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.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant Olivia M. Thompson, Ph.D., M.P.H.'s ("Appellant") respectfully submits this Reply Brief in support of her appeal in this matter.

ARGUMENTS

I. THE CIRCUIT COURT ABUSED ITS DISCRETION BY HOLDING THAT A PRIOR FORM 4 ORDER OF THE CIRCUIT COURT PRECLUDED IT FROM GRANTING APPELLANT'S MOTIONS FOR A PRELIMINARY INJUNCTION.

Citing our state's rule that "one circuit judge may not overrule another," Respondents College of Charleston ("CofC") and Frances C. Welch, Ph.D., M.A. ("Dr. Welch") argue that Circuit Judge Daniel Hall's Form 4 Order filed August 13, 2020—which denied without explanation or hearing Appellant's initial Motion for Preliminary Injunction filed June 25, 2020—barred Circuit Judge Roger Young from granting Appellant's subsequent Motion for Preliminary Injunction filed April 2, 2021 and Supplemental Motion for Preliminary Injunction filed July 9, 2021 even though those subsequent motions and Appellant's affidavit addressed new factual events occurring *after* Judge Hall's Form 4 Order. See Resp' Brief p.18-26. Respondents claim that Appellant's subsequent motions necessarily required Judge Young to "second-guess" or "overturn" Judge Hall's Form 4 Order denying Appellant's prior motion. Id. p. 6.

The critical flaw with Respondents' argument is that Appellant's subsequent motions did not ask or require Judge Young to review, overrule, or second-guess any ruling that Judge Hall made in his prior Form 4 Order. Judge Hall was never presented with and did not decide the factual matters forming the basis for Appellant's subsequent motions and affidavit that were before Judge Young.[1]

[1] Judge Hall filed his Form 4 Order at the outset of this case before any of the Defendants had even appeared and without conducting a hearing or having any communications with Appellant or her counsel about the motion. See Form 4 Order 8.13.20. His Order states in conclusory terms: "After careful consideration, the Plaintiff's Motion for Temporary Injunction is DENIED." Id. The Order gives no explanation or reason for the denial of the motion.

On June 24, 2020, Appellant filed her verified Complaint seeking enforcement of a written Memorandum of Understanding ("MOU") dated July 17, 2014 that Appellant had entered with Glenn McConnell (the CofC's then-President), Dr. George Hynd (the CofC's then-Provost), Dr. Jerry Hale (Dean of the CofC's School of Humanities and Social Sciences or "HSS"), and Dr. Welch (Dean of the CofC's School of Education, Health, and Human Performance or "EHHP"). See Verif. Compl. ¶20; MOU 7.17.14 pp.1-2. Under the MOU's terms, the CofC agreed to transfer Appellant from the EHHP and put her in the HSS. See Verif. Mot. 4.2.21 p.7; Verif. Compl. ¶26-27. The MOU mandates that Appellant will report directly to Dr. Kendra Stewart, who will serve as her Department Chairperson, and that Appellant'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 Appellant or her tenure-track and to prevent Dr. Welch from retaliating against Appellant and interfering with her Boeing-funded grant work. See Verif. Compl. ¶23.

Appellant's initial Motion for Preliminary Injunction filed June 25, 2020 sought injunctive relief based on events that had occurred after the MOU and *before this lawsuit was commenced on June 24, 2020.* On August 29, 2019, despite the MOU and without prior consultation with Appellant or her consent, Dr. Welch unilaterally transferred Appellant's faculty assignment from the CofC's HSS back to the EHHP, which action removed Appellant from Dr. Stewart's report and again placed her under Dr. Welch's supervision. See Verif. Compl. ¶36-41. Dr. Welch then engaged in numerous acts of retaliation against Appellant that interfered with and undermined her Boeing-funded grant work. See Verif. Compl. ¶52-60, 62-71, 131. These actions ultimately caused Boeing to terminate its grants with the CofC and withdraw its funding for Appellant's work on March 17, 2020. See Verif. Compl. ¶70, 76-79, 82. Appellant's initial motion addressed Dr. Welch's pre-suit actions breaching the terms of the MOU and requested a preliminary injunction based on those actions. As noted

above, Judge Hall denied this motion without any explanation or a hearing via Form 4 Order filed August 13, 2020. See Form 4 Order 8.13.20.[2]

In contrast to Appellant's initial motion that Judge Hall denied, Appellant's Motion for Preliminary Injunction filed April 2, 2021, Supplemental Motion for Preliminary Injunction filed July 9, 2021, and Affidavit filed October 2, 2021 sought injunctive relief based on new and different events that took place *many months after Judge Hall issued his August 13, 2020 Form 4 Order.* Although Respondents attempt to downplay this key fact, Appellant's subsequent motions and affidavit give a detailed account of numerous factual events *spanning from December 2020 through July 2021 that Judge Hall never considered or confronted*.

In December 2020, without Appellant's knowledge, the Respondents physically disconnected Appellant's office telephone and removed her from the Riley Center website and building directory, thus making it appear to students and others that she is no longer a professor at the CofC. In February 2021, Dr. Welch arbitrarily refused to accept Appellant's application and consider her for the open Chairperson position for the Department of Health and Human Performance ("HEHP") that had been vacated earlier that same month, invoking an informal application deadline of which Appellant had not been notified and that had not been posted to the faculty. In March 2021, Dr. Welch unilaterally removed Appellant's faculty office from the Riley Center—where she had been

[2] Respondents criticize Appellant for not immediately appealing Judge Hall's Form 4 Order. However, this does not mean that Appellant agrees with the Order or has abandoned her right to appeal. Appellant was not required to immediately appeal this intermediate order to preserve her right of review on appeal of a final judgment—i.e., she could wait to appeal at the conclusion of the case. S.C. CODE ANN. §§ 18-1-130, 14-3-330(1); see Link v. Sch. Dist. of Pickens Cty., 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990); Gunnells v. Raybestos-Manhattan, Inc., 261 S.C. 106, 111, 198 S.E.2d 535, 536 (1973). In the beginning of this case, Appellant did not feel it necessary to immediately appeal Judge Hall's Form 4 Order. She later appealed Judge Young's Order that denied her subsequent motions for a preliminary injunction because the circumstances have changed since Judge Hall entered his Form 4 Order.

located since August 2014 under the MOU—and physically relocated her office two miles away to the Silcox Building, which is a much older building in a deplorable condition, is in a state of disrepair, and is undergoing substantial construction and renovation work (including removal of asbestos ceiling tiles). In June 2021, the CofC had security officers physically escort Appellant out of the Riley Center with hands on their holsters and ordered her not to return to her faculty office at the Riley Center.[3] In July 2021, the CofC excluded Appellant from the opportunity to obtain a faculty merit pay raise for which she qualified while offering this opportunity to other faculty.

Respondents' brief nowhere explains how Judge Hall could have considered and ruled upon these events when they had not yet taken place by the time of his August 13, 2020 Form 4 Order. Respondents' position defies common sense. Judge Hall did not previously decide the matters raised in Appellant's subsequent motions because he could not have done so. Judge Hall's Form 4 Order did not preclude Judge Young from deciding Appellant's subsequent motions and affidavit that involved different matters which Judge Hall had not considered. Narruhn v. Alea London Ltd., 404 S.C. 337, 340–41, 745 S.E.2d 90, 92 (2013) (circuit judge's ruling on a separate matter does not run afoul of the general rule prohibiting one circuit court judge from overruling another).

In Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013), our state Supreme Court found that the rule holding that one judge of the same court cannot overrule another judge is inapplicable when the prior judge had not "specifically ruled on the issue" decided

[3] Respondents' brief conflates Dr. Welch's actions on August 29, 2019 in transferring Appellant's faculty assignment from the CofC's HSS back to the EHHP, which involved an administrative reassignment of Appellant, with Respondents' subsequent actions in December 2020 through June 2021 in physically disconnecting Appellant's office telephone, deleting her from the Riley Center website and building directory, removing Appellant's faculty office from the Riley Center and moving her office to the Silcox Building, and debarring Appellant from accessing the Riley Center, which involved a physical relocation of Appellant and her office. See Resp' Brief p.22.

by the subsequent judge. Id. at 573, 743 S.E.2d at 785; see also Andrick Dev. Corp. v. Maccaro, 280 S.C. 103, 105-06, 311 S.E.2d 95, 97 (Ct. App. 1984) (rule that one circuit judge cannot grant relief which has been previously sought from and denied by another circuit judge was not violated when the case did not involve submission of the same issue based on the same facts to a second judge after the first judge had ruled). Simply stated, in the present case, Judge Hall did not rule on whether a preliminary injunction should be issued against the Respondents based on the factual events presented in Appellant's subsequent motions and affidavit. It follows that his Form 4 Order did not bar Judge Young from considering this evidence and ruling upon that question.

Respondents' brief claims that Appellant's subsequent motions and affidavit "were really just extensions of" her prior motion even while Respondents begrudgingly concede that the subsequent motions and affidavit contain "some different allegations with regard to specific conduct" and focus on "conduct occurring after [Appellant] filed this lawsuit and after Judge Hall's August 13, 2020 First Order." See Resp' Brief p.18-26. Respondents claim the subsequent motions and affidavit were merely "extensions" of the initial motion because the later filings assert that Respondents did not cease their retaliation against Appellant after Judge Hall's Form 4 Order, but "continued" their retaliation against Appellant unabated even while this suit has been ongoing.

Respondents take the stance that one Circuit Judge cannot enjoin a defendant from engaging in acts of retaliation against a plaintiff if the defendant's actions "continue" the "same sort of conduct" for which another Circuit Judge had previously denied a preliminary injunction. Respondents fail to cite any legal support whatsoever for their position. Courts have rejected it. See Mason v. Cecil, No. 19-CV-01375-SPM, 2021 WL 1338060, at *5 (S.D. Ill. Apr. 9, 2021) ("Although the Motion for Preliminary Injunction currently before the Court reasserts allegations raised in the first motion for preliminary injunction, Mason has alleged new instances of retaliatory

conduct that have occurred since the Court held an evidentiary hearing and denied the first motion on August 24, 2020…. Accordingly, the Motion to Strike is denied, and the Court will consider the Motion for Preliminary Injunction.").

The facts addressed in Appellant's subsequent motions are not the same as those facts addressed in her initial motion. As discussed in Appellant's opening brief, South Carolina follows the rule that if a preliminary injunction has been refused, the movant may nevertheless obtain such relief on an amended, supplemental, or new application based on facts that occurred after the first application was refused. Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796, 798 (1928); see 43A C.J.S. Injunctions § 79 (2021); 42 AM. JUR. 2D Injunctions § 278 (2021); Red Star Yeast & Prod. Co. v. La Budde, 83 F.2d 394, 396 (7th Cir. 1936); Thayer Co. v. Binnall, 95 N.E.2d 193, 198 (Mass. 1950). Respondents' brief nowhere disputes or responds to any of these cases or authorities, which are on point with the present case.

Moreover, it bears emphasizing that an interlocutory order granting or denying an injunction is not the law of the case or *res judicata* as between the parties to the action. G-H Ins. Agency, Inc. v. Travelers Ins. Companies, 270 S.C. 147, 172, 241 S.E.2d 534, 546 (1978); Heath v. Coll. of Charleston, No. 217CV01792PMDJDA, 2018 WL 3353063, at *6 (D.S.C. June 15, 2018) (court's decisions at the preliminary injunction phase do not constitute law of the case); 18B E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478.5 (Apr. 2022) ("Preliminary or tentative rulings do not establish law of the case. The most frequent illustrations are provided by preliminary injunction orders." (footnotes omitted)). "[O]rdinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989).

In Sellers v. Nicholls, 432 S.C. 101, 851 S.E.2d 54 (Ct. App. 2020), which the Respondents cite in their brief, despite citing the "long-standing rule in this State that one judge of the same court cannot overrule another," this Court still held that a family judge was not bound by the prior order of another family judge denying a party's request for a trial continuance because it was an interlocutory order not affecting the merits of the case. Id. at 115-16, 851 S.E.2d at 61 ("[T]he substantial issue addressed in the order was counsel's disqualification, and the prospective denial of a motion for a continuance was therefore an interlocutory order. As such, this order could not prevent the family court from considering Mother's motion to continue. Therefore, the family court erred by determining it was bound by such order and abused its discretion by failing to exercise any discretion in ruling upon Mother's motion for a continuance.").[4]

Finally, Respondents argue that Appellant's motions should be denied because she "did not amend her Complaint to allege a claim concerning" the conduct raised in her motions and affidavit. See Resp' Brief p.23. However, it was unnecessary for Appellant to amend her Complaint when the

[4] Although the Sellers Court did not cite to South Carolina Rule of Civil Procedure 54(b), its holding is consistent with that rule's provisions stating that "any order or other form of decision, however designated, which adjudicates fewer than all the claims … is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." S.C. R. CIV. PRO. 54(b). Federal courts applying Rule 54(b) hold that an interlocutory order can be reconsidered at any time prior to a final judgment. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 13 n.14 (1983) ("[A]s Rule 54(b) provides, virtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown …."). Courts have specifically applied Rule 54(b) to requests for reconsideration of an order granting or denying preliminary injunctive relief. Dunlap v. Presidential Advisory Comm'n on Election Integrity, 319 F. Supp. 3d 70, 84 (D.D.C. 2018); Providence Title Co. v. Truly Title, Inc., No. 4:21-CV-147-SDJ, 2021 WL 5003273, at *3 (E.D. Tex. Oct. 28, 2021); J.O.P. v. U.S. Dep't of Homeland Sec., 338 F.R.D. 33, 60 (D. Md. 2020). "Under Rule 54(b), the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." Six Dimensions, Inc. v. Perficient, Inc., 969 F.3d 219, 227 (5th Cir. 2020) (citation omitted); see Cobell v. Jewell, 802 F.3d 12, 25 (D.C. Cir. 2015); Greene v. Union Mutual Life Ins. Co. of America, 764 F.2d 19, 22 (1st Cir.1985).

new matters addressed in her subsequent motions and affidavit are related to the claims stated in her Complaint. "The purpose of interim equitable relief is to protect the movant, during the pendency of the action, from being harmed or further harmed in the manner in which the movant contends it was or will be harmed through the illegality alleged in the complaint." Omega World Travel, Inc. v. Trans World Airlines, 111 F.3d 14, 16 (4th Cir. 1997). Thus, "a party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." Id. (citing Devose v. Herrington, 42 F.3d 470, 471 (8th Cir. 1994)).

For instance, in Hisp. Nat'l L. Enf't Ass'n NCR v. Prince George's Cty., No. CV TDC-18-3821, 2021 WL 1575772 (D. Md. Apr. 21, 2021), police officers sued the county for unlawful discrimination allegedly perpetrated pursuant to a long-standing county pattern and practice of discrimination against Black and Hispanic officers, including through the denial of promotions and desirable assignments based on race and color. During the litigation, the plaintiffs moved for a preliminary injunction to enjoin the county from administering certain promotion tests. The county opposed the motion and argued "the requested injunctive relief is based on 'wholly new claims and factual allegations' that were not pleaded in the operative complaint in this case." Id. at *11. In rejecting this argument, the Court held that "the requirement of a 'relationship' between the conduct asserted in the Complaint and the injury claimed in the Motion" was met when the Complaint alleged a pattern and practice of discrimination, including discrimination in the promotions process, and the plaintiffs' motion sought to enjoin promotions testing that was discriminatory. Id. at *12.

In this case, Appellant's subsequent motions and affidavit assert that Respondents have repeatedly and continuously harassed, intimidated, and retaliated against her in violation of the MOU. See Verif. Mot. 4.2.21 pp.2-3 ("[N]otwithstanding the pendency of this lawsuit, Defendants

have continued to breach, contravene, and disregard the clear terms and provisions of the written MOU dated July 17, 2014 that was executed by Plaintiff and Defendants CofC and Welch. Defendants have also continued to retaliate against, harass, and cause financial harm to Plaintiff while this litigation has been ongoing."); Verif. Supp. Mot. 7.9.21 p.2 ("[N]otwithstanding the pendency of this action and the filing of Plaintiff's previous Motion for Preliminary Injunction, Defendant CofC has continued to engage in retaliatory conduct, harassment, and intimidation towards Plaintiff even while this litigation has been ongoing."); Thompson Aff. 10.2.21 ¶3 ("Notwithstanding the pendency of this action and the filing of the motions mentioned above, Defendant CofC and its employees and agents unfortunately have continued to engage in retaliatory conduct, harassment, and intimidation towards me even while this litigation has been ongoing.").

These motions and affidavit are related to the claims set forth in the Complaint, which allege that Respondents violated the MOU and retaliated against Appellant. See Verif. Compl. ¶¶36-85. Appellant's subsequent motions and affidavit detail particular factual events occurring after this lawsuit was commenced and after Judge Hall's August 13, 2020 Form 4 Order was filed, which show that Respondents' retaliation against Appellant has continued and is ongoing despite this litigation. There is a "relationship between the claims in the underlying complaint and the preliminary injunction" motions, which is all that is needed for the motions to be granted. Brakeall v. Stanwick-Klemik, No. 4:17-CV-04101-LLP, 2019 WL 3713721, at *2 (D.S.D. Aug. 7, 2019).

Judge Young's November 12, 2021 Order disregarded the fact that Appellant's subsequent motions and affidavit requested relief based on factual events that occurred many months after this lawsuit was commenced and after Judge Hall issued his August 13, 2020 Form 4 Order. Judge Young erred as a matter of law by holding that Judge Hall's Form 4 Order precluded him from granting Appellant's subsequent motions.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT DID NOT DEMONSTRATE IRREPARABLE HARM.

"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).

Appellant demonstrated several different forms of irreparable harm she will suffer if an injunction is not granted. First, Appellant will be deprived of the contractual benefits and protection of the MOU that she negotiated with the CofC. The point of the MOU was to transfer Appellant away from Dr. Welch's supervision to ensure that Appellant would not have to endure further retaliation, harassment, and intimidation by Dr. Welch, which had precipitated the CofC's administration's involvement. Under the MOU's terms, the CofC "agreed to" take certain detailed actions involving Appellant and her faculty appointment, including the following:

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

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

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

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

See MOU 7.17.14 pp.1-2.

If an injunction is not granted, Appellant will be denied these benefits and protections 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). Rather than having her placement and tenure under Dr. Stewart's supervision, Appellant 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. Respondents' brief nowhere explains 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, Appellant 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. Appellant 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. See Verif. Mot. 4.2.21 p.29 & Exhs. E & F. 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. See Verif. Mot. 4.2.21 p.29. 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 Appellant 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 Appellant that no one should be working in the building because of the unsafe and unworkable conditions caused by the construction, noise, dust, etc. See Verif. Mot. 4.2.21 p.29-30 & Exh. G.

Respondents' brief first attempts to trivialize Appellant's forced relocation to the Silcox Building. They cite to an unpublished federal district court decision in which the judge held that an employer's relocation of an employee's office in the same office building was not irreparable harm for purposes of the federal employment discrimination laws. See Resp' Brief p.29 (citing Hornig v. Trustees of Columbia Univ. in City of New York, No. 17 CIV. 3602 (ER), 2018 WL 5800801 (S.D.N.Y. Nov. 5, 2018)). In Hornig, the federal judge initially said the plaintiff's "complaint about the relocation of her office in the same building borders on the frivolous" and she "has not demonstrated that her office's relocation qualifies as an injury at all, let alone one 'that cannot be remedied if a court waits until the end of trial to resolve'" Id. at *6 (internal citation omitted).[5]

Of course, in the present case, Appellant does not seek an injunction simply because Dr. Welch moved her faculty office down the hallway. Instead, she seeks relief because Dr. Welch disregarded the MOU's requirement that Appellant's faculty office and grant-related offices be placed in the Riley Center and Dr. Welch unilaterally moved Appellant's office to a different building miles away that is dilapidated and has unsafe, unhealthy, and unworkable conditions.

Other Courts have rejected Respondents' cavalier attitude concerning an employer's retaliatory and forced relocation of an employee's physical office. In Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3d Cir. 1998), the Court observed that an unlawful employment action

[5] In Hornig, the same judge later retreated from his earlier views and ruled the employer's relocation of the employee's office could be a material change in the terms and conditions of the employee's employment constituting unlawful retaliation. Hornig v. Trustees of Columbia Univ. in City of New York, No. 17 CIV. 3602 (ER), 2022 WL 976267, at *17 & n.30 (S.D.N.Y. Mar. 31, 2022).

"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." Id. at 788. 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 harassed and retaliated against a professor in violation of the federal discrimination statutes when the university's president ordered that 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).

Respondents next assert that "any harm from the movement of [Appellant's] office can be remedied upon the final trial of this matter on the merits." See Resp' Brief p.28-29. Yet, they do not explain how a jury would calculate such a monetary award for the loss of this intangible job benefit. 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 Appellant be returned to her office at the Riley Center, they could not do so retroactively. Their verdict would only operate prospectively. Respondents fail to explain how the jury could measure in monetary terms the harm to Appellant 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 Act Coal. v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014) ("Because intangible injuries generally lack an adequate legal remedy, 'intangible injuries [may] qualify as irreparable harm.'").

While Respondents cite to the rulings of some courts—none from South Carolina—holding that loss of employment or denial of a promotion is not irreparable injury, numerous other courts have reached contrary decisions and have specifically held that loss of opportunity to pursue a chosen profession, loss of employment opportunities, lost work experience, and loss of meaningful opportunity to compete for promotions or jobs *do* constitute irreparable harm. See Hisp. Nat'l, 2021 WL 1575772 *23 (delays in promotions cause irreparable harm because they affect the employees' "professional and leadership opportunities, as well as their long-term career trajectories," "because in addition to lost income, plaintiffs also face 'the loss of experience and chances to compete for promotions,' harms which 'are not easily valued'"); Arizona Dream, 757 F.3d at 1068 (loss of

opportunity to pursue a chosen profession is irreparable harm); Johnson v. City of Memphis, 444 F. App'x 856, 860 (6th Cir. 2011) ("Without the preliminary injunction, lost work experience and the opportunity to compete for promotions would be actual and imminent for [the Plaintiffs]. Back pay could remedy Plaintiffs' injuries due to lost income alone, but the loss of experience and chances to compete for promotions are not easily valued."); Howe v. City of Akron, 723 F.3d 651, 662 (6th Cir. 2013) (promotion delays would cause irreparable harm because, "without promotions, Plaintiffs will be unable to gain experience and unable to seek the next rank during the following round of testing"); Manlove v. Volkswagen Aktiengesellschaft, No. 1:18-CV-145, 2019 WL 2291894, at *14 (E.D. Tenn. May 17, 2019) ("lost work experience and the opportunity to compete for promotions" constitute irreparable harm); Tanner v. Fed. Bureau of Prisons, 433 F. Supp. 2d 117, 125 (D.D.C. 2006) ("The loss of specific job opportunities, training and competitive advantages can constitute irreparable harm."); Allied Const. Indus. v. City of Cincinnati, No. 1-14-CV-450, 2014 WL 2931421, at *15 (S.D. Ohio June 30, 2014) ("ACI has identified, however, several injuries for which money damages are inadequate. In the absence of a preliminary injunction, ACI members could lose work as well as the opportunity to meaningfully compete for contracts. Those harms are not quantifiable."); 35 New York City Police Officers v. City of New York, 819 N.Y.S.2d 852 (N.Y. Sup. Ct. 2006) ("[T]here is a loss of employment opportunities and other intangible benefits (in this case the chance to work under 'less onerous conditions') which warrants the granting of injunctive relief.").

Third, if Respondents are not enjoined, Appellant will also be denied the opportunity to apply for and obtain the merit pay increase awarded to other faculty members. Respondents again resort to the statement that this damage can be remedied by money damages even while they never address the question of how such damages would be calculated. 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. Respondents nowhere explain how a fact-finder can ascertain whether Appellant'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 Appellant can receive next year, which in turn reduces the pay increase that Appellant can receive each successive year.

Finally, unless an injunction is granted, Appellant 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. Respondents again misprize the intangible enhancement to status and importance to professional advancement that the Chairperson position would confer on Appellant. 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).

As with the other items discussed above, Respondents essentially argue a jury could order Appellant to be placed in the Chairperson position down the road after a trial on the merits is held. However, such a ruling would do nothing to compensate Appellant for the loss of the Chairperson 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 ten months later as of this brief). During this period, Appellant 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. 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) ("With regard to Plaintiff's first contention of irreparable injury, it is uncontested that Plaintiff has lost employment opportunities including chances for promotion, open assignments, and training. From this information, it is natural to infer that it is likely Plaintiff will continue to lose such opportunities if she does not receive immediate relief.… [T]he loss of training and work experience, opportunities for advancement, and opportunities to compete for promotion are more difficult to value."); Hisp. Nat'l, 2021 WL 1575772 at *23 ("Although some aspects of delayed promotions could be remedied with back pay and retroactive promotions, such remedies would be incomplete…. Particularly when eligibility for promotion to the next level requires a certain amount of time in service at the preceding rank, discriminatory promotion processes create a cascading effect that cause [employees] to fall further and further behind in career advancement in a manner that constitutes irreparable harm."); 35 New York City Police Officers, 819 N.Y.S.2d at *3 (In holding that policy which prevented police officers from pursuing employment caused irreparable harm, Court noted that "if petitioners lose the opportunity to be selected for this police class, for a variety of reasons, they may not have that

opportunity again. This harm is irreparable because it cannot be adequately compensated by monetary damages.").

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT DID NOT DEMONSTRATE LIKELIHOOD OF SUCCESS ON THE MERITS.

Appellant need not prove an "absolute legal right" when seeking a preliminary injunction, but she 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).

Appellant, Mr. McConnell (the CofC's then-President), Dr. Hynd (the CofC's then-Provost), Dr. Hale (Dean of the CofC's HSS), and Dr. Welch (Dean of the CofC's EHHP) all agreed to the MOU that sets forth detailed stipulations "regarding the change in the faculty appointment of Dr. Olivia M. Thompson." See MOU 7.17.14 p.1. The CofC's policies define the MOU as a contract. See Policy 2.3.1.1 ("The 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 ….").[6]

[6] Respondents falsely claim that Appellant "did not present [Policy 2.3.1.1] to the trial court in its consideration of" her motions. See Resp' Brief p.36. To the contrary, Appellant specifically quoted from this policy and raised it to Judge Young in the proposed Order that her counsel submitted to him on November 10, 2021. See Blanchard email to Young & Order pp.2, 17 & n.1. Judge Young had cut short the November 2, 2021 hearing and directed counsel to submit their arguments to him in the form of proposed Orders. Appellant's counsel raised Policy 2.3.1.1 in his proposed Order. Id. Appellant's counsel also again raised this policy in Appellant's Motion to Alter or Amend Judge Young's November 12, 2021 Order filed pursuant to Rules 54(b) and 59(e). See Motion 11.19.21

The MOU sets out in considerable detail the parties' mutual exchange of promises they made "regarding the change in the faculty appointment of Dr. Olivia M. Thompson." See MOU 7.17.14 p.1. These mutually agreed upon changes include that Appellant's faculty appointment was transferred and moved to the CofC's HSS; Appellant's tenure-track faculty line, faculty office, grant-related offices, and administrative location were moved to the Riley Center; Appellant was 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 [Appellant's] annual evaluations;" and Appellant's "basic teaching responsibilities" will be that she teaches three courses a semester. Id. pp.1-2. The MOU also includes Appellant's express agreement "to all of the stipulations noted above in regard to [her] faculty line being transferred from the [EHHP] to the [HSS]." Id. p.2.

Respondents now assert "the MOU is not enforceable because valuable mutual consideration does not support it." See Resp' Brief p.35. The CofC argues the MOU purportedly does not impose any duties on Appellant or "require her to give any consideration to the CofC." Id. "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).

A cursory review of the MOU's terms refutes the Respondents' position. Among other things, the MOU includes the mutual agreement of Appellant, the CofC, and Dr. Welch that Appellant's tenure-track faculty line is being transferred from the EHHP to the HSS and that her faculty office and grant-related offices are to be physically moved to the Riley Center. Under the MOU, Appellant also agreed that her Boeing grant and any other sources of external funding would

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p.10 & Exh. C.

be moved to the Riley Center. Appellant further agreed in the MOU that Dr. Stewart would become her supervisor, serve as her department chair, would conduct her annual evaluations, and would be responsible for determining her budgeted time for teaching, research, and service. Appellant also agreed that her "basic teaching responsibilities" will be that she teaches three courses a semester. Prior to the MOU, Appellant was not obligated to agree to any of these changes. Respondents' assertion that Appellant did not give any consideration for the MOU is simply belied by the facts.

Respondents also claim the MOU is unenforceable because it supposedly "does not have any specific term" and has no "duration." See Resp' Brief p.38. However, South Carolina law holds that a contract which provides it will terminate upon the occurrence of a specific event is not deemed perpetual 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 intended to continue in effect for so long as Appellant's tenure as a professor was not terminated due to her retirement or for adequate cause or she was promoted in accordance with the CofC's official policies and procedures. The MOU specifically incorporates by reference the CofC's Faculty Administration Manual ("FAM") and mandates that "[a]ll policies and procedures relative to [Appellant's] tenure and promotion (as outlined in [FAM] and appropriate official communications) will need to be followed." See MOU p.2. Appellant's Complaint alleges the CofC did not follow the FAM when Dr. Welch unilaterally transferred Appellant's faculty appointment on August 29, 2019. See Verif. Compl. ¶¶41, 92, 97-99.[7]

The FAM, which is part of Appellant's contract with the CofC as a tenured professor, includes specific provisions governing termination of her contract. Under the FAM, Appellant's contract with the CofC continues until either she retires or the CofC terminates her tenure 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

[7] The FAM is considered part of the 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). The FAM is publicly accessible on the CofC's website at https://academicaffairs.cofc.edu/fam.pdf. Section VII.C.1 of the FAM governs the conditions under which a tenured faculty member's contract can be terminated.

governing the termination of Appellant's contract as a tenured faculty member—either Appellant's retirement or her termination for adequate cause—the FAM establishes a specific event on which Appellant's faculty appointment and tenure as a professor will terminate, such that the MOU is not deemed to be perpetual in duration and is not terminable at will.

Additionally, even the case relied upon by Respondents in their brief holds that when the parties enter a "perpetual contract," the rule is that "the contract may be terminated by either, *on giving reasonable notice of his intention to the other,*" and the termination may not be "done arbitrarily, maliciously or in bad faith." Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98, 102, 447 S.E.2d 199, 201 (1994) (emphasis added); see Gen. Info. Servs., Inc. v. LP Software, Inc., No. C.A.3:08-324-CMC, 2009 WL 1743900, at *10 (D.S.C. June 18, 2009) ("The contract contained no termination clause. In the absence of express agreement, South Carolina law requires that a party provide reasonable notice of its intention to terminate a contract…. Even then, the merits of any such termination would be measured by the standards of good faith and fair dealing."). "Although the reasonableness of notice of termination is dependent on the facts of each case and the nature and circumstances of the contract involved, lack of notice is unreasonable under any set of circumstances." Gen. Info. Servs., 2009 WL 1743900 at *10.

As the record in this case shows, Respondents never gave Appellant any notice, much less reasonable notice, of their intention to terminate the MOU and Appellant has alleged facts showing that Respondents acted arbitrarily, unfairly, and in bad faith. See Verif. Compl. ¶¶96-99. Respondents are incorrect that the MOU is unenforceable. As discussed above, Appellant is not required to prove an "absolute legal right" to obtain a preliminary injunction, but is merely required to 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. Appellant

satisfied this burden. Judge Young erred by holding that Appellant did not satisfy the requirement of showing a likelihood of success on the merits.

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT DID NOT DEMONSTRATE AN INADEQUATE REMEDY AT LAW.

"[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."). "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.

Appellant's brief does nothing more than state in conclusory fashion that Appellant "has an adequate legal remedy in the form of a jury trial for money damages" and that "[l]egal damages can remedy any claimed harm to [Appellant] from CofC's actions and compensate for her injuries." See Resp' Brief p.41. Respondents do not articulate how a jury could measure or quantify money damages for the items of harm described above (e.g., deprivation of protections of MOU, removal of Appellant from HSS, loss of Dr. Stewart as supervisor, loss of a faculty office in Riley Center, removal from the Riley Center website and building directory, loss of opportunity to serve in Chairperson position, exclusion from consideration for discretionary merit pay increase).

For the same reasons detailed in Section II above discussing the irreparable harm element, Respondents are incorrect that money damages will adequately compensate Appellant for the harm they have caused and will cause to her.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION BY BASING ITS ORDERS ON PURPORTED FACTS THAT ARE UNSUPPORTED BY TESTIMONY OR EVIDENCE IN THE RECORD.

Appellant's opening brief shows that Judge Young's November 12, 2021 Order contains several findings of fact that are unsupported by any affidavit, testimony, or other evidence anywhere in the record.[8] Instead, these purported factual findings are derived entirely from arguments made by Respondent's legal counsel, which are not evidence.

Respondents' brief does not attempt to cite any evidence in the record supporting these purported facts. Respondents merely claim the inclusion of these findings in Judge Young's Order was harmless or immaterial to his decision. See Resp' Brief p.42. Respondents essentially argue they can make baseless factual representations to the Judge to persuade him to rule in their favor, insert those findings in the proposed Order they drafted for the Judge, and then claim after-the-fact that those factual representations were immaterial to the Judge's rationale or decision.

Respondents' counsel drafted the Order that Judge Young signed verbatim. See Stoney email 11.10.21 with attached Order; Order 11.12.21. Although this practice is rather frequent in our state trial courts, this Court "does not condone that practice." Bankers Tr. of S.C. v. Bruce, 283 S.C. 408, 418, 323 S.E.2d 523, 529 (Ct. App. 1984). Other Courts have also rebuked the practice. Anderson v. City of Bessemer City, 470 U.S. 564, 571-72 (1985); Chicopee Mfg. Corp. v. Kendall Co., 288 F.2d

[8] The Order makes findings that Dr. Welch's unilateral transfer of Appellant's faculty assignment to the CofC's EHHP and Dr. Welch's forced relocation of Appellant's faculty office to the Silcox Building "placed [Appellant] with similar disciplines," was "typical for a faculty member in her Department and area of study," "assigned [her] office with the other members of her department," and was "consistent with this academic setting." See Order 11.12.21 p. 8. The Order also finds that the MOU "do[es] not evidence an intent to be contractually bound to specific, enforceable obligations." Id. p. 11. The Order further finds that Appellant "has presented no evidence to show that she should have obtained [the HEHP Chairperson] position" for which Dr. Welch refused to consider her application. Id. p. 10. These findings are unsupported by any evidence in the record.

719, 724-25 (4th Cir. 1961); Hamm v. Comm'r, Alabama Dep't of Corr., 620 F. App'x 752, 757 n.3 (11th Cir. 2015).

The findings in the Order "though not the product of the trial judge's mind, are formally his." Bankers Tr., 283 S.C. at 418, 323 S.E.2d at 529. Thus Judge Young presumptively included these "findings" in his Order because he read them, agreed with them, and found them to be material to his decision denying Appellant's motions. His wholesale adoption of the findings that Respondents' counsel drafted for him, including findings that are unsupported by evidence, suggests he failed to independently determine the facts of the case. Howard v. City of Durham, No. 1:17CV477, 2021 WL 5086379, at *2 (M.D.N.C. Nov. 2, 2021). At a minimum, these findings should be overturned.

CONCLUSION

For the reasons stated, this Court should reverse the Orders of the Circuit Court, grant a preliminary injunction as requested by Appellant's motions, and remand the case for further proceedings accordingly.

Respectfully submitted,

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