22-5404UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 22-5404, Dana Simmons v. Andrew Beshear, et al
Originating Case No. : 3:21-cv-00052

Dear Counsel and Ms. Simmons,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0511n.06

Case No. 22-5404

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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DEBORAH S. HUNT, Clerk

DANA SIMMONS,

Plaintiff-Appellant,

v.

ANDREW BESHEAR, GERINA WHETHERS, RAY PERRY, in their individual and official capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

OPINION

Before: SUTTON, Chief Judge; GRIFFIN, and NALBANDIAN, Circuit Judges.

NALBANDIAN, Circuit Judge. During the COVID-19 pandemic, the Kentucky Personnel Cabinet developed workplace safety policies for executive branch employees, including a mandatory, at-work mask policy at the time relevant here. Plaintiff Dana Simmons was a staff attorney working for the Kentucky Public Protection Cabinet during the pandemic. She was fired for not complying with the mask policy, and she brought a § 1983 suit alleging that Kentucky government officials violated her Fourteenth Amendment right to due process by enforcing the policy. But Simmons fails to allege facts to support her procedural due process claims. And it is not clearly established that the enforcement of an at-work COVID mask policy shocks the conscience. Thus, Defendants are entitled to qualified immunity.

I.

In September 2020, the Kentucky Public Protection Cabinet hired Simmons as a staff attorney. The Public Protection Cabinet is the arm of the executive branch that ensures the safe and fair operation of Kentucky institutions.[1]

All was relatively well for Simmons, despite the COVID-19 pandemic, until two job-related changes came about in July 2021. First, Simmons transitioned from working remotely five days a week to working in person on Wednesdays and Fridays. The second change came from a memo circulated by the Personnel Cabinet's Secretary to all executive branch employees in response to the COVID-19 Delta variant. It required employees to wear a face covering in executive branch offices if another employee was present. So, in practice, employees had to wear face coverings in all common areas and during in-person meetings. The memo also warned: "Employees who do not comply with this policy may be removed from Executive Branch buildings/offices and may be subject to corrective or disciplinary action." (Am. Compl., ECF. No 33-1, Page ID 944.)

There is no dispute that Simmons did not comply. On September 21, 2021, the Deputy Commissioner of Simmons' department approached her and told her that she needed to wear a face covering while in common office areas. The next day, Simmons emailed her direct supervisor, Benjamin Seigel, and told him about the conversation. She wrote: "Simply put, I do not wear face coverings. I choose not to. I am of the belief that it is my prerogative to do so or choose not to do so." (Am. Compl., ECF. No 33-1, PageID 945.) She also questioned whether the executive branch could enforce this policy given that the Kentucky General Assembly "during the 2021 Special

[1] *Team Kentucky, Public Protection Cabinet*, https://ppc.ky.gov/ (last visited Nov. 28, 2022).

Session declined to [i]ssue a mask mandate." (Am. Compl., ECF. No 33-1, PageID 945.) Seigel responded, confirming that the policy applies to Simmons and noting that the policy "applies to Executive Branch employees only, no one else in the Commonwealth, so it does not conflict with the Legislature's decision not to impose a general mask mandate." (Am. Compl., ECF. No 33-1, PageID 942.)[2] More back-and-forth ensued, and Seigel offered to arrange a meeting between Simmons and anyone in the Office of Legal Services about the policy.

On September 24, 2021, Simmons met with the General Counsel for the Public Protection Cabinet, Ben Long, and the Manager of Human Resources, Jessica Van Sickel. The pair informed Simmons that she would not be permitted to come to the office on Wednesdays and Fridays if she didn't wear a face covering and that she wouldn't be permitted to take approved leave for those days. Simmons received an email and letter from Long summarizing what took place at the meeting, along with an appeal form. The email noted: "Any absence on those days due to non-compliance with cabinet policy may result in corrective or disciplinary action[.]" (Am. Compl., ECF No. 33-1, PageID 947.)

Despite this information, Simmons continued to defy the policy. And her defiance kicked off a series of stand-offs between Simmons and her higher-ups. On days where Simmons was scheduled to work, she would ask permission to enter the building. After confirming that she had no intention to abide by the policy, she would be directed to leave. This resulted in many days of unapproved leave and disciplinary action.

All told, Simmons was reprimanded once, suspended twice, and ultimately terminated. The September 30, 2021 written reprimand reminded her that she would be unable to enter the office

[2] It also applied to visitors to executive branch offices and buildings.

unless she abided by the policy and that failure to come in to work on Wednesdays and Fridays would "result in unauthorized leave without pay" and possible "disciplinary action." (Am. Compl., ECF No. 33-1, Page ID 958.) The letter also stated that she had a right to "respond to this reprimand in writing" and that a copy of her response would be placed in her personnel files. (Am. Compl., ECF No. 33-1, Page ID 958.)

On October 5, 2021, she was suspended for three days. The suspension letter noted that Simmons could appeal this action. She was again suspended on October 22, 2021, this time for five days, and was informed that she could appeal this action.

And finally, on November 8, 2021, she received an intent to dismiss letter. This came on the heels of more issues, including Simmons' failure to report for work on a few days and general inaccessibility. A pretermination hearing occurred on November 19, 2021, and her termination was effective on December 16, 2021.

Simmons, however, had filed suit, pro se, on October 22, 2021, long before her termination. Much of her complaint concerns the alleged unenforceability of the mask policy under Kentucky law. She alleges that a series of resolutions and bills that passed during the legislative sessions in 2021 "limit[ed] the Governor's emergency powers," including the Governor's ability to "impose requirements like a general mask mandate." (Am. Compl. ¶ 16, ECF No. 33, PageID 849.) And later in 2021, the Kentucky General Assembly declined to explicitly extend any executive order or administrative regulations for mask mandates. These measures, she contends, divested the executive branch of its authority to create and enforce the policy she challenges.

And because the Defendants disciplined her for her failure to abide by the policy, she continues, they violated her Fourteenth Amendment right to due process. Simmons makes three main arguments. First, Simmons alleges that she was deprived of a property interest in her

employment. Second, she alleges that she was deprived of a protected liberty interest in her "good name, reputation, honor, or integrity" when Defendants tarnished her "clean personnel record," with disciplinary actions, thereby reducing her future job prospects. (Am. Compl. ¶¶ 12, 43, ECF No. 33, PageID 848, 857 (citation omitted).) Third, Defendants violated her right to be free from "arbitrary" government action when the Public Protection Cabinet enforced the "illegal" COVID policy. (Am. Compl. ¶ 70, ECF No. 33, PageID 865.)

Defendants moved to dismiss, arguing that they are entitled to qualified immunity. The district court agreed with Defendants and granted the motion. And Simmons timely appealed.[3]

II.

We review the denial of a motion to dismiss on qualified immunity grounds de novo. *Crawford v. Tilley*, 15 F.4th 752, 762 (6th Cir. 2021). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And in determining whether government officials are entitled to qualified immunity, we conduct a two-step inquiry. "[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citation omitted). We can address these requirements in either order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

[3] In her complaint, Simmons requested both monetary damages and equitable relief. Qualified immunity would not bar the latter. *See Endres v. Ne. Ohio Med. Univ.*, 938 F.3d 281, 302 (6th Cir. 2019). But as we discuss below, her claims for equitable relief are now moot.

III.

Before turning to the merits, we will briefly address some jurisdictional disputes. The first involves what relief Simmons can obtain, given that she is a former employee and that the mask mandate has now been repealed. Simmons argues that she can obtain injunctive relief against Defendants in their official capacities under the *Ex Parte Young* exception to sovereign immunity. And she originally requested that Defendants be "enjoin[ed] . . . from enforcing . . . or otherwise requiring compliance with the Face Covering Policy[.]" (Am. Compl., at 24, ¶ 2, ECF No. 33, Page ID 868.)

At the time Simmons filed suit, she was a state employee. In her original complaint, she requested preliminary equitable relief to stop the state from enforcing the mask mandate. The district court denied that relief shortly after she filed suit and she took an interlocutory appeal. Before we could adjudicate that appeal, however, the district court dismissed her case entirely. *Simmons v. Beshear*, No. 3:21-CV-052, 2022 WL 1434644 (E.D. Ky. May 5, 2022). So the denial of preliminary relief merged into that final judgment. In addition, the governor rescinded the mask mandate in February 2022. *Simmons v. Beshear*, No. 21-6034, 2022 U.S. App. LEXIS 18264, at *4–5 (6th Cir. June 30, 2022). Thus, we dismissed her interlocutory appeal as moot. *Id.* at *5.

Although her briefing is unclear on whether she still seeks equitable relief, any request for that relief is moot. After she filed this suit, Simmons was terminated, making her request to enjoin the enforcement of the policy—and any prospective relief—moot. *See Buntin v. Breathitt Cnty. Bd. of Educ.*, 134 F.3d 796, 801 (6th Cir. 1998) (vacating an injunction involving employee's job duties because the employee was no longer employed); *cf. Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013) ("[C]laims for reinstatement are prospective in nature and appropriate subjects for *Ex Parte Young* actions." (citation omitted)). In addition, the mask mandate has been

lifted without any reason to believe that it will be re-imposed, which also moots this part of her case. *See Resurrection Sch. v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022) (en banc).[4]

So, to sum it up, we will analyze whether Simmons successfully brought claims, in her capacity as a former employee, against Defendants in their individual capacities for money damages.

The other preliminary dispute involves standing. Simmons has standing to sue as a former employee of the State. But Simmons challenges the district court's determination that she lacks standing to sue as a visitor to State buildings and offices. Recall that the policy at issue applies to employees and visitors of executive branch offices and buildings.

We're all familiar with the three elements to standing. "The plaintiff 'must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 861 (6th Cir. 2020) (citation omitted). "[A]t the pleading stage, the plaintiff must clearly allege facts demonstrating each element." *Id.*

Simmons lacks standing to sue as a visitor because she doesn't allege that she was, or would imminently be, injured as a visitor. She alleges that, as an employee, she could not work at the office on Wednesdays and Fridays because she refused to comply with the policy. And she alleges injuries flowing from that reality. (Am. Compl. ¶ 12, ECF No. 33, PageID 848 ("Defendants have caused injury-in-fact to Plaintiff including economic injury . . . [and] damage to Plaintiff's good name and reputation in that Plaintiff's personnel record is now full of disciplinary sanctions[.]").) She was not a visitor at her place of work. Nor did she allege that she

[4] This also resolves her argument that Defendants impliedly consented to suit.

intended to visit her former place of work or any other executive branch buildings as a visitor. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("[P]laintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek[.]"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (injury must be "actual or imminent, not conjectural or hypothetical" (citation omitted)); *Buchholz*, 946 F.3d at 865 (future harm must be "'certainly impending'" (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). So Simmons only has standing to challenge the policy as a former employee.

IV.

A. Property-Interest Claim

We now turn to the merits. To start, we'll address Simmons' claim that she was deprived of a constitutionally protected property interest in her employment with the Public Protection Cabinet without due process.

There are two steps in this inquiry. First, Simmons must establish that she had a protected property interest in her position at the Public Protection Cabinet. *See Kuhn v. Washtenaw Cnty.*, 709 F.3d 612, 620 (6th Cir. 2013). Second, if a constitutionally protected property interest is at play, we must determine whether Simmons was "afforded the procedures to which government employees with a property interest in their jobs are ordinarily entitled." *Id.* (citation omitted).

Here, Simmons has a constitutionally protected property interest in her position at the Public Protection Cabinet. (Appellees Br. at 18 (citing Ky. Rev. Stat. § 18A.095(1)).); *see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (noting that property interests can be created by independent sources such as state law); *Williams v. Kentucky*, 24 F.3d 1526, 1537–38 (1994) ("Statutes providing that state employees cannot be discharged or demoted without

cause clearly give the employee a protected property interest in continued employment."). She therefore passes step one.

But Simmons fails to allege that she wasn't afforded proper process. Under the Fourteenth Amendment, employees with constitutionally protected property interests have a right to notice and a pretermination hearing before being deprived of their property interest. *See Kuhn*, 709 F.3d at 620. Simmons doesn't allege any notice that she received was constitutionally deficient. In fact, her Complaint details how Defendants continuously provided Simmons with written notice of the potential outcome of her actions, *see, e.g.*, (Am. Compl., ECF No. 33-1, PageID 947 (warning that absence "due to non-compliance with cabinet policy may result in corrective or disciplinary action")), and her Complaint shows that she was notified of her procedural rights when disciplinary action was taken, *see, e.g.*, (Am. Compl., ECF No. 33-1, PageID 970 (suspension letter noting that she could appeal this determination).) And Simmons received a pretermination hearing on November 19, 2021, before her eventual termination on December 16, 2021.

Simmons pushes back in two ways. First, she argues that she shouldn't have faced disciplinary action because Defendants did not have authority to enact and enforce the policy. In other words, she disagrees with being subject to "process" in the first place. But this argument is misplaced because it hinges on the "reason for [her suspension] and ultimate termination," which is "not a consideration relevant to" whether she had "constitutionally adequate notice . . . and an opportunity to respond." *Kuhn*, 709 F.3d at 623. Simply put, this is an argument about the merits of the policy disguised as an argument about what process is due. We can't entertain that here.

And her second argument, that Defendants didn't follow proper procedures and violated Kentucky state law when putting the policy in place, suffers from the same problem. *See Anderson v. Ohio State Univ.*, 26 F. App'x 412, 414 (6th Cir. 2001) (allegations of a violation of a state's

formal procedure do not, on their own, establish a cognizable due process violation) (citing *Purisch v. Tenn. Tech. Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996)).

Her two arguments suffer from another related problem. They both stem from her belief that "Appellees have violated established State law." (Appellant Br. at 12; *id.*, pp. 12-19.) This simply isn't the forum for those arguments. *See Huron Valley Hosp. Inc v. City of Pontiac*, 887 F.2d 710, 714 (6th Cir. 1989) (A § 1983 claim is "limited to deprivations of *federal* statutory and constitutional rights. It does not cover official conduct that allegedly violates *state* law."); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Ultimately, nothing defeats the fact that she was afforded notice and an adequate hearing. We find that Simmons did not allege a violation of her right to procedural due process under the Fourteenth Amendment based on a property interest in her employment.

B. Liberty-Interest Claim

Simmons contends that Defendants deprived her of her liberty interest in her "good name, reputation, honor, or integrity" by issuing written reprimands and suspensions, and by ultimately terminating her. (Appellant Br. at 19 (citation omitted).)

The Due Process Clause of the Fourteenth Amendment protects Simmons' liberty interest in her "'reputation, good name, honor, and integrity.'" *Crosby v. Univ. of Ky.*, 863 F.3d 545, 555 (6th Cir. 2017) (citations omitted). Generally, that liberty interest "is impugned when a state actor stigmatizes an individual by means of voluntary, public dissemination of false information about the individual." *Id.* (cleaned up). To that end, Simmons must allege facts sufficient to establish the following: (1) that Defendants made "stigmatizing statements" in conjunction with her termination; (2) that those statements alleged more than "merely improper or inadequate performance, incompetence, neglect of duty or malfeasance"; (3) that the "stigmatizing

statements" were "made public"; (4) that "the charges made against [her] were false"; and (5) that "the public dissemination [was] voluntary." *Id.* If she established all five elements, she would be entitled to a name-clearing hearing. *Quinn v. Shirey*, 293 F.3d 315, 320 (6th Cir. 2002) (citation omitted). "It is the denial of the name-clearing hearing that causes the deprivation of the liberty interest without due process." *Id.* (citation omitted).

With all of this in mind, Simmons does not plead enough facts to establish that she has a constitutionally protected liberty interest. She's never denied that she intentionally violated the mask mandate, which led to the disciplinary action. So even if any statements in her record are "stigmatizing" (which they likely aren't), they don't allege anything beyond inadequate performance, and they aren't false. And although she alleges that the written reprimand, suspensions, and termination tarnished her "clean personnel record," (Am. Compl. ¶ 12, ECF No. 33, PageID 848.), she does not allege that Defendants made her employment record or its contents public. *Cf. Crosby*, 863 F.3d at 555 (involving a dean who gave stigmatizing statements at a faculty meeting); *Quinn*, 293 F.3d at 318 (involving a plaintiff who alleged that "city and county officials publicly issued disparaging statements").

Finally, she alleges that finding new employment might be challenging given the reason for her termination, but a charge that "merely makes a plaintiff less attractive to other employers" doesn't implicate a liberty interest. *Crosby*, 863 F.3d at 556 (citation omitted). We find it unlikely that Defendants "imposed upon [her] a moral stigma such as immorality or dishonesty capable of seriously damaging [her] standing and associations in the community[.]" *Id.* at 556 (cleaned up). But we need not decide that because she needs to allege facts that would support all five elements of this liberty-interest claim to be entitled to any process. And she has not. So her liberty-interest claim fails.

C. Arbitrariness Claim

Finally, Simmons argues that Defendants' "enforcement" of the mask policy "rises to the level of '*abusive executive action*' *that is arbitrary, oppressive, and which* '*shocks the conscience*.'" (Am. Compl. ¶ 70, ECF No. 33, PageID 865 (citation omitted).)

One liberty interest protected by substantive due process is "the right not to be subjected to arbitrary and capricious government action that 'shocks the conscience and violates the decencies of civilized conduct.'" *Guertin v. State*, 912 F.3d 907, 918 (6th Cir. 2019) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998)). "[T]he measure of what is conscience shocking is no calibrated yard stick," nor is it "subject to mechanical application." *Lewis*, 523 U.S. at 847, 850. But "[o]ver the years, the courts have used several tropes to explain what it means to shock the conscience." *Range v. Douglas*, 763 F.3d 573, 589 (6th Cir. 2014). For example "[d]ue-process-violative conduct . . . 'shocks the conscience,' infringes upon the 'decencies of civilized conduct,' is 'so brutal and so offensive to human dignity,' and interferes with rights 'implicit in the concept of ordered liberty.'" *Guertin*, 912 F.3d at 923 (citation omitted). "The quintessential example of 'conscience-shocking' behavior arose in the physical-force context: A police officer directed a doctor to pump a suspect's stomach to obtain illicit drugs as evidence." *Golf Vill. N. LLC v. Cnty. of Powell*, 42 F.4th 593, 601 (6th Cir. 2022) (citing *Rochin v. California*, 342 U.S. 165, 172–73 (1952)).

This example puts into perspective why Simmons' claim is unconventional. She's alleging that her employer's decision to enforce a COVID policy was arbitrary in the constitutional sense. Yet she cites no case law that establishes that this "shocks the conscience." And in order to overcome a defendant's assertion of qualified immunity, a plaintiff must show that her asserted

right is "clearly established." *See Wesby*, 138 S. Ct. at 589 (citation omitted). Because Simmons fails to do so, Defendants are entitled to qualified immunity.[5]

And to the extent that Simmons alleges that the policy violated state law, these claims are not cognizable, as we've explained above. *See supra* p. 11.

V.

For these reasons, Defendants are entitled to qualified immunity, and the decision below is affirmed.

[5] Sometimes our Court requires plaintiffs to establish both "an underlying constitutionally-protected right" and conscience-shocking behavior; and other times, we have treated these two elements as separate ways to state a substantive due process claim. *Range*, 763 F.3d at 589 (noting the conflict in our cases); *see EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 861–62 (6th Cir. 2012) (collecting cases). But because we resolved Simmons' claim on the clearly established prong, we need not consider this conflict.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5404

DANA SIMMONS,

Plaintiff - Appellant,

v.

ANDREW G. BESHEAR, individually and in his official capacity as Governor; GERINA WHETHERS, individually and in her official capacity as Secretary of the Personnel Cabinet; RAY PERRY, individually and in his official capacity as Secretary of the Public Protection Cabinet,

Defendants - Appellees.

FILED
Dec 09, 2022
DEBORAH S. HUNT, Clerk

Before: SUTTON, Chief Judge; GRIFFIN and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

CIVIL ACTION NO. 3:21-cv-052 (WOB)

DANA SIMMONS **PLAINTIFF**

VS. **MEMORANDUM OPINION ORDER**

ANDREW BESHEAR, ET AL. **DEFENDANTS**

This is an action filed by Dana Simmons, a former employee of the Commonwealth, against Governor Andy Beshear and other state officials for violations of her Fourteenth Amendment substantive and procedural due process rights stemming from a policy that all executive branch employees wear a mask while at work. Currently pending before the Court are Defendants' motion to dismiss, (Doc. 38), Plaintiff's motion for jury trial, (Doc. 35), Defendants' motion to strike, (Doc. 37), Plaintiff's motion to strike, (Doc. 41), and Plaintiff's motion to vacate, (Doc. 43). After careful consideration, the Court concludes that oral argument is unnecessary, and it issues the following Memorandum Opinion and Order.

FACTUAL AND PROCEDURAL BACKGROUND

On March 6, 2020, Governor Andy Beshear declared a state of emergency in the Commonwealth of Kentucky in response to the COVID-19 pandemic. (Doc. 33-1 at 1-3). Throughout the course of the pandemic, the Governor issued various executive orders meant

to curb the spread of COVID-19. (*See* Doc. 33 at ¶ 14). These executive orders, among other things, mandated the closing of non-essential business and schools and the wearing of face masks in public areas. (*Id.*). Pursuant to the executive orders, the Governor's designees also issued orders that set minimum requirements for businesses and other community entities to help the citizens of Kentucky stay safe for the duration of the pandemic. (*Id.*).

On May 11, 2020, the Secretary for Health and Family Services, Eric Friedlander, signed an order establishing the "Healthy at Work" program, which set the minimum requirements for the reopening of businesses. (Doc. 33-1 at 5-11). The Healthy at Work program mandated that "businesses, organizations, and entities must ensure, to the greatest extent practicable, that their employees, volunteers, and contractors wear a cloth mask." (*Id.* at 7).

Throughout 2020, there were various challenges to the Governor's executive orders. However, in November of 2020, the Kentucky Supreme Court held that the Governor was properly exercising the power that had been delegated to him by the Kentucky General Assembly under KRS Chapter 39A. *Beshear v. Acree*, 615 S.W.3d 780, 813 (Ky. 2020). The Court cautioned, however, that the General Assembly had the authority to revoke that power if it deemed fit. *Id.*

In January 2021, during its Regular Session, the General Assembly responded to *Acree* by passing Senate Bill 1 and House Joint Resolution 77. Senate Bill 1 amended KRS Chapter 39A and restricted the Governor's emergency powers. First, it prohibited the Governor from declaring a state of emergency based "upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly." 2021 Ky. Acts ch. 6 (SB 1) § 2(3). Second, it prohibited any executive order, administrative regulation, or other directive that restricted in-person activities from lasting longer than thirty days unless the General Assembly passed an extension. *Id.* at § 2(2). The General Assembly also passed House Joint Resolution 77, which declared an end to the state of emergency. 2021 Ky. Acts ch. 168 (HJR 77). Both House Joint Resolution 77 and Senate Bill 1 were enacted over the Governor's veto.

The General Assembly's restriction of the Governor's emergency powers triggered a new round of challenges in Kentucky state courts. The Franklin County Circuit Court issued a state-wide temporary restraining order, finding that the laws likely violated the Kentucky Constitution. *Beshear v. Osborne, et al.*, No. 21-CI-89 (Franklin Cty. Apr. 7, 2021). The Boone County Circuit Court, on the other hand, upheld the laws finding that they were a valid exercise of the General Assembly's delegation

powers. *Ridgeway, et al. v. Beshear*, No. 20-CI-678, slip op. (Boone Cty. June 15, 2021). Eventually, the issue made its way to the Kentucky Supreme Court, which ruled on August 21, 2021 that the laws were constitutional and therefore, the Governor's powers pursuant to KRS Chapter 39A were appropriately limited by the General Assembly. *Cameron v. Beshear*, 628 S.W.3d 61, 78 (Ky. 2021).

To solidify this holding, on September 7, 2021, the General Assembly passed Joint Resolution 1, which provided that "all SARS-COV-2-related orders issued by the Governor and all executive actions and administrative orders . . . are of no further force or effect . . . ." 2021 Ky. Act ch. 1 (HJR 1). In the recitals, the General Assembly highlighted that this was being enacted to clarify the Governor's emergency powers. *Id.* The Resolution specifically exempted Personnel Cabinet Memorandum No. 21-14, which aimed to incentivize executive branch employees to receive their COVID-19 vaccine. *Id.* at § 3. The Memorandum referenced the Commonwealth's continued implementation of the "Healthy at Work" initiative to "ensur[e] the health and safety of [] state employees." Personnel Cabinet Memorandum No. 21-14 (Aug. 5, 2021).

Dana Simmons ("Plaintiff") was an executive branch classified employee with the Commonwealth of Kentucky Public Protection Cabinet, Office of Legal Services where she served as a Staff Attorney II. (Doc. 33 at ¶ 2). She began work on September 16,

2020 and worked remotely five days a week because of the COVID-19 pandemic. (*Id.* at ¶ 29). In July of 2021, her position moved to a hybrid work model, where Plaintiff worked in-person some days and remotely on other days. (*Id.*). At the time she moved to a hybrid work model, face masks were not required in the office.

On July 29, 2021, Defendant and Personnel Secretary, Gerina Weathers, disseminated to all executive branch employees a face covering policy. (Doc. 33-1 at 54-55). The policy required that individuals in executive branch buildings wear a face covering while in common areas. (*Id.* at 55). Employees were free to remove their face coverings while at their workstations. (*Id.*). It is unclear from the record whether Plaintiff was initially compliant with the policy or if she was always noncompliant. But regardless, at some point during the summer or early fall of 2021, Plaintiff decided not to comply with the face covering policy.

Plaintiff's noncompliance prompted the Deputy Commissioner to approach her on September 21, 2021 and remind her that she needed to wear a mask while in common areas. (Doc. 33 at ¶ 31). Following this interaction, Plaintiff emailed her direct supervisor and explained that she believed it was her prerogative to choose to wear a mask or not. (*Id.* at ¶ 32). Her supervisor responded to her emphasizing that he was "thankful for the good work" Plaintiff did and explained that the policy was permissible despite the Kentucky Supreme Court's decision in *Cameron v. Beshear* because

the policy only applied to executive branch employees. (Doc. 33-1 at 73-74). Plaintiff continued to be noncompliant with the face covering policy.

A few days later, Plaintiff had a meeting with the General Counsel of the Public Protection Cabinet, Ben Long. (Doc. 33 at ¶ 33). At the meeting, Mr. Long provided Plaintiff with a copy of the face covering policy and an appeals form, and he told her that she would not be permitted to work on days she was scheduled to work in the office if she chose not to wear a face covering. (*Id.*). A few hours after the meeting, Plaintiff received an email from Mr. Long, explaining for the first time that she would not be permitted to use leave time on the days she was scheduled to work in the office. (*Id.* at ¶ 34). The email further stated that "Any absence on those days due to non-compliance [sic] with cabinet policy may result in corrective or disciplinary action . . . ." (*Id.*).

Plaintiff was scheduled to work in the office on September 29, 2021. (*Id.* at ¶ 35). She arrived at her desk without a face covering and logged on to her computer to see an email from Mr. Long that was sent the night before, instructing her not to come to work without a face covering. (*Id.*). Plaintiff replied that she was already in the building and would not be wearing a face covering. (*Id.*). Mr. Long responded and instructed her to leave, which she did. (*Id.*). Plaintiff received a written reprimand the

next day from Mr. Raley, the Executive Director of the Office of Administrative Services. (*Id.* at ¶ 36).

Plaintiff again showed up for in-person work on October 1, 2021. (*Id.* at ¶ 37). She waited in the lobby and emailed Mr. Long that she was there to work but would not enter the building without permission. (*Id.*). Plaintiff did not receive a response and left the premises. Mr. Raley emailed her later in the day and said that she may only enter the building if she wore a face covering. (*Id.*). She did not work that day. (*Id.*).

On October 5, 2021, Plaintiff received an email from Mr. Raley suspending her without pay for the next three days for her refusal to comply with the policy. (*Id.* at ¶ 38). After her suspension, she continued with her telecommuting schedule and took approved vacation from October 13, 2021 until October 15, 2021. (*Id.* at ¶ 39). Plaintiff resumed remote work and was on leave without pay again on October 20, 2021. (*Id.*). On November 8, 2021, Plaintiff received an intent to dismiss letter. (*Id.* at ¶ 40). Her pre-termination hearing was held on November 19, 2021 and her termination was effective December 16, 2021.[1] (Doc. 48).

Plaintiff filed this lawsuit on October 22, 2021, alleging violations of her fundamental liberty interests. (Doc. 1). She

[1] Plaintiff's supplemental initial disclosures state her termination was effective December 16, 2022. (Doc. 48). Given that such date has yet to occur, and the events referenced in the complaint leading up to her termination all occurred in 2021, the Court concludes that this was a typographical error meant to say December 16, 2021.

requested a preliminary injunction, which this Court denied, finding that there was not sufficient evidence of irreparable harm. (Doc. 12). Plaintiff subsequently filed an appeal with the Sixth Circuit.[2] (Doc. 13). Plaintiff has since amended her complaint. (Doc. 33). Defendants now move the Court to dismiss the case on the grounds of sovereign and qualified immunity, and failure to state a claim. (Doc. 38).

ANALYSIS

To survive a motion to dismiss, the complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible upon its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). While the Court construes the complaint in favor of the complaining party, the Court need not accept as true legal conclusions or unwarranted factual inferences. *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

A. Standing to Challenge the Policy

The Court must first address standing. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). The Court

[2] "As a general rule, an effective notice of appeal divests the district court of jurisdiction over the matter forming the basis for the appeal." *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987). However, "an appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits." *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995).

assesses the following three elements in determining whether a party has constitutional standing: (1) whether the plaintiff has alleged an "injury in fact," (2) that is traceable to the challenged action of the defendant, and (3) can be redressed by the court. *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016) (citing *Lujan*, 504 U.S. at 560-61).

When an injury has not yet occurred, a plaintiff must plead that the injury is certainly impending or there is a substantial risk the harm will occur. *Id.* "The plaintiff must show that [s]he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (internal quotations omitted). Broad and speculative allegations are not sufficient; the plaintiff must allege concrete plans to show future injury. *See Lujan*, 504 U.S. at 579 (Kennedy, J., concurring in-part) (noting that the purchase of a plane ticket would be sufficient to show future harm).

Plaintiff challenges the face covering policy in two different ways. First, she alleges that the policy was a violation of her constitutional rights as an employee of the Commonwealth. Second, she alleges that because the policy applied to any visitor of an executive branch building, it was an impermissible executive order under current state law.

Plaintiff has clearly established all three elements as it relates to her as an executive branch employee—the defendants' policies caused her to be placed on unpaid leave. But Plaintiff does not have standing to contest the constitutionality of the policy requiring visitors to wear facemasks in executive branch buildings because she has not alleged an injury in fact. Plaintiff has not alleged her plans to exercise her rights and enter a governmental building without wearing a mask beyond the purview of her job. *See Lyons*, 461 U.S. at 105. Her complaint is devoid of any such allegations of future harm. Therefore, Plaintiff only has standing to challenge the policy as an employee.

B. Mootness for Prospective Harm

Plaintiff also does not have standing to sue for prospective injunctive or declaratory relief. Plaintiff is no longer an employee of the Commonwealth. "In order to fall within the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law." *Diaz v. Michigan Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013). This exception is simply not applicable based on the facts alleged in the complaint. Because Plaintiff has been terminated, there is no continuing violation of federal law. Instead, Plaintiff's claims for

prospective relief are moot.[3] *See Thomas v. City of Memphis, Tenn.*, 996 F.3d 318, 330 (6th Cir. 2021) ("Any injunction or order declaring [the defendant's conduct] unconstitutional would amount to exactly the type of advisory opinion that Article III prohibits."); *Hilburn v. Dep't of Corr.*, No. 2:07-cv-06064, 2010 WL 703202, at *6 (D.N.J. Feb. 23, 2010) ("Plaintiff has been fired; he is not at risk of being fired again; he has no standing to seek prospective injunctive relief.").

Additionally, federal courts cannot grant relief against state officials based on state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Accordingly, Plaintiff's claims for prospective relief are dismissed for lack of subject matter jurisdiction.

C. Qualified Immunity for Damages

It is a well-established principle that the Eleventh Amendment bars plaintiffs from suing state officials in their official capacities for retroactive relief unless the state waives immunity. *See Edelman v. Jordan*, 415 U.S. 651, 665 (1974). Kentucky has not waived said immunity with respect to Section 1983

[3] Defendants argue that prospective relief is moot because the face covering policy has been rescinded. (Doc. 44 at n.2). However, because it can be enacted again at any time, it is not moot on this basis. *See In Resurrection Sch. v. Hertel*, 11 F.4th 437, 449-54 (6th Cir. 2021).

litigation. *Sefa v. Kentucky*, 510 F. App'x 435, 437 (6th Cir. 2013). Thus, Plaintiff's request for damages against Defendants in their official capacities is denied pursuant to Rule 12(b)(1).

However, Plaintiff's claims for damages are still viable against Defendants in their individual capacities. Defendants, in response, argue that they are entitled to qualified immunity.

Qualified immunity protects government officials from lawsuits filed against them in their individual capacities unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The unconstitutionality of the alleged action must be "beyond debate" when the official acted, so much so that any reasonable person would know they violated a right. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). "When the qualified immunity defense is raised at the pleading stage, the court must determine only whether the complaint adequately alleges the commission of acts that violated clearly established law." *Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 681 (6th Cir. 2011).

i. Substantive Due Process

Simmons's first claim is for violation of her substantive due process rights. Substantive due process affords individuals with protection against arbitrary governmental action, including "the exercise of power without any reasonable justification in the

service of a legitimate governmental objective." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Courts have likened violations of substantive due process to that of arbitrary and capricious exercise of state power. The state action "will withstand [a] substantive due process attack unless it is not supportable on any rational basis or is willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992) (internal quotation marks omitted).

In the instant case, Simmons argues that the face covering policy enacted by the Personnel Secretary was unlawful and not within her powers, and the imposition of this requirement on her as a government employee was contrary to clearly established law. In simpler terms, she argues that she was subjected to an unlawful policy. To show that it was clearly established that the policy was impermissible, she cites to legislation passed by the General Assembly which revoked the Governor's emergency powers—a revocation later upheld by the Kentucky Supreme Court.

The Court has discretion as to which of the two issues in a qualified immunity analysis to address first—whether the plaintiff has pled a constitutional violation or whether the law was clearly established. *Hearring v. Sliwowski*, 712 F.3d 275, 279 (6th Cir.

2013). In this case, "it is plain that a constitutional right [was] not clearly established but far from obvious whether in fact there is such a right," so the Court begins its analysis there. *Pearson v. Callahan*, 555 U.S. 223, 237 (2009).

For a right to be clearly established, "[t]he contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent." *Id.* (internal citations omitted).

In 2020, there was a series of lawsuits disputing the constitutionality of Governor Beshear's declaration of a state of emergency and his subsequent executive orders relating to COVID-19. The Kentucky Supreme Court held that the Governor's exercise of emergency powers was constitutional. *Beshear v. Acree*, 615 S.W.3d 780, 813 (Ky. 2020). The Court explained that the General Assembly delegated to the Governor the power to declare a state of emergency and issue executive orders under KRS Chapter 39A. Therefore, the Governor's declaration of a state of emergency and his designees' subsequent issuance of executive orders in response to the COVID-19 was proper. However, the Court cautioned

that this power was not absolute, writing, "there is nothing wrong with this [delegation of authority] so long as the delegating authority retains the right to revoke the power." *Id.* at 810 (quoting *Commonwealth v. Assoc. Indus. of Ky.*, 370 S.W.2d 584, 588 (Ky. 1963)).

In early 2021, the General Assembly did just that. The General Assembly declared an end to the state of emergency and limited the Governor's ability to issue new executive orders relating to COVID-19 restrictions. In simpler terms, the General Assembly took back the emergency powers it had delegated to the Governor.

After conflicting circuit court orders about the constitutionality of the General Assembly's actions, the Kentucky Supreme Court upheld the General Assembly's revocation of the Governor's emergency powers pursuant to KRS Chapter 39A. *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021). Specifically, the Court wrote, "the Governor's emergency powers derive from the statutes enacted by the General Assembly, not from [Kentucky's] Constitution and not from his 'inherent' powers." 628 S.W.3d at 78; *see also Oswald v. Beshear*, 555 F. Supp. 3d 475, 478 (E.D. Ky. Aug. 19, 2021) ("The executive branch cannot simply ignore laws passed by the duly-elected representatives of the citizens of the Commonwealth of Kentucky."). In other words, the Kentucky Supreme

Court held that the Legislature's revocation of emergency powers was properly executed and must be enforced.

Simmons reads the opinion in *Cameron v. Beshear* very broadly when it is deliberately narrow. She argues that the Kentucky Supreme Court opinion holds that all mask mandates are now deemed unconstitutional. But *Cameron v. Beshear* is limited to the powers delegated to the Governor under KRS Chapter 39A. The statute delegates to the Governor and the Division of Emergency Management the power to act "to protect life and property of the people of the Commonwealth, and to protect public peace, health, safety, and welfare . . . and in order to ensure the continuity and effectiveness of government in time of emergency, disaster, or catastrophe." Notably absent from KRS Chapter 39A is discussion of how the Governor should run his own executive branch. Indeed, the language of KRS Chapter 39A specifically refers to how the Governor may act to protect and help the "people of the Commonwealth."

Rather, the administration of executive branch employees is controlled by KRS Chapter 18A. The General Assembly enacted KRS Chapter 18A, which establishes "a system of personnel administration . . . governing the recruitment, examination, appointment, promotion, transfer, lay-off, removal, discipline, and welfare of its classified employees and other incidents of state employment." Defendants argue that the face covering policy

was enacted pursuant to their authority under KRS Chapter 18A.030. (Doc. 38-1 at 10). Under KRS Chapter 18A.030(i) specifically, the Personnel Secretary has the duty to "prepare, in cooperation with appointing authorities and others, programs for employee training, safety, morale, work motivation, health, counseling, and welfare . . . ." The Governor appoints and oversees the Personnel Secretary. The General Assembly has not abrogated any of the powers delegated to the executive branch under KRS Chapter 18A throughout the COVID-19 pandemic.

Government officials benefit from qualified immunity in Section 1983 cases when they followed a reasonable interpretation of the law that is "assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson*, 483 U.S. at 639. Here, the General Assembly delegated discretionary authority to the Personnel Secretary to create internal "programs" designed to promote the health and safety of executive branch employees. The General Assembly did not define the term "program," nor did it outline methods of enforcement. The scope of the Personnel Secretary's discretionary authority was broad and had gone uncontested up until this point. Similarly, the scope of the Public Protection Cabinet Secretary's authority to dictate how to enforce this policy was similarly broad and discretionary.

At the time Plaintiff was disciplined for her noncompliance with the face covering policy, the Kentucky Supreme Court had only

ruled on the Governor's powers under KRS Chapter 39A. It had not addressed the authority the Governor and his designees had pursuant to KRS Chapter 18A to enact a face covering policy in executive branch buildings. It can hardly be said that enacting the face covering policy was an unreasonable interpretation of the authority vested to the Personnel Secretary by the General Assembly. Nor can it be said that Joint Resolution 1 clearly prohibited the Personnel Secretary from promulgating internal policies directed at promoting executive branch employees' health and wellness. The language of the resolution is not that comprehensive. Further, there is no evidence that the policy was disseminated with any bad faith.

The contours of the Personnel Secretary's powers were not clearly defined at the time Simmons was reprimanded for failing to comply with the face covering policy. Therefore, the three defendants, in their individual capacities, are entitled to qualified immunity for the damages Simmons seeks. "Qualified immunity is immunity from suit, and not merely liability." *Skousen v. Brighton High Sch.*, 305 F.3d 520, 525 (6th Cir. 2002).

This Court ultimately declines to rule on the constitutionality of the face covering policy under KRS Chapter 18A because the contours of that law are "more appropriately addressed by Kentucky state courts." *Scheweder v. Beshear*, 3:21-cv-19, 2021 WL 5150603, at *4 (E.D. Ky. Nov. 11, 2021). The

constitutional-interpretation question has "no effect on the outcome of the case," and thus, the Court need not resolve it. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Accordingly, all three Defendants are entitled to qualified immunity for Plaintiff's substantive due process claim.

ii. Procedural Due Process

Plaintiff also pleads a violation to her procedural due process rights. In general, "procedural due process principles protect persons from deficient procedures that lead to the deprivation of cognizable liberty interests." *Pittman v. Cuyahoga Cty. Dep't of Children and Family Servs.*, 640 F.3d 716, 729 (6th Cir. 2011). Plaintiff must show (1) that she has been deprived of a cognizable liberty interest, and (2) that such deprivation occurred without adequate procedural protections. *Id.* The alleged deprivation must have been the result of more than a "lack of due care." *Daniels v. Williams*, 474 U.S. 327, 333 (1986). Instead, the "conduct must be grossly negligent, deliberately indifferent, or intentional." *Howard v. Grinage*, 82 F.3d 1343, 1350 (6th Cir. 1996).

The Court notes it is difficult to ascertain the exact nature of Plaintiff's procedural due process claim. She does not plead any procedural due process violations regarding her discipline or termination. On the contrary, she has attached exhibits to her amended complaint showing that she had the opportunity to appeal

the disciplinary actions taken against her and have a pre-termination hearing before her termination took effect. (Doc. 33 at ¶ 33; Doc. 33-1 at 93-94). But generally, Simmons takes issue with the fact that the face covering policy was a regulation that did not go through the proper notice and comment procedures. She also claims her reputation was harmed by the disciplinary measures taken by her supervisors. None of these, however, amount to a deprivation of her liberty interests.

As discussed in greater length above, the face covering policy was promulgated as a "program" by the Personnel Secretary. The term "program" indicates that the face covering policy is an internal policy that does not require the promulgation of formal rules that are subject to a notice and comment period. *See* KRS § 13A.010(2)(a) (exempting from notice and comment "statements concerning only the internal management of an administrative body and not affecting private rights or procedures available to the public."). Further, the policy does not contradict KRS Chapter 13A.130, which provides specific examples of when internal policies or memorandums are prohibited. *See also Vestal v. Motley*, 2007 Ky. App. LEXIS 286 (Ky. Ct. App.) (holding that an internal memorandum mandating the canteen of receipts for 60 days was reasonably related to goals outlined by statute and did not violate administrative law). Accordingly, the fact that this face covering

policy did not go through notice and comment does not amount to a procedural due process violation.

Plaintiff also refers to her damaged reputation in her complaint, arguing that her once clean personnel record is now tarnished, making it difficult for her to find employment. (Doc. 33 at ¶¶ 12, 43, 46). A "person's reputation, good name, honor, and integrity are among the liberty interests protected by the due process clause of the [F]ourteenth [A]mendment." *Quinn v. Shirley*, 293 F.3d 315, 319 (6th Cir. 2002).

To establish that Defendants' actions amounted to a procedural due process violation, Simmons must show that Defendants made false and stigmatizing statements in conjunction with her discipline and that these statements were made public. *Id.* at 320 (citing *Brown v. City of Niota*, 214 F.3d 718, 722-23 (6th Cir. 2000)). Once a plaintiff has established these elements, she "is entitled to a name-clearing hearing if [she] requests one." *Brown*, 214 F.3d at 723. "It is the denial of the name-clearing hearing that causes the deprivation of the liberty interest without due process." *Quinn*, 293 F.3d at 320.

Plaintiff's complaint is completely lacking factual allegations connected to these required elements. Although Simmons complains that her disciplinary record has made it difficult to find subsequent employment, she does not identify any part of her record that she considers false, nor does she allege

that any stigmatizing statements were disseminated and made public. Even more, she does not claim that she requested and was denied a name-clearing hearing. Therefore, she has failed to sufficiently plead a procedural due process violation.[4]

D. Motion to Vacate

Plaintiff has additionally filed a motion to vacate the Court's previous order, (Doc. 36), which deemed Defendants' first motion to dismiss as moot. She claims this was in error due to the Court's "oversight or mistake." (Doc. 43 at 4).

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[4] Plaintiff only explicitly pleads two claims: substantive due process and procedural due process. These two claims are squarely addressed above. However, Plaintiff also claims Defendants violated her Eighth, Ninth, and Tenth Amendment rights, parallel Kentucky Constitutional rights, and that she is entitled to relief pursuant to 42 U.S.C. § 1988. For purposes of a clear and thorough record, the Court briefly addresses these miscellaneous claims and why they fail.

First, Plaintiff fails to allege any facts explaining how Defendants' actions violated her Ninth or Tenth Amendment rights. Therefore, to the extent the Court would construe these as individual claims, they are dismissed pursuant to Rule 12(b)(6) under *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544 (2007). Second, the Eighth Amendment is inapposite here. *See Cecil v. Ky. Comm. & Tech. Coll. Sys.*, 2021 WL 4129973, at *6 (E.D. Ky. Sep. 9, 2021) (finding there is no authority to extend Eighth Amendment protections to employment disputes). Finally, Plaintiff's Section 1988 claim fails because it "requires that a plaintiff receive at least some relief on the merits of [her] claim before [s]he can be said to prevail." *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 619 (6th Cir. 2007).

Plaintiff also asserts violations to Sections 1, 2, 17, and 26 of the Kentucky Constitution. However, she does not identify any state statutory vehicle for vindicating her state constitutional rights. Section 1983 applies only to deprivations of federal constitutional and statutory rights. *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 597 (6th Cir. 2003). "There is no analogous state statute or authority that enables [Simmons] to pursue a civil claim for an alleged violation of the Kentucky Constitution." *Shepherd v. Univ. of Kentucky*, No. 5:16-cv-5, 2016 WL 4059559, at *4 (E.D. Ky. July 28, 2016). Therefore, to the extent these are construed as separate claims, they fail as a matter of law.

Plaintiff moved for leave to file an amended complaint. (Doc. 21). Although she attached her amended complaint to her motion for leave, Plaintiff's amended complaint was not docketed until the Court granted the motion. (Doc. 31). In between Plaintiff filing her motion for leave and the Court's granting of the motion, Defendants filed their first motion to dismiss. (Doc. 23). However, the amended complaint only became the operative complaint when the Court granted the motion and instructed the Clerk to docket the amended complaint. (Doc. 31). This was not a "second bite at the apple" as Plaintiff contends. It was merely the Court maintaining a clear docket. The Court has broad discretion as to how it manages its docket, and therefore Plaintiff's motion to vacate will be denied. *See Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999).

More importantly, deeming Defendants' first motion to dismiss moot did not unfairly prejudice Plaintiff. By the time Defendants' first motion to dismiss would have been ripe, Plaintiff was already terminated from her job—meaning she did not lose the right to prospective relief because of the Court's order. Further, the arguments presented in Defendants' original motion to dismiss and subsequent motion to dismiss are substantially similar. The Court's order was not "legally or factually erroneous," and therefore, the Court need not vacate it. *Westport Ins. Corp. v.*

Mudd, No. 1:08-cv-34-R, 2010 WL 5068140, at *2 (W.D. Ky. Dec. 6, 2010).

Accordingly, for the reasons stated above,

IT IS ORDERED:

1. Defendants' motion to dismiss, (Doc. 38), be, and is hereby **GRANTED.**
2. Plaintiff's motion to vacate, (Doc. 43), be, and is hereby **DENIED.**
3. Plaintiff's motion for jury trial, (Doc. 35), be, and is hereby **DENIED AS MOOT.**
4. Defendants' motion to strike, (Doc. 37), be, and is hereby **DENIED AS MOOT.**
5. Plaintiff's motion to strike, (Doc. 41), be, and is hereby **GRANTED.**

A separate judgment shall enter concurrently herewith.

This 5th day of May 2022.

Signed By:
William O. Bertelsman WOB
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

DANA SIMMONS,	)	
	)	
Plaintiff,	)	Civil Action No. 3: 21-52-WOB
	)	
v.	)	
	)	
ANDREW BESHEAR, *et al.*,	)	**ORDER**
	)	
Defendants.	)	

*** *** *** ***

On November 19, 2021, the Defendants moved to dismiss the Complaint filed by Plaintiff Dana Simmons on numerous grounds. [R. 23] Simmons has filed her response [R. 26], to which the Defendants have recently replied [R. 27]. The motion to dismiss is therefore fully briefed and ripe for decision by the Court.

A few days later, before the Defendants filed a responsive pleading and prior to any discovery, Simmons filed a motion for summary judgment in her favor touching upon some of the same grounds addressed in the motion to dismiss. [R. 28] Defendants, through counsel, requested Simmons's agreement to defer their obligation to respond to her motion until the motion to dismiss was decided. Simmons declined, indicating that the Court "may find it efficient to treat the Motion for Summary Judgment as a cross motion with your motion to dismiss ..." [R. 29-1 at 2] Unsatisfied, Defendants have filed a motion requesting that their deadline to respond to Simmons's motion be extended until 21 days after the Court rules upon the pending motion to dismiss. [R. 29]

Appendix D

Rule 56 of the Federal Rules of Civil Procedure does not, by its terms, prohibit the filing of a motion for summary judgment until after the close of discovery. Still, the Rule supposes that some discovery may have transpired, Rule 56(b), and permits a party to request deferral of such a dispositive motion until more discovery has been conducted, Rule 56(d). And the Sixth Circuit has long directed that "[b]efore ruling on summary judgment motions, a district judge must afford the parties adequate time for discovery, in light of the circumstances of the case." *Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F. 3d 1190, 1195 (6th Cir. 1995) (citations omitted). As one Court has explained, motions "for summary judgment filed before the close of discovery are often denied as premature in the Sixth Circuit, either on the opposing party's Rule 56(f) affidavit and request or on the Court's own initiative without an explicit request from the opposing party." *Wells v. Corporate Accounts Receivable*, 683 F. Supp. 2d 600, 602 (W.D. Mich. 2010) (cleaned up). *See also Unan v. Lyon*, 853 F.3d 279, 292 (6th Cir. 2017). The Court will therefore deny Simmons's motion for summary judgment as premature pending its resolution of the Defendants' motion to dismiss.

In any event, Simmons's motion is predicated almost entirely upon the allegations of her Complaint and legal arguments in support of her claims. Such a motion is more in the nature of a request for judgment on the pleadings. *Cf. Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F. 4th 293, 302 (2d Cir. 2021) (citing 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1367 (3d ed. 2021) ("[J]udgment on the pleadings only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court."). Such a motion must await the close of the pleadings, Fed. R. Civ. P. 12(c), so that the Defendants' defenses set forth in their answer may be considered.

Accordingly, it is **ORDERED** as follows:

1. Simmons's Motion for Summary Judgment [R. 28] is **DENIED** without prejudice as premature pending resolution of the Defendants' motion to dismiss.

2. Defendants' Motion for Extension of Time [R. 29] is **DENIED** as moot.

This 28th day of December, 2021.

Signed By:
William O. Bertelsman WOB
United States District Judge