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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

South Carolina Court of Appeals Appellate Case No. 2022-000044
Opinion No. 2023-UP-301 (S.C. Court of Appeals filed August 30, 2023)
Court of Common Pleas Case No. 2020-CP-10-02726

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

Petitioner,

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 A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner Olivia M. Thompson, Ph.D., M.P.H. ("Petitioner") certifies the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 2, 2023. (App. 56-57).[1]

QUESTIONS PRESENTED

I. Did the Court of Appeals and Circuit Court err by denying Petitioner's preliminary injunction motions when Petitioner made a *prima facie* showing she will suffer irreparable harm, she is likely to succeed on the merits, and she lacks an adequate remedy at law if Respondents are not enjoined from breaching her employment contract?

II. Did the Court of Appeals err by affirming the Circuit Court's factual findings which are unsupported by testimony, affidavit, or other evidence in the record?

INTRODUCTION

This Petition raises novel issues under our state law. First, it involves what standard an employee must satisfy to establish irreparable harm or inadequacy of a legal remedy to obtain a preliminary injunction restraining her employer from breaching her employment contract; specifically, whether the employee must show she is at risk of completely losing her job or professional livelihood. Second, it concerns whether a money judgment in favor of an employee is an adequate legal remedy when the injury involves the loss of intangible job benefits that are difficult to quantify or ascertain. Our state courts have yet to resolve these important questions.

Petitioner is a tenured professor at Respondent College of Charleston ("CofC"). On July 17, 2014, due to serious retaliation and harassment Petitioner had endured from her department Dean, Frances C. Welch, Ph.D., M.A. ("Welch"), the CofC and Petitioner entered a written contract to diffuse the situation and to eliminate further conflicts between Petitioner and Welch.

[1] Citations to the pagination of the Record on Appeal filed in the Court of Appeals are referred to herein as "R. __" and citations to the Appendix in this Court are referred to as "App. __."

This contract, which was styled a Memorandum of Understanding ("MOU"), expressly requires that Petitioner be moved to another department not under Welch's supervision. It further mandates that Petitioner's tenure-track faculty line, faculty office, and administrative location be moved to the CofC's Joseph P. Riley, Jr. Center for Livable Communities ("Riley Center") and that Petitioner be under the supervision of Dr. Kendra Stewart.

Petitioner and the CofC implemented this contract and initially carried it out. Indeed, Petitioner was thriving under the contract for several successful years without interference by Welch. In 2019, however, after the CofC elevated Welch to Interim Provost, Welch then unilaterally changed Petitioner's faculty assignment without her consent and unilaterally transferred Petitioner back to a department under Welch's own supervision. Welch then reinitiated a campaign of retaliation against Petitioner in addition to interfering with a lucrative grant program funded by the Boeing Company and directed by Petitioner. Welch's interference ultimately caused Boeing to irretrievably withdraw its funding for the program, which had paid a significant portion of Petitioner's salary. Petitioner has lost this portion of her salary.

Petitioner filed this action to enforce her employment contract with the CofC, to enjoin Welch from further retaliation and harassment against her, and to recover damages for the interference with her grant program. Notwithstanding this action, the CofC and Welch continued to retaliate against and harass Petitioner even while this litigation was ongoing.

After this suit was filed, the CofC and Welch arbitrarily excluded Petitioner from consideration for a vacated department chairperson position on a trumped-up claim she missed an unpublished application deadline; unilaterally relocated Petitioner's physical faculty office away from the Riley Center and banished her to a less desirable building located miles away that is in a deplorable and dilapidated condition, is in a state of disrepair and is unsafe, and is

undergoing substantial construction and renovation work (including asbestos remediation); unilaterally removed Petitioner from her office building's website and directory as well as the CofC's Public Health Program website and online directory making it appear Petitioner was no longer a professor at the CofC; physically barred Petitioner from having access to her faculty office and had security officers physically remove her from the building when she tried to access her office; and failed to notify Petitioner of and refused to consider her for a merit pay raise offered to other faculty members and for which Petitioner was eligible to receive.

As a result of the above, Petitioner filed a Motion for Preliminary Injunction in the Circuit Court on April 2, 2021. When the CofC and Welch continued to retaliate against Petitioner even after that motion was filed, Petitioner then filed a Supplemental Motion for Preliminary Injunction on July 9, 2021. These two motions sought an order preliminarily enjoining the CofC and Welch from breaching the terms of Petitioner's employment contract, to stop the constant and ongoing retaliation and harassment against Petitioner, and to maintain or restore the status quo that had existed before the events addressed in the motions occurred.

The Circuit Court denied Petitioner's motions in an order drafted entirely by Respondent's counsel. The Court of Appeals affirmed in result even though it reversed portions of the Circuit Court's findings on the grounds they were unsupported by any evidence. (App. 1-4). The Court of Appeals stated two reasons for its affirmance. First, it said Petitioner "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." (App. 3). Second, the court held Petitioner "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." Id.

This Petition raises at least two novel issues under current state law. First, it argues irreparable injury is present and the legal remedy is inadequate in this case because monetary damages would be difficult to determine or ascertain given the intangible nature of the losses to be sustained by Petitioner. Federal courts have adopted this reasoning. See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551-52 (4th Cir. 1994) ("Generally, 'irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.'" (quoting Danielson v. Local 275, 479 F.2d 1033, 1037 (2nd Cir. 1973)); Uhlig, LLC v. Shirley, No. 6:08–cv–01208, 2012 WL 2458062, at *3 (D.S.C. June 27, 2012) ("Where monetary damages are difficult to ascertain, remedies at law are generally inadequate."). However, our state appellate courts have yet to directly address that question.

Second, the Petition argues it was unnecessary for Petitioner to prove she was at risk of completely losing her faculty appointment or professional livelihood to establish irreparable harm or inadequacy of a legal remedy. Numerous other courts have held an employee's potential loss of employment opportunities short of the employee's complete loss of their livelihood or profession can satisfy this showing. 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); Brinkley v. Bd. of Comm'rs of Franklin Cty., No. 2:12-CV-00469, 2013 WL 394158, at *7 (S.D. Ohio Jan. 29, 2013); 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); Robinson v. D.C. Gov't, No. CIV. A. 97-787 (GK), 1997 WL 607450, at *8 (D.D.C. July 17, 1997); 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). Again, our state courts have yet to address that important question.

For the reasons discussed below, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals in accordance with SCACR 242.

STATEMENT OF THE CASE AND FACTS

Since August 2011, Petitioner has been employed full-time by the CofC as a faculty member, and currently is a tenured Associate Professor. (R_027 ¶11; R_112). Prior to August 16, 2014, Petitioner's faculty appointment was in the CofC's School of Education, Health, and Human Performance ("EHHP"), which placed her under the direction and supervision of Welch, as the Dean of EHHP. (R_028 ¶14; R_112).

On July 17, 2014, because Welch had been interfering with and undermining Petitioner's Boeing-funded grant work and had unsuccessfully attempted to block Petitioner's tenure and promotion, the CofC and Petitioner executed a written agreement to resolve the issues and eliminate any further conflicts between Petitioner and Welch. (R_027-029 ¶14-23; R_112-14; R_220-21 ¶4). This contract is labeled a MOU, which the CofC's official policies define as a contract. (R_029 ¶20; R_071-072; R_114). Under the MOU's terms, the CofC and Petitioner mutually "agreed to" take certain actions involving Petitioner's faculty appointment, including:

- To transfer Petitioner from the EHHP and put her in the CofC's School of Humanities & Social Sciences ("HSS"), which removed Petitioner from under Welch's supervision.
- To move Petitioner's tenure-track faculty line, faculty office, and administrative location to the CofC's Riley Center at 176 Lockwood Boulevard, Charleston.
- To have Petitioner report directly to Dr. Stewart "who will serve in the functional role as [Petitioner's] department chair" and who will be responsible for "conducting [Petitioner's] annual evaluations."
- Petitioner's "basic teaching responsibilities" will be that she teaches three courses a semester.

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

The MOU was designed to relieve Petitioner of any further accountability to Welch, to remove Welch from supervision over Petitioner or her tenure-track, and to prevent Welch from retaliating against Petitioner and interfering with her grant work. (R_029-030 ¶23; R_116; R_221 ¶6). In accordance with the MOU, the CofC transferred Petitioner from the EHHP and placed her in the HSS effective on August 16, 2014. (R_030 ¶26-27; R_116; R_221 ¶7). Petitioner reported directly to Dr. Stewart, who served as her Department Chair, and Petitioner's tenure-track faculty line, faculty office, and grant-related offices were moved to and administratively housed in the Riley Center, which is within the CofC's HSS, not the EHHP. Id.

Petitioner thrived under the MOU for several years. She successfully secured more than $2 million in grant funds from Boeing. (R_027 ¶12; R_112). On March 15, 2017, Petitioner was awarded tenure and promotion to the rank of Associate Professor within the Riley Center. (R_112). On August 28, 2018, due to Petitioner's efforts, Boeing agreed to make a $250,000 grant for a project to be conducted by Petitioner entitled "Veterans Fellowship Program in Sustainable Food Systems" ("SFS Program"). (R_031 ¶28; R_117-118). The program was to be perpetual and to fund 25% of Petitioner's annual salary and benefits. (R_032-033 ¶35).

The situation, however, quickly deteriorated soon after Dr. Andrew Hsu (the CofC's newly appointed President) appointed Welch as Interim Provost and Executive Vice President for Academic Affairs effective May 16, 2019. (R_033-034 ¶36-41; R_119; R_222 ¶8). Soon thereafter, on August 29, 2019, despite Petitioner's MOU and without prior consultation with Petitioner, Welch unilaterally transferred Petitioner from HSS back to EHHP and into EHHP's Department of Health and Human Performance ("HEHP"), thereby removing Petitioner from Dr.

Stewart's report and again placing her under Welch's supervision. Id.

Welch again began retaliating against Petitioner and interfered with her SFS Program. (R_037-043 ¶53-71; R_059 ¶ 131; R_124-130). In late 2019 and early 2020, Petitioner repeatedly requested a meeting with Dr. Hsu to demand that Welch's retaliation against her and Welch's interference with the SFS Program immediately stop. (R_043-044 ¶72-74; R_130). Petitioner warned the CofC that Welch's conduct was jeopardizing Boeing's funding for the SFS Program as well as Boeing's relationship with Petitioner and the CofC. Id. However, President Hsu refused to meet with Petitioner or to take any action. Id.

On March 17, 2020, as Petitioner feared, Boeing irrevocably withdrew its grant funding for the SFS Program. (R_042 ¶70; R_44-045 ¶76-79; R_046 ¶82; R_131-132; R_222 ¶9). Boeing terminated its grants with the CofC, thereby causing monetary harm, reputational harm, loss of professional prestige and standing, and other damages to Petitioner. Id.

On June 24, 2020, by verified Complaint, Petitioner commenced this action against the Respondents. (R_024-073). Even after the suit was filed, the CofC and Welch continued to engage in constant retaliation against Petitioner. After this action was filed, the CofC and Welch:

- arbitrarily excluded Petitioner from consideration for a vacant department chairperson position and awarded the position to an individual less experienced and less qualified than Petitioner, thus depriving Petitioner of the enhancement in standing and prestige as well as the increase in compensation and salary associated with the promotion (R_134-136; R_146-160; R_237 ¶6; R_351-352);
- for no academic or administrative need, unilaterally relocated Petitioner's physical office away from the new state-of-art Riley Center and banished her to a completely different building known as the Silcox Building located miles away

that is in a delipidated and deplorable condition, is in a state of disrepair and is unsafe, and is undergoing substantial construction and renovation work (including asbestos remediation) and which does not have functioning heat/air conditioning or hot or tepid water in any of the nearby restrooms (R_137-140; R_162-179; R_181-189; R_191-192; R_194);

- unilaterally removed Petitioner from her office building's website and directory as well as from the CofC's Public Health Program website and online directory without her knowledge making it appear she was no longer a professor at the college (R_137-138); and
- physically barred Petitioner from having access to her faculty office and had three security officers from the CofC's Department of Public Safety ("DPS") physically escort Petitioner from her office and building and directed her not to return to her office after they performed a physical search of Petitioner's purse and belongings and treated her as if she were a thief (R_223-229 ¶¶11-25; R_235).

As a result of the above, Petitioner filed a verified Motion for Preliminary Injunction in the Circuit Court on April 2, 2021, to restrain and enjoin the CofC and Welch. (R_110-194). On July 9, 2021, following the events at the Riley Center, Petitioner filed a verified Supplemental Motion for Preliminary Injunction and later an affidavit seeking, *inter alia*, an order preventing the CofC from denying Petitioner access to her faculty office in the Riley Center. (R_218-244 ¶20). Despite these motions, the CofC continued to retaliate against Petitioner. (R_238 ¶7). On July 31, 2021, the CofC intentionally failed to notify Petitioner of and refused to consider her for a merit raise ranging between 4-15% of annual base salary that was offered to other faculty members and for which Petitioner was eligible. (R_238-239 ¶¶8-10; R_242-244).

On November 2, 2021, Judge Young conducted a virtual hearing on Petitioner's motions. (R_304-340). Due to time constraints, Judge Young abbreviated the hearing and directed both sides to submit proposed Orders containing their respective positions. (R_335-336). He effectively had the parties argue their respective positions to him in the form of proposed Orders.

The parties submitted their respective proposed Orders on November 10, 2021. (R_355-380; R_381-392). On November 12, 2021, Judge Young adopted verbatim the proposed Order submitted by Respondents' counsel without any changes and denied both of Petitioner's motions. (R_004-015; R_381-392). Petitioner moved to alter or amend the Order. (R_279-303). However, Judge Young denied that motion without a hearing on December 16, 2021. (R_021-023).

On January 13, 2022, Petitioner appealed the Circuit Court's Orders to the Court of Appeals. (R_407-413). On August 30, 2023, without oral argument, the Court of Appeals issued an unpublished opinion affirming portions of Judge Young's Orders while reversing other portions. (App. 1-4). The court held Judge Young "abused [his] discretion in finding a prior Form 4 order denying [Petitioner's] first motion for preliminary injunction decided the merits of her second and third motions for preliminary injunction" and it also reversed several of his factual findings. (App. 2-3). However, it held Judge Young's errors were "harmless." Id.

On September 14, 2023, the Petitioner filed a Petition for Rehearing. (App. 5-28). On September 15, 2023, the Court of Appeals requested that Respondents file a Return to the Petition. (App. 29-30). Respondents filed their Return on September 25, 2023. (App. 31-55). The Court of Appeals denied the Petition on November 2, 2023. (App. 56-57).

ARGUMENTS

I. STANDARD OF REVIEW.

Whether a preliminary injunction should be granted rests within the sound discretion of

the trial judge. MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct. App. 2003). "An abuse of [that] discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." Levine v. Spartanburg Reg'l Servs. Dist., Inc., 367 S.C. 458, 463, 626 S.E.2d 38, 41 (Ct. App. 2005).

"Actions for injunctive relief are equitable in nature." Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." Id.; Brown v. Cty. of Berkeley, 366 S.C. 354, 359, 622 S.E.2d 533, 536 (2005). "Thus, this court may reverse a factual finding by the trial court in such cases when the appellant satisfies [this court] the finding is against the greater weight of the evidence." Rhett v. Gray, 401 S.C. 478, 489, 736 S.E.2d 873, 879 (Ct. App. 2012).

II. PETITIONER ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS JUSTIFYING A PRELIMINARY INJUNCTION.

Under South Carolina law, to obtain injunctive relief, a party 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).

Petitioner 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). 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).

The Court of Appeals held "[Petitioner] 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." (App. 3). 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 Petitioner supposedly failed to present a "reasonable question" or "fair question" the MOU satisfies any of these requirements. Petitioner is left to speculate.

The Court of Appeals disregarded the *only* evidence that was presented to the Circuit Court on these matters. In the Circuit Court, Petitioner offered her sworn affidavit, her verified or sworn motions, and her verified 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). "Mutual promises… constitute a good consideration." Evatt v. Campbell, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959). Petitioner's evidence shows that she, the CofC, and Welch all executed a written MOU, setting forth the mutual promises they exchanged. This MOU was signed by Petitioner, the CofC's then-President (Glenn McConnell), the CofC's then-Provost (Dr. George Hynd), the Dean of the CofC's HSS (Dr. Jerry Hale), and Welch. The MOU also explicitly state its terms

were "agree[d] to" by Petitioner 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 detail exactly what Petitioner, the CofC, and Welch mutually agreed upon. Under the MOU's terms, the parties all "agreed to" take certain detailed actions involving Petitioner and her faculty appointment, including the following:

- To transfer Petitioner from the EHHP and put her in the HSS, which removed Petitioner from under Welch's supervision.
- To move Petitioner's tenure-track faculty line, faculty office, and administrative location to the CofC's Riley Center at 176 Lockwood Boulevard, Charleston.
- To have Petitioner report directly to Dr. Stewart "who will serve in the functional role as [Petitioner's] department chair" and who will be responsible for "conducting [Petitioner's] annual evaluations."
- Petitioner's "basic teaching responsibilities" will be that she teaches three courses a semester.
- "All policies and procedures relative to [Petitioner's] tenure and promotion (as outlined in [the CofC's FAM] and appropriate official communications) will need to be followed."

(R_071-072). The MOU also includes Petitioner's 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 Petitioner, the CofC, and Welch concerning Petitioner's faculty appointment. The simple fact the parties styled their agreement a MOU 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). Our 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). The terms of the MOU evince an intent by the parties to reach a 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 "[a]ll policies and procedures relative to [Petitioner'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). The MOU incorporates by reference the provisions of the FAM, which impose additional obligations and requirements upon the CofC with respect to tenured faculty members like Petitioner.

The MOU was supported by mutual consideration. It explicitly states the mutual agreement between Petitioner, the CofC, and Welch, *inter alia*, that Petitioner'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 Petitioner 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 Petitioner's employment.

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

Petitioner's MOU with the CofC also does not leave any material terms open or for future agreement. It 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 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. The MOU was and is the parties' final expression of their agreement.

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 FAM.[2] The MOU expressly incorporates the FAM and mandates that "[a]ll policies and procedures relative to [Petitioner's] tenure and promotion (as outlined in [the FAM] and appropriate official communications) will need to be followed." (R_072). Petitioner is a tenured faculty member. Section VII.C.1 of the FAM governs the conditions under which a tenured professor's contract or faculty appointment can be altered or terminated. Petitioner's Complaint specifically alleges the CofC did not follow the FAM when Welch unilaterally transferred her faculty appointment on August 29, 2019, in breach of the MOU. (R_034 ¶41; R_047-049 ¶92, 97-99).

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[2] The FAM is considered part of Petitioner'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 S.E.2d 402, 410 n.7 (Ct. App. 2000).

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 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."); 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).

Here, the MOU was to continue in effect so long as it was not terminated or revised in accordance with the FAM's provisions. The FAM, which is part of Petitioner's contract with the CofC, includes specific provisions governing the termination or alteration of her contract. Under the FAM, Petitioner's contract with the CofC continues until she retires or is terminated for "adequate cause." Termination of a tenured professor for cause must be preceded by written notification of the proposed dismissal. By setting forth the circumstances governing the termination of Petitioner's contract as a tenured professor—either Petitioner's retirement or her termination for adequate cause—the FAM establishes a specific event on which Petitioner'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. The Court of Appeals erred to the extent it found the MOU is not a binding agreement. It erred by holding Petitioner 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.

III. PETITIONER ESTABLISHED IRREPARABLE HARM AND AN INADEQUATE REMEDY AT LAW JUSTIFYING 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) ("The irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin."). "[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).

In Columbia Broadcasting Sys., Inc. v. Custom Recording Co., 258 S.C. 465, 189 S.E.2d 305 (1972), this court edified:

> [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).

In this case, the Court of Appeals held "Petitioner 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." (App. 3). The court implied it was necessary for Petitioner to prove she was at risk of completely losing her faculty appointment or professional livelihood to establish irreparable harm. The court also assumed the harm Petitioner will suffer can be remedied at trial by making an award of monetary damages to her.

The Court of Appeals erred by assuming the harm Petitioner will suffer can be remedied at trial with an award of monetary damages. Although a novel issue under state law, federal

courts hold that "irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate." Multi-Channel TV, 22 F.3d at 551; Uhlig, 2012 WL 2458062 at *3; Baker v. Boeing Co., No. CV21802574RMGMGB, 2021 WL 2813622, at *6 (D.S.C. May 19, 2021). As explained below, the potential injuries which prompted Petitioner to seek a preliminary injunction primarily are intangible in nature and cannot easily be remedied by money damages.

The Court of Appeals further erred by requiring Petitioner to show she is at risk of a complete loss of her livelihood to warrant an injunction restraining the CofC from breaching its employment contract with her. Notably, in Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983), this court reversed the circuit court's denial of a preliminary injunction and held an employee's breach of his obligations under an employment contract warranted an injunction even though the employer made no showing it would fail or go out of business in the absence of an injunction. The underpinning for decisions like Rental Unif. Serv. is that an award of money damages is inadequate and the harm is irreparable because of the difficulty in calculating the losses resulting from the breach of the employment contract. Accordingly, this court issued an injunction to prevent the harm before it occurs.

Courts have applied this same reasoning to loss of business opportunities, loss of professional competency, loss of goodwill, and injury to reputation. Levine, 367 S.C. at 463, 626 S.E.2d at 42 (physician's loss of professional practice and loss of competency if she were unable to ply her trade was irreparable harm and justified preliminary injunction restraining hospital from terminating her hospital privileges); Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 455 & n.2, 626 S.E.2d 34, 37 & n.2 (Ct. App. 2005) (loss of professional practice and loss of a business or business goodwill can be irreparable harm); 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." (cited in Peek)); Celsis In Vitro, Inc. v. CellzDirect, Inc., 664 F.3d 922, 930 (Fed. Cir. 2012) ("[L]oss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm.").

The same reasoning applies here. There is no principled basis to treat an employer's loss of *business* opportunities as irreparable harm, but to deny equal treatment to an employee's loss of *employment* opportunities. In fact, numerous courts have specifically held an employee's potential loss of employment opportunities short of the employee's complete loss of their livelihood or profession *does* constitute irreparable harm, such as loss of opportunity to pursue a chosen profession, loss of professional opportunities, lost work experience, loss of meaningful opportunity to compete for promotions or jobs, loss of training, and denial of tenure. See Hisp. Nat'l, 2021 WL 1575772 at *23; Brinkley, 2013 WL 394158 at *7; Arizona Dream, 757 F.3d at 1068; Manlove, 2019 WL 2291894 at *14; Tanner, 433 F. Supp. 2d at 125; Allied Const., 2014 WL 2931421 at *15; 35 New York, 819 N.Y.S.2d at 852; Equal Emp. Opportunity Comm'n v. Tufts Inst. of Learning, 421 F. Supp. 152, 165 (D. Mass. 1975).

In Johnson v. City of Memphis, 444 F. App'x 856 (6th Cir. 2011), in rejecting the argument that employees' injuries could be adequately 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 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").

Petitioner's evidence demonstrated several different forms of irreparable harm she will suffer if Respondents are not enjoined. First, 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 Petitioner and the CofC. Under its terms, the CofC agreed to place Petitioner in the HSS. (R_030 ¶26-27; R_116; R_221 ¶5). The MOU mandates that Petitioner will report directly to Dr. Stewart, who will be her Department Chairperson, and that Petitioner's faculty office and grant-related offices will be at the Riley Center. The MOU's purpose was to remove Welch from having any authority over Petitioner or her tenure-track. (R_029-030 ¶23; R_220 ¶4).

If an injunction is not granted, Petitioner will be denied the intangible benefits and protections of this contract. She will be forced to endure further retaliation by Welch. Brandt v. Gooding, 368 S.C. 618, 629, 630 S.E.2d 259, 265 (2006) (restraining order was necessary to prevent party from harassing other parties during the litigation). Petitioner will be denied her placement and tenure in the HSS, which is where the MOU required that Petitioner be transferred to remove her from under Welch's supervision. Petitioner will be deprived of the ability to report directly to Dr. Stewart who "will serve in the functional role as [Petitioner's] department chair" and who will be responsible for "conducting [Petitioner's] annual evaluations." (R_071-072).

Rather than having Petitioner's placement and tenure under Dr. Stewart's supervision, she will have to endure placement and supervision under Welch, the very same person who has been retaliating against her for years. The deprivation of Dr. Stewart's supervision and the forced placement under Welch's supervision is not something that can be easily measured in monetary terms. Neither the Court of Appeals nor Respondents have ever explained 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, Petitioner 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 on a different campus, roughly two miles away from the Riley Center. Petitioner documented the glaring differences in the quality and conditions of the offices at the Riley Center and the Silcox Building. (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 Petitioner 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 advised 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, Petitioner 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 and 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 embarrassment, humiliation, and indignity based on this transfer of her faculty appointment.

These losses are intangible in nature. Courts 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.

In May v. Trustees of California State Univ., No. H024624, 2005 WL 459556 (Cal. Ct. App. Feb. 28, 2005), 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).

The Court of Appeals assumed the intangible harms Petitioner will suffer from her faculty reappointment and the relocation of her office can be remedied at trial with money. Yet, the Court nowhere explains how a jury would calculate such a monetary award for the loss of these intangible job benefits. The loss of a faculty office is not easily measured in monetary terms although it can have great worth to the 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 Petitioner be returned to her office at the Riley Center, they could not do so retroactively. Their verdict would only operate prospectively.

Third, if Respondents are not enjoined, Petitioner will also be denied the opportunity to 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 Petitioner after the fact if she is not considered for the merit increase. The Court of Appeals again surmised this injury can be remedied by money damages even though it never addressed the important issue of the difficulty in calculating such damages. Merit pay increases are not the same for each employee. The Court nowhere explains how a fact-finder can ascertain whether Petitioner's merit pay increase should be set at 4%, 15%, or some other percentage. The loss of the merit pay increase will also 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 Petitioner can receive next year,

which in turn reduces the pay increase that Petitioner can receive each successive year. The uncertainty of fixing damages renders a potential monetary recovery an inadequate remedy.

Finally, unless an injunction is granted, Petitioner 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 promotion. The value of this increase in professional standing is difficult to measure in monetary terms, thus its loss is irreparable. Levine, 367 S.C. at 463, 626 S.E.2d at 42; IAC, Ltd., 160 S.W.3d at 200. The Court of Appeals again disregarded the intangible enhancement to status and importance to professional advancement the Chairperson position would confer on Petitioner. This loss is irreparable because its value is not easily ascertained in terms of money.

Even if a jury orders that Petitioner should be placed in the Chairperson position after a trial on the merits, such a ruling would do nothing to compensate Petitioner 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 judgment. Petitioner will be deprived of the increase in standing, professional reputation, notoriety, prestige, experience, and good will associated with the Chairperson position during this period. 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; Rucker v. City of Kettering, 84 F. Supp. 2d 917, 932 (S.D. Ohio 2000); Connecticut State Police v. Rovella, No. HHDCV196120210S, 2020 WL 5101967, at *8 (Conn. Super. Ct. Aug. 7, 2020); Brinkley, 2013 WL 394158 at *7 & n.9; Hisp. Nat'l, 2021 WL 1575772 at *23.

Petitioner 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 Petitioner'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 Petitioner to the CofC's HSS, *retroactively* put her under Dr. Stewart's supervision or *retroactively* have Dr. Stewart perform Petitioner's annual evaluations, or *retroactively* return Petitioner 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 Petitioner for the loss of these benefits of the MOU.

IV. THE COURT OF APPEALS ERRED BY AFFIRMING THE CIRCUIT COURT'S FACTUAL FINDINGS 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.").

The Court of Appeals upheld the Circuit Court's findings that Petitioner purportedly "has presented no evidence to show that she should have obtained [the HEHP Chairperson] position" for which 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 fails to cite or discuss any actual evidence anywhere in the record supporting those findings. Id. Petitioner is again left to guess.

Petitioner respectfully submits these factual findings are unsupported by any affidavit, testimony, or other evidence in the record. Instead, these "findings" are derived entirely from

arguments that Respondent's legal counsel inserted in the proposed order they drafted for Judge Young and which he signed without any change. Lawyer arguments are not evidence. 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 Judge Young's Order was harmless. See Resp' Brief p.42.

Petitioner's own affidavit states she is more qualified for the position than the only other person whose application Welch would consider. (R_237 ¶6; R_148). Respondents offered nothing to contradict this affidavit. The absence of contradictory evidence is not evidence. Moreover, the only evidence in the record was that the CofC and Petitioner *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, Petitioner, Welch, and the CofC's highest ranking officials all "agree[d] to" its terms. (R_071). Nothing in the MOU says it is non-binding. 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.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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