or her termination for adequate cause—the FAM establishes a specific event on which Thompson's faculty appointment and tenure as a professor will terminate, such that the MOU is not deemed to be indefinite or perpetual in duration and is not terminable at will.

Thompson has never agreed to modify or waive the terms of the MOU. The CofC has offered nothing to contradict the terms of the MOU, which were specifically agreed to and executed by Thompson, Dr. Welch, and the CofC's President, Provost, and Dean of HSS. This Court's Opinion is erroneous to the extent it can be construed as a finding that the MOU is not a binding agreement. It must be kept in mind that Thompson is not required to prove an "absolute legal right" to obtain a preliminary injunction, but must only present a "reasonable question" or "fair question" as to the existence of such a right." AJG Holdings, 382 S.C. at 43, 674 S.E.2d at 509; Peek, 367 S.C. at 456, 626 S.E.2d at 37. Thompson met this burden. The Court erred by holding that Thompson did not make a sufficient showing of likelihood of success on the merits to justify the issuance of a preliminary injunction enforcing the obligations imposed by the MOU.

II. The Opinion Erroneously Held that Thompson Did Not Establish Irreparable Harm or an Inadequate Remedy at Law Sufficient to Justify the Issuance of a Preliminary Injunction.

"[T]he issues of irreparable harm and adequacy of remedies at law are inextricably intertwined." ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc., 694 F.3d 1312, 1337 (Fed. Cir. 2012); see MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 569 (E.D. Va. 2007)

S.E.2d 402, 410 n.7 (Ct. App. 2000).

("The irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin."). "Irreparable injury means that the injunction is reasonably necessary to protect the rights of the plaintiff pending the litigation." JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 508 (2nd ed. 1996). "Generally, 'irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.'" Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994).

"[W]hether there is an adequate remedy at law for a wrong, [is a] question[] that [is] not decided by narrow and artificial rules." Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13, 15 (1939). "The adequacy of a legal remedy is a pragmatic determination based upon the certainty of fixing damages, the practicality of obtaining relief, and the efficiency of the legal remedy in the particular circumstances." FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE p. 508. In Columbia Broadcasting Sys., Inc. v. Custom Recording Co., 258 S.C. 465, 189 S.E.2d 305 (1972), the South Carolina Supreme Court stated:

> [I]f the available legal remedy in a given case reduces itself to a matter of words, rather than to a matter of efficacy, because of its impracticability, or because the threatened acts may continue during the progress of an action at law, or because successive actions at law would be necessary to protect the plaintiff's rights, equity will hold that the existence of the legal remedy is not an obstacle to the exertion of the equitable power.

258 S.C. at 478, 189 S.E.2d at 312 (quoting Kirk).

This Court's Opinion held that "Thompson failed to demonstrate irreparable harm and an inadequate remedy at law because she is not at risk of a complete loss of her professional practice, and the injuries she alleged can be remedied by monetary damages or an order of the circuit court." See Opinion ¶ 2. The Court implies the only way Thompson could establish irreparable harm is if she proves she was at risk of completely losing her faculty appointment or professional livelihood.

It is unnecessary for Thompson to show she is at risk of a complete loss of her livelihood to warrant injunctive relief enforcing her contract with the CofC. Notably, our state supreme court held a preliminary injunction was appropriate to restrain an employee's breach of obligations imposed by an employment contract even though the employer made no showing or claim that it would fail or go out of business in the absence of an injunction. See, e.g., Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983) (covenant not to compete). Instead, the rationale supporting decisions like Rental Unif. Serv. is that it would be too difficult to attempt to calculate the losses resulting from the employee's breach of the employment contract after-the-fact, thus the legal remedy of a monetary award is considered inadequate and the harm irreparable. Accordingly, the Court issues an injunction to prevent the harm before it occurs. The same reasoning applies will equal force here.

Numerous other courts have specifically held that an employee's *potential* loss of employment opportunities short of the employee's complete loss of their livelihood or profession constitute irreparable harm. See Hisp. Nat'l L. Enf't Ass'n NCR v. Prince George's Cty., No. CV TDC-18-3821, 2021 WL 1575772, *23 (D. Md. Apr. 21, 2021); Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014); Manlove v. Volkswagen Aktiengesellschaft, No. 1:18-CV-145, 2019 WL 2291894, at *14 (E.D. Tenn. May 17, 2019); Tanner v. Fed. Bureau of Prisons, 433 F. Supp. 2d 117, 125 (D.D.C. 2006); Allied Const. Indus. v. City of Cincinnati, No. 1-14-CV-450, 2014 WL 2931421, at *15 (S.D. Ohio June 30, 2014); 35 New York City Police Officers v. City of New York, 819 N.Y.S.2d 852 (N.Y. Sup. Ct. 2006).

In Johnson v. City of Memphis, 444 F. App'x 856 (6th Cir. 2011), for instance, in specifically rejecting the claim that any injury the employees could "suffer in the absence of the injunction can be compensated by money damages," the court held that "[w]ithout the preliminary injunction, lost

work experience and the opportunity to compete for promotions would be actual and imminent for" the employees and that "[b]ack pay could remedy [the employees'] injuries due to lost income alone, but the loss of experience and chances to compete for promotions are not easily valued." Id. at 860; see also; Howe v. City of Akron, 723 F.3d 651, 662 (6th Cir. 2013) (delays in promotions would cause irreparable harm to employees because, "without promotions, Plaintiffs will be unable to gain experience and unable to seek the next rank during the following round of testing").

Thompson demonstrated several different forms of irreparable harm she will suffer if an injunction is not granted. First, she showed that she will be deprived of the contractual benefits and protection of the MOU which she negotiated with the CofC. The MOU is a binding contract between Thompson and the CofC. Under its terms, the CofC agreed to transfer Thompson from the EHHP and place her in the HSS. (R_030 ¶26-27; R_116; R_221 ¶5). The MOU mandates that Thompson will report directly to Dr. Stewart, who will serve as her Department Chairperson, and that Thompson's faculty office and grant-related offices will be moved to the CofC's Riley Center. The MOU's purpose was to remove Dr. Welch from having any supervision or authority over Thompson or her tenure-track given Dr. Welch's prior history of retaliating against Thompson and to prevent Dr. Welch from retaliating against Thompson and interfering with her grant work in the future. (R_029-030 ¶23; R_220 ¶4).

If an injunction is not granted, Thompson will be denied the benefits and protections of this contract and she will be forced to again endure further retaliation, harassment, and intimidation by Dr. Welch. Brandt v. Gooding, 368 S.C. 618, 629, 630 S.E.2d 259, 265 (2006) (holding that issuance of a restraining order was necessary to prevent party from harassing other parties during the litigation). Thompson will be denied her placement and tenure in the CofC's HSS, which is where the MOU required that Thompson be transferred to remove her from under Dr. Welch's supervision.

Thompson will be deprived of the ability to report directly to Dr. Stewart who "will serve in the functional role as [Appellant's] department chair" and who will be responsible for "conducting [Thompson's] annual evaluations." (R_071-072).

Rather than having her placement and tenure under Dr. Stewart's supervision, Thompson will have to endure placement and supervision under Dr. Welch, the very same person who has been retaliating against, harassing, and intimidating her for years. The deprivation of Dr. Stewart's supervision and the forced placement under Dr. Welch's supervision is not something that can be easily measured in monetary terms. Neither this Court's Opinion nor the Respondents' brief have ever attempt to explain how this harm can be remedied by a monetary award or how such a monetary award could be measured or calculated.

Second, unless an injunction is granted, Thompson will be deprived of her faculty office in the Riley Center, she will be removed from the Riley Center website and building directory, and she will be relocated to the Silcox Building. The Silcox Building is located at 24 George Street on a different campus, roughly two miles away from the Riley Center located at 176 Lockwood Boulevard. Thompson documented the glaring differences in the quality and conditions of the offices at the Riley Center and the Silcox Building in her verified motion and with photographs. (R_138; R_162-179; R_181-186). The Riley Center is a new state-of-art office facility in impeccable condition. In stark contrast, the Silcox Building is an old building in a deplorable condition, is in a state of disrepair, and is undergoing substantial construction and renovation work, including a new roof, new windows, and new HVAC air handlers and ductwork. (R_137-139). The Silcox Building has asbestos ceiling tiles that are damaged, dislodged, and missing allowing asbestos fibers to become airborne and inhalable. Id. The office in the Silcox Building that Thompson was told to occupy does not have functioning heat/air conditioning or hot or tepid water in any of the nearby

restrooms. Id. The CofC's Facilities Management Department informed Thompson that no one should be working in the building because of the unsafe and unworkable conditions caused by the construction, noise, dust, etc. (R_138-139; R_188).

If Respondents are not enjoined, Thompson will suffer interference with her ability to perform her responsibilities as a tenured Associate Professor at the CofC, including the inability to conduct in-person meetings with students and others in her faculty office in the Riley Center (which is where she was to be assigned under the MOU) and her inability to access and use the equipment and facilities that come with this office location. She will be relocated from the Riley Center to an inferior office location at the Silcox Building despite the deplorable, unhealthy, unsafe, and unworkable conditions that exist there. She will suffer injury to professional standing associated with such a demotion to an inferior office location and mental distress, embarrassment, humiliation, and indignity based on such a transfer of her faculty appointment in violation of the MOU.

Thompson seeks an injunction in part because the CofC is disregarding the MOU's requirement that Thompson's faculty office and grant-related offices be placed in the Riley Center and because Dr. Welch is unilaterally moving Thompson's office to a different building miles away that is dilapidated and has unsafe, unhealthy, and unworkable conditions. Court have held that an unlawful employment action "does not require loss of money or benefits but rather may consist of changes in location, duties, perks, or other basic aspects of the job" and that "[a]ssigning an employee to an undesirable schedule can be more than a 'trivial' or minor change in the employee's working conditions." Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 788 (3d Cir. 1998). In Collins v. State of Ill., 830 F.2d 692 (7th Cir. 1987), the Court ruled that "adverse job action is not limited solely to loss or reduction of pay or monetary benefits," but "can encompass other forms of

adversity" including "an employer's moving an employee's office to an undesirable location" and "transferring an employee to an isolated corner of the workplace." Id. at 703 (citing cases).

In May v. Trustees of California State Univ., No. H024624, 2005 WL 459556 (Cal. Ct. App. Feb. 28, 2005), in a factual situation similar to the present case, the Court held a university had unlawfully retaliated against a professor when the university's president ordered the professor's office be moved out of a "high-tech building of classrooms and offices" and relocated to an "isolated building" with "no drinking water," "no operational office equipment," and which "was not refurbished" and "lacked proper ventilation." Id. at *1-2, 13; see also Pellei v. International Planned Parenthood Federation, No. 96 Civ. 7014, 1999 WL 787753 at *12-13 (S.D.N.Y.1999) (employee's reassignment to a "small, poorly lit, isolated cubicle" constituted unlawful retaliation); Langley v. Merck & Co., 186 F. App'x 258, 261 n.3 (3rd Cir. 2006) (moving a person's office to an undesirable location could, under certain circumstances, constitute an adverse employment action); Lorenzo v. St. Luke's-Roosevelt Hosp. Ctr., 837 F. Supp. 2d 53, 69 (E.D.N.Y. 2011) (relocation of employee "from a private office to an open cubicle setup" was adverse employment action); Neal v. Daily's Juice, No. CIV.A. 07-1497, 2009 WL 331591, at *3-5 (W.D. Pa. Feb. 10, 2009) (employer's actions in relocating employee to facilities with "deplorable working conditions," including moving employee's office to "the back of a tractor-trailer" with "no light except for sunlight" and that "leaked water and had no heat" and to an office "the equivalent of a broom closet," constituted unlawful employment discrimination).

This Court's Opinion assumes that any harm Thompson will suffer from the relocation of her office can be remedied at trial with an award of monetary damages. Yet, the Court's Opinion does not explain how a jury would calculate such a monetary award for the loss of this intangible job benefit. The loss of a faculty office is not easily measured in monetary terms although it can have

great value or benefit to the affected faculty member. Courts have recognized that "[a] private office is a valuable commodity." Lorenzo, 837 F. Supp. 2d at 69. But the loss of an office is not a loss of money. Although a jury could order that Thompson be returned to her office at the Riley Center, they could not do so retroactively. Their verdict would only operate prospectively. The Court's Opinion nowhere explains how the jury could measure in monetary terms the harm to Thompson caused by her removal from the Riley Center and her forced relocation to the Silcox Building. It is precisely because such intangible job losses are not easily remedied by a monetary award that irreparable harm will occur. Arizona Dream, 757 F.3d at 1068 ("Because intangible injuries generally lack an adequate legal remedy, 'intangible injuries [may] qualify as irreparable harm.'").

Third, if Respondents are not enjoined, Thompson will also be denied the opportunity to apply for and obtain the merit pay increase awarded to other faculty members. Because of the discretion involved in awarding a merit increase to a particular faculty member—the increases range from 4% to 15% of the faculty member's annual salary—it will not be easy to calculate the financial loss to Thompson after the fact if she is not considered for the merit increase.

This Court's Opinion again surmises this injury can easily be remedied by money damages even though the Opinion never addresses the important issue of the difficulty in calculating such damages. Merit pay increases are not the same for each employee. Faculty members who qualify for merit pay receive an increase in pay ranging from 4% to 15% of their annual salary. (R_238 ¶7). The Court nowhere explains how any fact-finder can ascertain whether Thompson's merit pay increase should be set at 4%, 15%, or some other percentage. Additionally, the loss of the merit pay increase will have a cascading effect because such increases are incremental each year and are based on a percentage of the employee's prior year's salary. The loss of a pay increase for this year reduces the pay increase that Thompson can receive next year, which in turn reduces the pay increase that

Thompson can receive each successive year. The uncertainty of fixing damages renders a potential monetary recovery an inadequate remedy.

Finally, unless an injunction is granted, Thompson will be deprived of the opportunity to be considered for the HEHP Chairperson position and the resulting increase in standing, professional reputation, notoriety, prestige, experience, and good will that accompanies such a change in status. The value of this increase in professional standing is difficult to measure in monetary terms, thus its loss is irreparable. Levine v. Spartanburg Reg'l Servs. Dist., Inc., 367 S.C. 458, 463, 626 S.E.2d 38, 42 (Ct. App. 2005) (holding that physician's loss of competency if she were unable to ply her trade as the lawsuit progressed was irreparable harm and justified preliminary injunction restraining hospital from terminating her hospital privileges); see also IAC, Ltd. v. Bell Helicopter Textron, Inc., 160 S.W.3d 191, 200 (Tex. Ct. App. 2005) ("Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.").

This Court's Opinion again overlooks or disregards the intangible enhancement to status and importance to professional advancement that the Chairperson position would confer on Thompson. In Bryson v. Chicago State Univ., 96 F.3d 912 (7th Cir.1996), while holding that a tenured professor's loss of an unofficial "in-house title" and her membership on university committees constituted an adverse employment action, even though her duties, rank, or salary had not changed, the Court noted that the title "would communicate to others both within the State Colleges and Universities system and outside it what kind of responsibilities had been entrusted to her" and that committee work "is often a prelude to an administrative career." Id. at 916; see also Goodwin v. Circuit Court of St. Louis County, Mo., 729 F.2d 541, 547 (8th Cir. 1984) (employee's transfer, with the same pay, from one position to another was adverse because the new position was less

prestigious); de la Cruz v. New York City Human Resources Admin., 82 F.3d 16, 21 (2d Cir.1996) (employee's transfer without any cut in pay constituted adverse employment action because it moved him from an "elite" division of employer, which provided prestige and opportunity for advancement, to a less prestigious unit).

Even if a jury orders that Thompson should be placed in the Chairperson position down the road after a trial on the merits is held, such a ruling would do nothing to compensate Thompson for the loss of the position during the period spanning from June 2021 (when the position was set to be filled) until the date of the Court's judgment (which is yet unknown but is already twenty-seven months later as of the filing of this Petition). During this period, Thompson will be deprived of the increase in standing, professional reputation, notoriety, prestige, experience, and good will associated with the HEHP Chairperson position. This delay in promotion and the loss of the enhanced status it entails is difficult to measure in monetary terms, thus its loss is irreparable. Levine, 367 S.C. at 463, 626 S.E.2d at 42 (loss of competency that would result from being denied position during pendency of litigation was irreparable harm); Brinkley v. Bd. of Comm'rs of Franklin Cty., Ohio, No. 2:12-CV-00469, 2013 WL 394158, at *7 & n.9 (S.D. Ohio Jan. 29, 2013); Hisp. Nat'l, 2021 WL 1575772 at *23; 35 New York City Police Officers, 819 N.Y.S.2d at *3.

Thompson demonstrated she has no adequate remedy at law for the harm or damage done or threatened to be done by the Respondents. Even if a judgment is entered in Thompson's favor following a trial on the merits, the Court wouldn't be able to undo the actions that will have already transpired since this lawsuit was filed. A jury could not *retroactively* return Thompson to the CofC's HSS, *retroactively* put her under Dr. Stewart's supervision or *retroactively* have Dr. Stewart perform Appellant's annual evaluations, or *retroactively* return Thompson to her office in the Riley Center even as part of a judgment in her favor. Awarding money damages over those issues would be

difficult to calculate or award. As a result, a jury verdict would be inadequate to compensate Thompson for the loss of these benefits of the MOU.

The Court erred in holding that money damages will adequately compensate Thompson for the harm the Respondents have caused and will continue to cause to her. Many of the injuries suffered or to be suffered by Thompson cannot readily be remedied by a monetary judgment after waiting for a trial on the merits. The Court erred by holding that Thompson did not make a sufficient showing of irreparable harm or an inadequate remedy at law to justify the issuance of a preliminary injunction enforcing the obligations imposed by the MOU.

III. The Opinion Erroneously Affirmed the Circuit Court's Factual Findings That Are Unsupported by Evidence in the Record.

"An abuse of discretion occurs when the [trial court's] ruling is based on an error of law or a factual conclusion without evidentiary support." Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); see Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 37, 691 S.E.2d 135, 143 (2010) ("An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law.").

This Court's Opinion upheld the Circuit Court's findings that Thompson purportedly "has presented no evidence to show that she should have obtained [the HEHP Chairperson] position" for which Dr. Welch refused to even consider her application (R_013), and the MOU "do[es] not evidence an intent to be contractually bound to specific, enforceable obligations" (R_014). See Opinion ¶ 3. This Court's Opinion states in conclusory fashion that these findings "are supported by evidence in the record," yet the Opinion nowhere cites to any actual evidence anywhere in the record which actually supports those findings. Id. Thompson is again left to guess as to what evidence supposedly supports the Circuit Court's findings.

Thompson respectfully submits these factual findings are unsupported by any affidavit, testimony, or other evidence in the record. Instead, these purported factual findings are derived entirely from arguments made by Respondent's legal counsel, which are not evidence. In their appellate brief, Respondents themselves did not even attempt to cite any evidence in the record supporting these purported facts. They merely argued the inclusion of these findings in the Circuit Judge's Order was harmless. See Resp' Brief p.42.

With respect to the Circuit Judge's findings as to Thompson's qualifications for the HEHP Chairperson position, Thompson's own affidavit states she is more qualified for the position than the only other person (Dr. Pfile) whose application Dr. Welch would consider. (R_237 ¶6; R_148). Respondents offered nothing to contradict this affidavit. The absence of contradictory evidence is not evidence.

With respect to the Circuit Judge's finding that Thompson and the CofC did not intend for the MOU to be an enforceable contract, the only evidence in the record was that the CofC and Thompson *did* intend for the MOU to be a binding contract. (R_071-072; R_029-030 ¶20-23; R_114; R_220-212 ¶4-6). As the MOU's terms make explicit, Thompson, Dr. Welch, and the CofC's highest ranking officials all "agree[d] to" its terms. (R_071). Nothing in the MOU says that those parties intended for the document to be non-binding or unenforceable. Nothing in the MOU states it will not be binding until a more formal document is executed. The CofC's own official policies define the MOU as a contract. (R_298-303). There is no evidence in the record (or in the MOU itself) showing the parties did not intend to be contractually bound by its terms.

This Court erred by affirming the findings in the Circuit Court's Order that are unsupported by evidence in the record. These findings should be stricken from the Order.

CONCLUSION

For the forgoing reasons, Thompson respectfully submits the Court has overlooked or disregarded uncontroverted evidence in the record. The Court further erred as a matter of law by affirming the Circuit Court's factual findings which are unsupported by evidence in the record. Thompson respectfully submits the Court's Opinion is erroneous, a rehearing should be granted, and the Circuit Court's Orders should be reversed.

Respectfully submitted,

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September 14, 2023.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Judge

Appellate Case No. 2022-000044
Court of Common Pleas Case No. 2020-CP-10-02726

OLIVIA M. THOMPSON, PH.D., M.P.H.,

Appellant,

v.

COLLEGE OF CHARLESTON; COLLEGE OF CHARLESTON FOUNDATION, INC.; FRANCES C. WELCH, PH.D., M.A.; GODFREY A. GIBBISON, PH.D., M.S.; AND CHRISTOPHER R. TOBIN,

Defendants,

v.

Of whom COLLEGE OF CHARLESTON AND FRANCES C. WELCH, PH.D., M.A. are Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Respondents by mailing copies to their attorneys of record on September 14, 2023, by United States first-class mail, with sufficient postage affixed thereto, and addressed as follows:

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